

# THE COURT AND THE CONSTITUTION

**Comments On The Supreme Court Reference  
On Constitutional Amendment**

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# FOREWORD

September 28, 1981. Never before had there been such a day in the calendar of the Supreme Court of Canada. Never had the Court been drawn so firmly into the heart of a political crisis of the first order. Never had a decision been awaited with such intensity, and delivered with cameras rolling and television commentary reminiscent of an election night. Never had a Court judgment had such a critical impact on the subsequent course of the political life of the nation.

The significance of the opinions of the Supreme Court in the *Reference Re Amendment of the Constitution* will last long beyond the unravelling of the immediate political conflict which gave rise to the case in the first place. Undoubtedly, some of the elements in the judgment which monopolized public attention at the time—such as the conventional requirement for a substantial measure of provincial consent for constitutional changes affecting provincial powers—will be overtaken by the Canada Act and its new formal amending procedure. But the case also posed more fundamental dilemmas which will remain at the core of constitutional doctrine: the role of the courts in Canadian life; the nature of Canadian federalism; the relationship between convention and law. The opinions of our highest court on these enduring issues will remain salient for decades to come.

Such an historic judgment demands careful attention, and the five commentaries in this volume provide an impressive analysis of the Court's reasoning and the implications of its judgment. The five authors rank among the leading specialists in constitutional law, and their views deserve a wide audience.

The production of this volume within months of the Court's judgment required the cooperation of many people. In particular, we would like to thank our authors, who readily accepted a commission to plunge directly into this complex case, and the staff of the Institute of Intergovernmental Relations, especially Virginia Lyons and Mary Pearson who mastered the technology of computer typesetting so well.

Keith G. Banting

# 1

## THE SUPREME COURT DECISION: BOLD STATESCRAFT BASED ON QUESTIONABLE JURISPRUDENCE

*Peter Russell*

On September 28, 1981, the Supreme Court of Canada released its decision in what is surely the most momentous case in the Court's history. Never before has Canada awaited so expectantly for a decision from its highest court. Indeed, even if we look south of the border to the democracy in whose history Supreme Court decisions have played such a dramatic role, it is difficult to find a similar occasion when the main stream of national political life flowed so relentlessly up to a Supreme Court decision. Perhaps the *Dred Scott* case is a parallel.

Writing so soon after the decision when a constitutional accord between the federal government and all the provinces except Quebec has been consummated, the political consequences of the decision may appear to be essentially positive. The Supreme Court's decision was the decisive event in paving the way for a federal-provincial accommodation that would enable the Canadian constitution to be patriated in a manner acceptable to the federal government and nine provinces. The split nature of the Court's verdict gave both Ottawa and the provinces a strong incentive to return to the bargaining table they had abandoned a year earlier. While the decision gave Ottawa a legal green light to proceed unilaterally with its constitutional plans, it cast a heavy mantle of political illegitimacy over the constitutional changes that would result from such a procedure. On the other hand, while the decision confirmed the provinces' claim that their participation in fundamental constitutional change was a constitutional requirement, it warned the provinces that if they failed to work out an agreement with Ottawa, Ottawa could go ahead without them and the courts would do nothing to enforce the provinces' right of participation. When the federal and provincial leaders assembled at the Ottawa Conference Centre on November 2nd, their opening statements testified to the efficacy of the Supreme Court's decision in restoring their interest in reaching an accommodation on the constitution.

But the risk to Canada inherent in the Court's decision was also apparent as one contemplated the possibility that an accommodation might not have been reached and the federal government might then have exercised its legal option of proceeding unilaterally. If that had occurred, the country would have experienced the worst possible consequences of the Court's decision. Patriation with an amending formula and a charter of rights would have been achieved, but in a manner which our highest court considered to be unconstitutional. One could scarcely think of a worse way for Canada to finally take charge of her own constitutional affairs and inaugurate a new regime of entrenched rights and freedoms.

The risk I have described has not entirely dissipated. It is now clear that the Lévesque government will do all it can to undermine the legitimacy of the November 5th accord and the Canadian Constitution it is likely to produce. As part of this campaign, the question of whether Quebec's consent is a constitutional requirement for changes in the Canadian constitution affecting Quebec's powers has been referred to the Quebec Court of Appeal.<sup>1</sup> The outcome of this court action is difficult to predict. If the constitutional resolution passed by the Canadian Parliament and now delivered to the Queen<sup>2</sup> obtains a swift passage through the British Parliament, the Quebec Court of Appeal or the Supreme Court of Canada might view the question as moot and refuse to answer it. What is predictable is that René Lévesque's government and the separatist movement will attempt to take maximum political advantage of any judicial outcome. A refusal to answer the question, given the courts' willingness to answer the earlier decisions, will be branded as a gross injustice and an affront to constitutional government. If the courts deny that Quebec has a veto, the judges will be pilloried as *vendus* and agents of the federal government. Finally, there is the possibility that the courts, or at least a majority of their Quebec francophone members, will find that the requirement of substantial provincial consent has a cultural as well as quantitative dimension that makes Quebec's consent a constitutional requirement at least in a conventional sense. Such a decision would do much to undermine the legitimacy of Canada's newly patriated constitution in the province of Quebec and to increase support for Quebec independence.

### Criteria For Assessing The Decision

Given the decision's weighty political consequences it is tempting to assess the decision solely on the basis of its political results rather than on the quality of the judges' reasoning. Certainly the key political actors in the constitutional struggle do not appear to have been

greatly influenced by the arguments the Supreme Court judges advanced for their holdings. Federal and provincial politicians were making public statements about the decision within hours of its release. These political leaders looked for what they could use in the decision to enhance their cause—the provincial premiers (at least the eight who opposed the federal initiative) emphasizing the majority's conclusion that the federal government's unilateral approach was unconstitutional in a conventional sense; federal leaders emphasizing a different majority's finding that there was no legal bar to the federal government's proceeding in this unconstitutional fashion. For the media and the public whose opinion is shaped by the media, the justices' reasoning was of little consequence. The mass media cannot communicate information about as complex a matter as the reasons for a judicial decision. They can only report the "bottom line"—the bare results. Given that the decision had, in effect, two "bottom lines" with no clear winner, the public probably found the decision confusing. Any damage this may have done to the Supreme Court's public reputation was likely offset by the fact that the split nature of the Court's verdict immunized the Court from attack by either group of contending politicians and rekindled interest in seeking a broad Canadian consensus.

Even if short run political reactions are not influenced by the Court's reasons, it is to be hoped that in the longer run the reasons advanced by the judges as the grounds for their decision will figure more prominently in Canadians' assessments of the merits of the decision. For adjudicative decisions, unlike the decisions of the political branches of government, "the quality of rationality ... is a prerequisite for their moral force."<sup>3</sup> Judges, especially those who serve on our highest court of appeal, are required to persuade us by their reasons that their findings are based on a wise and accurate reading of our constitutional and legal experience. But, while the nature of the judicial process obliges us to examine the soundness of the reasoning on which the judges' conclusions rest, we may well find that the rationality of a decision of this kind might have to be tested on two planes—one, more narrowly jurisprudential and related to the internal logic of the decision, and the other, more politically prudential and related to the exigencies of the national crisis.

Having emphasized the importance of assessing the judges' reasons, I must acknowledge that the central issue in this case is such as to reduce the long-run importance of the majority and dissenting opinions. Normally judicial opinions can have a developmental effect on the law by leaving certain aspects of a question somewhat open and by providing ideas and arguments that might be used by counsel in subsequent cases to persuade judges to revise or further refine legal doctrines. However,



aside from the response to Quebec's current court challenge, there will not likely be an occasion for future judicial decision-making on the main point at issue in the case at hand—namely, whether some or all of the Canadian provinces must consent to constitutional amendments affecting their powers. For, if the Canadian constitution is soon patriated with a comprehensive amending formula, this particular question will henceforth be governed by the written constitutional text.

There is, however, a broader constitutional issue at the very core of this case which will be of enduring importance and is not capable of being definitively resolved by amendments to our written constitution. That issue is the nature of constitutional convention and its relationship to law. If the Supreme Court's decision in this case is read 50 years from now for more than its "bottom line," I suspect that it will be because of what the judges said on the general question of law and convention. Accordingly, my own comments on the decision will give priority to the Court's treatment of that question.

### **Should The Court Have Answered The Questions?**

Before considering the Supreme Court's decision on the substantial issues, a threshold question must be raised. Were the questions appropriate for a court to answer? The federal government's position throughout was that the rules and principles concerning Canadian requests to the U.K. Parliament for amendments to the BNA Act were entirely in the realm of convention not law and as such were not appropriate for judicial determination.<sup>4</sup> This is one of the reasons for the federal government's refusal to exercise its option of referring questions concerning the validity of its unilateral approach directly to the Supreme Court of Canada. The Court's holding on the nature of convention may seem to vindicate the federal government. The Court held that conventions, although part of the constitution, are distinct from the law of the constitution and that the remedy for breach of convention must be obtained in the political arena not from the courts. If in the Court's view constitutional conventions are entirely political and not at all legal in nature, what, it might be asked, was a court of law doing rendering a decision on a non-legal subject?

It is no answer to this question to say that the Supreme Court had no choice but to answer the questions put to the provincial courts of appeal and appealed to the Supreme Court. Although provincial and federal legislation establishing the reference case procedure appear to put virtually no limits on the questions which governments can submit to courts, Canadian judges have refused to answer questions considered to

be inappropriate for judicial determination. As recently as the *Senate Reference* of 1980, the Supreme Court had refused to answer several questions about Parliament's power to make certain changes in the Senate because these questions were too vague and indeterminate.<sup>5</sup> Also, a majority on the Manitoba Court of Appeal had refused to answer the first question at issue in this case—namely, whether the contents of the constitutional resolution before the Court if enacted would affect federal-provincial relations or provincial powers—because, at the time, the resolution was still being debated in Parliament and there was no telling how it might be amended before it was finally adopted. This objection to the indeterminate nature of the first question had, however, been overcome when the case went on appeal to the Supreme Court by virtue of an all-party agreement in the House of Commons that no further amendments would be made to the resolution submitted to the Supreme Court in April 1981.

Still, the issue remains of whether the Supreme Court should have answered the question about the existence of a convention—a question which, in its own view, was not a legal question. This, it should be noted, is to pose the issue of justiciability in narrower terms than the Trudeau government's claim that there was no justiciable question concerning the federal government's unilateral procedure. That broad claim was surely untenable. There were a number of important arguments based, *inter alia*, on an interpretation of the Statute of Westminster, to the effect that there was a legal requirement of provincial consent. These arguments clearly raised issues appropriate for judicial determination. Further, the relationship of constitutional convention to law is itself a legal question.

When disputes arise about a person's or a government's rights, obligations or powers, it is the function of courts to provide authoritative rulings on these disputed questions of law. That is the *raison d'être* of the judiciary in our system of government. Thus, the Supreme Court had no difficulty in determining, without dissent, that the questions as to whether provincial consent was a constitutional requirement in a legal sense (one dimension of the third question in the Manitoba and Newfoundland appeals) or whether Parliament was authorized by statute to proceed with certain amendments without provincial consent (one dimension of the second Quebec question) were justiciable.<sup>6</sup>

But the Court could not give the same justification for its decision to treat the question about constitutional convention as justiciable. Here, I think, the Court was "hoist with its own petard." Because it separated convention from law so completely it had difficulty explaining what business it had as a court of law answering a non-legal question.

Personally, I am not persuaded by the Court that there is such a complete gulf between law and convention. I will advance my arguments on this point later in this paper. Here I wish only to draw attention to a lack of intellectual coherence in the Court's overall handling of the convention question.

The three dissenting judges on the convention question (Chief Justice Laskin, Justices Estey and McIntyre) were clearly troubled by the justiciability issue. At the beginning of their opinion they explain that because, in their view (and the view of the majority), convention is not law, questions concerning the existence of convention normally ought not to be answered as "it is not the function of the Court to go beyond legal determinations." Still, they were willing to answer these questions—"notwithstanding their extra-legal nature"—"because of the unusual nature of these References and because the issues raised in the questions now before us were argued at some length before the Court and have been the subject of the reasons of the majority."<sup>7</sup> The majority appear less conscience-stricken about justiciability. They adopt the opinion of Chief Justice Freedman of the Manitoba Court of Appeal that even if the existence of a convention is not a question of law it is, nevertheless, a question which is "constitutional in character." Further, they point out that in answering the question, they are not enforcing a constitutional convention but simply recognizing its existence—something which courts have often done in the past when conventions have been used as an aid to constitutional or statutory construction.<sup>8</sup>

Now I can accept the latter argument because, in my view, it is the courts very use of conventions and the principles upon which they are based in interpreting legal rights and duties that makes it wrong to divorce convention completely from law. But on this point, of course, the Court's view is different from mine. In their view convention is in no sense part of constitutional law. So I remain unconvinced by their own or Justice Freedman's reasons that, given their views on the nature of convention, they should have answered this part of the reference questions.

To understand why the Supreme Court judges answered the questions concerning convention we have to look beyond the internal logic of their arguments to their sense of the necessities of judicial statescraft. This is hinted at in the dissenting judges' vague reference to "the unusual nature of these References." The circumstances surrounding these References certainly were unusual. The country was caught in a very difficult constitutional impasse. There was a widely shared assumption by the people and the politicians that a Supreme Court decision was the next essential step in resolving the crisis. A refusal to deal with a

major dimension of the reference questions might reasonably have been regarded as threatening greater damage to the constitutional fabric of the country than would stretching the notion of justiciability to embrace what the Court regarded as a constitutional question of a non-legal kind.

Partisans of the federal government might contest the view that a judicial decision was needed. Mr. Chrétien, the federal Justice Minister, is reported to have opposed suspending the federal initiative to await a court decision on the grounds that

such a delay would set a dangerous precedent, whereby any citizen or group could challenge the legality of Government action before it was taken and thus suspend the ability of Parliament to pass legislation.<sup>9</sup>

Such an argument is not sound. Among other things, it ignores the fact that the reference procedure can only be initiated by governments and that it has been used many times by both levels of government to obtain advisory opinions on legislative proposals.<sup>10</sup>

No doubt court references are often used by a province or by the federal government partly to obtain some tactical advantage in federal-provincial bargaining. In this case clearly it was the provinces that felt they had most to gain by referring the matter to the courts. At the very least the court cases would slow down the federal initiative. A number of provincially initiated references would entail even more delay than a federal reference directly to the Supreme Court and increase the probability of obtaining a judicial ruling favourable to the provincial position. The federal government's decision not to pre-empt the provinces and initiate its own reference gave the provinces the additional advantage of being able to frame questions in a manner best calculated to elicit answers favourable to their position.

The fact that reference cases may be tactical manoeuvres in federal-provincial controversies does not negate their value in Canada's constitutional system. While they entail the risk of enabling politicians to plunge our higher appeal courts into the thick of the hottest federal-provincial controversies, they have the advantage of making it possible to remove constitutional doubts before implementing major changes in legislation or the constitution. Imagine the situation which would have occurred had Parliament forged ahead in 1979 and replaced the Senate with a House of the Federation only to have the constitutional amendment effecting this change subsequently challenged in the courts. Assuming the Supreme Court would have decided such a case in the same way it decided the 1980 Reference, Canada would have had an unconstitutional House of Parliament.

In the case at hand, where the very foundation of Canada's constitution and a major change in its system of government—a constitutional charter of rights—were at issue, it was in the country's interest to resolve doubts about the constitutionality of these changes before rather than after they were made. Having said this, it must be admitted that the Court's decision was such as to retain the possibility that the changes might still be made in a manner not only alleged by provincial politicians to be unconstitutional but also held by a majority of the Supreme Court to be unconstitutional. This was surely the great risk inherent in the Court's decision: that Canada might find itself in the predicament of having an unconstitutional constitution.

### The Nature Of Convention

For Canada, and indeed for all democracies whose constitutions combine "unwritten" conventions with "written" constitutional instruments, the Court's holdings on the nature of constitutional conventions have enduring implications. Also, the intellectual coherence of the Court's overall conclusion that provincial consent for amendments affecting provincial powers, while a constitutional requirement, is not a legally enforceable right, depends on the validity of the way in which the Court drew the line between law and convention.

It was clear from the opening moments of the hearing before the Court that this would be a crucial, if not the crucial, issue in the case. Mr. Twaddle, the lead counsel for Manitoba had just begun to develop the provincial case when Chief Justice Laskin leaned across his desk and asked, "Mr. Twaddle, are you talking about law or convention?"<sup>11</sup> Clearly in the Chief Justice's view, law and convention belonged to different realms. As it turned out, all of his brethren shared this point of view.

In examining the Court's position on this issue it is useful to begin by setting out what the majority of six (Justices Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer) say about convention that is relatively uncontentious at least in the sense that it is generally consistent with the writings of English and Canadian constitutional scholars. The three judges who dissent on the question of convention agree with much of the majority opinion on the general nature of convention, although they clearly disagree on a few points.

Both the Supreme Court judges and constitutional writers take the discussion of constitutional conventions in A. V. Dicey's *Introduction to the Study of the Law of the Constitution* as their starting point.<sup>12</sup> This is to be expected for it was largely through the influence of Dicey that the concept of constitutional convention came into use. Dicey used

the term to refer to precepts or rules of political conduct (to use his own language, "a body of constitutional or political ethics")<sup>13</sup> concerning the proper use of legal powers. He wrote primarily about the conventions relating to Cabinet government, the Crown's prerogatives and the relationships between the three branches of government.

The following passage from the majority opinion captures the essence of Dicey's conception:

The main purpose of constitutional conventions is to ensure that the legal framework of the Constitution will be operated in accordance with the prevailing constitutional values or principles of the period.<sup>14</sup>

It is worth unravelling this conception, for such an exercise will reveal, I believe, four essential features of constitutional conventions that are acknowledged by most constitutional writers, including Dicey's critics.

The first feature is that the constitutional function of conventions is to provide rules concerning the proper exercise of the legal powers of government. For example, the convention requiring that the Queen or her representative should act on the advice of Ministers responsible to the elected branch of parliament governs the way in which the Queen should exercise the vast powers vested in her by law. *At least* in this sense, conventions are closely related to laws. As many constitutional writers have pointed out, the existence of some legal powers—for example, section 9 of the BNA Act which vests "the Executive Government and Authority of and over Canada" in the Queen—would be intolerable if these powers were not exercised in accordance with well-established constitutional conventions.

Secondly, conventions have a strong normative character. Conventions may arise through custom and practice but unlike mere custom or earlier precedents, conventional rules have come to be regarded as obligatory by most of those who are active in the institutions to which the conventions pertain. It may not be easy to discern the extent to which a convention, or a particular formulation of a convention, has come to be accepted as obligatory. Take, for example, the conventions relating to the Crown's prerogative power to dissolve Parliament. In 1926 when Governor General Byng refused Prime Minister King's request for a dissolution, not all of the political actors involved agreed that constitutional convention permits a Governor General to deny a dissolution in those circumstances.<sup>15</sup> But the existence of this dispute does not in itself constitute proof that the Governor General was wrong. Even less does it prove that there is no constitutional convention permitting the

Crown in certain circumstances to refuse a Prime Ministerial request for a dissolution.

The three dissenting judges appear not to agree with this point. According to them,

While a convention, by its very nature, will often lack the precision and clearness of expression of a law, it must be recognized, known and understood with sufficient clarity that conformance is possible and a breach of conformance immediately discernible.<sup>16</sup>

I think this is too exacting a test of convention. It would mean that the normative force of a convention could be destroyed by the mere existence of a dispute about its correct application. This is wrong because the normative force of a convention is derived from acceptance of the principle upon which it is based.

This brings us to the third essential feature of constitutional conventions—namely, that their justification depends on the prevailing political principles of the period. For Dicey the validity of constitutional conventions depended on the fundamental principle of popular sovereignty. He endeavoured to show that the reason for following the conventions of responsible government was to ensure that the exercise of governmental power was, as far as possible, in harmony with the will of the nation.<sup>17</sup> This was a requirement of democratic theory, and democratic theory, by this time, was at the foundation of the British constitution. In this sense, the ultimate justification of constitutional conventions must be in terms of whether a convention serves what has come to be a fundamental principle of the constitutional system.

But note it is the prevailing principles of the period that justify convention. This points to a fourth essential feature of conventions—the dynamic element they bring to a constitution. The observance of convention may avoid the necessity for formal constitutional change or revolution by ensuring that the exercise of legally defined powers is not out of keeping with what the politically active people of the nation find acceptable. In Great Britain the conventions of responsible and cabinet government meant that the operation of the British constitution could be adjusted to the requirements of a political culture that demanded government do much more for the people and be much more responsive to them.

### **Conventions In A Federal State With A Written Constitution**

While all nine judges appear to be, for the most part, in agreement on these basic Diceyan attributes of convention, the three dissenting

judges on the convention question took the position that constitutional conventions must have a much more limited application in the context of a federal state with a written constitution:

In a federal state where the essential feature of the Constitution must be the distribution of powers between the two levels of government, each supreme in its own sphere, constitutionality and legality must be synonymous, and conventional rules will be accorded less significance than they may have in a unitary state such as the United Kingdom.<sup>18</sup>

It is not entirely clear how this statement is meant to apply to the conventions of parliamentary and cabinet government. In the very next sentence the dissenting judges equate "constitutionalism in a unitary state" with the "practices" within "the national and regional units of a federal state." These practices, as is generally acknowledged by Canadian constitutionalists, are based primarily on conventional rules many of which are subsumed under the phrase in the preamble of the BNA Act which states that Canada is to have "a Constitution similar in principle to that of the United Kingdom."<sup>19</sup> If the dissenting judges were suggesting that these conventions are to be accorded less significance in Canada than in the United Kingdom, they were surely wrong. Canadians no less than Englishmen would regard a failure to comply with the rule that the Queen or the Queen's representative act on the advice of Ministers responsible to the elected branch of the legislature as a serious breach of constitutional convention. The conventions of responsible government are as significant in Canada as they are in the United Kingdom.

Nor can I understand a later passage in the dissenting opinion on convention in which "the Dicey convention" is distinguished from the convention at issue in this case on the grounds that the former "does not qualify or limit the authority or sovereignty of Parliament or the Crown" while the latter "would truncate the functioning of the executive and legislative branches at the federal level."<sup>20</sup> The rules which Dicey called conventions do qualify the authority of the Houses of Parliament and the Crown in that they govern in an ethical, if not a legal, sense how the legal powers of these institutions are to be used. The majority attributed no greater force to the convention of provincial consent in the amending process.

It may be that the dissenting opinion's down-grading of the significance of convention in the Canadian context was meant to apply only to those conventions governing federal-provincial relationships. Perhaps the point they were getting at was that because there is a written constitutional text governing most of the important features of those relationships, conventional rules must have less significance in this



area. Now if significance here is meant to have only a quantitative meaning, no one could seriously quarrel with the point. In countries which, unlike Britain, have written constitutions a smaller proportion of important constitutional rules will take the form of conventions. But I suspect the dissenters were thinking of significance in a qualitative as well as a quantitative sense. They were, I think, suggesting that where conventions concerning federal-provincial relationships exist, they must necessarily be given less normative weight than is normally given to conventions. This is a much more dubious proposition.

In constitutional systems that have a basic constitutional text as one of their ingredients, constitutional conventions are often needed to modify or supplement relationships which are fixed in the formal text of the constitution.<sup>21</sup> This point has been made by many constitutional writers. Mr. Colin Munro (one of the Supreme Court's most respected authorities on conventions) points out that Dicey himself came to acknowledge that conventions may play an important role in countries which unlike England have written constitutions. Munro goes even further by suggesting that

Indeed, it is at least arguable that convention should play a larger role in countries with written constitutions; the greater the degree of constitutional rigidity, the greater the need for the benefits of informal adaptation which conventions bring.<sup>22</sup>

Conventions have certainly played an important role in the development of Canadian federalism. For example, early recognition of the requirement that all regions of the country be represented in the federal Cabinet helped render tolerable the exercise of central government powers over a society marked by sharp regional differences and compensated for the weakness of the mechanism provided for this purpose in the constitutional text, namely the Senate.<sup>23</sup> Another example is the federal government's refusal in recent years to use its powers of disallowance and reservation over the provinces no matter how much it might be provoked by provincial legislation.<sup>24</sup> This pattern of refusal reflects the growing strength of the federal principle in the operative political ethics of the Canadian constitution.

The last example demonstrates how a formal constitutional text can limit the application of convention. Even those who believe that the non-use of disallowance and reservation should be regarded as a constitutional convention would, I think, agree with the Supreme Court of Canada's holding in 1938 that if such a convention exists it could not legally nullify a power explicitly established by the BNA Act.<sup>25</sup> The incapacity of convention to have the *legal* effect of nullifying established legal powers is not confined to conventions relating to federa-

lism. For instance, although by convention royal assent should be given to bills passed by the legislature, because royal assent is a strict legal requirement, courts will not give legal effect to a bill from which royal assent has been withheld even though it has been withheld in defiance of constitutional convention.<sup>26</sup> But, of course, the overriding effect of explicit legal powers does not in itself destroy the normative weight of convention.

Also it is important to note that the legally overriding effect of explicit powers established in the constitutional text is not relevant in a context involving a constitutional power or relationship not explicitly provided for in the written constitution. Precisely such a context is involved in the case at hand. The conditions under which it is proper for the federal Parliament to address requests to the U.K. Parliament for amendments to the BNA Act are not spelled out in that Act. Indeed no power to make such requests or effect amendments concerning legislative powers is explicitly established by the written constitution. So this situation must be distinguished from the disallowance or reservation situation.

The dissenting judges, with their insistence that in a federal state with a written constitution "constitutionality and legality must be synonymous," disagreed with the majority that a breach of constitutional convention is properly referred to as "unconstitutional" behaviour. Here they seemed to be maintaining that because in a country like Canada "unconstitutional" can have a distinctly legal meaning—i.e. a violation of the division of powers in the BNA Act—which it could not have in the United Kingdom, the word should be used exclusively for such violations. But this argument ignores the fact that there is much more at stake than mere semantic tidiness in deciding how the concepts of "constitutional" and "unconstitutional" are to be used. To deny that behaviour which is merely a breach of convention can be considered unconstitutional is to take most of the political sting out of the finding that it would be a breach of convention for the federal Parliament to proceed with the proposed constitutional resolution without a substantial measure of provincial support.

The devaluation of the significance of violating conventions is reasonable if one is not prepared to attach importance to the principle upon which conventions are based. Dicey thought it appropriate for an Englishman to refer to conduct violating convention as unconstitutional and mean something different from and often deeper than calling behaviour illegal because in his view these conventions were based on a fundamental principle of the English constitution—popular sovereignty.<sup>27</sup> By the same token, Canadians who regard the principle of federalism upon

which the convention at issue in this case is based as fundamental to the Canadian constitution should agree with the majority that it is appropriate to refer to conduct violating the convention as unconstitutional even though such action might not be illegal.

### Identifying The Conventional Requirement

Turning to the substantive issue of whether the majority were correct in finding that convention requires at least a substantial measure of provincial consent, it is essential to consider the methodology used by the Court in answering this question. It may be that the Court's elucidation and application of this methodology is the most significant contribution it makes in this case to Canadians' understanding of their constitution.

The methodology employed by both the majority and the dissenters follows logically from the Diceyan conception of convention. It is a test which they found neatly summarized in the following passage from Sir W. Ivor Jennings' *The Law and the Constitution*:

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?<sup>28</sup>

It is vital to appreciate the multi-faceted nature of this approach. Too often debates about Canadian conventions have been carried on solely in terms of precedent—each side endeavouring to bolster its case with some historical precedents, however quaint, irrelevant or peculiar they might be. Such an approach may be attractive because it seems so thoroughly empirical and therefore objective, avoiding any "value judgments" about which practices are right. But that is precisely the weakness of such an approach. By leaving out of account the reason for following a particular practice—the principle on which the convention is based—it ignores the extent to which questions about conventions are not simply questions about historical facts but are normative or ethical questions. But they are ethical questions of a peculiar kind. An historical component is involved in answering these questions in as much as an acceptable answer depends not on one's personal view as to why a practice ought to be followed but on being able to maintain that the reason for following the practice rests on a principle of government that has come to be an essential feature of the political community in question.<sup>29</sup>

While the majority and the dissenters appear to agree on the threefold test of convention—precedents, attitudes of political actors and princi-

ple—they come to very different conclusions in applying each part of the test. The majority opinion follows closely the report of the British Kershaw Committee<sup>30</sup> and the submissions made to the Court by Dean Lysyk as counsel for Saskatchewan. The dissenters follow most of the major arguments put forward by Mr. Chrétien in his paper which attempts to rebut the Kershaw Committee.<sup>31</sup> Kershaw, Dean Lysyk and the majority have much the better of this argument.

Consider first the treatment of precedents. The threshold question here is—what are the relevant precedents? For the majority the relevant precedents are those involving amendments which “directly affected federal-provincial relationships in the sense of changing provincial legislative powers.”<sup>32</sup> Using this criterion they find only five positive precedents: the 1930 amendment giving the western provinces control of their natural resources, the Statute of Westminster, and the amendments of 1940, 1951 and 1964 giving the federal parliament jurisdiction in the fields of unemployment insurance, old-age pensions and supplementary benefits respectively. All of these amendments were approved by all of the provinces whose powers were directly affected. Further, in negative terms, they find that “no amendment changing provincial legislative power has been made since Confederation when agreement of a province whose legislative powers would have been changed was withheld.”<sup>33</sup>

For the dissenting judges, on the other hand, “the real test of relevance” is the reaction an amendment provoked from one or more of the provinces.<sup>34</sup> Thus amendments concerning central government institutions or federal subsidies to the provinces to which at least one province objected count for the dissenters as evidence that there is not a convention requiring unanimous provincial consent.

Setting aside for the moment the question of unanimity, I think that the dissenters’ criterion of relevancy is much too wide. By including aspects of federalism outside the realm of intergovernmental relations it goes beyond the reference in the questions submitted to the courts to amendments “affecting federal-provincial relationships or the powers, rights or privileges” of the provinces. Further such a criterion is not sufficiently sensitive to the question of principle at issue in this case—namely, whether one level of government in the Canadian federation should be able unilaterally to alter the powers of the other level.

Secondly, in considering the attitudes of political actors—the second part of the test of convention—it is essential to consider the historical context in which words were uttered. The dissenting judges do not do this. In their view the existence of conflicting statements in the historical record “adds additional weight to the contention that no convention of provincial consent has achieved constitutional recognition to this day.”<sup>35</sup> But, if instead of attaching equal weight to all quota-

tions, these judges had taken historical context into account, they would have found it much more difficult to maintain their agnostic position. For example, at the Dominion-Provincial Conference of 1931, Prime Minister Bennett, in seeking the support of the provinces for the "Canada clause" in the Statute of Westminster exempting the amendment of the BNA Act from that statute assured the provincial Premiers

that there would be no amendment to the constitution of Canada in its federal aspect without consulting the Provinces which, it must be remembered, had the same powers within their domain that the Dominion has within hers.<sup>36</sup>

Now, if Prime Minister Bennett meant to commit the federal government here only to consult with the provinces while maintaining the right to proceed unilaterally with amendments directly affecting provincial powers over the opposition of most provinces, then his statement and general performance at this conference must rank as one of the great confidence tricks in modern history.

The majority's interpretation of two other statements of crucial historical importance is also much more convincing than the dissenting judges' treatment of the same material. I refer to Prime Minister King's 1940 statement in the House of Commons and the fourth principle as set out in the 1965 White Paper on Constitutional Amendment in Canada. Mr. King's statement was made on a critically important occasion—the first time since the enactment of the Statute of Westminster that the federal Parliament had considered a resolution addressed to the United Kingdom requesting a constitutional amendment affecting the division of legislative powers. By obtaining the consent of all of the provinces for this amendment, Mr. King explained to the House that his government had

avoided the raising of a very critical constitutional question, namely whether or not in amending the British North America Act it is absolutely necessary to secure the consent of all the provinces, or whether the consent of a certain number of provinces would of itself be sufficient.<sup>37</sup>

In the majority's opinion the only point about which Mr. King was uncertain was whether unanimity was required. There was no doubt "as to whether substantial provincial support is required." The dissenting judges dismiss King's statement as showing merely that Mr. King thought it was "good politics" to obtain provincial consent.<sup>38</sup> But here they miss the point about convention: conventions are fundamentally about "good politics" in that they embody standards of political conduct that have come to be required by the prevailing sentiment of the political community.

The fourth principle in the 1965 White Paper to which the majority opinion gives great weight is described as follows:

The Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process however, have not lent themselves to easy definition.<sup>39</sup>

They rightly emphasize that this statement was carefully formulated by the federal government and accepted by all of the provinces. Again, the dissenting judges' denial of this statement's significance is unconvincing. They allude to a sentence in the White Paper referring to all of the principles governing the process of securing the U.K. amendments to the BNA Act as "not constitutionally binding in any strict sense."<sup>40</sup> But, of course, this statement only recognized that these principles belong to the conventional part of the constitution and are not in the written constitution. As the second Kershaw Report points out, if this statement were taken to mean that the principles in the White Paper were not constitutional requirements even in a conventional sense, then Canadians could have no constitutional objections if the U.K. Parliament ignored the White Paper's first principle by amending the BNA Act on its own without any request from Canada.<sup>41</sup> But surely such an action would be regarded by the federal government and by the provinces as unconstitutional.

The minority also maintained that the two sentences following the fourth principle demonstrate an absence of the unanimity and certainty required for constitutional amendments. Taking unanimity first, and setting aside qualms I have about accepting unanimity as a necessary property of conventions (who must be unanimous? does one successful repudiation or breach of convention destroy the convention?), the fact that all the provinces and Ottawa accepted the White Paper as a correct statement of the principles governing the amending process shows that by 1965 the most relevant political actors all accepted the convention of provincial consent. As for uncertainty, again it is questionable to regard certainty as a necessary property of conventions. Whose formulations, for instance, of the conventions of parliamentary and cabinet government are to be regarded as certainly the correct ones? As Dean Lysyk pointed out in his oral submission to the Court, the absence of a precise and universally accepted definition of the conditions under which a legislature's confidence in the government may be said to be

lost does not prove that there is no convention requiring the government to maintain that confidence.<sup>42</sup> Besides, the uncertainty in question pertains only to the precise extent of provincial agreement required. That is precisely the issue about which Mackenzie King was uncertain, on which federal and provincial leaders over many years were not able to agree and on which the majority wisely did not attempt to be definitive but left open to resolution in the political arena. Lack of knowledge as to exactly how much provincial consent is required does not preclude a firm belief that for the federal government to proceed against the wishes of eight of the ten provinces would be a violation of constitutional ethics.

It is the statements of the political actors that provide the main basis for the majority's declining to find that convention requires unanimous provincial consent. As all of the relevant precedents, on their face, supported unanimity, without these statements the evidence might seem to favour unanimity. As for principle—the third part of the test for convention—it does not provide a firm basis for unanimity. There have certainly been many Canadian leaders who have regarded Confederation as a compact the terms of which can only be changed with the consent of all the parties. That indeed was the position which seven of the eight provinces opposing Ottawa took in this case. But such a view of the federal principle implicit in Canada's constitution has not been accepted by federal leaders nor by all provincial leaders.<sup>43</sup> Nor can a requirement of unanimous consent be derived from the general theory and practice of federalism. None of the classical federal systems require that all of the units agree to amendments affecting their powers.<sup>44</sup>

Although the majority do not find that unanimity is required, neither do they reach a firm conclusion that unanimous consent is not required. Their conclusion is that "the agreement of the provinces of Canada, no views being expressed as to its quantification, is constitutionally required ...."<sup>45</sup> Thus, it is still open for Quebec to argue that its consent is required on the grounds that unanimity is a conventional requirement. I think a stronger case would be based on the contention that the requirement of substantial provincial consent has not only a quantitative dimension but also a qualitative, dualistic dimension which requires the consent of the province in which most of Canada's French-speaking citizens reside. In considering this claim not only must precedents be considered but, equally, the extent to which federal and provincial leaders indicated that they felt obliged to observe a Quebec veto and the historical acceptance of cultural dualism as a fundamental principle in Canadian political life.

Finally, there is the question of principle—the reason for accepting a practice as binding. The majority looked upon provincial autonomy in

matters constitutionally assigned to the provinces as basic to the federal character of Canada's constitution. That principle has been recognized as a fundamental principle of the Canadian constitution in a number of judicial decisions.<sup>46</sup> In the majority's view that principle

cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.<sup>47</sup>

It is no answer to this to say, as do the dissenters, that "the BNA Act has not created a perfect or ideal federal state," or to point to provisions of the BNA Act that modify the federal aspects of the Canadian constitution.<sup>48</sup> For the majority position to be sound it is necessary to accept only that as a minimum requirement of the federal dimension of the constitution one level of government not be able unilaterally to alter the powers of the other level. Unquestionably, the BNA Act contains provisions that were based on principles other than those of federalism. Alongside the federal division of powers are provisions derived from British imperial history, more suitable to the constitution of a unitary state, with a senior level of government at the centre and inferior local governments.<sup>49</sup> These unitary or imperial elements of the constitution were, no doubt, welcomed by those Fathers of Confederation who, like John Macdonald did not care for federalism at all. Still, it is reasonable to assume that the Confederation coalition would not have held together had it been understood that the federal element in the new constitution was so weak that the provinces' powers could be altered unilaterally by the central government. It is even clearer that as Confederation evolved, the unitary-imperial provisions so valued by Macdonald's part of the Confederation coalition became increasingly unusable because their operation collided with the deepening and broadening acceptance of federal principles by the bulk of politically active Canadians. In Canada "the prevailing constitutional values or principles of the period" are now such as to require that the federal principle be respected at least to the extent of ensuring that the provinces participate in making decisions on amendments affecting their own powers. Paradoxically, of course, this is evident in the Trudeau government's commitment to an amending formula that would entrench in a patriated constitution the right of the provinces to participate in the amending process.

The best counter to the majority's position on convention was given not by dissenting judges but by dissenting politicians. This is what one should expect given that conventions are established and developed in the political arena. Prime Minister Trudeau in his initial response to the Supreme Court decision (the televised press conference from Seoul,



South Korea) acknowledged that a convention requiring provincial consent for amendments affecting provincial powers had existed.<sup>50</sup> However, he went on to argue that unless this convention was set aside, at least for the immediate period, its strict observance would perpetually frustrate the realization of another essential Canadian constitutional value—the full achievement of Canada's self-government. This response has the merit of recognizing that constitutional conventions are a dynamic part of the constitution and further that a constitutional system is based not on a single absolute principle but on a number of political values or normative considerations, the ordering of which may well be shaped by the political exigencies of the country. Mr. Trudeau, as it turned out, did not press this argument to the point of proceeding unilaterally with the patriation package without making one more effort to arrive at a consensus with the provincial premiers. But, I would submit, had the concessions he made in modifying his package not been reciprocated by concessions from a substantial number of Premiers, he would have had a reasonably strong case in terms of constitutional ethics for proceeding unilaterally.

### Law And Convention

While the Supreme Court justices did not agree as to whether a convention requiring provincial consent exists nor as to whether violations of conventions in Canada constitute unconstitutional behaviour, they were unanimous that whatever the convention is it cannot be enforced by the courts. This brings us to the most difficult question of jurisprudence in this case—the relationship between law and convention. On this issue the Supreme Court judges may speak as one, but the constitutional scholars clearly do not.<sup>51</sup>

There can be no serious quarrel with the Court's starting point on this issue. The Court was surely correct in drawing a distinction between convention and law. As their quotations from Dicey demonstrate, Dicey introduced the concept of "convention" precisely to distinguish two sets of constitutional rules—one set which he referred to as laws "in the strictest sense" and another, which although forming a "portion of constitutional law" he called conventions. Also it is true that for Dicey, as for the Supreme Court, the key difference between the two sets of rules was that whereas "constitutional laws in the strict sense" are enforced by the courts, constitutional conventions are not.<sup>52</sup> Conventions develop in the political arena and the sanctions for breaching them are administered in that same arena by officials, politicians and ultimately by the electorate.

But pointing out this difference between law and convention does not exhaust what can be said about the relationship between law and convention. As the Supreme Court itself acknowledged, conventions have frequently been recognized in judicial decisions "to provide aid for and background to constitutional or statutory construction."<sup>53</sup> Many cases were cited by counsel for the provinces (most systematically by D. A. Schmeiser, counsel for Manitoba)<sup>54</sup> in which Canadian and English courts have referred to constitutional conventions. However, the Supreme Court insisted that none of these cases constitutes an instance of a court enforcing convention or of a convention crystallizing into law, and that it was "an overdrawn proposition" to say that in the cases cited the court had "given force to convention."<sup>55</sup> The majority on convention went even further and denied that convention was part of constitutional law: "constitutional convention plus constitutional law equal," they said, "the total constitution of the country."<sup>56</sup>

Now I have some difficulty with this portion of the Court's jurisprudence. I see at least two problems in insisting on such an unbridgeable gulf between law and convention. The first is that some of the cases cited do suggest that in certain contexts courts will give legal effect to conventions. The second is the Court's implicit inference that what is not enforceable by courts is not law.

The cases which are difficult to reconcile with the Court's position are those involving conventions which, far from being in conflict with the law, were used to interpret legal rights and obligations. The best known Canadian example is Chief Justice Duff's opinion in the *Labour Conventions* case that the practice of Dominions entering into agreements with foreign states "must be recognized by the Courts as having the force of law."<sup>57</sup> For the Supreme Court this example does not really count as it belongs in the realm of international law which "perforce has had to develop, if it was to exist at all, through commonly recognized political practices of states ...."<sup>58</sup> So let us consider a completely domestic example, *Arseneau v. The Queen*.<sup>59</sup> In *Arseneau* the Supreme Court held that a person charged under the section of the Criminal Code establishing the offence of bribing "a member of a legislature" could not escape conviction by claiming that the person who accepted his bribe did so as a Cabinet minister rather than as a member of the legislative assembly. Justice Ritchie, writing for the majority, rejected this distinction because it was not in accord with "the generally accepted practice in this country whereby Ministers are accountable to the elected representatives of the people in Parliament or the Legislature."<sup>60</sup> A similar English example, cited by Mr. Schmeiser, is *Liversidge v. Anderson*<sup>61</sup> where the House of Lords referred to the convention

of ministerial responsibility as one of its reasons for not going behind a detention order. In these cases conventions were given legal effect to the extent that they shaped the interpretation of legal powers and responsibilities and the decisions recognizing the conventions became legal precedents.

Outside the context of statutory interpretation there are examples, at least in English law, of the courts giving legal effect to fundamental political principles and making them part of the common law. The most important example is the courts' recognition of the supreme authority of Parliament. In the words of Sir Ivor Jennings, "It is, therefore, *common law* that Parliament can do as it pleases."<sup>62</sup> A much more recent example of the English courts showing a willingness to incorporate convention into the common law is *Attorney-General v. Jonathan Cape* (the Crossman Diaries case).<sup>63</sup> In that case the British government sought an injunction to prevent publication of an ex-Cabinet Minister's diaries on the grounds that publication would violate the convention of cabinet confidentiality. Against this claim the publisher contended that "whatever the limits of the convention of joint Cabinet responsibility may be, there is no obligation enforceable at law to prevent the publication of Cabinet papers and proceedings, except in extreme cases where national security is involved."<sup>64</sup> The government's claim, it should be noted, was not tied to any alleged breach of the Official Secrets Acts or of an oath of office but was based solely on the essential importance of the rule of Cabinet confidentiality in maintaining Cabinet responsibility. After considering a great deal of evidence concerning the existence of the convention in question, Chief Justice Widgery concluded that

the Attorney-General has made out his claim that the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussion are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest.

The maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual Ministers.

There must, however, be a limit in time after which the confidential character of the information, and the duty of the court to restrain publication, will lapse.<sup>65</sup>

Because nearly 10 years had elapsed since the Cabinet conversations recorded in Mr. Crossman's diaries had taken place, the Chief Justice thought that Cabinet solidarity would not be endangered and therefore refused the injunction.

The Supreme Court tried to explain away *Jonathan Cape* on the grounds that the court was simply "applying its own legal principles as it might to any question of confidence, however it arose."<sup>66</sup> But this does not adequately account for the fact that in this case the English judge stated that he was prepared in certain circumstances to give legal protection to Cabinet information in order to uphold an important convention of the constitution. Chief Justice Widgery's reference to precedents outside of the political context in which the courts had given protection to confidential communications (in commerce and matrimonial relations) does not detract from the fact that he was willing to give legal effect to the convention of cabinet confidentiality in a situation where cabinet solidarity would otherwise be endangered.

The process whereby judicial decisions give some legal effect to constitutional conventions may not be most aptly characterized as "conventions crystallizing into law"<sup>67</sup> or of "the transformation of a conventional rule into a legal rule."<sup>68</sup> These expressions suggest that once the courts have pronounced upon a conventional rule it is no longer a convention, but that is surely not the case. The conventions of parliamentary and cabinet government remain conventions even though they may be recognized from time to time in judicial decisions. Also, these expressions may suggest that once the courts have given legal effect to a convention in one context they would thereby be committed in the future to enforcing the convention in all contexts. But this too would be incorrect. The courts need only treat the cases recognizing convention as legal precedents in situations where similar rights and powers are at issue as were involved in the earlier cases. Also, of course, because conventions are established and changed in the political arena, they can be altered independently of judicial decisions. Thus, for example, if the politicians abandoned the convention of cabinet confidentiality, the courts could not recognize it in subsequent decisions.

The second problem with the Court's categorical distinction between convention and law is its implicit assumption that enforceability by a court is a necessary condition for the existence of law. This proposition which, I take it, is a first premise of legal positivism seems to be taken for granted by the Court. But I find it difficult to accept this positivism as Canada's official philosophy of law without resolving a number of questions it raises. Among such questions are the following: what does enforceability mean? does it mean giving a remedy? any remedy, even a declaratory judgment? who decides what is enforceable? if it is the judges who decide, how are they to know before they have enforced a rule whether or not it is a law? or must all law originate in statutes or the written constitution, and if that is so, how do we account for common law?

Perhaps there are good answers to all of these questions. But until I find acceptable answers I am not persuaded that conventions must be denied any legal status because normally courts do not enforce them. Dicey who as much as any other writer made a distinction between conventional rules and rules that "are in the strictest sense 'laws'" did not go as far as the Supreme Court. While he distinguished constitutional conventions from the "law of the constitution," he referred to both as the "two elements" of the "constitutional law" of his country.<sup>69</sup> By recognizing that convention and the law of the constitution were organically related as twin sources of constitutional law, the Court might have been better able to justify its decision as a court of law to answer the question on convention.

### The Incompleteness Of Canada's Constitution

Besides the contention that the convention itself was enforceable, there were other legal arguments which the Court (by a seven-to-two majority) had to overcome to be able to conclude that provincial consent was not a legal requirement for an amendment affecting provincial powers. These questions had both a Canadian and a British side.

On the Canadian side the central issue was whether the Canadian Parliament was legally empowered to address resolutions to the United Kingdom requesting changes in the provinces' power. In answering this question the majority rejected the implication in the second Quebec question that the power of the House of Commons and the Senate must be proven by remarking that "it would be equally consistent with constitutional precedent to require disproof."<sup>70</sup> Here they seem to be doing more than asserting a presumption of constitutionality (for which there is certainly precedent). They were also making the more fundamental point that Canada's constitution is "incomplete" in that not all the powers of government are specified and defined by statutes or the written constitution.<sup>71</sup>

Now even if we concede this assumption about the incompleteness of Canada's constitution, it does not follow that any branch of government, including the House of Commons and the Senate, can act in relation to those matters on which the constitution is silent so as to effect fundamental changes with respect to those matters on which the written constitution is quite specific. That is precisely the point emphasized by the two dissenting judges (on the question of law) in insisting that under a system of constitutional government a legislative body cannot do indirectly what the written constitution precludes it from doing directly.<sup>72</sup> As Justices Martland and Ritchie point out, in other areas where

the Canadian constitution might be said to be incomplete such as judicial review, the inter-delegation of legislative powers and, Canadian treaties,<sup>73</sup> the courts have ruled that legislatures are *ultra vires* if they act in a manner that would bypass or defeat the federal division of powers in the BNA Act. This, I think, is a powerful argument which is not adequately answered by the majority.

The majority's position rests on drawing a sharp distinction between passing resolutions and enacting legislation. They accept the federal government's contention that the passing of resolutions is not subject to the division of powers in the BNA Act. Such an activity simply falls under the power of the Houses of Parliament to govern their own internal proceedings, a power which they claim is on the same legal footing as that of the British Parliament and which is therefore beyond judicial review.<sup>74</sup> But nowhere do they consider the appropriateness of transposing this British doctrine to a country like Canada with a written constitution and a federal division of powers. Nor do they consider the implications of the Senate and House of Commons Act which limits the 'internal' powers of these bodies to what is "not repugnant to the BNA Act." It is the view of the dissenting judges that such a restriction precludes a resolution which would have the effect of curtailing provincial legislative powers under s.92 of the BNA Act.<sup>75</sup> Justices Martland and Ritchie, rightly in my view, go beyond legal formalism. Noting the federal government's repeated assertion that there is a "firm and unbinding convention" that the British Parliament must enact any amendment requested by a joint resolution of the House of Commons and Senate, they realistically find that the resolution at issue in this case, although only a resolution and not a legislative enactment, will have the effect of altering provincial powers.<sup>76</sup>

### **The Legal Omnipotence Of The British Parliament Over Canada's Constitution**

There was also a British side to the legal issues. The majority appear to deny this. Near the beginning of the majority judgement on law we find the following statement:

Secondly, the authority of the British Parliament or its practices and conventions are not matters upon which the Court would presume to pronounce.<sup>77</sup>

Despite this statement, the opinion goes on to discuss at length whether the British Parliament's authority to amend the BNA Act is subject in law to a requirement of provincial consent. The Court could not avoid

this question if it was to deal with the provinces' argument that since the recognition in 1926 of the Dominions as "autonomous Communities within the British Empire,"<sup>78</sup> the British Parliament had relinquished its supremacy over the sovereign powers (federal and provincial) of the Canadian community. In answering this question concerning the independence of Canadian legislatures from the British Parliament, the Court, regardless of its protestations, was necessarily answering a question about the power of the British Parliament over Canada.

The majority rejected the provincial claims of sovereignty for their legislatures and upheld the federal government's view that the British parliament has retained its "omnipotent legal authority in relation to the British North America Act."<sup>79</sup> This conclusion is based entirely on interpretation of the Statute of Westminster. The majority, in a rather cursory manner, rejected any suggestion that where the Statute of Westminster recognizes the principle of the modern Commonwealth that laws made by the U.K. Parliament will not extend to a Dominion "otherwise than at the request and with the consent of that Dominion,"<sup>80</sup> the Dominion, in the case of Canada, means not the Dominion Parliament alone, but the federal state of Canada in which sovereign legislative power is distributed between the federal and provincial legislatures. The majority do not explain why those who drafted the Statute of Westminster would have used such an ambiguous word as "Dominion" if their intention was to establish a Dominion Parliament's request as the requisite antecedent condition for Imperial legislation extending to an autonomous Dominion.<sup>81</sup>

The majority go further and, in effect, assert that Canada in law is a British colony so far as authority over her constitution is concerned. This, in their view, is the effect of section 7(1) of the Statute of Westminster which exempts amendment of the BNA Acts from that statute. This exemption, they hold, leaves the British Parliament's power to amend Canada's constitution supreme and completely untrammelled. This finding means that not only is Britain free to impose constitutional changes on the Canadian provinces but it is equally free to impose changes on the federal Parliament or to reject changes requested by that Parliament.

The majority's conclusion that Canada, so far as her constitution is concerned, is still, in law, totally subordinate to the U.K. Parliament seems wrong to me because it ignores the right to self-determination which Canada could successfully assert internationally. If Britain were to impose constitutional changes on Canada or refuse to enact changes requested by the federal Parliament and all ten provinces, I am sure that Canada's rejection of this exercise of British power would be upheld by her own courts and by the international community. In other

words, it would appear doubtful that the enactment of changes in Canada's constitution by the British Parliament, regardless of the wishes of the autonomous Canadian community, is all that is needed to give such changes legal status in Canada.<sup>82</sup> The Supreme Court majority, like many Canadians who are in a rush to achieve patriation, may find it convenient to forget that the legal procedures agreed to at the Constitutional Conference of February 1971 for achieving patriation called for the passing of identical resolutions by the Parliament of Canada and all the Provincial Legislatures endorsing the amending formula and any substantive constitutional changes. The British Parliament's authorization was then simply regarded as an extra step "to ensure the legal validity of the procedures."<sup>83</sup>

### Conclusion

Thus my own assessment of the strength of the arguments advanced by each side of the Court on the questions of law and convention leads me to the conclusion that the provinces should have won the case on the basis of law alone. Although I think the opinions on convention also favour the provinces, still I believe that, given the view put forward by the majority at the beginning of their opinion that convention is *entirely* political and in no sense legal, in strict logic the Court should not have answered the question about the content of convention.

This is a troubling conclusion because, as I have suggested in the introduction to this comment, it may be that the Court's opinion will have had a beneficial effect in bringing about a resolution to Canada's constitutional impasse. If that is so, I would like to be able to congratulate the members of the Supreme Court, especially the four judges, Justices Dickson, Beetz, Chouinard and Lamer who anchored both majorities, for the wisdom of their statescraft. But to do so I am afraid may mean that I am subscribing to a 'result-oriented' jurisprudence which assesses judicial decisions in terms of whether they support one's personal political preferences. Such a jurisprudence is scarcely jurisprudence at all, for in denying the relevance of rationality in the judges' reasons it denies that there is any inherent difference between decision-making by courts and decision-making by the political branches of government. And that is a conclusion which neither I nor, I am sure, the Court could accept.



## Notes

- 1 The question which the Quebec Government proposed to submit to the Quebec Court of Appeal is as follows:

"Is Quebec's consent necessary, by convention, for adoption by the House of Commons and Senate of a resolution whose aim would be to modify the Canadian constitution so as to interfere with: 1) the authority of Quebec's legislature under the Canadian constitution; 2) the status or role of the legislature or Government of Quebec within the Canadian federation; and does Quebec's objection render adoption of such a resolution unconstitutional according to convention?" *Toronto Globe and Mail*, Dec. 3, 1981.
- 2 The constitutional resolution reflecting the agreement reached by the federal government and nine provinces (with a few modifications) was received by the Queen on Dec. 9, 1981.
- 3 Paul Weiler, "Two Models of Judicial Decision-Making," (1968) 46 *Canadian Bar Review*, p. 419.
- 4 The argument is set out at pages 29 to 31 of the Factum of the Attorney General of Canada submitted to the Supreme Court in this case.
- 5 [1980] 1 S.C.R. 54.
- 6 (1982), 125 D.L.R. (3d) 1 at 17.
- 7 *Ibid.*, 107. It should be noted that Justice Hall of the Manitoba Court of Appeal refused to answer the second question put to the Court "because it is not appropriate for judicial determination." *Reference re. Amendment of the Constitution of Canada* (No. 1) 117 D.L.R. (3d) 1 (Man. C.A.).
- 8 (1982), 125 D.L.R. (3d) at 88.
- 9 *Toronto Globe and Mail*, Oct. 15, 1980.
- 10 For a good discussion of the pro's and con's of the reference procedure, see Barry Strayer, *Judicial Review of Legislation in Canada*, University of Toronto Press, 1968.
- 11 This is based on my own record of these proceedings. There is no official transcript of oral hearings in the Supreme Court of Canada.
- 12 The first edition of Dicey's book was published in 1885. References to the book which follow are to the tenth edition published by MacMillan in 1959 and edited by Professor E. C. S. Wade.
- 13 A. V. Dicey. *Introduction to the Law of the Constitution*, p. 417.
- 14 (1982), 125 D.L.R. (3d) at 84.
- 15 For a discussion of conflicting views see Peter W. Hogg, *Constitutional Law of Canada*, Carswell, 1977, pp. 158-60.
- 16 (1982), 125 D.L.R. (3d) at 114.
- 17 The purpose of conventions, said Dicey "is to secure that Parliament, or the Cabinet, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the state—the majority of the electors or (to use popular though not quite accurate language) the nation." Dicey, p. 429.
- 18 (1982), 125 D.L.R. (3d) at 110.

- 19 For a discussion of the role and status of such conventions in Canada's constitutional system see R. MacGregor Dawson, *The Government of Canada*, 4th edition, University of Toronto Press, 1963, ch. 4.
- 20 (1982), 125 D.L.R. (3d) at 115.
- 21 See K. C. Wheare, *Modern Constitutions*, Home University Library, 1950.
- 22 Colin R. Munro, "Laws and Conventions Distinguished," (1975) 91 *Law Quarterly Review*, p. 219.
- 23 See W. A. Matheson, *The Prime Minister and the Cabinet*, Methuen, 1976. According to Matheson, "The practice of ensuring representation from provinces and groups (in the Cabinet) has now broadened into a rigid convention of the Canadian contribution ..." p. 27.
- 24 Some constitutional scholars would still support the use of disallowance at least to protect civil liberties, but others view it as being rendered obsolete by convention. See Peter W. Hogg, *Constitutional Law of Canada*, p. 39, note 37.
- 25 *Reference re Disallowance and Reservation of Provincial Legislation*, [1938] S.C.R. 71.
- 26 *Gallant v. The King*, [1949] 2 D.L.R. 425.
- 27 Dicey, p. 419.
- 28 (1982), 125 D.L.R. (3d) at 90. Jennings' three-fold test was proposed in Saskatchewan's factum. See p. 14.
- 29 In principle the task of ascertaining the answer to a question about convention is similar to Ronald Dworkin's characterization of the judge's task in deciding "hard cases" about legal rights, a task in which the judge must recognize that "what an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions." Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1968, p. 87.
- 30 First report of the Foreign Affairs Committee, *British North America Acts: The Role of Parliament*, House of Commons (U.K.), Session 1980-81, January 30, 1981.
- 31 Jean Chretien, *The Role of the United Kingdom in the Amendment of the Canadian Constitution* (Government of Canada, March 1981). The Kershaw Committee produced a rejoinder to this paper. *Supplementary Report on the British North America Acts: The Role of Parliament*, House of Commons (U.K.), Session 1980-81, April 15, 1981.
- 32 (1982), 125 D.L.R. (3d) at 93.
- 33 *Ibid.*, 94. The four negative examples were Ontario's and Quebec's refusal to support a proposed amendment on indirect taxation in 1951, the failure to agree on an amending formula in 1960, Quebec's rejection of the Fulton-Favreau amending formula following the 1964 first ministers' conference, and Quebec's rejection of the Victoria Charter in 1971.
- 34 *Ibid.*, 118.
- 35 *Ibid.*, 121.
- 36 *Ibid.*, 105.

- 37 Ibid., 101.
- 38 Ibid., 121.
- 39 Ibid., 99.
- 40 Ibid.
- 41 *Supplementary Report on the British North America Acts: The Role of Parliament*, House of Commons (U.K.), Session 1980-81, April 15, 1981, p. xvii
- 42 A different point is developed in Saskatchewan's written factum. There it is argued (pp. 37-38) that traditionally in exercising judicial review courts have ruled that in the particular circumstances of the case government activity violates the constitution without providing a comprehensive and precise formulation of a constitutional rule covering all circumstances. For example in the *Anti-Inflation Act Reference* the Court did not define a precise level of inflation that justifies use of the federal emergency power.
- 43 See Edwin R. Black, *Divided Loyalties: Canadian Concepts of Federalism*, McGill-Queen's University Press, 1975, ch. 5.
- 44 See W. S. Livingston, *Federalism and Constitutional Change*, Oxford, 1956.
- 45 (1982), 125 D.L.R. (3d) at 107.
- 46 Numerous decisions were cited in the majority opinion on convention and in the minority opinion on law. See especially *ibid.*, 55-60 and 75-77.
- 47 Ibid., 104.
- 48 Ibid., 125.
- 49 The principal examples of these imperial elements are the federal government's powers of disallowance and reservation, of appointing provincial Lieutenant Governors, of appointing the senior provincial judges and the federal Parliament's power to declare local works to be under federal jurisdiction and to establish Canada's Supreme Court.
- 50 *Toronto Globe and Mail*, Sept. 29, 1981, p. D7.
- 51 Colin Munro's article. *op. cit.*, is a strong statement of the view that law and convention are totally distinct. Sir Ivor Jennings's *The Law and the Constitution* provides a powerful statement of the opposing view.
- 52 Dicey, p. 24.
- 53 (1982), 125 D.L.R. (3d) at 88.
- 54 See, Factum of the Attorney General of Manitoba, pp. 30-36.
- 55 (1982), 125 D.L.R. (3d) at 88.
- 56 Ibid., 87.
- 57 *Reference re Weekly Rest in Industrial Undertakings Aid*, [1936] S.C.R. 461, at 477.
- 58 (1982), 125 D.L.R. (3d) at 24.
- 59 *Arseneau v. The Queen* [1979] 2 S.C.R. 136.

- 60 *Ibid.*, p. 149.
- 61 [1942] A.C. 206.
- 62 Ivor Jennings, *The Law and the Constitution*, p. 109.
- 63 [1976] 1 Q.B. 752.
- 64 *Ibid.*, p. 765.
- 65 *Ibid.*, p. 771.
- 66 (1982), 125 D.L.R. (3d) at 26.
- 67 Sir Ivor Jennings attributes the "crystallization" language to the Chief Justice's use of this concept in *Reference re Weekly Rest in Industrial Undertakings Act*. But he states that Duff's use of the concept in this case was "not consistent with the practice of the courts, which is the common law. The constitutional usages which were incorporated into the common law were more of the seventeenth century." *op. cit.*, p. 127.
- 68 Professor Hogg suggests that "a judicial decision could have the effect of transforming a conventional rule into a legal rule." *Constitutional Law of Canada*, p. 8. The minority opinion on convention appears to repudiate this possibility, (1982), 125 D.L.R. (3d) at 113.
- 69 Dicey, p. 24.
- 70 (1982), 125 D.L.R. (3d) at 31.
- 71 *Ibid.*, 41.
- 72 The BNA Act does not explicitly prohibit the federal Parliament from amending the BNA Act with respect to provincial powers. However, the fact that in 1949 Parliament obtained a limited amending power (S. 91(1)) which explicitly excludes, among other things, amendments affecting provincial powers provides an overwhelming presumption that Parliament is not empowered to enact amendments affecting provincial powers. *Ibid.*, 61.
- 73 See cases discussed in *ibid.*, 73-76 and 58-61.
- 74 *Ibid.*, 30.
- 75 *Ibid.*, 70-73.
- 76 *Ibid.*, 69.
- 77 *Ibid.*, 21.
- 78 The phrase used in the Balfour Declaration which issued from the Imperial Conference of 1926.
- 79 (1982), 125 D.L.R. (3d) at 34.
- 80 This phrase is found in the preamble to the Statute. Section 4 of the Statute establishes the same rule.
- 81 (1982), 125 D.L.R. (3d) at 39-40.

- 82 For an analysis of "autochthony," the process whereby Commonwealth countries give force of law to their constitutions through action taken in their own territories, see K. C. Wheare, *The Constitutional Structure of the Commonwealth*, Oxford, 1960, Ch. IV.
- 83 *Final Report of the Special Joint Committee of the Senate and of the House of Commons on The Constitution of Canada, 1972*, p. 8. For a discussion of this issue see Melvin Smith, "Patriation: A Myth or Reality?" *Policy Options*, December, 1981.

## LE POUVOIR JUDICIAIRE FACE AU JEU POLITIQUE

*Robert Décary*

### Les Défis de la Cour

Le jugement de la Cour suprême sur la constitutionnalité du projet fédéral d'amendement de la Constitution constitue un exemple fascinant de la réaction du pouvoir judiciaire face au jeu politique. Il était en effet évident, dès le début des procédures qui ont mené au jugement que l'on sait, que la Cour, quelle que fût sa réponse, s'engageait sur un champ miné. L'intérêt principal que suscitait le jugement, devenait dès lors, moins de savoir qui, du gouvernement fédéral ou du groupe des Huit aurait raison, que de savoir de quelle manière la Cour éviterait de tomber dans les pièges que lui tendaient nos hommes politiques.

La crédibilité de la Cour était en jeu à trois égards. Elle ne pouvait pas ne pas répondre aux questions qui lui étaient posées: la population, peu informée de la "réserve judiciaire" ("judicial restraint"), n'aurait pas compris, et encore moins accepté, que le plus haut tribunal du pays ne cherchât pas à éclaircir l'imbroglio juridique qui entourait le rapatriement de la Constitution. Elle se devait, par ailleurs, de répondre aux questions d'une manière qui ne laissât pas de doute sur la nature et les conséquences de la réponse donnée: la population, encore là, ne pardonnerait pas à la Cour de se prononcer sans se prononcer vraiment. Enfin, la Cour, créature fédérale autant par sa loi constitutive que par sa composition, se devait, à l'égard de la population et, surtout, des Législatures provinciales, de jouer un rôle d'arbitre impartial, ce que signifiait, à toutes fins utiles, qu'elle ne pouvait pas se rallier, à l'unanimité et sans aucune espèce de critique, à la position fédérale.

A ces trois éléments relatifs à la crédibilité de la Cour, s'ajoutait un quatrième élément, relatif, celui-là, à la crédibilité des trois juges de la Cour qui étaient québécois. Ces trois juges avaient une responsabilité et un fardeau particuliers. Originaires d'une province

fondatrice qui, de tout temps, s'est opposée à toute modification, sans son consentement, de ses pouvoirs législatifs, ces trois juges ne pouvaient pas faire abstraction du mouvement très fort de contestation qui agitait le Québec, s'ils n'y participaient pas; déjà, eux-mêmes, en leur for intérieur. La pression devait être immense, sur ces trois hommes, de faire front commun et de faire mentir le dicton, que se plaisent à répéter depuis quarante ans les dirigeants québécois, que la Cour est une tour de Pise penchant toujours du côté fédéral. Il était en conséquence tout-à-fait improbable que ces trois juges donnent raison à Ottawa sur toute la ligne.

Pour bien comprendre comment la Cour a relevé ces défis, il sera utile d'analyser brièvement le jugement sous un angle politique.

### La Réponse "Juridique" de la Cour

Ayant décidé, à l'unanimité, de répondre à ces questions qui "visent l'interprétation d'un document, surtout un document qu'on dit être dans sa forme définitive" et qui "soulèvent des questions de droit," la Cour a conclu, par une majorité de 7 à 2, que le projet de rapatriement n'était pas illégal.

Cette partie "juridique" du jugement est la plus étonnante, non pas en raison de la conclusion à laquelle la Cour en est arrivée, mais en raison du déséquilibre qui existe entre les raisons des sept juges majoritaires et celles des deux juges dissidents. L'opinion de ces derniers, en effet, est d'une clarté et d'une cohérence remarquables, tandis que celle de la majorité est hésitante et, à maints égards, superficielle. La raison en est que les deux juges dissidents se sont attaqués, de front, aux quatre aspects majeurs de la question soulevée: 1) la nature et les effets de la résolution fédérale, 2) la fédéralisme comme principe dominant du droit constitutionnel canadien, 3) l'existence, de par le préambule de l'Acte de l'Amérique du Nord britannique, du pacte fédératif et 4) le devoir de la Cour suprême de préserver la Constitution, tandis que les juges majoritaires, qui ont adopté une approche beaucoup plus prudente et conservatrice, n'ont pas été capables de mener leur raisonnement jusqu'au bout et ont dû, en cours de route, écarter du revers de la main des arguments, tels celui du fédéralisme comme principe dominant du droit constitutionnel canadien, qui méritaient, à défaut d'être retenus, un bien meilleur sort. Ce qui laisse à penser que des membres de la Cour se préoccupaient davantage de la question conventionnelle que de la question juridique et qu'ils ont consacré plus de temps à raffiner leur position à l'égard de la première qu'à l'égard de la seconde.

Ainsi, par exemple, la majorité ne définit pas ce qu'est une "résolution" et prend pour acquis qu'il suffit de désigner un acte accompli par le mot "résolution" pour le rendre inattaquable devant les tribunaux. La démonstration n'est pas faite, qu'une résolution dont l'effet ultime est d'amender la Constitution du pays, doit être interprétée, dans une fédération, au même titre qu'une résolution souhaitant un heureux anniversaire à Sa Majesté. De même, quand la Cour conclut que le pouvoir des Chambres fédérales de procéder par résolution pour modifier la Constitution par adresse à Sa Majesté, peut résulter du mutisme de l'AANB à ce sujet, elle fait peu de cas du caractère fédéral du pays. On aurait souhaité que la Cour levât les voiles de la Résolution et du caractère fédéral pour s'interroger sur leur nature législative réelle, d'autant plus qu'elle reconnaît que "l'effet de la résolution actuelle est de mettre fin au besoin de recourir au Parlement du Royaume-Uni à l'avenir." L'effet n'est-il pas beaucoup plus étendu que cela?

A ce propos, il importe de souligner un passage, dans la décision majoritaire, qui indique la faiblesse du raisonnement adopté par les sept juges:

*"Par rapport tout au moins à la formule de modification, le processus en question ici ne vise pas la modification d'une constitution complète, mais plutôt l'achèvement d'une constitution incomplète."*

*"Il s'agit en l'espèce de la touche finale, d'ajouter une pièce à l'édifice constitutionnel ...."* (les soulignés sont les nôtres)

Le processus ne vise l'achèvement d'une constitution incomplète qu'en autant qu'il ne contient qu'une formule d'amendement. Mais *en l'espèce*, il n'y a pas qu'une *pièce* (ladite formule) qui s'ajoute à l'édifice constitutionnel, il y a d'autres pièces, dont la Charte des droits, au sujet de laquelle ces mêmes juges reconnaissaient, plus tôt, qu'elle "envisage la suppression d'un pouvoir législatif provincial." La Cour parle de *touche finale* quand il s'agit, en fait, d'une *touche nouvelle*.

Quand la majorité écarte les prétentions du groupe des Huit selon lesquelles ses positions trouvent "un fondement juridique dans le régime fédéral canadien tel qu'il ressort des antécédents historiques, des déclarations de personnalités politiques importantes et du préambule de l'AANB," elle y va un peu trop rondement. Passe encore, pour les déclarations de personnalités politiques, qui n'auront jamais force de loi. Mais de là à écarter en deux mots la théorie du pacte au motif qu'"il s'agit de théories qui relèvent du domaine politique, de l'étude des sciences politiques," et à écarter, sans autres commentaires, ces mots que l'on retrouve dans le Préambule "Considérant que les provinces du



Canada, de la Nouvelle-Ecosse et du Nouveau-Brunswick ont exprimé le *désir de contracter une Union fédérale*," il y a un raccourci par trop facile et on eût souhaité que la cour, doctrine ou jurisprudence à l'appui, expliquât pourquoi l'intention originaire des provinces ne doit pas, en cas de doute ou de conflit relativement à l'exercice d'un pouvoir fédéral, être prise en considération. La Cour, en écartant l'histoire du champ juridique, a-t-elle voulu répondre, à l'avance, à ces arguments qu'avanceront, inmanquablement, les autochtones et le gouvernement du Québec? Ce n'est pas impossible, encore qu'il faille souligner que ces propos sont tenus dans le contexte de la partie "juridique" de l'avis de la Cour et ne peuvent, en principe, être utilisés pour contrer leur utilisation éventuelle dans un contexte "conventionnel." Aussi dans le Renvoi qui est en ce moment devant la Cour d'appel du Québec et qui porte strictement sur l'existence d'un veto conventionnel pour le Québec, rien n'interdit de recourir aux réalités historiques et à la dualité originelle de ce pays.

Enfin, les sept juges ne répondent pas vraiment à l'argument selon lequel le gouvernement fédéral pourrait obtenir une modification de l'AANB qui ferait du Canada un état unitaire. Ils se défilent en disant que "ce n'est pas ce que la présente résolution envisage." Cette réponse ne tient pas, car il est clair que le raisonnement adopté par la Cour, en l'espèce, ne pourrait être différent s'il s'agissait d'une résolution visant à transformer le Canada en état unitaire. Comment une telle résolution serait-elle alors compatible avec "l'achèvement d'une constitution incomplète," avec "la touche finale," avec l'addition d'une "pièce à l'édifice constitutionnel"?

Cette partie du jugement de la Cour contient ainsi des failles majeures. Peut-être serait-il possible de les justifier tout en arrivant à la même conclusion, mais en ce cas, il faut se demander pourquoi la Cour n'a pas cherché à les justifier davantage et, surtout, comment elle a pu, en cours de route, faire si peu de cas de la Charte. Son raisonnement vaut dans la mesure où on l'applique à un processus qui n'inclurait que rapatriement et formule d'amendement. Pour le reste, son raisonnement est incomplet, voire contradictoire, et trop rapide. Comme si "résolution," "caractère fédéral" et "pacte" étaient des tabous sur lesquels il fallait éviter à tout prix de se pencher.

### **La Réponse "Conventionnelle" de la Cour**

La Cour s'est ici divisée 6 à 3, et l'une et l'autre des raisons données à l'appui des deux positions sont exposées avec clarté et vigueur et illustrent à quel point les mêmes faits et les mêmes principes de droit

peuvent amener des interprétations contradictoires. On peut réduire à deux, les différences majeures qui séparent ces positions. Les juges dissidents, adoptant une approche traditionnelle, refusent de modifier les termes d'un renvoi qui leur paraissent clairs et qui, selon eux, réfèrent au consentement unanime des provinces. Par ailleurs, ils concluent, après avoir passé en revue les précédents, que ces derniers n'indiquent en rien que le consentement unanime des provinces est requis ni que les acteurs aient agi en fonction d'un consentement unanime.

La majorité, par contre, y va d'un jugement qui étonnera tous les observateurs par la volonté, qui y est manifeste, de servir une leçon de morale politique au gouvernement fédéral et de prendre, pour y arriver, tous les moyens, même si ces moyens ne sont pas conformes à la retenue traditionnelle de la Cour. On a l'impression, en lisant cette partie du jugement, que les quatre juges qui avaient rongé leur frein en se joignant à la majorité dans la réponse "juridique," avaient choisi d'exploser en se ralliant à la majorité dans la réponse "conventionnelle."

Première surprise: en présence de questions dont le moins qu'on puisse dire est qu'elles étaient ambiguës, et en dépit des prétentions de plusieurs provinces, la Cour décide que "le fond de la question est de déterminer si conventionnellement le consentement provincial est obligatoire et non si, en ce cas, il doit être unanime." La Cour, ce faisant, rendait un fier service au groupe des Huit qui avait craint qu'en requérant moins que l'unanimité sur l'aspect conventionnel, il mettait en péril ses prétentions, au niveau juridique, à l'effet que les provinces étaient toutes égales. Les six juges ont donc *voulu* répondre à la question. Sinon, il leur eût été facile de refuser pour cause d'ambiguïté ou de conclure, comme les trois juges dissidents, que la question référerait au consentement de toutes les provinces. Le passage précité du jugement révèle cependant un élément sur lequel peu de commentateurs se sont penchés jusqu'ici: la Cour ne fait pas de l'unanimité une question de fond à laquelle elle s'adresse, ce qui réduit ses commentaires et ses conclusions sur ce point au rang de simple "obiter dictes." Elle conclura qu'un consentement provincial est obligatoire, elle ne conclura pas que ce consentement doit ou non être unanime. Nous reviendrons sur ce point.

Deuxième surprise: la Cour s'aventure dans la rédaction d'un mini-traité de droit constitutionnel canadien, qui s'adresse bien plus à la population qu'aux parties en cause. Ainsi, quand la Cour dit que "bien des canadiens seraient probablement surpris d'apprendre ...", elle fait oeuvre d'enseignement autant, sinon plus que de jugement.

Troisième surprise: la Cour exprime l'avis, ce qui n'était pas nécessaire aux fins du jugement, que "certaines conventions peuvent être plus importantes que certaines lois." Cette phrase, qui établit une échelle

de valeur, semble avoir pour but d'amoindrir l'effet de cette partie de la décision qui traite des lois. Elle a été citée à profusion par le groupe des Huit, et la Cour ne pouvait ignorer qu'il en serait ainsi.

Quatrième surprise: la Cour soutient que "si les précédents se trouvaient seuls, on pourrait alléguer que l'unanimité est requise." C'est là faire entrer, par la porte-arrière, la possibilité d'un droit de veto de certaines provinces si la démonstration était faite que dans leur cas, leur consentement était exigé non seulement par les précédents mais aussi par les acteurs. Le Québec, débouté, dans la partie légale, sur son argument du "pacte," pourra-t-il, sous l'angle d'un veto conventionnel, connaître un meilleur sort?

Cette question, qui ne se posait jusqu'ici que de manière académique, a pris une allure on ne peut plus concrète avec la décision du Québec de demander aux tribunaux de reconnaître son veto. Ridiculisée au départ par certains politiciens fédéraux, cette idée n'est pourtant pas si saugrenue qu'il a pu paraître à prime abord: s'il fallait que le Québec, citations centenaires à l'appui et s'inspirant en plus des propos récents d'un premier ministre ontarien se félicitant d'avoir renoncé au veto traditionnel de l'Ontario, prouve que les "acteurs" lui ont, de tous temps, reconnu le veto qu'il exerça en 1964 et en 1971 et qui a sa raison d'être dans l'indéniable spécificité québécoise, la Cour pourrait bien, pour être fidèle à sa propre logique, donner raison aux prétentions québécoises. Cette conclusion ne serait pas étonnante outre mesure: la Cour n'a-t-elle pas signalé qu'elle ne s'adresserait qu'accessoirement à la question de l'unanimité, et n'a-t-elle pas constaté qu'il lui "semblait" que la règle de l'unanimité n'était pas acceptée par tous les acteurs, comme si elle ne se ralliait à cette hypothèse que du bout des lèvres et gardait toute grande ouverte la porte à cette province, le Québec probablement, qui viendrait prétendre qu'unanimité ou pas, aucun consensus provincial ne serait possible sans son consentement?

Cinquième surprise: alors que dans le jugement majoritaire portant sur l'aspect juridique, la Cour s'était contentée, en quelques mots, de constater que la Charte proposée "envisage la suppression d'un pouvoir législatif provincial," voilà qu'elle décide, cette fois, que "si le projet de *Charte des droits* devenait loi, chacun des chefs de compétence législative provinciale (et fédérale) pourrait être touché," que "la *Charte des droits* aurait un effet rétrospectivement de même que prospectivement ..." et qu'elle "diminuerait l'autorité législative provinciale sur une échelle dépassant l'effet des modifications constitutionnelles antérieures pour lesquelles le consentement des pro-

vinces avait été demandé et obtenu." Il n'était pas nécessaire d'aller si loin. La Cour a voulu le faire. Ce passage, c'était prévisible, a été repris avec ferveur par le groupe des Huit.

Sixième surprise: la Cour porte un jugement de valeur, et pas des moindres, sur la démarche du gouvernement fédéral: "le principe fédéral, dit-elle, est irréconciliable avec un état des affaires où l'action unilatérale des autorités fédérales peut entraîner la modification des pouvoirs législatifs provinciaux" ... C'est "le processus qui porte atteinte au principe fédéral. C'est en tant que protection contre ce processus que la convention constitutionnelle est née." On ne saurait trouver condamnation plus formelle d'un acte gouvernemental.

Septième et dernière surprise: en concluant que "le but de cette règle conventionnelle est de protéger le caractère fédéral de la Constitution canadienne et d'éviter l'anomalie par laquelle la Chambre des communes et le Sénat pourraient obtenir par simple résolution ce qu'ils ne pourraient valablement accomplir par une loi," quatre des six juges—ceux-là qui avaient conclu que la "simple résolution" était à l'abri des tribunaux—expriment des propos qui sont irréconciliables avec ceux exprimés relativement à la question juridique: comment, en effet, puisque la convention, par définition, n'a pas de force légale, l'existence d'une telle convention peut-elle protéger, contre une "simple résolution", le caractère fédéral et éviter l'anomalie ci-haut écrite? Cette contradiction constitue peut-être l'illustration la plus frappante du dilemme dans lequel se sont trouvés ces quatre juges incapables de conclure à la fois à la non-illégalité et à la constitutionnalité au sens conventionnel, ou à la fois à l'illégalité et à l'inconstitutionnalité au sens conventionnel.

## **Conclusion**

Nous ne saurons jamais comment chacun des membres de la Cour a réagi, personnellement, aux pressions dont il était fait état en introduction, mais nous savons que la Cour, collectivement, par le jeu des majorités et des dissidences, par la véhémence, notamment, du jugement majoritaire sur la question conventionnelle, s'en est tirée avec la plupart des honneurs de la guerre, et que son image et sa crédibilité ont été raffermies.

La Cour, d'abord, ne s'est pas dérobée. Même ceux de ses membres qui étaient des plus agacés par la formulation des questions et par le rôle politique qu'on imposait à la Cour, n'ont pas hésité à répondre à des questions auxquelles, en d'autres temps, ils auraient pu facilement refuser de répondre. La Cour ne pouvait choisir de meilleur moment pour ne pas exercer sa retenue habituelle.

La Cour, ensuite, a clairement répondu aux questions posées. L'unanimité, bien sûr, eût été idéale, mais elle n'était tout simplement pas possible, tant les questions en litige faisaient appel à des instincts qui sous-tendaient les arguments juridiques. La Cour s'est retrouvée plus représentative de l'opinion publique qu'on aurait pu le croire. Elle s'est retrouvée avec un jugement qui donnait raison aux deux parties mais dans lequel d'aucuns ont vu, à tort, un jugement de Salomon: il suffit, en effet, de constater l'usage qu'en ont fait respectivement le groupe des Huit et le gouvernement fédéral, pour se convaincre que ce jugement, dans son esprit sinon dans toute sa lettre, appuyait d'emblée les prétentions du groupe des Huit.

De plus, en penchant si fortement, par le style adopté, du côté du principe fédéral, la Cour s'est-elle établie, peut-être définitivement, comme un arbitre impartial et le protecteur de la Constitution. Il est raisonnable de penser que ces premiers ministres provinciaux qui ont tant vanté la Cour depuis la publication du jugement, auront mauvaise grâce, à l'avenir, de la vilipender. La Cour s'est peut-être, du même coup, mise à l'abri d'une réforme en profondeur au cours des discussions constitutionnelles qui viendront.

Somme toute, la Cour suprême a habilement renvoyé la balle aux politiciens des deux camps, affichant à la fois son indépendance face au pouvoir politique et sa volonté de sauvegarder, dans les limites que lui impose le système, le principe fédéral. Les juristes pourront discuter longuement de la qualité légale du jugement rendu. Les politologues, par contre, à qui pourtant la Cour ferme sèchement la porte, peuvent dès maintenant applaudir à la sagesse d'un jugement qui aura conduit, sur le plan politique, à un déblocage important. On sait maintenant que, malheureusement, ce déblocage n'inclut pas le Québec, et la Cour, dans une certaine mesure, a rendu l'isolement du Québec possible, puisqu'elle a trop donné l'impression même si ce n'était que sous forme d'obiter, que l'unanimité n'était pas requise. En rétrospective, on peut dire que la Cour a commis l'erreur de parler d'unanimité, quand il n'était pas nécessaire de le faire puisqu'il lui suffisait de dire, noir sur blanc, qu'au moins un degré appréciable de consensus était requis, qui ne se retrouvait pas en l'espèce. Le gouvernement fédéral n'aurait pas eu, alors, la même latitude pour diviser les provinces et éventuellement, isoler le Québec et procéder sans lui.

Les jeux juridiques ne sont pas faits pour autant et la Cour suprême n'est pas au bout de ses peines. La nouvelle démarche québécoise, qui vise à faire reconnaître le veto du Québec, impose un nouveau défi à la Cour; après s'être portée, majoritairement et avec un cran remarquable, à la défense du principe fédéral, voilà qu'on lui demande de se porter à la défense d'une dualité qu'elle-même a du mal à refléter et de dire aux

Québécois si oui ou non, la Constitution et les tribunaux sont là pour les protéger et faire respecter, à leur égard, l'esprit, sinon les termes de l'entente de 1867. Le défi est de taille. La tentation de la Cour pourrait être grande, de se dérober cette fois, au motif que l'existence d'un veto conventionnel est devenu une question académique. Il faut espérer qu'elle ne succombe pas à cette tentation: si elle y succombe, elle aura perdu, aux yeux des Québécois, cette image, qu'elle vient de se donner, de défenseur du principe fédéral—lequel comprend, au Québec, la reconnaissance de la dualité et de son corrolaire, le veto québécois.

### 3

# THE SUPREME COURT OF CANADA AND BASIC CONSTITUTIONAL AMENDMENT

*William Lederman*

Since September 28, 1981, events have moved with considerable speed toward the resolution of Canada's urgent problems of major constitutional reform. On that date the nine justices of the Supreme Court of Canada brought in their landmark decision on the nature of the amending process necessary to accomplish fundamental constitutional changes directly affecting the essentials of the Canadian federal union, founded in 1867. The decision had been preceded by many months of political and legal deadlock in the country on the issues, with eight Provincial Governments arrayed against the Federal Government and the remaining two Provincial Governments. In the winter of 1980-81, the controversy was taken to three Provincial Courts of Appeal, those of Manitoba, Newfoundland and Quebec. When these courts had spoken, with quite mixed results, their respective decisions were in effect consolidated for purposes of a single appeal to the Supreme Court of Canada. Argument was heard there at the end of April, 1981 and the decision of the Court, with reasons, was given about five months later, on September 28. The issues were as complex as they were basic, so the Supreme Court certainly moved with quite remarkable speed in the circumstances as indeed the Provincial Courts of Appeal had also done earlier in the year.

It soon became apparent after September 28 that while the Supreme Court had not by any means settled all the constitutional issues confronting Canadians, it had moved us much closer to the resolution of our difficulties by settling some important questions of method, of the right way of doing things in the realm of basic constitutional change, as only the Court of final authority for Canada could have done. Look at what has happened since the judgment. On November 5th, in a Federal-Provincial Conference, nine Provincial Governments and the Federal Government agreed on a domestic amending formula for basic change that

would, if implemented, accomplish patriation of the Canadian constitution; they agreed also on a wide-ranging "Canadian Charter of Rights and Freedoms" to be entrenched in the constitution as part of the patriation process. Certainly, these would be fundamental changes to the federal union. Sadly, however, it must be added that the Provincial Government of Quebec was not a party to this consensus, thus casting a serious shadow that must be of continuing concern for all Canadians, including all Quebecers. Nevertheless, the degree of provincial consent obtained was quite remarkable and was deemed sufficient to enable the Parliament of Canada to go ahead. After a few agreed changes in the Charter, with the Quebec Government maintaining its general dissent, all-party support for the joint address to London was secured in both Houses of the Parliament of Canada, along with that of the nine provinces and the address to the Queen was sent in early December. As this is being written, in late January of 1982, it sounds likely that the British Parliament will pass the proposed measures soon and without change, thus discharging their traditional function in this respect for the last time.<sup>1</sup>

My purpose in this short critical essay is to attempt some analysis and explanation of the Supreme Court judgments so as to account for the great influence they have had on events since September 28 last. Because the reasons of the judges occupy about 115 pages in the Dominion Law Reports, composing a short commentary is indeed a formidable task. But the nine judges do fall into four groups according to the positions taken by them on the issues, so that if one keeps to the main thrust and emphasis of these four positions, perhaps reasonable accuracy can be combined with some brevity. In any event, this is what the writer will attempt to do.

The constitutional issues to which the Supreme Court of Canada addressed itself arose out of the historical fact that, while the BNA Act of 1867, an Act of the British Parliament, provided Canada with a federal constitution, it did not provide any domestic process for amending the basics of that constitution in Canada by some adequate measure of domestic agreement between the provinces and the central government. Accordingly, it has been necessary during the past 114 years to obtain such amendments to the BNA Act by an appropriate request to the Government and Parliament of Britain from Canada. Over the years, as Canada grew to independent nationhood, certain principles or customs concerning what was an appropriate request developed informally. The two principles involved in the issues before the Court were as follows:

1. The British Parliament would not enact any basic amendments of the Canadian constitution except at the request of both Houses of the Parliament of Canada; and



2. the Canadian Parliament would not request "an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces."

Accordingly, the questions for determination by the Court concerned primarily the constitutional status (if any) of the second customary rule just stated. Is it a law of the constitution binding on all parties, or if not was it at least a convention of the constitution having objective obligatory character? If it was neither of these, then it was a mere precept of desirable political behaviour in some circumstances having no objective binding force for the governments concerned. The federal Government of Prime Minister Trudeau had taken this latter position and decided they were free to go ahead unilaterally, without provincial agreement, to request from the British Parliament in London the basic constitutional changes they proposed. In early October, 1980 they introduced the necessary resolution for an address to the Queen in the Parliament of Canada. For several months prior to this they had tried without success to obtain provincial agreement.

Political objection to this unilateralism developed quickly in the Parliament of Canada, primarily on the part of the Conservative Party; also six of the dissenting provinces took the Federal Government to court as described earlier, alleging that the unilateral procedure being followed was unconstitutional in the legal sense or at least in the conventional sense. By the time the three provincial court judgments reached the Supreme Court of Canada on appeal, eight provinces were supporting this position against the Federal government. By this time, largely due to the efforts of the Official Opposition (the Conservatives), the constitutional resolution had been tabled in the Parliament of Canada to await the decision of the Supreme Court and the Federal Government had agreed to abide by the decision when it came. It came on September 28, 1981.

Let us turn then to the positions taken by the judges and their reasons for them. The problems they had to deal with are both basic and complex; it is not surprising therefore that two majority positions and two minority positions emerged, in the form of joint opinions by the various judges respectively in agreement on each of the four positions. So, hereafter, I will speak on the majority and minority judgments number I (on strict constitutional law), seven judges to two and of the majority and minority judgments number II (on established constitutional conventions), six judges to three. Majority Judgment I was given by Chief Justice Laskin and Justices Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer; with Justices Martland and Ritchie dissenting in Minority Judgment I. Majority Judgment II was given by Justices Mart-

land, Ritchie, Dickson, Beetz, Chouinard and Lamer; with Chief Justice Laskin and Justices Estey and McIntyre dissenting in *Minority Judgment II*.

The judges forming *Majority I* ruled that, as a matter of law, there was no requirement for any provincial consents to be obtained before the Parliament of Canada could properly request amendments directly affecting federal-provincial relationships from the British Parliament. A unilateral request to London by the Government and Parliament of Canada was legal, they said. Justices Martland and Ritchie, forming *Minority I*, dissented, taking the view that in these circumstances the strict law of the Constitution required provincial consent so that the unilateral address planned was illegal. They left open the question whether, in their opinion, the consents of all the provinces had to be obtained or whether some lesser but still substantial measure of provincial consent would, as a matter of law, suffice.

The judges forming *Majority II* ruled that, as a matter of established constitutional convention, apart from law, the Canadian Constitution had come to require that "The Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces." Moreover they ruled that a substantial measure of provincial consent would suffice to satisfy the convention, thus holding that unanimous consent of all the provinces was not required by the terms of the convention. Chief Justice Laskin and Justices Estey and McIntyre, forming *Minority II*, dissented. They concluded that an established convention had not developed requiring provincial consent in the circumstances so that conventionally as well as legally the planned unilateralism of the Federal Government and the Parliament of Canada was constitutional.

It will have been noticed that four of the judges are common to *Majority I* on law and *Majority II* on convention. They are Justices Dickson, Beetz, Chouinard and Lamer. If one analyzes carefully what accounts for this, one can largely explain not only the different positions taken by the two majority groups but also those taken by the two minority groups. My thesis is that the judges in each of the four groups were responding to three primary constitutional questions which had to be faced one way or another for them to dispose of the case. Their responses differed in critical ways; nevertheless, the majority view did emerge that enabled the Canadian political actors thereupon to make the remarkable progress toward solution described earlier, the accord of November and December, 1981.

The three primary themes or questions I have in mind concerning first things constitutional are as follows.

1. Given that the constitution is a combination of laws and conventions, what is the nature of law itself, what is the nature of convention itself, what is the relation between the two and from what sources do they respectively originate?
2. Given that the constitution is a federal constitution of some sort, what kind of a federal constitution is it? In other words, what is the nature of Canadian federalism?
3. What is the proper function of the traditional courts, especially of the Supreme Court of Canada, as the final guardians of compliance with the constitution, as a matter of law or convention or both? In other words, what basic constitutional issues are justiciable? What is the extent of the power of judicial review?

Let us now examine how the four groups of judges—the two majorities and the two minorities—divided and combined on these questions.

In Majority Judgment I, the seven judges took a rather narrowly positivist and historically static view of the nature of Canadian constitutional law, at least at the primary level in question, that of basic amending process. They assert that legal rules at this level must be directly expressed in formal authoritative documentary sources such as relevant British Statutes or judicial decisions either British or Canadian. They hold that no such source can be found giving a legal amending process for Canada that requires a federal-type measure of provincial consent, or any provincial consents at all, in relation to the legal power of the Parliament of Canada to ask what it pleases of the British Parliament by way of joint address. And especially, there is no legal requirement that limits the old Imperial Supremacy of the British Parliament to do whatever it pleases about requested amendments from Canada.

I have characterized this view of law as narrowly positivist because it treats certain authoritative formal sources of law as unique and exclusive of the operation of any other source of law. I have characterized it as historically static because Canadian federalism and independence are both undoubted and long-standing historical facts in the modern world; yet neither fact is accommodated in this conception of the strict law of the constitution. This seems to take us back not just to 1867 but to 1866. I respectfully submit that there is something wrong with a conception of basic constitutional law that is so unreal. Nevertheless, the result of Majority Judgment I is that, as a matter of law, we must have one last British statute that gives us a domestic constitutional amending process of a suitable federal type before we

have such a legal Canadian amending process at all. Until then, they say, there is simply a large gap in our constitutional law. It is just drastically incomplete.

Finally, we should now notice that this strict and narrow definition of law permitted all seven judges in Majority I to avoid issues concerning the nature of Canadian federalism. It is only because they agreed on a narrow definition of law that they could join in Majority Judgment I, which was strictly confined to the legal issue. As we shall see, Chief Justice Laskin and Justices Estey and McIntyre on the one hand (Minority Judgment II) and Justices Dickson, Beetz, Chouinard and Lamer on the other hand (in Majority Judgment II) have quite different conceptions of the nature of Canadian federalism. So, the minute it is raised, the groups just mentioned part company.

But, before pursuing that point, we should look at the significance of Minority Judgment I, the dissent on strict law of Justices Martland and Ritchie. In the *Edwards case* in 1930,<sup>2</sup> Lord Sankey said: "The British North American Act planted in Canada a living tree capable of growth and expansion." Justices Martland and Ritchie took this broader sociological and organic view of Canadian constitutional law as it relates to basic amendment processes. They considered constitutional law to have been growing to completeness in the federal sense and to independence from Britain in the 114 years since Confederation. They inferred a requirement for provincial consents in a typically federal amending process as a matter of law, by necessary implication from formal legal sources—the BNA Act itself, the Statute of Westminster of 1931 and a number of important judicial decisions in the Judicial Committee of the Privy Council and the Supreme Court of Canada distributed through the whole period since Confederation. They considered the formal sources in the light of the full facts of Canadian political and constitutional history, including the political facts about how amendments were secured from the British Parliament throughout the period. This use of the full historical context for the formal sources in aid of legal inferences manifests a very different conception of what basic constitutional law is and where it comes from than what we found in the majority judgment on the legal issue. The legal results reached by Justices Martland and Ritchie as described earlier is realistic but it is a minority judgment and so, however great its theoretical validity, it did not directly influence subsequent events.

At this point however, we find that Justices Dickson, Beetz, Chouinard and Lamer recognized that the narrow conception of law in which they had concurred when they were part of Majority I was so incomplete that it had nothing at all to say about a basic amending process ap-

appropriate for Canadian federalism. They were however willing to complete the constitution as a *federal* constitution in this respect by rules arising from constitutional conventions that had been established over the years since Confederation. They found as outlined earlier that there was indeed a conventional rule requiring a substantial measure of provincial consent for basic amendments affecting the federal union. Moreover, they held that such constitutional conventions could be identified, defined and authoritatively declared as obligatory rules by the Court even though they were not legal rules and the Court could do nothing to enforce them if there were not willing compliance by the political actors concerned. The tests they used to identify and define the relevant convention arising from the custom and usage of the official political actors, over the 114 years since Confederation, were those stated by Sir Ivor Jennings. He said:<sup>3</sup>

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that 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 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.

Thus we see that Justices Dickson, Beetz, Chouinard and Lamer arrived, as a matter of convention, at virtually the same conclusion respecting the present basic amending process as had Justices Martland and Ritchie as a matter of law. Moreover, this was in each case by virtue of the same reading of the obligatory significance of the historical evidence. It was natural and proper then that Justices Martland and Ritchie should join with the other four judges just named to give Majority Judgment II on convention, the judgment that really counted as we shall see later. For Justices Martland and Ritchie, a rose by any other name still smelled as sweet. Finally, it should be emphasized that the unifying factor for the six judges in Majority II was not just a common view of the nature and function of established constitutional conventions, it was also a common view of the nature of Canadian federalism.

All six judges in Majority II conceived the total Canadian constitution (by virtue of convention) to be essentially in harmony with the classic federal model in what was required of provincial consents for basic amendments. According to the classic model, federalism is an equal partnership between the provincial governments and legislatures on the one hand and the central government and Parliament of Canada on

the other. Those who read Canadian constitutional history and jurisprudence in the courts as manifesting classic, balanced federalism will naturally infer that there is a requirement for at least substantial provincial consent, along with that of the Parliament of Canada, for amendments directly affecting the federal union. As we have seen, for Justices Martland and Ritchie this inference was both legal and conventional, whereas for Justices Dickson, Beetz, Chouinard and Lamer it was conventional only, albeit very real at that level. In terms of the Jennings' tests, the classic character of Canadian federalism was the reason for the convention requiring provincial consent.

The contrasting view of the nature of Canadian federalism is found at full strength only in the dissenting opinion on convention of Chief Justice Laskin and Justices Estey and McIntyre (Minority Judgment II). As they read Canadian constitutional history and jurisprudence in the courts, these sources manifest only a partial and incomplete federalism at the level of basic amendments directly affecting the federal union of the country, whether one is talking of law or convention. Indeed, they deny that there is any one "classic" model for federalism in political science or constitutional jurisprudence. In any event, they conclude that the Canadian constitution is only partially federal and had included from the beginning some elements of a unitary state that give certain overriding powers to the Parliament or Government of Canada. They conclude that these are inconsistent with a finding, legal or conventional, that Canada is, or was intended to be, a classic balanced-partnership federalism, at least where the basic amending process is concerned and in certain other respects as well.

What are these overriding powers, formal legal powers, that give the Parliament of Canada superior status? Minority II emphasize the potentially extensive overriding character of the legislative paramountcy of the Parliament of Canada under the Peace, Order and Good Government clause of the BNA Act, the power of that Parliament to take over regulation of provincial works by declaring them to be works for the general advantage of Canada and the power of the federal cabinet to disallow provincial legislation by order-in-council.<sup>4</sup>

It is no doubt clear to readers by now that I favour the classic version of the nature of Canadian federalism though no constitution is absolutely pure in compliance with a given model. So, in principle, I agree with both Minority Judgment I and Majority Judgment II; this has been my position for many years. Nevertheless, I am bound to admit that the rather centralized and partial version of the nature of Canadian federalism given in Minority Judgment II has been until quite recently the prevailing version among the professors of constitutional law and political science of English Canada. By contrast, the prevailing view

among these groups in French Canada has been and still is the classic version. They see the special central powers pointed to in Minority Judgment II as anomalies. And it should be added that the courts have definitely set close limits to the potentially sweeping character of the Peace, Order and Good Government Clause.<sup>5</sup>

In any event, to come back to the judgments of September 28th, 1981, I am suggesting that the differing beliefs of the respective judges about the nature of Canadian federalism had a significant steering effect on the results they came to in three of the four groups into which they formed themselves—Minority I (law), Majority II (convention) and Minority II (convention). I admit that to attempt to detect a "steering effect" is something of a chicken and egg problem. But, after all, the three groups were reading the same constitutional history and court judgments—so how else does one explain that one group of judges went one way and the other two groups the opposite way on the issue of a present constitutional requirement for provincial consents to basic amendments? How else does one explain that the same fact of history or jurisprudence is the "usual thing" to one person but "anomalous" to another person? To carry the point a little further, what accumulation and selection of historical facts gives you the dominant type or pattern for Canadian federalism as a matter of evidence?

We come now to the third basic question or theme concerning which all the judges recognized that a response was necessary. What is the proper function and authority of the traditional superior courts, especially the Supreme Court of Canada, as guardians of compliance with the constitution? Whether basic constitutional law is defined narrowly (as by Majority I) or more broadly (as by Minority I), all the judges in the case presumably agreed that the Supreme Court had final authority to declare, define and enforce the law according to whatever a majority of the court found to be the law in any given case. Since 1867, to go no further back, it has been accepted that the superior courts do have the legal power of judicial review (the last word) respecting the legal limitations on the powers of provincial and central parliaments in Canada that obtain, for example, by virtue of the BNA Act. But there is no specific text that literally spells this out in any formal fundamental legal document. I believe the power to be legal all right and no doubt it could be implied from formal sources *if full context historical interpretation were used* as it was in the case under discussion by Justices Martland and Ritchie in Minority Judgment I. Or one can say that custom and usage for such judicial review have so long been consistently and widely accepted that they have crystallized into law. I suggest that these two ways of putting it come to the same thing.

Either way, something legal has been added to what can be derived by direct literal interpretation of what is contained in formal documentary sources.

Be that as it may, the open differences between the judges on the power of judicial review relate to the justiciability of established conventions, accepting the sharp dichotomy between law as narrowly defined by Majority I and convention as defined by Majority II. Chief Justice Laskin and Justices Estey and McIntyre doubted that established conventions were justiciable at all and they only addressed themselves to the existence and terms of a relevant convention because they were, so to speak, pressured into doing so since the other six, Majority II, held that conventional issues were justiciable, except for judicial enforcement measures. The six judges of Majority II found that the Court had both the power and the duty to look for relevant constitutional conventions and, if they found one to be established by the Jennings' tests, to declare it authoritatively and to define its terms. They admitted they could do nothing to enforce compliance if the political actors would not willingly comply; nevertheless, this goes a long way beyond the preferred position of Chief Justice Laskin and Justices Estey and McIntyre that conventions were not justiciable at all. So, by a majority of six to three, we have a precedent that serious allegations concerning established constitutional conventions are justiciable to the extent explained.

As a final observation on such justiciability, I suggest that the non-enforceability of conventions by the Court is of only marginal importance, at least in nearly all situations. In nearly all cases, the power authoritatively to identify and declare the terms of established constitutional conventions will be enough to extract voluntary compliance from the political actors. At the end of the day, if the prestige of the Supreme Court of Canada and the legitimacy of its power of judicial review in a federal country are widely accepted by the official political actors and by the people at large, the judicial declaration will induce willing compliance. If there is no such official and general acceptance of the role of the Court, what effective enforcement measures would be possible anyway? Fortunately, it appears that we do have this kind of acceptance in Canada. Is this not what explains the political accord of November and early December 1981?

More specifically, I am asserting that it was the terms of Majority Judgment II by Justices Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer that impelled the Canadian political actors to accomplish the political agreement on constitutional issues that they reached in November and early December of 1981. In conclusion, we should now look in more detail at what these judges said.



A summary of their position can be given in six points.

1. The total of rules and principles making up the constitution of Canada falls into two parts: "Constitutional conventions plus constitutional law equal the total constitution of the country."
2. Constitutional law consist of statutes (including relevant British statutes such as the BNA Act) and common law rules. The parentage of the latter is that they have been originated by the courts as judge-made law. The courts decide issues arising in these areas and make appropriate enforcing orders.
3. Constitutional conventions are rules or principles of the constitution made by custom, usage and precedent developed by important political leaders in office and accepted by the electorate over the years for the control of the conduct of the public affairs of the country. Such conventions have never been enforced by the courts and cannot be. Nevertheless, in appropriate cases the courts may authoritatively declare that a particular convention has been established and likewise declare what its terms are. This reference case, the group of six say, is one of those appropriate occasions.
4. Established conventions are full-fledged obligatory rules of the constitution. They are binding and ought to be obeyed by all concerned even though there are no specific court processes available to enforce them.
5. Conventional constitutional rules are frequently of very great importance. Often their purpose is to limit the use of legal powers and discretions which are very wide or extensive. In spite of the letter of the law, conventions prescribe that such legal powers should be used only in a certain limited manner, if at all. To a vital degree, democracy itself in our country rests on conventions, in this case the conventions of responsible government.

In law, for example, the Queen is the all-powerful executive head of state. By convention she can only exercise those powers according to the advice of ministers who have the confidence of the majority of the members of the popularly elected house of the parliamentary body concerned. Likewise in the vital realm of basic constitutional amendment, Canadian federalism itself rests upon and is defined by the convention for provincial consents explained earlier, in addition to the consent of the Parliament of Canada.

6. Legally, the Parliament of Canada can pass any resolution it pleases on any subject whatever and address it to any person in the world. But as a matter of constitutional convention, it would clearly be unconstitutional for it to pass a joint address intended to procure amendments from the British Parliament "directly affecting federal-provincial relationships without prior consultation and agreement with the provinces."

The six judges in Majority II dealt also with the quantification of provincial consent called for by the terms of the convention just quoted. They said the unanimous consent of all the provinces was not required and then continued as follows:<sup>6</sup>

It would not be appropriate for the Court to devise in the abstract a specific formula which would indicate in positive terms what measure of provincial agreement is required for the convention to be complied with. Conventions by their nature develop in the political field and it will be for the political actors, not this Court, to determine the degree of provincial consent required.

It is sufficient for the Court to decide that at least a substantial measure of provincial consent is required and to decide further whether the situation before the Court meets with this requirement. The situation is one where Ontario and New Brunswick agree with the proposed amendments, whereas the eight other provinces oppose it. By no conceivable standard could this situation be thought to pass muster. It clearly does not disclose a sufficient measure of provincial agreement.

Finally, by way of overview, I wish to say two things. First, fundamental theoretical issues about the proper definition of law have been around for a long time and they will continue to occur in our constitutional jurisprudence. I do not think the sharp dichotomy between law, narrowly defined, and established conventions, a dichotomy favoured by seven of the nine judges in discussion, will last very long. Its historical legitimacy is doubtful and even the seven admit that custom and usage do make international law. Nevertheless, it must be conceded that this sharp dichotomy is standard English constitutional doctrine. Also, the major contrasting views of the nature of Canadian federalism discussed earlier have been with us for 114 years and the tension between them will continue as an influence, one way or another, in our constitutional jurisprudence. There is much more to be said on both these matters but it cannot be said here.

What should be said here though is a word or two in praise of the Supreme Court of Canada. All nine judges identified the three funda-

mental theoretical issues that had to be faced as a matter of constitutional jurisprudence. They differed in critical ways on the right answers concerning those issues but when they discovered in their private conference room that this was so, they then grouped themselves very effectively into two majorities and two minorities. The resulting four judgments explored the basic themes thoroughly from all angles with great professional skill and distinguished scholarship. Choices had to be made and they were made. The judges faced the music, so to speak. Majority Judgment II on convention emerged and had the effective result described earlier. I think authoritative judicial review is alive and well and living in Canada.

## Notes

- 1 On January 18, 1982, the Foreign Affairs Committee of the British House of Commons published its "Third Report On the British North America Acts: The Role of Parliament." They recommended unequivocally to the British Government and Parliament that the latter should now pass into law the measures requested in the joint address to the Queen from the Parliament of Canada. Despite the continued dissent of the Province of Quebec the Committee found that there was now a sufficient measure of consent in Canada to convey "the clearly expressed wishes of Canada as a federally structured whole." This, they had said in their First Report (January 30, 1981), was the test to be satisfied for action as requested to be proper and constitutional by the British Parliament. They added "We consider that it would be proper for the U.K. Parliament to enact the proposals, notwithstanding that they will directly affect the powers of the Canadian Provinces and are dissented from by one of those Provinces, Quebec ... It is regrettable that so large and distinctive a Province as Quebec, a founding Province, dissents from the present proposals. That dissent may have significance for the welfare of Canada. However, that is a matter of political judgment and not something which should concern the U.K. Government and Parliament in dealing with a constitutionally proper request from an independent and Sovereign country." The British Government and Parliament are not bound to accept the recommendations of the Kershaw Committee but they are very likely to do so.
- 2 Judicial Committee of the Privy Council, [1930] A.C., 124.
- 3 Sir Ivor Jennings, *The Law and the Constitution*, 5th edition, 1959, p. 136.
- 4 *Re Constitution of Canada*, Supreme Court of Canada, (1982), 125 D.L.R. (3d) at 125-6. The judges forming *Minority II* said:

The BNA Act has not created a perfect or ideal federal State. Its provisions have accorded a measure of paramountcy to the federal Parliament. Certainly this has been done in a more marked degree in Canada than in many other federal States. For example, one need only look to the power of reservation and disallowance of provincial enactments; the power to declare works in a Province to be for the benefit of all Canada and to place them under federal regulatory control; the wide powers to legislate generally for the peace, order and good government of Canada as a whole; the power to enact the criminal law of the entire country; the power to create and admit Provinces out of existing territories and, as well, the paramountcy accorded federal legislation. It is this special nature of Canadian federalism which deprives the federalism argument described above of its force. This is particularly true when it involves the final settlement of Canadian constitutional affairs with an external government, the federal authority being the sole conduit for communication between Canada and the Sovereign and Canada alone having the power to deal in external matters. We therefore reject the argument that the preservation of the principles of Canadian federalism requires the recognition of the convention asserted before us.
- 5 *Reference Re Anti-Inflation Act*, Supreme Court of Canada, (1976) 68 D.L.R. (3d) 452.
- 6 *Re Constitution of Canada*, Supreme Court of Canada (1982), 125 D.L.R. (3d) at 103.

# CONSTITUTIONAL THEORY AND THE MARTLAND—RITCHIE DISSENT

*Noel Lyon*

The dissenting opinion of the Justices Martland and Ritchie as to the legality of the 1981 Joint Resolution should not be tossed on the scrap heap of legal history simply because it was the view of only two judges against seven. The majority and dissenting opinions may reflect fundamentally different conceptions of the law of the Canadian Constitution and the significance of that difference is not necessarily confined to this one controversy. That is, while the patriation issue is no doubt the most critical legal question the Supreme Court has ever faced, we will continue to live in a federal system built on the English parliamentary model. The relative importance of the federal principle and the principle of legislative supremacy, and the proper way to blend them in the distinctive Canadian constitutional system will persist as fundamental questions for jurists. And they are questions of great importance. We need to know, then, how to construct from first principles a sound theoretical model within which to locate difficult legal questions for analysis and decision. It is in the construction of this model that comparison of the divergent opinions in the 1981 reference case can be useful.

The basic difference between the two opinions can be stated briefly: the majority thought the appropriate question was "what law limits the power of the Parliament of Canada to do anything it likes outside the field of legislative enactment?"; the dissenting judges considered that just the opposite formulation was appropriate, that is, "what law authorizes the Parliament of Canada to adopt the 1981 Joint Resolution?"

The particular arguments about convention hardening into law, about the fundamental importance of the federal principle mandating a judicial inference of a legal requirement of provincial consent, and about "the Dominion" whose consent is required by the Statute of Westminster, 1931, being the collectivity of component governments that make up the federal

system are all secondary to the primary issue of what is the appropriate question to ask. Indeed, these particular arguments become relevant only if it is shown that the majority's formulation of the question is sound. With the hindsight provided by the dissenting judgment it may be possible to assert that the provinces made a strategic error by relying mainly on the particular arguments and thus implicitly accepting as the appropriate question that adopted by the majority, which is also that of the federal government.

This is not the first time the Supreme Court has had difficulty sorting out a constitutional issue that does not fit squarely into the division of legislative powers framework governed by sections 91 and 92 of the British North America Act. In *Reference re Ownership of Offshore Mineral Rights*<sup>1</sup> the dispute was over public property. Did Canada or British Columbia have the better claim to those rights of territory and exclusive exploitation that international law had ceded to the Canadian federal state? The Court's answer in favour of the central government amounted to an equating of Canada the federal nation-state with Canada the central government in the federal system, and of legislative responsibility for the areas in question with proprietary rights.

The Court never asked the central question in the case, which was "what disposition does Canadian federal law make of new territory and mineral rights acquired through accession?" Part VIII of the British North America Act deals with "Revenues, Debts, Assets, and Taxation." Section 109 provides that all lands, mines and minerals belonging to a province shall remain the property of that province. By section 108 only specific property listed in the third schedule was assigned to Canada. We are not here concerned with the vagaries of the arrangements made for other provinces as they were admitted, the main ones being those relative to the prairie provinces, which did not acquire ownership of their territorial resource bases until 1930.<sup>2</sup> Rather, it is the proper legal interpretation of section 109 that bears on the matter of a sound model for constitutional interpretation by the Supreme Court. The accepted view is that section 109 operated to fix provincial ownership as of July 1, 1867 or on the applicable later date of admission to the Union or acquisition of ownership of territorial resource base. It seems not to have occurred to the Supreme Court that sections 108 and 109 constitute the core of the regime of law on the division of public property comparable to the regime of federal law on legislative powers enacted in sections 91 and 92. And the reason it never occurred to the Court, I suggest, is the absence of a properly constructed theoretical model for constitutional interpretation.

The absence of a model, in turn, results from a belief, made dogma through long and uncritical repetition, that the Canadian Constitution is just the English Constitution with a federal division of legislative powers tacked on. I suggest that close analysis of this "eleven replicas of the mother Parliament" model reveals a fundamental fallacy built on a belief that constructing a federal system of government out of parliamentary building materials is just a mechanical operation, like laying building blocks, or an exercise in arithmetic.

In an article entitled "The Central Fallacy of Canadian Constitutional Law,"<sup>3</sup> I attributed to this fallacy the Supreme Court's failure in the *Breathalyser Reference*<sup>4</sup> case to ask the question that was central to that case, namely whether the law of the Canadian Constitution permits the Parliament of Canada to delegate to the Governor in Council power to amend an Act of Parliament in a significant way through selective proclamation of parts of the Act. I further suggested that section 91, by giving to Parliament the power to make laws in the federal domain, fixes the plenary, or primary, legislative power in Parliament to the exclusion, as a matter of law, of all other bodies. Only *subordinate* legislative power can be delegated, and by definition as well as judicial interpretation,<sup>5</sup> this excludes the power to alter the primary enactment, the statute itself.

Whether this interpretation of section 91 is sound or unsound is not important here. What is important is whether this question should have been faced by the Court. Although the Court divided five to four on the outcome, nine judges all reached their conclusions on the basis of their assessments of Parliament's intention in delegating the proclaiming power to the Governor in Council. None of them acknowledged a constitutional issue in the case and Mr. Justice Laskin made a point of denying there was one.<sup>6</sup>

Again, the reason for the Court's failure to recognize the constitutional issue is, I suggest, the absence of a complete theoretical model of the Canadian Constitution. Once questions about the division of legislative powers are disposed of, we look to English authorities for answers.

I am convinced that this absence of adequate theory explains the difference between the majority and dissenters on the question of legality of the 1981 Joint Resolution, and that the majority opinion is based on the fallacious assumption that the Parliament of Canada, like the mother Parliament, has unlimited powers in law, subject only to the limits on subject matter of legislation set out in section 91 and 92 of the British North America Act.

In accepting this starting point, the majority find their analogy in biology rather than constitutional theory. They believe that once the

Parliament of Canada was created and empowered by the constitutive act it could then free itself of that Act and simply assert unlimited powers on the basis, not of law, but of pedigree.

The dissenting judgment, by its formulation of the first question to ask ("What law authorizes the Parliament of Canada to adopt this resolution?") implicitly postulates a legislature of statutory, or legal, origin whose powers come to it from law and from no other source. We cannot have it both ways. If ours is a federal system of government then it simply cannot accommodate legislative bodies with inherent powers that are incompatible with the federal principle. Federalism postulates a legal constitution; otherwise there can be no definition of a basic federal structure that can be assured over the long term.

The gap theory of the majority, that the Joint Resolution is not an alteration of the federal constitution but rather a completion of an incomplete constitution, denies the finality of the Acts of 1867 and 1931. It would have us return notionally to 1867 and re-enact *Charlotte-town* and *London*. The dissenters deny the existence of a legal gap, preferring the view that all legal powers needed for a federal constitution are already in existence. The task is to identify the ways in which they may be exercised.

The dissenting judges, by asserting that it is substance, not just form, they are concerned with in assessing the legality of Parliament's proposed adoption of the Joint Resolution,<sup>7</sup> operate on the implicit assumption that the power of constitutional amendment resides in Canada even though the formal machinery is elsewhere, and that the power is therefore subject to the federal constitution under which Canadian legislatures and governments function. Under that constitution the powers of those legislatures and governments are federally defined, and thereby limited.

The heart of the majority opinion, on the other hand, is the assertion at page 26 of their judgment that "There is no limit anywhere in law, either in Canada or the United Kingdom ... to the power of the Houses to pass resolutions." What is the authority for this proposition that those Houses may proceed by resolution to do anything at all, free of all limitations enacted in the federal constitution? It is *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, described in the judgment as a leading treatise on *British* parliamentary proceedings. Given that the question before the Court could never arise in Britain and that the problem would never have occurred to the author of the treatise, this response begs the question. But it is a typical form of question-begging through which we have from the beginning avoided the major conceptual problems of setting the British parliamentary system within a federal constitution.



The gist of the dissenters' response to this question is that the Houses of Parliament, by adopting the 1981 Joint Resolution, will be invoking the amending procedure for the Canadian federal constitution. To treat this process as comparable to the adoption of a resolution by the Parliament of the United Kingdom is to ignore the central issue in the case.

It is equally subversive of the federal constitution, upon which the Parliament of Canada is totally dependent for its existence and, I submit, its powers, to permit the central government to support its claim with section 18 of the British North America Act which authorizes Parliament to define by statute the "powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the Members thereof." The federal context in which that section appears can hardly leave room for doubt that this is the same Parliament as is given a limited role by section 91 of the same Act and that the power conferred by section 18 is contained within that role. Parliamentary powers, like executive powers, must be taken to follow a parallel division to that of legislative powers.<sup>8</sup>

In the end I conclude that the majority never explain where the Houses of the Parliament of Canada, the creature of a federal constitution, derive the legal authority to alter that constitution by themselves by using a legislative process that is available to them as a kind of historical anomaly. The attempt to overcome this difficulty by equating the Parliament of Canada to that of the United Kingdom is simply a denial of the two fundamental differences of the Canadian system: a federal system and a written constitution.

In another context the Judicial Committee commented on the significance of the latter of these differences:

During the argument analogies were naturally sought to be drawn from the British Constitution, but any analogy must be very indirect, and provides no helpful guidance. The British Constitution is unwritten whereas in the case of Ceylon their Lordships have to interpret a written document from which alone the legislature derives its legislative power.<sup>9</sup>

To claim that the federal principle limits the Parliament of Canada only in its exercise of legislative power and that it is free to do anything it chooses with other powers, however contrary to or destructive of the federal principle, is to be captive of the central fallacy of Canadian constitutional law. That fallacy, as I stated earlier, sees the Canadian federal system as eleven replicas of the British parliamentary system, each with a legislative domain instead of a kingdom.

What is the point of going on at such length in praise of a judicial opinion which was shared by only two dissenting judges and which is not the law in Canada? The answer, already implied, is that the dissenting judges applied what I believe is a sound theoretical model to the question before them and by adopting their model we can expect better analysis of other difficult questions of constitutional interpretation that we are now facing or that may arise in the future. Let me offer a few examples.

Take the spending power. The current claim of the central government to act without legal restraints when proceeding by resolution is a natural extension of the theory of the spending power. Parliament may enact laws for the raising of money by any mode or system of taxation (BNA Act, s. 91(3)). Parliament may also enact laws in relation to the public property (BNA Act s. 91(1A)). Therefore, it is claimed, Parliament can raise unlimited sums of money and authorize the federal government to buy from the provinces what it cannot legally get through the direct exercise of its legislative powers. Just as the federal position in the 1981 reference case involves a claim that the Houses of Parliament have legal authority to abolish the federal system without provincial consent (unless, of course, the British have a residual power of independent judgment in these matters, which would limit Canadian sovereignty) so their continuing use of the spending power to make conditional grants involves a claim of legal authority to capture all of the available tax revenues in Canada and fund provincial governments on the condition they secure provincial legislation dictated by the central government.

The fallacy of the spending power is that the federal taxing power is not subject to the federal principle. One need only look at the context within which that taxing power was enacted to realize that it cannot include the power to raise money for provincial purposes. The problem is not whether the power is limited by the federal principle but rather how a court of law could ever detect a provincial purpose in a federal taxation statute. The federal government is too smart for that. They do not use titles like "An Act to Raise Revenue to be Used by Federal Ministers to Negotiate Agreements with the Provinces Obliging those Provinces to Secure the Enactment of Legislation Deemed Desirable by the Government of Canada." However, if after the event a court of law can be shown the companion legislation and the resulting federal-provincial agreements through which federal funds are exchanged for provincial laws the court could conclude that the funds in question were raised in contravention of the law of the constitution. This very technique was used by the Supreme Court of Canada to strike down a mineral taxation statute in British Columbia where companion legislation author-

izing a "bounty" on iron ore which varied with the degree of processing done in British Columbia disclosed a true purpose of imposing an export tax on raw iron ore.<sup>10</sup>

The legality of the spending power has never been determined by the Supreme Court of Canada and a test may yet come. If it does, and if the Court simply says that spending money is not the same as making laws so that the central government may spend its money in any way it chooses for any purpose it sees fit, we will miss an important opportunity to provide legal protection to the federal principle. The idea that federal officials, acting on the authority of an Act of Parliament and using money raised under another Act of Parliament, may use the money to pursue purposes lying clearly within the provinces' legislative domain is a legal fiction through which the judiciary would become handmaidens to a functioning unitary system of government in which the provinces would be subordinate agencies of the central government. Money talks enough in the political domain without permitting it to buy legal powers conferred by the constitution. Yet in our mistaken conception of the Canadian constitution that is what we have been doing.

Another matter that requires a broader theoretical model than can be built around section 91 and 92 of the British North America Act is ownership of offshore mineral rights. I earlier described what I consider the Supreme Court's failure even to ask the basic question of federal law in the British Columbia reference. That decision is now more than a decade in the past and is part of the equilibrium that is now established in mineral exploitation along the Pacific coast. But Newfoundland continues to assert its distinctive claim and that claim may yet end up before the Supreme Court. If it does, the Court should be willing to examine the decision in the British Columbia case critically and within an appropriate framework, to test its soundness in principle before applying it to Newfoundland. I suggest that application of the Martland-Ritchie model to that problem reveals that the Court's equation of Canada the federal nation-state with Canada the central government within the federal system is comparable to equating the Parliament of Canada with the Parliament of the United Kingdom and was inspired by the same fallacy. That fallacy seems to be inspired by a sense that judicial review is repugnant to the doctrine of parliamentary supremacy and should therefore be kept to the absolute minimum of interpreting the federal division of legislative powers. Unfortunately, however, judicial review is the necessary corollary of a written constitution if government is to be under law.

Use of a better model could open our minds to the possibility of seeing Part VIII of the British North America Act as enacting a *regime*

of federal division of public property from which we can derive federal law for new questions that arise concerning property rights as between the central and provincial governments. Is it the dominant loyalty to the common law in Canadian legal minds that has led us to see Part VIII as merely a transfer of assets and conveyance or quit-claim of property?

Finally, there is the problem that surfaced in the breathalyser reference: does the law of the constitution vest the power to make and unmake statutes (as opposed to mere regulations) in the established legislatures to the exclusion of all other bodies, including the Governor in Council? If we respond to this question by saying it is not a question of the division of legislative powers so that we can look to British law for an answer we are once again taking it on ourselves to substitute British constitutional theory and law (which is really non-law in view of the absolute character of the doctrine of parliamentary supremacy) for what has been enacted in the rest of the British North America Act beyond sections 91 and 92. Moreover, we simply ignore the fundamental point of difference that flows from the fact that all Canadian legislatures have powers that are defined, and therefore limited, by law.

The constitution, which is our fundamental law intended for service over the long term, deserves open-minded consideration of the possibility that some of our most basic assumptions that direct judicial interpretation of that constitution are simply unsound.

## Notes

- 1 [1967] S.C.R. 792.
- 2 The legislation effecting the transfer, which was confirmed and entrenched by the British North America Act, 1930 (3-4 Geo. IV, c. 36) is reproduced in M. Olivier's *British North America Act and Selected Statutes, 1867 to 1962* (Queen's Printer) at 361-414.
- 3 (1976) 22 McGill L.J. 40.
- 4 [1970] S.C.R. 777.
- 5 *Booth v. The King* [1914] 51 S.C.R. 20.
- 6 Fn. 4 supra, at 800.
- 7 (1982) 125 D.L.R. (3d) 1 at 69.
- 8 This obvious departure from the British concept of one indivisible Crown was set out by the Judicial Committee in *Bonanza Creek Gold Mining Co. Ltd. v. The King* [1916] 1 A.C. 566 at 578-80. This division, while dictated by sections 12 and 65 of the BNA Act necessarily follows from the federal principle. The exception in the case of treaty-making is apparent only since the Judicial Committee tacked the federal principle onto this power in *A-G Canada v. A-G Ont.* [1937] A.C. 326.
- 9 *Liyanage v. The Queen* [1967] 1 A.C. 259.
- 10 *Texada Mines Ltd. v. A-G for B.C.* [1960] S.C.R. 713.

# THE OPINIONS OF THE SUPREME COURT: SOME UNANSWERED QUESTIONS

*Dan Soberman*

Such is the fluidity of the constitutional position in Canada that less than six weeks after the Supreme Court of Canada handed down its most important opinion in 100 years,<sup>1</sup> that opinion seemed to recede into history, overtaken by an even more important political event, the Ottawa accord of November 5, 1981, reached by nine of the ten provinces and the federal government. However, the appearance may be misleading and we may yet be confronted by fundamental questions that arise not only because of what the court said but also because of what it did not say in its majority opinions.<sup>2</sup>

## Substantial Measure Of Consent

To the question, "Is it a constitutional convention that ... [the Canadian Parliament] will not request ... [the British Parliament] to amend the Constitution of Canada ... [so as to affect provincial legislative powers] without first obtaining the agreement of the provinces?," a six-judge majority said yes. It also described "agreement" as requiring "at least a substantial measure of provincial consent,"<sup>3</sup> but it left unanswered the meaning of that phrase. The Court stated only:

*It would not be appropriate for the Court to devise in the abstract a specific formula which would indicate in positive terms what measure of provincial agreement is required for the convention to be complied with. Conventions by their nature develop in a political field and it will be for the political actors, not this Court, to determine the degree of provincial consent required.*<sup>4</sup> [emphasis mine]

The difficulty with this statement is that the Court, whether it wishes it or not, may be confronted with determining the meaning of "substan-

tial measure" if, as has happened, an agreement is reached with less than unanimity and one or more dissenters return to the Court for an opinion. This consequence could only have been avoided if there had been unanimous agreement on an amending formula.

The Court did go on to say that it would, "decide further whether the situation before the court meets this requirement," and it added:

The situation [in September 1981] is one where Ontario and New Brunswick agree with the proposed amendments whereas the eight other provinces oppose it ... It clearly does not disclose a sufficient measure of provincial agreement.<sup>5</sup>

Let us try to give content to the phrase. The first and simplest approach would be to say that since "unanimity" means ten provinces, "substantial measure" must mean less than unanimity and the smallest departure from unanimity would be one less than ten, that is nine. Accordingly, whether or not some lesser number than nine would satisfy the requirement, surely nine must; otherwise, we are back to unanimity. However, there are problems with this numerical solution as a matter of convention. The Court has not relied on, nor indeed found specific statements about, what number constitutes a sufficient measure of consent in the history of convention making in Canada. It is true that leading political actors have on occasion said that unanimity was *not* required (without stating what was required), when they had already obtained unanimity for their requests to Westminster for changes in the BNA Act affecting provincial legislative powers. But in the two most recent and indeed most relevant occasions (because in both cases the negotiations were about an amending formula), when one province dissented alone, the proposals were definitively abandoned by the federal government as well as the remaining provinces.<sup>6</sup> Therefore, a purely numerical approach based on consent of less than ten provinces is not well supported by historical evidence.

In any event, as a logical question a straight nose count of provinces is not persuasive: if nine is enough but eight is not, then Ontario with over 35% of the population, or Quebec with over 25% cannot veto, but Prince Edward Island and Newfoundland together, with less than 3% of the population can veto. If eight is enough but seven is not, the straight nose counting leads to an even more unacceptable result: Ontario and Quebec together, with over 60% of the population of Canada, cannot block an amendment, but the two Atlantic provinces noted above, joined by New Brunswick, and together containing less than 6% of the population can exercise a veto! The illogic of allowing eight provinces with less than 40% of the population to amend the constitution cannot be countered by referring to any existing Canadian legislative

or decisional body where all provinces have an equal vote, such as in the Senate of the United States. Not in our Senate, nor in the composition of the Supreme Court itself is equality of provincial representation to be found.

If the Court is pushed to quantify "substantial measure" in simple numerical terms by counting provinces, historical evidence will not provide it with a formula; it will have to create an anomalous formula, one which has never received political approval and which derives its validity primarily from the Court's own prior pronouncement that something less than unanimity would suffice. It is one thing for the parties to an anomalous amending formula to agree expressly to that formula for diverse external reasons; it is quite another for a Court to construe such a formula on slender historical evidence, unsustainable by logical analysis of the consequences. Accordingly, I do not believe the Court can find a convention based on numbers of provinces alone.

Did the Supreme Court then, contemplate a "substantial measure" to mean something other than a simple tally of provinces? Perhaps the anomalies would be minimized in such a formula by adding a reference to a minimum percentage of total Canadian population. But again, there is not historical evidence of an accepted convention which includes such a reference. (It is true that the amending formula ultimately agreed on in the November accord adds a second element requiring the minimum number of provinces to contain a majority of the population,<sup>7</sup> but there is no prior history of consensus on this factor. In any event, the November accord contains a third element, the right of a dissenting province to opt out of an amendment containing changes in its legislative powers.<sup>8</sup> Paradoxically, this right to opt out was not offered to a province dissenting to the accord itself, so that the action taken by the remaining ten governments is in conflict with the rights created by the accord.)

"Substantial measure of consent" can have other than a purely numerical interpretation; it can refer to the consent of all the principal elements of the country—by region, for example. Although there is no self-evident logical division of the country, it has often been assumed that the four Atlantic provinces comprise one of four regions within Canada. But there is no agreement on what would amount to adequate consent of that region. The 1964 Fulton-Favreau formula did not deal with regions.<sup>9</sup> The Victoria formula stated that resolutions of "at least two of the Atlantic provinces" were necessary.<sup>10</sup> The 1980 proposed Federal resolution stated "at least two of the Atlantic provinces that have ... at least fifty percent of the population ..."<sup>11</sup>, thus



eliminating any role for Prince Edward Island, since any two of the other provinces would contain at least fifty per cent, either for the purpose of blocking or of giving consent to an amendment. The amended federal resolution of April, 1981,<sup>12</sup> returned to "two or more of the Atlantic provinces," thus permitting the anomaly that Newfoundland and Prince Edward Island, with less than 32% of the region's population, could give consent on behalf of the region, overcoming a dissenting vote in the other two provinces of New Brunswick and Nova Scotia containing the remaining 68%.

None of these proposals has ever received a consensus and indeed all have now been rejected in favour of a modified double majority rule in the Ottawa accord reached in November, 1981.<sup>13</sup> The Ottawa formula can hardly be considered to give definitive content *ex post facto* to "substantial measure of consent" (unless, of course, it did so by unanimity), but it does indicate that there never has been an established, identifiable, customary view of majority consent in the region.

A similar problem arises with the four western provinces. Both the Victoria formula<sup>14</sup> and the 1980 federal resolution<sup>15</sup> required consent of at least two provinces with at least fifty per cent of the population. It gave rather more power to British Columbia and Alberta, each with over two million population and less to Saskatchewan and Manitoba, each with only one million. The amended April 1981<sup>16</sup> resolution moved to a straight "two or more" provision and again, as in the Atlantic region, it permitted two provinces (Saskatchewan and Manitoba) with less than one third the population of the region to give approval against the wishes of the two more populous members. Moreover, British Columbia has laid claim to being a region in itself. In any event, none of these proposals achieved a consensus and the question has been overtaken by the Ottawa accord. We cannot isolate and identify a clear criterion that could be held to represent consent to constitutional amendment in the region.

Therefore, with respect to both the Atlantic and western regions it seems virtually impossible for the Supreme Court to construct a conventional model of a "substantial measure of consent" based on regions. It should be added that in the regional approach each of Ontario and Quebec constitutes a region with each having a veto. Not until the November 1981 conference did Ontario offer to "give up" its veto in bargaining for an accord. Quebec agreed only conditionally to "give up" its veto in April 1981, as described below.

A third approach to consent may be related to the primary language and cultural communities in Canada. The BNA Act itself,<sup>17</sup> and each of the major proposals for a constitutional amendment process recognize,

for at least some purposes, the linguistic duality in Canada. As a practical matter, the Fulton-Favreau formula,<sup>18</sup> the Victoria Formula<sup>19</sup> and the proposed resolutions of 1980<sup>20</sup> and 1981<sup>21</sup> all gave Quebec a veto. And this veto was recognized implicitly in 1966 and 1971 when the amending formula proposals were dropped upon Quebec refusing to consent.<sup>22</sup> The first indication that Quebec would itself consider giving up its *de facto* (established by convention?) veto came in April 1981, when it joined in the "Vancouver" formula and accepted the right to opt out of any constitutional amendment in exchange for its veto, provided it was guaranteed fiscal compensation.<sup>23</sup> That formula was not accepted in its original form by the Ottawa accord and Quebec has objected to the revised version. It seems highly unlikely that the Court could seize upon this one tentative occasion of Quebec's agreement to a qualified majority to create a convention of "substantial measure" without Quebec. The only approach that could yield a formula not requiring the consent of Quebec on a linguistic-cultural basis, would be to assert that the recognition of language rights in the BNA Act and in the various proposed amending formulae, and the solicitude toward Quebec's consent in all past negotiations are insignificant matters, or at least matters not sufficiently important to prevent obtaining a substantial measure of consent despite a veto from Quebec.

In summary, we are left with the position that the anomalies inherent in any numerical formula or in any regionally based formula, and in the denial of Quebec's special interest in one based on the linguistic and cultural duality of Canada, make it difficult if not virtually impossible to construe a basis for a "substantial measure of consent" less than unanimity. We have noted that a formula—any formula no matter how anomalous—can be arrived at by express agreement, but that is quite different from a court construing a formula from past practices. It may seem plausible to argue in the abstract that something less than unanimity is required by convention, especially if one need not give consent to the "something," but an examination of the history of constitutional negotiations and practices, when combined with the unique qualities of the ten provinces, seems to make it impossible to give meaningful content to that element.

### Law, Convention And Morality

The classical debate about the relation between law and morality appears to have gained a third element in constitutional convention. Although the Supreme Court has not said so, some commentators have interpreted the finding that the consent of the provinces is "constitutionally required" by convention, as a statement that consent is morally required.<sup>24</sup> In one sense then, they have equated rules of con-

vention and moral rules distinct from, and opposed to, rules of law. I do not believe that the opinion of the Court justifies such an interpretation.

In a democratic society, laws are *intended* to be moral, that is, to reflect the morality of society, however imperfectly they may succeed in so doing. Accordingly, laws are presumptively considered to be moral, although a particular law or set of laws may be shown to deviate from, or be repugnant to, morality. I think it is the same with conventions; they are presumptively moral but may be shown to be otherwise. What if a law and a convention are in conflict? Is there a presumption that the law is more likely to reflect morality than is the convention, or vice versa? I see no basis for a presumption one way or the other. Yet a presumption in favour of convention has been implicit in many statements made about the Court's opinion, especially by those sympathetic to the position taken by the eight provinces.

We must remember first, that the Court was asked specifically to respond to the question, "is it a constitutional convention that ... [Parliament will not ask Westminster to amend the BNA Act] without first obtaining the agreement of the provinces?"<sup>25</sup> Accordingly, the first major task of the Court was to describe the convention.

The discussion of the nature of conventions suggests that they fulfil a role in society analogous to that of legal rules; the need to create conventions arises in much the same way it arises to create new laws. Conventions usually regulate the customary conduct of various branches of government or of governments as a whole, some internally and some in their relations with other branches or governments. It may seem inappropriate to put these arrangements in the form of legal rules, for many conventions are expected to evolve in response to changing conditions. On this point, the Court said:

A federal constitution ... may also constitute a fertile ground for the growth of constitutional conventions ... It is conceivable for instance that usage and practice might give birth to conventions in Canada relating to the holding of federal-provincial conferences [etc.] ...

The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with *the prevailing constitutional values or principles of the period*.<sup>26</sup> [emphasis mine]

Many conventions, therefore, are not writ in stone. Like laws they change from time to time. We change laws by act of the legislature or by courts departing from prior rules found to be erroneous or no longer appropriate. Conventions change when principal political actors depart

from earlier practices. Whether the departure is justified may be difficult to answer. To use the Court's own language, the departure must be measured against "prevailing constitutional values or principles." Moreover, the question remains, "Who decides whether the departure is justified?" Is it decided by vague, general acquiescence of the main political actors themselves, by legislatures or governments of both levels, or by the general electorate?

It is important, of course, first to establish the content of conventions, but more significant are the reasons for them. Their influence "depends on ... [the importance] of the value or principle which they are meant to safeguard."<sup>27</sup> The Court discusses this aspect under "A reason for the rule."<sup>28</sup> What follows is a series of key extracts from that section:

The preamble of the BNA Act states that, "the provinces ... desire to be federally united ..."<sup>29</sup>

The federal character of the Canadian Constitution was recognized in innumerable judicial pronouncements.<sup>30</sup>

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. It would indeed offend the federal principle that "a radical change" ... [could occur at the request of a bare Parliamentary majority].<sup>31</sup>

... the requirement of provincial consent did not emerge as early as other principles, but it has gained increasing recognition and acceptance since 1907 and particularly since 1930 ... By 1965, the rule had become recognized as a binding constitutional one ... The purpose of this conventional rule is to protect the federal character of the Canadian Constitution and prevent the anomaly that the House of Commons and Senate could obtain by simple resolutions what they could not validly accomplish by statute.<sup>32</sup>

It is the process itself [that of unilaterally proceeding to Westminster by the federal government] which offends the federal principle.<sup>33</sup>

Here then, the Court has summarized the main reason for the rule and found that the proposed resolution, opposed as it was by eight provinces, would offend that reason: the preservation of the federal principle.

Whether the main political actors or the electorate should ultimately agree with the position of the Court is another question, but the reasoning of the Court seems to be sound and unambiguous on this point.

However, the Court did not, and probably ought not, discuss whether there were countervailing reasons that would justify disregarding the federal principle in the circumstances. For instance, might it have been argued that the country faced a graver danger in continuing deadlock over the Constitution and that all things considered, it was better to proceed with a resolution unilaterally than to risk failure in the amendment process? It is submitted that such consideration ought not to be laid before the Court since they are well beyond the realm of justiciability. They are quintessentially political questions, for parties other than the Court. Indeed, the Court itself took this position when it stated:

It is because the sanctions of convention rest with institutions of government other than Courts, such as the Governor General or the Lieutenant Governor, or the Houses of Parliament, or with public opinion and ultimately, with the electorate that it is generally said that they are political.<sup>34</sup>

A final observation on this point: the court gave a clear reason for the convention—a sound reason. Perhaps, absent other considerations, it could be argued that offending the federal principle is morally wrong, but again not because a convention was broken but because there were sound reasons behind it that were disregarded. Nevertheless, that does not conclude the issue. To decide on the rightness or wrongness of the proposed unilateral procedure it is necessary to examine any countervailing reasons, even if that examination begins with a presumption against those who break the convention, leaving them with the burden of persuading the political actors and the electorate that they were justified. The Court has fulfilled its role when it has described the convention, the reasons for it, and whether or not it has been departed from.

### **Role Of The British Parliament**

It is interesting to note that in the constitutional debate waged during 1980 and 1981, all parties assumed without question the pivotal role of the British Parliament. Before announcement of the Supreme Court opinions, the provinces were ready to do battle in London to persuade the British not to accede to a request from the Federal Parliament to amend the BNA Act; the federal government was prepared to insist that the British had no alternative but to carry out the request. Both sides viewed the response of the British Parliament as crucial. It should be noted that none of the questions asked of the

Court directly raised the importance of the British role. Nevertheless, the opinion of the majority of the Court on the third question, whether "the agreement of the provinces of Canada [is] constitutionally required for amendment to the Constitution ...,"<sup>35</sup> contains many statements about the role of the British Parliament.

It is generally agreed that before the Statute of Westminster, 1931,<sup>36</sup> Canada's independence was legally incomplete. That Act gave Canada freedom from the restrictions of the Colonial Laws Validity Act and from the application of any future laws of the British Parliament unless passed at Canada's request, as well as granting Canada "full power to make laws having extra-territorial application."<sup>37</sup> However, the Court added:

[the Act] appeared to ... maintain the *status quo ante*; that is, to leave any changes in the British North America Act, 1867 ... to the prevailing situation, namely with the legislative authority of the United Kingdom Parliament being left untouched.<sup>38</sup>

In 1931, immediately after passage of the Statute, no one would have disputed that amendments to the BNA Act required the legislative authorization of the Parliament at Westminster. That state of affairs existed, at the very least, because all parties accepted it.

The eight dissenting provinces pressed upon the Court an argument that asserted the existence of some legal limits on the power of the British Parliament to amend the BNA Act, as result of s. 4 of the Statute of Westminster. S. 4 states that, "No Act of Parliament [of the U.K.] ... shall extend ... to a Dominion ... unless it is expressly declared ... that the Dominion has requested, and consented to, the enactment thereof." The Court went on to say:

The argument goes that ... s. 4 must be read in its preclusive effect on a Dominion as having the Provinces in view; that the "request and consent" which must be declared ... is the request and consent of the Dominion and the Provinces ...

Nothing in the language of the Statute of Westminster, 1931 supports the provincial position yet it is on this interpretation that it is contended that the Parliament of the United Kingdom has relinquished or yielded its previous omnipotent legal authority in relation to the British North America Act, 1867, one of its own statutes. As an argument on Question 3 ... it asserts a legal diminution of United Kingdom legislative supremacy. The short answer to this ramified submission is that it distorts both history and ordinary principles of statutory or constitutional interpretation.<sup>39</sup>

Accordingly, the Court dismisses the argument in favour of any limitation of the legislative supremacy of the British Parliament as being without foundation.

The Court does not consider—it is not evident that counsel for any of the eleven governments invited it to consider—whether the intervening fifty years might have effected a change in the legal authority of the British Parliament to enact changes in the BNA Act. So long as *all* parties accepted that the British Parliament's imprimature was needed for valid amendment, the question seemed to be of no consequence. However, as discussed below, I believe the question raises important implications for the interpretation of the Canadian constitution.

We should note that the majority of seven in the opinion on the third question repeatedly states that the legal authority of the British Parliament to amend the BNA Act remains unhindered:

... ultimately, whatever political consensus might be achieved, [on amendment procedures] there would still be the *legal necessity* of final United Kingdom legislative action. [emphasis mine]<sup>40</sup>

The legal competence of that Parliament [U.K.] ... remains unimpaired, *and it is for it alone to determine if and how it will act*. [emphasis mine]<sup>41</sup>

Whatever the statute [of Westminster] may import as to intra-Canadian conventional procedures, there is nothing in it or in the proceedings leading up to it that casts any doubt in law as to the undiminished authority of the Parliament of the United Kingdom over the British North America Act, 1867.<sup>42</sup>

... 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.<sup>43</sup>

It seems clear then, that the Court has accepted without question the essential role of the British Parliament in amending the BNA Act: it alone may amend the Act—no other method exists—and the seemingly necessary corollary is that any amendment to the Act by that Parliament is *ipso facto* effective in amending our constitution, whatever may be the objections of some Canadians.

Is there a contrary view worth considering? Suppose that in November 1981 there had occurred a "miracle at Ottawa," and all eleven governments had agreed to an amending formula. Suppose further, that in the first flush of euphoria over the great occasion one first minister had said, "What do we need the British for? We've finally agreed! Instead of going to London, let's show the world that we have come of age. Let each of our legislatures pass a resolution approving the amending for-

mula and present it with an appropriate preamble to the Governor General with a request that he proclaim it at once as our new constitutional amendment procedure." And suppose all agreed and followed this course. Would our courts fail to give effect to a subsequent amendment duly passed under the new formula? The Supreme Court did not deal with this issue directly, although perhaps by inference it suggested that such an assault on the positivist view of British (and therefore Canadian) constitutional law would be thwarted by the courts. The Court referred to *Madzimbamuto v. Lardner-Burke et al.*,<sup>44</sup> and stated:

There the Privy Council rejected the assertion that a convention formally recognized by the United Kingdom as established, namely, that it would not legislate for Southern Rhodesia on matters within the competence of the latter's Legislature without its Government's consent, could not be overridden by British legislation made applicable to Southern Rhodesia after the unilateral declaration of independence by the latter's Government.<sup>45</sup>

The Court then quoted Lord Reid in the *Madzimbamuto* case:

If Parliament chose to ... [legislate on matters within the competence of the Rhodesian legislature] the Courts could not hold the Act of Parliament invalid. It may be that it would be unconstitutional to disregard this convention. But it may also be that the unilateral Declaration of Independence released the United Kingdom from any obligation to observe the convention. Their Lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament.<sup>46</sup>

We may believe that the Rhodesian Declaration of Independence was morally wrong, whereas a similar Canadian declaration would not be. It seems that this distinction would not be one recognized by the courts. On the other hand, there may be an important difference between recognition of Canada in the world community—in international law—as a fully independent nation (with the exception of our anomalous amending lacuna), and recognition of Southern Rhodesia at the time of its declaration, as only semi-independent and without full sovereignty, a land in the process of evolving from colony to nationhood and for which the United Kingdom still had both responsibilities and legal powers. However, the Court seemed to disregard this difference, and by implication rejected any argument based on Canada's evolution since 1931 as a completely autonomous nation.

It would seem to follow that the Court would not recognize an amendment passed according to the scenario I have suggested about a uni-



lateral Canadian declaration: despite unanimous agreement we should still have to return to Westminster "one last time." (That is what the Court seems to say, although I find it hard to believe that is what would happen).

The other side of this positivist coin appears to be that any act passed by the British Parliament, expressly affecting Canada without its request and consent, would nevertheless become law within Canada, notwithstanding the Statute of Westminster and Canada's subsequent evolution to nationhood. This unyielding position has been amply noted above. The late Mr. Justice Rand, in a speech delivered at Harvard Law School after his retirement from the Supreme Court of Canada, took a strongly contrary view. It is worthwhile repeating his statement:

The question may be raised of the political and legal force of resolutions passed by Imperial Conferences and confirmed by legislation. It cannot, in my view, be less than this: that they are to be treated as creating constitutional commitments of a permanent nature, which once approved and entered upon become irrevocable as self-executing conventions, placed, by that fact, beyond repudiation. They have not become the subject of juridical examination but that might happen. Should, for example, the British Parliament, of its own initiative, purport to repeal the Act of 1931 what would be the position of Canadian legislation and of Canadian courts? The answer must be that the purported repeal would not be recognized. Once such fundamental agreements have been reached, certainly when embodied in legislation, they become as executed treaties between peoples to be modified only by the agreement of the parties to them; and they bind equally discretionary action by the Sovereign. They are definitive surrenders of political and constitutional powers analogous to the exhaustion of executive power over a subordinate territory: by the grant of self-government, apart from express or necessarily implied reservation, the executive authority is so far spent. The acceptance of the convention concludes resort to conflicting statutory power; if that were not so, the bonds of colonial relations embodied in statutes could never constitutionally be dissolved, there could be no termination of statutory enactment, a link of that nature would be perpetual; even express renunciation would be revoked. Actual or constructive revolution would then be the only means of establishing a status of independence.<sup>47</sup>

I believe it is unfortunate for future constitutional litigation in Canada that neither the federal government nor the provinces sought to clarify their positions with respect to the residual imperial power in Canada. All seemed to hope that the problem would go away once the

constitution was patriated. Indeed, the federal government in particular looked to support in London to add final legitimacy to its claim to alter the BNA Act over substantial provincial opposition. As a result, the Court seems to have been left free to assume a narrow traditional and positivist view of the legitimate sources of legislative power in Canada, undisturbed by increasingly widely accepted principles of international law about the nature of national independence.

This approach to problems of sovereign power does not give us cause for optimism that the Court will search for broad fundamental principles in future interpretation of a much expanded constitution. The first test may come with the current reference by the government of Quebec on the significance of its attempt to exercise a veto over the resolution sent to the British Parliament. If, as is likely, the Court's opinion is not handed down until after all formalities have been completed in London, will the Court say the whole question is moot and need not be answered? The Court could refer to its statements in its decision of September 1981 and state simply, that since it was for the British Parliament "alone to determine if and how it will act," and to exercise its "omnipotent" and "undiminished authority," there is nothing left for the Court to say. That would be an easy way out of the dilemma of determining what amounts to "a substantial measure of consent." Yet, for the legitimacy of the new constitution and for the well-being of Canada, it can be argued that Quebec is entitled to an answer. The apparently "safe" approach to avoid giving an answer may not be chosen by the Court, but its unequivocal assertions about the legal authority of the British Parliament are not reassuring.

## Notes

- 1 *Reference re Amendment of the Constitution of Canada* (1982), 125 D.L.R. (3d) 1, delivered September 28, 1981. Further references to this case will be by page number alone.
- 2 The Court handed down four opinions, one majority and one dissenting on each of two questions described in the text.
- 3 P. 103. (The six judges in the majority were, Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer.)
- 4 *Ibid.*
- 5 *Ibid.*
- 6 P. 95, where the Court notes that Quebec withdrew its consent to the proposed Fulton-Favreau amendment formula in 1965; and again in 1971 when it withdrew from the Victoria proposals.
- 7 Text of Resolution respecting the Constitution of Canada adopted by the House of Commons on December 2, 1981, s. 38 (1) (b).
- 8 *Ibid.*, s. 38 (3).
- 9 See, Hon. Guy Favreau, Minister of Justice. *The Amendment of the Constitution of Canada* pp. 110-115. Ottawa: Queen's Printer, 1965.
- 10 Reproduced in, Whyte & Lederman, *Canadian Constitutional Law* (2nd ed.) p. 3-15, Toronto: Butterworths, 1977.
- 11 Proposed Resolution Respecting the Constitution of Canada. S. 41 (1) (b) (ii), Ottawa: Publications Canada, 1980.
- 12 Dept. of Justice. *Consolidation of Proposed Constitutional Resolution*, April 24, 1981, S. 46 (1) (b) (ii).
- 13 *Supra*, fn. 7.
- 14 Whyte and Lederman, *op cit. supra*, fn. 10.
- 15 *Supra*, fn. 11, s. 41 (1) (b) (iii).
- 16 *Supra*, fn. 12, s. 46 (1) (b) (iii).
- 17 30 and 31 Victoria, c. 3., s. 133. (U.K.).
- 18 Favreau *op. cit. supra*, fn. 9.
- 19 Whyte and Lederman, *op. cit. supra*, fn. 10.
- 20 *Supra*, fn. 11, s. 41 (1) (b) (i).
- 21 *Supra*, fn. 12, s. 46 (1) (b) (i).
- 22 *Supra*, fn. 6.
- 23 Canadian Intergovernmental Conference Secretariat, Document No. 850-19/004, s. 3, Ottawa: April 16, 1981, as collected in Zukowsky, R.J. *Struggle over the Constitution* p. D-1. Kingston: Institute of Intergovernmental Relations, 1981.
- 24 There has not been enough time for commentary to appear in the periodical literature, but this interpretation was frequently asserted by political leaders of the eight dissenting provinces with substantial support in the press.

- 25 P. 12.
- 26 P. 84.
- 27 P. 87.
- 28 Pp. 103-106.
- 29 P. 103.
- 30 P. 104.
- 31 Ibid.
- 32 P. 106.
- 33 Ibid.
- 34 P. 86.
- 35 P. 12. (The seven judges in the majority were Laskin, C.J.C., Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer.)
- 36 22 George V. c. 4 (U.K.).
- 37 Ibid., S. 2.
- 38 P. 37.
- 39 P. 39.
- 40 P. 38.
- 41 P. 41.
- 42 P. 42.
- 43 P. 47.
- 44 [1969] 1 A.C. 645.
- 45 P. 22.
- 46 [1969] 1 A.C. 645, at 723.
- 47 (1960), 38 Can. B. Rev. 135 at p. 148.

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