Constitutional Law -- Amendment of the British North America Act -- Role of the Provinces

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CONSTITUTIONAL LAW—AMENDMENT OF THE BRITISH NORTH AMERICA ACT—ROLE OF THE PROVINCES.—In Reference re Amendment of the Constitution of Canada (1981) the Supreme Court of Canada held that the package of constitutional amendments proposed by Prime Minister Trudeau could, as a matter of law, go forward for enactment by the United Kingdom Parliament without the consent of the provinces; as a matter of convention, however, the consent of the provinces was required. This comment will examine that decision.

The decision of the Supreme Court of Canada was rendered on September 28th, 1981. After the decision a new round of discussions between the Prime Minister and the Premiers yielded an agreement on November 5th, 1981 on the essentials of an altered package of amendments. (A few elements were agreed to later that same month.) The changes, principally affecting the charter of rights and the amending formula, are not significant for the purpose of this comment. The new version of the amendments was embodied in a resolution which was adopted by the House of Commons on December 2nd, 1981 and by the Senate on December 8th, 1981. At the time of writing (February 1982) this is the version which has been sent to the United Kingdom for enactment by the United Kingdom, although it has not yet been enacted.

Unfortunately, the agreement of November 5th, 1981, which supports the current version of the amendments, included only nine of the ten Premiers, Premier Levesque of Quebec being the odd man out. The National Assembly of Quebec, on December 1st, 1981, passed a resolution formally expressing its dissent from the amendments. The government of Quebec then directed a reference to the Quebec Court

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Footnote: (1981), 125 D.L.R. (3d) 1 (S.C.C.). Four opinions were written, none attributed to an individual judge. These will hereafter be referred to as: (1) majority opinion on law, which was signed by Laskin C.J., Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ., (2) dissenting opinion on law, which was signed by Martland and Ritchie JJ., (3) majority opinion on convention, which was signed by Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ., and (4) dissenting opinion on convention, which was signed by Laskin C.J., Estey and McIntyre JJ.
of Appeal calling for a decision as to whether Quebec’s consent is necessary, by convention, as a precondition to the passage of the proposed amendments. At the time of writing it seems unlikely that this new litigation will stop the enactment of the proposed amendments by the United Kingdom Parliament; and, if the United Kingdom Parliament does enact the amendments, Quebec’s reference (which seeks only a decision as to the applicable constitutional convention, not a decision as to the law) will presumably become moot.

The enactment of the amendments will also rob the Supreme Court of Canada’s decision (the subject of this comment) of much of its significance. The new amendments will incorporate into the British North America Act (to be renamed the Constitution Act) an amending formula (or, to be exact, six different amending formulas) which will for the first time eliminate the role of the United Kingdom Parliament and stipulate the precise roles of the federal and provincial levels of government in future amendments to the Act. In future, therefore, aside from any problems of interpreting the complex new amending formulas, the law (and convention) regarding provincial participation in the amending process will be settled by the provisions of the Constitution Act. Thus, despite the enormous political importance of the decision at the time of its announcement (which was televised for the first time), its importance in the longer term is more doubtful. However, the fundamental character of the issues presented, the subtlety of the competing arguments, and above all the role of the Supreme Court of Canada as an arbiter of essentially political controversies, have stimulated this comment.

Facts

The first version of the constitutional amendments was introduced by Prime Minister Trudeau into the House of Commons on October 6th, 1980. It was entitled “Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada”. As the name indicates, it was an “address” to the Queen (the government of the United Kingdom) requesting her to lay before the Parliament of the United Kingdom the bill that would accomplish the proposed amendments. The draft bill was incorporated in the address. The address was to be passed by both Houses of the federal Parliament and transmitted to the United Kingdom by the Governor

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2 Globe and Mail, Toronto, Dec. 3rd, 1981, which supplies the full text of the question.
3 The decision of the Supreme Court of Canada which is the subject of this comment, supra, footnote 1, does of course provide a precedent for the answer of a question which carries no legal consequences: infra.
4 British North America Act, 1867, 30 & 31 Vict., c. 3 (Imp.); R.S.C., 1970, Appendix II. No. 5; hereinafter referred to as the B.N.A. Act.
General for enactment by the Parliament of the United Kingdom.

The resolution was passed with some amendments by the House of Commons on April 23rd, 1981 and by the Senate on April 24th, 1981; and it was this amended version which was considered by the Supreme Court of Canada. (As noted earlier, after the decision a third version was adopted by the House of Commons and the Senate to give effect to the federal-provincial agreement of November 5th, 1981.)

The leading features of the constitutional resolution in the (second) version in which it reached the Supreme Court of Canada (and in its third and presumably final version) were as follows: (1) new amending formulas which would enable the British North America Act (to be renamed the Constitution Act) to be amended in future without resort to the United Kingdom; (2) the relinquishment by the United Kingdom Parliament of its residual power to legislate for Canada (this is the "patriation" of the constitution); (3) a charter of rights which would protect various civil liberties from impairment by either the federal Parliament or the provincial Legislatures; and (4) a new provincial power over natural resources which would expand provincial power to tax and control natural resources.

These proposals had a considerable potential impact on the provinces. The clearest adverse effect on provincial powers flowed from the proposed charter of rights which would have the effect of limiting the powers of the provincial Legislatures to enact laws curtailing the civil liberties defined in the charter. The proposed amending formula also affected the provinces in that it would enable future amendments to be made either with the consent of a specially-composed majority of the provinces or under the authority of a referendum which would bypass the provincial governments altogether. (The final version involved a new set of amending procedures which did not include a referendum.) The new resources clause added a new legislative power to the provincial Legislatures. It was obvious that the proposals had a serious effect on provincial legislative powers, and the Supreme Court decision started from that premise.

Despite the impact on the provinces of the new constitutional proposals, Prime Minister Trudeau had introduced them into the

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5 These amendments are to be accomplished by the enactment by the United Kingdom Parliament of a statute called the Canada Act 1982, which includes as a schedule the Constitution Act, 1982. The Canada Act would accomplish the "patriation" of the constitution by a provision abrogating the power of the United Kingdom Parliament to make laws for Canada. The Constitution Act, 1982 includes the amending formulas, the charter of rights and the resources clause. The Constitution Act, 1982 would also change the name of the B.N.A. Act, 1867 to the Constitution Act, 1867.

6 The first question dealt with by the court related to the impact on the provinces of the proposals, and the court emphasized that the charter of rights would limit the legislative powers of the provinces: majority opinion on law, supra, footnote 1, at p. 20.
federal House of Commons, and proposed their passage by joint resolution of the two Houses (as a prelude to enactment by the United Kingdom Parliament), without the consent of the provinces. At the time of the Supreme Court decision New Brunswick and Ontario were the only provinces which had agreed to the proposals; the other eight provinces were opposed. The controversy in the country at large and in the courts was whether the proposals could or should proceed with the consent of only two of the ten provinces and in spite of the objection of the other eight provinces.

The package of amendments proposed by Prime Minister Trudeau represented a stage in the search for a domestic amending formula which had been going on intermittently since 1927 and intensively since 1968. For Prime Minister Trudeau, who has held office with only one brief interruption since 1968, constitutional reform has been a major objective, but he has never been able to assemble a package of amendments which would command the agreement of the ten provincial Premiers. The latest round of constitutional discussions was stimulated by the Quebec referendum on sovereignty-association which was defeated on May 20th, 1980 by a popular vote of sixty per cent to forty per cent. In the referendum campaign, the federalist forces promised that a "no" to sovereignty-association was not a vote for the status quo, and that the defeat of the referendum would be followed by constitutional change to better accommodate Quebec's aspirations. But even this commitment, although shared by the provincial Premiers and the Prime Minister, was not sufficient to secure agreement on specifics at federal-provincial conferences which lasted through the summer and early fall of 1980. Faced with yet another failure to achieve a consensus, Prime Minister Trudeau decided that the federal government should proceed, unilaterally if necessary, for the patriation of the constitution (including an amending formula) and a charter of rights. (The natural resources clause was added to the proposals later.) He therefore introduced his proposals into the federal Parliament, and used the government majorities in both Houses to secure the passage of the necessary resolution (with some changes). But, as noted earlier, at the time of the Supreme Court of Canada decision, although the resolution had been passed by both Houses of the federal Parliament, it was supported by only two provincial governments and opposed by the other eight.

Proceedings

The governments of Manitoba, Newfoundland and Quebec each directed a reference to the Court of Appeal of the province with a view to testing the constitutionality of the federal proposals. The questions posed in the Manitoba reference were as follows:

1. If the amendments to the Constitution of Canada sought in the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the
Constitution of Canada”, or any of them, were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and if so, in what respect or respects?

2. Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?

3. Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?

The same three questions were posed in the Newfoundland reference with the addition of a fourth question relating specifically to Newfoundland which will not be discussed in this comment.7

The questions posed in the Quebec reference were similar in substance, but they were differently formulated as follows:

A. If the Canada Act and the Constitution Act 1981 should come into force and if they should be valid in all respects in Canada would they affect:
   (i) the legislative competence of the provincial legislatures in virtue of the Canadian Constitution?
   (ii) the status or role of the provincial legislatures or governments within the Canadian Federation?

B. Does the Canadian Constitution empower, whether by statute, convention or otherwise, the Senate and the House of Commons of Canada to cause the Canadian Constitution to be amended without the consent of the provinces and in spite of the objection of several of them, in such a manner as to affect:
   (i) the legislative competence of the provincial legislatures in virtue of the Canadian Constitution?
   (ii) the status or role of the provincial legislatures or governments within the Canadian Federation?

In the lower courts a variety of answers were given to the questions. The Manitoba Court of Appeal, by majorities which differed on each question, refused to measure the effects on the provinces of the proposed amendments (question 1) on the ground that it would be premature to do so since they might be changed; answered no to the question whether there was a “constitutional convention”

7 The fourth question in the Newfoundland reference essentially asked whether the proposed amending formula would authorize changes in the Terms of Union of Newfoundland without the consent of the province, and the answer of the Supreme Court of Canada was yes (except for the province’s boundaries which are protected by s. 3 of the B.N.A. Act, 1871, 34-35 Vict., c. 28): majority opinion on law, supra, footnote 1, at pp. 47-48.
requiring provincial consents (question 2); and also answered no to the question whether provincial consents were "constitutionally required" (question 3). The Newfoundland Court of Appeal unanimously answered yes to each question, holding that the proposed amendments did have the stipulated effects on the provinces (question 1), that there was a constitutional convention requiring provincial consents for such amendments (question 2), and that provincial consents were "constitutionally required" (question 3). The Quebec Court of Appeal unanimously answered yes to the question whether the proposed amendments would affect the legislative competence of the provinces (question A(i)) and the status or role of the provinces (question A(ii)); and by a majority answered yes to the question whether the constitution could be so amended without the consent of the provinces (question B(i), (ii)). Thus, the federal side prevailed in the Manitoba and Quebec courts, and the provincial side prevailed in the Newfoundland court.

The decisions of the provincial Courts of Appeal were appealed to the Supreme Court of Canada. In the Supreme Court of Canada eight of the ten provinces supported the position that the federal initiative was contrary to constitutional convention and constitutional law. On the other side the federal government was joined by New Brunswick and Ontario to argue that the federal initiative was in accordance with constitutional convention and constitutional law.

The Supreme Court of Canada held unanimously that the proposed amendments would significantly affect the provinces in the ways stipulated by the various questions. The court then held by a majority of seven to two (Laskin C.J., Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ., with Martland and Ritchie JJ. dissenting) that the agreement of the provinces to the proposed amendments was not constitutionally required "as a matter of law". The court then held by a majority of six to three (Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ., with Laskin C.J., Estey and McIntyre JJ. dissenting) that there was a constitutional convention requiring the agreement of the provinces to an amendment of the kind proposed, and that the agreement of the provinces was constitutionally required "as a matter of constitutional convention". In sum, the court addressed itself separately to the laws of the constitution and to the conventions of the constitution, holding that the federal initiative to be authorized by law but unauthorized by convention.

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A formal peculiarity of the decision is that the legal question and the conventional question are treated in separate opinions so that each judge signed two opinions, one on the law and another on the convention. Since there is a majority opinion and a dissenting opinion on each issue, there is a total of four opinions. Another formal peculiarity of the decision is that the principal author of each opinion is not identified: the majority opinion on the law (majority opinion on law) is the opinion of seven judges. The majority opinion on the convention (majority opinion on convention) is the opinion of six judges. Four judges, namely, Dickson, Beetz, Chouinard and Lamer JJ., were part of the majority of seven answering no to the legal question and were also part of the majority of six answering yes to the convention question.

If the court had followed the usual format for split decisions, this four-judge group would not have signed two separate majority opinions but would have written a single opinion dealing with both questions, with each of the remaining five judges adhering to the part he agreed to and dissenting from (or at least writing separately on) the part he did not agree to. This usual format would have required the four-judge group to write a single, coherent opinion, in which the answer to the legal question was reconciled with the answer to the convention question. As the separate opinions now stand, the answers are not literally inconsistent: obviously, one can say that something is in accordance with the law but is contrary to convention. But the tone and thrust of the two opinions is so different that it is hard to see how the four-judge group could have signed both opinions. The majority opinion on the legal question is sympathetic to the federal initiative. The majority opinion on the convention question is hostile to the federal initiative. The result is rather confusing. Indeed, after the

11 For the mode of citation to be used hereafter, see supra, footnote 1. Multiple-author opinions are not uncommon in the High Court of Australia and the Supreme Court of the United States, but I think the only Supreme Court of Canada precedents are a few cases in which the court has been unanimous and in which the sole opinion is described as that of "the court": Re Offshore Mineral Rights of B.C., [1967] S.C.R. 792; A.-G. Que. v. Blaikie, [1979] 2 S.C.R. 1016; A.-G. Man. v. Forest, [1979] 2 S.C.R. 1032; Re Upper House, [1980] 1 S.C.R. 54; A.-G. Que. v. Blaikie (No. 2) (1981), 123 D.L.R. (3d) 15 (S.C.C.).

12 It is hard to provide authority for "tone and thrust", but see e.g., supra, footnote 1, at pp. 33 ("we must operate the old machinery perhaps one more time"), 41 ("the completion of an incomplete constitution", "a finishing operation").

13 See e.g., ibid., at pp. 104 ("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"), 106 ("the anomaly that the House of Commons and Senate could obtain by simple resolutions what they could not validly accomplish by statute"). Note also the discrepancies between the opinions on the question of what degree of provincial consent is required: see infra, footnotes 38-40 and accompanying text.
result was announced, both sides claimed to have won the case. Of course, in law the federal side had won; but that result was obscured by the language used in the majority opinion on convention. If the four-judge group had written a single opinion dealing with both questions they would have had to reconcile the two parts of the decision, and the result would have been much clearer.

It could be argued that the obscurity of the result, offering something to both sides, was politically sound, since it helped to persuade both sides that an agreement should be reached—and of course, when the bargaining resumed, an agreement (albeit an agreement which isolated Quebec) was in fact reached. But this argument assumes the propriety of the court acting outside its legal function and attempting to facilitate a political outcome. Indeed, the only justification for even considering the convention question would be to influence the political outcome—a justification which will be criticized later in this comment.

**Background**

The B.N.A. Act differs from the constitutions of the United States and Australia (and other federal countries) in that it contains no general provision for its own amendment.\(^{14}\) As an imperial statute it could be amended only by the United Kingdom Parliament at Westminster. In 1931 the Statute of Westminster\(^ {15}\) conferred upon Canada (and the other Dominions) the power to repeal or amend imperial statutes applying to Canada. But, at Canada’s insistence, the B.N.A. Act was excluded from this new power. Section 7(1) of the Statute of Westminster provided that its provisions did not extend to the repeal, amendment or alteration of the B.N.A. Act. This provision was inserted so that the B.N.A. Act could not be amended by an ordinary statute of either the federal Parliament or a provincial Legislature.\(^ {16}\) The idea was, and still is, that a constitution should be more difficult to amend than the Income Tax Act.\(^ {17}\)

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\(^{14}\) Limited powers of amendment are granted by ss 91(1), 92(1) and some other provisions of the B.N.A. Act.


\(^{16}\) It is doubtful whether s. 7(1) was really necessary to protect the B.N.A. Act from fundamental change: Wheare, Constitutional Structure of the Commonwealth (1960), p. 69.

\(^{17}\) An irony of the present decision is that a resolution of the two Houses of Parliament is all that is necessary to initiate an amendment. If this resolution must be complied with automatically by the United Kingdom Parliament, then, as a matter of law, the constitution is just as easy to amend as the Income Tax Act. The objecting provinces argued that the Statute of Westminster, especially s. 7(3), implicitly forbade any alteration of provincial legislative powers without the consent of the provinces. This argument was rejected: majority opinion on law. *supra*, footnote 1, at p. 40.
After the Statute of Westminster, while other imperial statutes had lost their protected status, the B.N.A. Act could still be amended only by the United Kingdom Parliament. This did not mean, however, that the amending process was outside the control of Canadians. At an imperial conference in 1930 (the same conference that recommended the enactment of the Statute of Westminster) it was agreed by the Prime Ministers of all the Dominions that the United Kingdom Parliament would not enact any statute applying to a Dominion except at the request and with the consent of that Dominion. This agreement, which reflected already longstanding practice, created a constitutional convention which has never been departed from. This convention means that the Parliament of the United Kingdom will not enact an amendment to the B.N.A. Act except at the request and with the consent of Canada.

The convention does not stipulate which governmental bodies in Canada should make the request for, and give the consent to, proposed amendments to the B.N.A. Act. However, long before 1930 the practice had developed of requesting amendments by a “joint address” of the Canadian House of Commons and the Canadian Senate. The joint address consists of a resolution which requests the United Kingdom government to lay before the United Kingdom Parliament a bill to accomplish the desired amendment; the text of the bill is included in the resolution. After the resolution has been passed by the two Houses of Parliament it is sent by the Governor General to the United Kingdom government for enactment. This is the procedure which is being followed for enactment of the current proposals.

The provinces play no role in the amending process which has just been described. Moreover, there has been no consistent practice by the federal government of obtaining the consent of the provinces before requesting an amendment. The United Kingdom Parliament has enacted fifteen important amendments to the B.N.A. Act since confederation. Only four of these—in 1940, 1951, 1960 and 1964—were preceded by the unanimous consent of the provinces. One other—in 1907—was preceded by consultation with the provinces (British Columbia opposed the amendment). The remaining amendments were requested by joint address of the two Houses of the federal...

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18 The convention is recited as a preamble to the Statute of Westminster. It is not enacted by the Statute of Westminster, because it was thought in 1931 that the United Kingdom Parliament was incompetent to limit its own sovereignty. However, s. 4 of the Statute of Westminster reinforced the convention by providing that no Act of the United Kingdom Parliament would extend to a Dominion “unless it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof”.

19 The Statute of Westminster, 1931, supra, footnote 15, which was not literally an amendment to the B.N.A. Act, but which added to the powers of the federal Parliament and provincial Legislatures, was also preceded by the unanimous consent of the provinces.
Parliament and enacted by the United Kingdom Parliament without prior consultation with the provinces.\(^{20}\)

The four amendments which were preceded by unanimous provincial consent include the only amendments which have altered the distribution of legislative powers within Canada. Three of these unanimous-consent amendments\(^{21}\) shifted a legislative power from the provincial Legislatures to the federal Parliament: (1) over unemployment insurance,\(^{22}\) (2) over old age pensions,\(^{23}\) and (3) over supplementary benefits.\(^{24}\) These three amendments are the only ones which have altered the distribution of legislative powers between the federal Parliament and the provincial Legislatures.\(^{25}\) Since each of these amendments was preceded by the unanimous consent of the

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\(^{20}\) The amendments are listed, with information on provincial consultation and consent, in Laskin, Canadian Constitutional Law (3rd ed. rev., 1969), pp. 33-34. For fuller accounts of the history of constitutional amendment in Canada, see Gérin-Lajoie, Constitutional Amendment in Canada (1950); Livingston, Federalism and Constitutional Change (1956), ch. 2; Favreau, The Amendment of the Constitution of Canada (Government of Canada, 1965); Lalonde and Basford, The Canadian Constitution and Constitutional Amendment (Government of Canada, 1978). The Favreau summary, which lists 22 alleged amendments, is reproduced in *Re Upper House*, [1980] 1 S.C.R. 54, at p. 60 and in the present case, *supra*, footnote 1, in no less than three places: dissenting opinion on law, at p. 62; majority opinion on convention at p. 91; dissenting opinion on convention, at p. 116.


\(^{22}\) British North America Act, 1940, 3 & 4 Geo. VI, c. 36 (Imp.); R.S.C., 1970, Appendix II, No. 27, adding s. 91 (2A) to the B.N.A. Act.


\(^{25}\) The first of the three amendments (1940) clearly had this effect, since it transferred the power over unemployment insurance from the exclusive authority of the provincial Legislatures to the exclusive authority of the federal Parliament. The second and third amendments (1951 and 1964) are less clear in that the new s. 94A which they introduced (1951) and substituted (1964) conferred a new power on the federal Parliament which was merely concurrent, and in addition expressly withheld the power to "affect the operation of any law present or future of a provincial Legislature". It is arguable therefore that the 1951 and 1964 amendments are more closely analogous to the 1949 amendment which conferred on the federal Parliament the power to amend the constitution of Canada in certain limited ways without detracting from provincial powers: British North America Act (No. 2), 1949, 13 Geo. VI, c. 81 (Imp.); R.S.C., 1970, Appendix II, No. 31; this 1949 amendment was not preceded by provincial consents. As noted, *supra*, footnote 19, another relevant precedent is the Statute of Westminster, which although not an amendment of the B.N.A. Act, conferred upon the federal Parliament the power to legislate with extraterritorial effect and upon both the federal Parliament and the provincial Legislatures the power to repeal or amend imperial statutes in force in Canada (other than the B.N.A. Act); the enactment of the Statute of Westminster was preceded by unanimous provincial consent.
provinces, there has been an invariable practice of securing provincial consents to amendments altering the distribution of powers.26

Convention requiring provincial consents

The federal government’s invariable past practice, of obtaining the consents of all the provinces before proceeding with an amendment affecting provincial powers, naturally invites the question whether there is an obligation to obtain the consents of the provinces. Such an obligation could be imposed by a constitutional convention or by a constitutional law. The questions put to the court by Manitoba, Newfoundland and Quebec called upon the court not only to decide the legal issue, whether there was an obligation imposed by law, but also to decide the nonlegal issue, whether there was an obligation imposed by convention. Question 2 of the questions put to the court by Manitoba and Newfoundland asked whether there was a “constitutional convention” requiring “the agreement of the provinces”; and question 3 of the questions put to the court by Quebec asked whether “by statute, convention or otherwise”, the constitution empowered the federal Houses to proceed with an amendment “without the consent of the provinces and in spite of the objection of several of them”.

I expected the court to refuse to rule on the existence of a convention, on the ground that the issue was not justiciable; and for reasons which I will give later in this comment I still believe that the court should not have answered this question. However, as explained, the court did answer the question. Indeed, the court was unanimous that the question should be answered. The court then divided on the answer: a six-judge majority (Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ.) held that there was a convention requiring provincial consent for an amendment which like the present proposals purported to change provincial legislative powers or provide a mechanism which could effect a change of provincial legislative powers; the three dissenters (Laskin C.J., Estey and McIntyre JJ.) held that there was no such convention.

A convention differs from a mere usage or practice in that it is normative: the persons to whom the convention applies must feel obliged to follow it. In order to decide whether there was a convention in this instance the court looked at three questions: (1) what were the precedents? (2) did the actors in the precedents believe that they were bound by the rule? and (3) was there a reason for the rule?27

26 There are negative precedents as well in that amendments proposed by the federal government in 1951, 1960, 1964, and 1971 which were agreed to by all but one or two provinces were not proceeded with for lack of unanimity: majority opinion on convention, supra, footnote 1, at p. 94.

27 The three questions were taken from Jennings, The Law and the Constitution (5th ed., 1959), p. 136. The third question seems otiose, except as casting light on the answer to the second question.
With respect to the precedents, the six-judge majority surveyed the prior amendments (which were briefly described earlier in this comment) and concluded that there had been an invariable practice of obtaining provincial consent to amendments which made a change in legislative powers. With respect to the belief of the actors, the majority concluded from statements in a federal white paper and by various federal ministers that the actors on the federal side did feel bound to obtain the consent of the provinces to amendments changing legislative powers. With respect to the reason for the rule, the court found that the reason was "the federal principle" which required that a modification of provincial powers should not be obtainable "by the unilateral action of the federal authorities".

Having decided that there was a convention, the six-judge majority had to decide what the convention was. They held that the convention required "a substantial degree" or "a substantial measure" of provincial consent, but that it was not necessary for the court to decide what the required degree or measure was. It was enough for the court to say that the current proposals, having been agreed to by only New Brunswick and Ontario, did not have "a sufficient measure of provincial agreement". The court thus rejected the unanimity rule which had been contended for by all objecting provinces except Saskatchewan.

The six-judge majority's rejection of the unanimity rule seems open to criticism. If the precedents evidence a convention (as the six-judge majority holds they do), surely they are consistent only with unanimity. In no case was an amendment altering legislative powers proceeded with over the objection of even a single province. If the beliefs of the current actors are relevant (as they surely must be) is it not rather startling that only one province (Saskatchewan) apparently

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28 The white paper relied upon was the Favreau paper (1965), op. cit., footnote 20. The court did not refer at all to the Lalonde and Basford white paper (1978), op. cit., footnote 20, although that paper asserted (p. 13) that the federal government was "not constitutionally obliged" to obtain provincial consents to amendments that involve the distribution of powers.

29 Majority opinion on convention, supra, footnote 1, at p. 104.

30 Ibid., at p. 103.

31 Ibid.

32 The passage in the majority opinion on convention which refuses to rule on the degree of provincial consent required by the convention (supra, footnote 1, at p. 103) does not explicitly reject the unanimity rule, but I think it does so implicitly. Note also the earlier passage in the opinion (at p. 100) in which their lordships say: "It seems clear that while the precedents taken alone point at unanimity, the unanimity principle cannot be said to have been accepted by all the actors in the precedents."

33 The Attorney General of Saskatchewan argued that "a measure of provincial agreement" was required, and that the court need not define what the required measure was, except to hold that the agreement of only Ontario and New Brunswick was insufficient: Factum of the Attorney General of Saskatchewan. undated, pp. 24-42.
believed the rule to be what the court said it was? Seven provinces argued that unanimity was required; two provinces and the federal government argued that there was no convention at all. In these circumstances, it is difficult to support the six-judge majority's finding that there was a convention requiring only a "substantial degree" of provincial consent. It is true, as the majority points out, that there were statements by federal ministers asserting that unanimity was not necessary. But since these statements were not supported by any precedents it seems more plausible to treat the statements as denying the existence of any convention at all, rather than as affirming the existence of a convention but denying that it required unanimity. This was the view contended for by New Brunswick, Ontario and the federal government and accepted by the three judges (Laskin C.J., Estey and McIntyre JJ.) who dissented on the existence of the convention. The three-judge minority also argued that so long as the degree of provincial participation "remains unresolved" the supposed convention would be so uncertain as to be unworkable: the lack of definition of the required degree of provincial participation "prevents the formation or recognition of any convention".

The trouble with a unanimity rule, of course, is that it places the constitution in a straightjacket. The unsuccessful efforts by meetings of first ministers over the past fifty years to find a suitable amending formula certainly demonstrates the inconvenience of unanimity—but they equally demonstrate that unanimity has been the operating premise of these meetings. There has been a sentiment that a single province or a small minority of provinces should not be coerced into an unwanted amendment. Indeed, as the three-judge minority pointed out, only unanimity gives full effect to the federal principle, and only unanimity avoids the acute problems of definition which would be raised by acceptance of anything less than unanimity. It is therefore easy to see why unanimity has been the practice of the first ministers. What is not easy to see is why the six-judge majority of the court would want to design a different rule for the first ministers. Four of the members of the six-judge majority also signed the seven-judge majority opinion on law, in which the court said, as one reason for holding that the convention had not crystallized into law, that a rule of substantial provincial compliance or consent would not be acceptable as a legal rule because its uncertainty would be "an impossible position for a Court to manage". The remaining two members of the

34 Majority opinion on convention, supra, footnote 1, at pp. 100-102.
35 Dissenting opinion on convention, supra, footnote 1, at p. 115.
36 Ibid., at p. 125.
37 Ibid.
38 Majority opinion on law, supra, footnote 1, at p. 29. The opinion also implies that substantial compliance is thought to be sufficient only by Professor W.R. Leder-
six-judge majority on convention (Martland and Ritchie JJ.) had dissented on the legal issue, holding that there was a legal requirement of "the consent of the provinces". Their lordships expressly refrained from deciding whether the consent had to be unanimous, but the whole thrust of their reasoning would seem to lead inexorably to a unanimity requirement. If that is so, how could a convention have developed requiring a lesser degree of consent?

I think it is fair to say that the Supreme Court of Canada's first foray into political science did not yield very satisfactory reasoning or conclusions. That is not surprising. The existence and definition of a convention has to be ascertained without the help of the prior judicial decisions which would support a rule of common law and without the sworn testimony and rules of evidence which would support a finding of fact. What the court was doing I suppose (although the judges did not say so) was taking judicial notice of public statements and documents and inferring from that material the existence and definition of the convention. It is extraordinarily difficult to draw a safe conclusion from such inherently unreliable material, as is demonstrated by the range of positions taken by the contending governments (whose beliefs are supposed to be relevant in ascertaining the convention) and by the sharp difference of opinion within the court itself. Moreover, the vagueness of the rule announced by the court leaves in doubt the question whether the consent of the populous and predominantly French-speaking province of Quebec is required to be part of a "substantial degree" or a "substantial measure" of provincial consent. I will return to this point in the next section of this comment.

Propriety of answering the convention question

The most important and disturbing question which is raised by the court's answer to the question about the existence of a convention is: why did the court answer the question at all? The court emphasized the truism that the striking peculiarity of the conventions of the constitution is that "in contradistinction to the laws of the constitution, they are not enforced by the courts". That being so, no legal consequences could flow from the answer to the question. The consequences of answering the question could only be political.

man. ("The position advocated is all the more unacceptable when substantial provincial compliance or consent is by him [i.e., by Professor Lederman] said to be sufficient.") This appears to overlook the fact that the six-judge opinion also regards something akin to "substantial provincial compliance or consent" as sufficient. This is one of several passages which makes it hard to believe that four judges signed both opinions, the tone and thrust of which are so utterly different.

39 Dissenting opinion on law, supra, footnote 1, at p. 79.
40 Ibid.
41 Majority opinion on convention, supra, footnote 1, at p. 84.
The six-judge majority gave two reasons for answering the question: (1) courts had in previous cases recognized the existence of conventions, and (2) the question of the existence of the convention in this case had been asked in the three orders of reference. Neither of these reasons seems to me to be persuasive. Taking the first reason first, while there are no cases in which a court has enforced a convention, it is true that there are a number of cases in which the courts have recognized the existence of a convention. For example, the courts have taken notice of the conventions of responsible government, involving the accountability to Parliament of Ministers of the Crown, as a consideration in deciding to give a broad rather than a narrow interpretation to a statute conferring power on a Minister. In these cases, and in the other cases in which the existence of a convention has been recognized, the existence of the convention was relevant to the disposition of a legal issue, usually the interpretation of either a statute or a written constitution.

The cases which have recognized the existence of a convention establish no more than the proposition that the existence of a convention may occasionally be relevant to the determination of a legal issue, and where it is so relevant the court must decide it. But this is obvious. It is equally true that a court must occasionally determine the effect of intoxication upon human behaviour, the appropriate medical procedure to deal with appendicitis, and the resistance to fire of fibreglass insulating material. There is hardly a medical, scientific, technical or other factual question which some court has not had to determine at some time—but only because the resolution of that question was necessary to dispose of a justiciable issue before the court. In the present case the resolution of the convention question would have been necessary to dispose of a justiciable issue if the court had accepted the argument that a convention requiring provincial consents had "crystallized" into a legal requirement. But, as will be explained later in this comment, the court rejected the theory that a convention could crystallize into law. When this theory was rejected, the

42 Ibid., at pp. 87-88. The three dissenting judges also agreed that it was appropriate to answer the convention question, giving (at p. 107) as reasons "the unusual nature of these references" and the fact that the question had been "argued at some length before the Court and [had] become the subject of the reasons of the majority". The first of these reasons is obscure, and the second seems to me to have no force at all.


45 Numerous other cases are cited by the court, supra, footnote 1, majority opinion on law at pp. 22-28, and majority opinion on convention at p. 88.
justification for answering the convention question disappeared. The question then stood alone as a nonlegal question of no relevance to any legal question. Courts have not in the past answered such nonlegal questions.

The court's second reason for answering the convention question was that the convention question was one of the questions referred to it for an answer. This is true: the questions referred to the court by Manitoba, Newfoundland and Quebec included the question whether a convention exists.\textsuperscript{46} It is also true that the provincial statutes under which the questions were referred authorized the reference of "any matter" or "any question" and did not explicitly restrict the reference to a point of law.\textsuperscript{47} But this is not a sufficient reason for the court to answer the question. It is clearly established that a court has a discretion not to answer a question posed on a reference.\textsuperscript{48} If the question had called for a decision as to the effect of intoxication on human behaviour, the appropriate medical procedure to deal with appendicitis, or the resistance to fire of fibreglass insulating material, and no legal consequence turned on the answer, the court would obviously have pronounced the issue nonjusticiable and refused to answer it.\textsuperscript{49}

While a question about the conventions of the constitution is much closer to the traditional work of a court than biology, medicine, chemistry or physics, it is fraught with the peculiar danger of being one of the issues in a political controversy. One may confidently surmise that the referring provinces asked the convention question in case they lost on the legal question. In that event, they wanted an answer to the convention question for the purpose of strengthening their political position in bargaining with the federal government and

\textsuperscript{46} Manitoba and Newfoundland question 2; Quebec question B. The text of the questions is set out earlier in this comment, \textit{supra}.

\textsuperscript{47} The statutory provisions are set out in majority opinion on law, \textit{supra}, footnote 1, at p. 16.

\textsuperscript{48} \textit{A.-G. Ont. v. A.-G. Can.} (Local Prohibition), [1896] A.C. 348, at p. 370, refusing to answer questions which "have not as yet given rise to any real and present controversy" and are therefore "academic rather than judicial": \textit{A.-G. B.C. v. A.-G. Can.} (Fishing Rights), [1914] A.C. 153, at p. 162, refusing to answer questions "of a kind which it is impossible to answer satisfactorily": \textit{Reference re Upper House} (1979), 102 D.L.R. (3d) 1, at p. 16 (S.C.C.), refusing to answer questions that were too vague "in the absence of a factual context or actual draft legislation": and in the present case, \textit{supra}, footnote 1, at p. 16 (majority opinion on law), asserting the power to refuse to answer "questions which may not be justiciable", and at p. 107 (dissenting opinion on convention) to the same effect.

\textsuperscript{49} In the Manitoba Court of Appeal (\textit{supra}, footnote 8) three judges refused to answer question 1 and one judge refused to answer question 2. In the Newfoundland Court of Appeal (\textit{supra}, footnote 9) and the Quebec Court of Appeal (\textit{supra}, footnote 10) all judges answered all questions.
If necessary lobbying the United Kingdom government and Parliament.\(^5\) If this was the provincial plan, it worked perfectly: the objecting provinces came away from the decision heavily rearmed for the next phase of the battle—a phase which was wholly political.

I can understand the concern of the court that an answer to the legal question only might imply judicial approval of the unilateral federal initiative and would certainly strengthen the political position of the federal government. But surely these are classic examples of the kinds of considerations of which a court should not take account. The court has no mandate to intervene in these matters. The first ministers were elected for that purpose. The judges of the court were not elected at all; they were appointed, and they were appointed to decide legal questions, not to be wise counsellors on nonlegal questions. Nor can their answer to the convention question be defended as a kind of consensual arbitration of a point in dispute between the two levels of government: the federal government's submission to the court was that the convention question was not appropriate for judicial determination, and that the question should not be answered.\(^5\)

The question whether the reference procedure is a satisfactory one for determination of constitutional issues is difficult. It is obviously convenient to be able to secure an early ruling on the constitutionality of a new or proposed government initiative. Yet both the Supreme Court of the United States\(^5\) and the High Court of Australia\(^5\) have refused to entertain the reference of questions for advisory opinions. In their view, the reference of even purely legal questions would take them outside their judicial function because advice to government is an executive function to be performed by the law officers of the government. This objection seems rather theoretical at first blush, but it can be reinforced by some practical considerations. One practical objection to the reference procedure is that it sometimes leads to premature and abstract rulings on issues which

\(^{50}\) It is interesting to compare the main ground which was offered by the objecting provinces for their opposition to the proposed charter of rights, which was, that a charter of rights would require the courts to decide questions which are best regarded as political and hence not appropriate for judicial determination.

\(^{51}\) Factum of the Attorney-General of Canada, April 21st, 1981, p. 20. The same position was taken by the Attorney General for Ontario: Factum of the Attorney General for Ontario, undated, p. 30. The Attorney General of New Brunswick (the other province on the federal side of the argument) argued that the convention question should be answered no: Factum of the Attorney General of New Brunswick, April 16th, 1981, p. 6. See also majority opinion on convention, supra, footnote 1, at p. 87.

\(^{52}\) The Supreme Court of the United States has never had to formally decide the issue, but in 1793 it refused on constitutional grounds to give an advisory opinion; the refusal is contained in correspondence between the court and the executive branch: Note (1956), 69 Harv. L. Rev. 1302.

would have been better resolved in a concrete controversy. More germane to our present concern is the objection that the reference procedure gives rise to the possibility that a government will try to manipulate a court for political purposes. Professor Paul C. Weiler has charged, for example, that in the *Manitoba Egg Reference* the government of Manitoba enacted a marketing scheme for the purpose of referring it to the court, and set up the reference in such a way as to encourage a holding of invalidity.

In the present case the only consequence of an affirmative answer to the convention question was to influence the political outcome of the controversy over the patriation package, and to influence it in favour of the referring provinces. By answering the question the court allowed itself to be manipulated into a purely political role. A political role carries with it political risks, both to the court itself and to the substantive issue of policy which the court seeks to influence. The risk to the court itself was minimized in this case by the delphic character of the decision: by offering something to both sides the risk of attacks on the court by politicians from either side was minimized. The risk to the substantive issue was more serious. The court had no way of knowing whether a federal-provincial government agreement would subsequently be reached, and it certainly could not assume that any such agreement would be unanimous. Yet it not only undertook to affirm the existence of a convention requiring provincial consent, but it left deliberately vague the degree of consent required by the convention. In fact, as I have noted, there was a subsequent agreement, but the agreement did not include Quebec. The broadening of provincial agreement from two provinces to nine is no doubt a fortunate outcome owing a good deal to the court’s decision, but the isolation of Quebec is unfortunate, and its harmful effect may well prove to have been exacerbated by the court’s decision. The convention announced by the court leaves in doubt the question whether the consent of Quebec must be part of a “substantial degree” or “substantial measure” of provincial consent. There is surely a strong argument that these phrases do not stipulate merely a high numerical measure of provincial agreement (nine out of ten), but a measure of agreement which reflects the principle of duality (implying the protection of the powers of the only predominantly French-speaking province). As noted

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57 One may ask whether a private individual could sue for a declaration that a convention had been broken. Presumably, the private individual would lack both standing and a cause of action. Yet, it now appears that a government is entitled on a reference to have such a question answered.
earlier, that doubt on this issue has already led to further litigation, and (especially in Quebec) it undermines the political legitimacy of the constitutional proposals now before the United Kingdom Parliament. As Professor Peter H. Russell has put it, the court has left us in danger of acquiring an "unconstitutional constitution"!58

**Law requiring provincial consents**

Question 3 of the questions put to the court by Manitoba and Newfoundland asked whether the agreement of the provinces was "constitutionally required" for an amendment which affected the powers, rights or privileges of the provinces. Question B of the questions put to the court by Quebec asked whether the constitution "empowered" such an amendment without the consent of the provinces and in spite of the objection of several of them. The seven-judge opinion of Laskin C.J., Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ. which I have been citing as the "majority opinion on law" dealt with the strictly legal aspect of these questions, that is to say, it addressed the issue whether the agreement of the provinces was required by law, as opposed to convention. The answer given, as noted earlier, was that there was no such requirement of law.

The reasoning of the seven-judge majority boiled down to two very simple propositions: (1) the two Houses of Parliament could as a matter of law pass any resolution they chose, including a resolution requesting an amendment of the B.N.A. Act;59 and (2) the Parliament at Westminster could as a matter of law pass any statute for Canada it chose, including a statute amending the B.N.A. Act.60 Neither of

58 The court's decision leaves no doubt as to the validity in law of the constitutional proposals once enacted, but it raises the possibility that without Quebec's agreement they will have been enacted contrary to convention and will be "unconstitutional" in that softer sense of the word: see majority opinion on convention, supra, footnote 1, at p. 87 ("... it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence"). Professor Peter H. Russell used the phrase "unconstitutional constitution" in a panel discussion at the Osgoode Hall Law School of York University on Feb. 3rd, 1982. His analysis of the political risk undertaken by the court is elaborated in P.H. Russell, The Supreme Court Decision: Bold Statescraft based on Questionable Jurisprudence (1982) to be published along with other papers on the decision by the Institute of Intergovernmental Relations, Queen's University.

59 Majority opinion on law, supra, footnote 1, at pp. 29-30.

60 The majority opinion on law, supra, footnote 1, describes the authority over Canada of the Parliament at Westminster as "untrammeled" (p. 34), "untouched" (p. 37), "omnipotent" (p. 39), "unimpaired" (p. 41) and "undiminished" (p. 42). It is arguable however that the court was only discussing the Parliament at Westminster's authority to amend the B.N.A. Act, and was not considering the (purely theoretical) possibility of other kinds of laws. In any event, the court does not state or imply that Canadian consent is a legal prerequisite to the validity in Canada of laws passed by the United Kingdom Parliament—and that is the point I wish to develop later in this comment.
these propositions, in the view of the majority, was affected by Canada's evolution to independence from the United Kingdom, by the passage of the Statute of Westminster, or by the federal principle. They summarized their view as follows: "The law knows nothing of provincial consent, either to a resolution of the federal Houses or as a condition to the exercise of United Kingdom legislative power."\(^{61}\)

One argument in favour of a legal requirement of provincial consent was that the convention requiring provincial consent (which the six-judge majority on convention held to exist) had "crystallized" into a rule of law. This argument was based on a paper published by Professor W.R. Lederman who had argued that there was a convention requiring provincial consent to important amendments and that the convention was so fundamental to the federal character of the country that it could be regarded as having crystallized into law.\(^{62}\) The court\(^{63}\) rejected this argument by holding that a convention was inherently different from a rule of common law, the former developing through political practice and recognition, the latter developing through judicial determinations of justiciable controversies.\(^{64}\) The court also pointed out that in many cases a convention is essentially in conflict with a law; for example, the convention requiring a Governor General to assent to every bill duly passed by the two Houses of Parliament is in conflict with the legal power to refuse assent. In such cases, for example, where the Governor General had refused assent, the court's duty was to apply the law not the convention.\(^{65}\) The court pointed out, finally, that there was no precedent of a convention having crystallized into law.\(^{66}\) The court concluded, therefore, that a convention could not crystallize into law.\(^{67}\)

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\(^{61}\) Majority opinion on law, supra, footnote 1, at p. 47.


\(^{63}\) The majority opinion on law rejected it explicitly; the dissenting opinion on law did not mention it at all, relying on the federal principle to supply the legal requirement.

\(^{64}\) Majority opinion on law, supra, footnote 1, at p. 22.

\(^{65}\) Majority opinion on convention, supra, footnote 1, at pp. 85-86.

\(^{66}\) Majority opinion on law, supra, footnote 1, at pp. 22-28.

\(^{67}\) It seems an extreme position to assert that a convention may never crystallize into law, which is what the seven-judge majority is asserting. This assertion would be put to the test if the United Kingdom Parliament were to enact a law for Canada without any request or consent from Canada in violation of the convention adopted in 1930 (and recited as a preamble to the Statute of Westminster) that the United Kingdom Parliament will not legislate for a Dominion except at the request and with the consent of the Dominion. It is hard to believe that a Canadian court would accept such a law as valid in Canada. However, it is possible that the rejection of such a law by a Canadian court could be accomplished without the invocation of the convention: see, infra, footnote 83, and accompanying text.
The most powerful argument in favour of a legal requirement of provincial consent was the argument accepted by the two judges (Martland and Ritchie JJ.) who dissented on the legal question. They held that the federal nature of the Canadian constitution imposed limitations on the powers of the various Canadian organs of government. One of those implicit limitations was the inability of either level of government to curtail the powers of the other level of government. A resolution of the two Houses of the federal Parliament which had as its object an amendment to the B.N.A. Act which would curtail the powers of the provinces was inconsistent with that federal principle. Accordingly, in this dissenting opinion, the two Houses were held to lack the power to pass such a resolution.

The strength of Martland and Ritchie JJ.'s dissent on the legal question is its realistic appraisal of the nature and function of the resolution to be passed by the two Houses of Parliament. They emphasized that the resolution was the major initiating step in the process of amending the Canadian constitution. When the actions of the Houses of Parliament are viewed from the perspective of their purpose (to amend the constitution) it then becomes reasonable to ask whether the institutional context does not impose restraints upon the powers of the Houses. While there are no precedents applying a federal principle to limit the power of the Houses to pass resolutions, the dissenting judges pointed out that there are precedents which can be read as applying a federal principle to limit the powers of the federal Parliament or provincial Legislatures to pass statutes, for example, the Labour Conventions case limiting federal power to implement treaties dealing with matters otherwise within provincial jurisdiction, the Nova Scotia Interdelegation case limiting federal and provincial power to delegate away their powers, the Amax Potash case limiting provincial power to bar recovery of taxes collected under an unconstitutional statute, and the Senate Reference limiting federal power to alter those institutions of central government which serve as protectors of provincial interests. In none of these cases was the limitation on power explicit in the B.N.A. Act; it was implied by the court as an implication from the federal character of the constitution. There is no reason of logic or legal doctrine why a similar limitation could not be

68 This principle was reinforced by s. 7(3) of the Statute of Westminster: dissenting opinion on law, supra, footnote 1, at p. 78.
69 The extensive argument is briefly summarized in dissenting opinion on law, supra, footnote 1, at pp. 78-79.
inherent in the resolution power of the two Houses of Parliament. For the seven-judge majority of the court, however, such a holding would be "judicial legislation"—the retroactive creation by the courts of a domestic amending formula.\(^{74}\)

The weakness of Martland and Ritchie JJ.'s dissent on the legal question is its failure to analyze the effect of an absence of provincial consent on the power of the United Kingdom Parliament. The dissenting judges carefully confine their opinion to the resolution power of the Houses of the federal Parliament. In my view, they also needed to consider the extent of the power of the United Kingdom Parliament. After all, if the seven-judge majority were right in holding that the United Kingdom Parliament still had untrammelled authority over Canada, then, even if the resolution were invalid, the United Kingdom Parliament could still enact the proposed amendments and the enactment would have to be recognized as valid by the Canadian courts. Of course, if the resolution were held to be invalid, as the dissenting judges thought it should be, presumably the federal government would not send any request to the United Kingdom government and if it did the United Kingdom Parliament might not comply with it. But these are political consequences, not legal ones. If the United Kingdom Parliament is still omnipotent for Canada, then it cannot be said that provincial consents are required by law for amendment of the constitution of Canada.\(^{75}\) In other words, for Martland and Ritchie JJ. to reach their conclusion that provincial consents were required by law for the proposed amendments, they had to decide not merely that in the absence of provincial consents the Houses of Parliament had no authority to request the proposed amendments, but also that in the absence of a proper request the United Kingdom Parliament had no authority to enact the proposed amendments. Their failure to address this latter question means that their reasoning did not go far enough to warrant their conclusion.

The seven-judge majority opinion on law did not ignore the question of the scope of authority of the United Kingdom Parliament. To be sure, early in the opinion we find the proposition that "the authority of the British Parliament or its practices and conventions are not matters upon which this Court would presume to pronounce".\(^{76}\) As the opinion continues, however, we find repeated assertions that the British Parliament's authority over Canada is "untrammelled": it was "untouched" by the Statute of Westminster, it remains "unimpaired", and "undiminished",\(^{77}\) and it is certainly not subject to

\(^{74}\) Majority opinion on law, supra, footnote 1, at p. 33.

\(^{75}\) B. Slattery, Westminster and the Constitution: the Effects of Patriation (1982), to be published in the Supreme Court Law Review.

\(^{76}\) Majority opinion on law, supra, footnote 1, at p. 21.

\(^{77}\) Ibid., at pp. 34, 37, 39, 41, 42; and see supra, footnote 60.
"any requirement of provincial consent". The court therefore did "presume to pronounce" on the authority of the British Parliament. In the remainder of this comment I will argue that the court was wrong to indicate any reluctance to determine the limits of the United Kingdom Parliament's authority over Canada, and (having properly decided to determine those limits) was wrong to hold that the United Kingdom Parliament's authority over Canada was unlimited.

We must start with the proposition that Canada is no longer a colony of Britain. As an independent country Canada is subject to the laws of the United Kingdom Parliament only to the extent that the Canadian courts, applying Canadian law, recognize those laws as valid. The authority of the United Kingdom Parliament over Canada cannot be determined authoritatively by the courts of the United Kingdom for whom the issue could only arise in an accidental or peripheral way. It is ultimately and exclusively for the Canadian courts to decide whether any given law is valid in Canada, whether the source of that law be the federal Parliament or a provincial Legislature or the United Kingdom Parliament. That, in my view, is why the seven-judge majority was wrong to indicate any reluctance to determine the limits of the authority over Canada of the United Kingdom Parliament, and why the two-judge minority was wrong to ignore the issue.

If it can be accepted that the extent of the authority over Canada of the United Kingdom Parliament is a question of Canadian law properly determinable by Canadian courts, is the short answer to that question of Canadian law that the United Kingdom Parliament has unlimited authority over Canada? As I have explained, that was the answer given by the seven-judge majority. If we suppose that the United Kingdom Parliament enacted a statute which purported to apply to Canada without having obtained the request or consent of any legislative or governmental body in Canada, would that statute be recognized as valid by Canadian courts? The answer implicit in the majority opinions in this case is yes. The statute would be in breach of the convention agreed upon in 1930 (that the United Kingdom Parliament would not legislate for a Dominion except at the request and with the consent of that Dominion), but a mere convention cannot be enforced in the courts, and the seven-judge majority on law tells us

78 Ibid., at p. 47.
79 Canada's independence was judicially recognized in Re Offshore Mineral Rights of B.C., supra, footnote 1, at p. 816.
80 Slattery, op. cit., footnote 75.
81 Supra, footnote 60.
82 In order to eliminate the complications created by s. 4 of the Statute of Westminster (supra, footnote 18), assume that s. 4 was complied with by a false declaration in the hypothetical statute that Canada had requested, and consented to, the enactment thereof.
that a convention cannot crystallize into law. The same majority adds that the legal authority of the United Kingdom Parliament is unlimited. The result is that the unwanted law would be valid, and Canada's only remedy would be in the realm of international relations, that is to say, diplomatic protests and the like.

Since there are no cases in which a Canadian court has struck down a United Kingdom statute purporting to apply to Canada, the Supreme Court of Canada's holding of unlimited United Kingdom legislative authority over Canada cannot be demonstrated to be wrong. But I think it is wrong. If the United Kingdom Parliament were to enact a statute for Canada without any Canadian consent, it is surely more likely that a Canadian court would hold that one of the consequences of Canadian independence is that a statute of the United Kingdom Parliament enacted without the consent of Canada is simply not the law of Canada. Without the consent of Canada the statute has the same status in Canadian law as a statute enacted for Canada by Australia or the United States or Poland. That is to say, it has no status at all — it is a nullity. 83

If my argument is so far accepted, it follows that there is at least one legal limitation on the authority of the United Kingdom Parliament. The limitation is that the United Kingdom Parliament has no legal authority to legislate for Canada without Canada's consent. It also follows that it is the duty of the Canadian courts, when the occasion arises, to determine the nature of the consent which will provide the United Kingdom Parliament with the authority to legislate for Canada. I conclude therefore that the seven-judge majority should have considered and determined the question of the nature of the Canadian consent which was required for a United Kingdom statute which would have the effect of altering provincial legislative powers.

If there were no other relevant considerations, the federal nature of Canada's constitution would suggest that the provinces should join in the consent to any amendment affecting their powers. This was the

83 In Hogg, Constitutional Law of Canada (1977), p. 8, I suggested this situation as one in which the Canadian courts might give legal effect to a convention (i.e., the convention that the United Kingdom Parliament will not legislate for Canada except at the request and with the consent of Canada), thus transforming the convention into a rule of law. In the present case the dissenting opinion on convention, supra, footnote 1, at pp. 112-113, quoted this passage but commented obiter that "it is our view that it is not for the Courts to raise a convention to the status of a legal principle". Professor Brian Slattery, op. cit., footnote 75, argues that the hypothetical unwanted United Kingdom statute would be rejected by a Canadian court "for the simple reason that Canada is no longer a British colony". He says that such a statute "would possess no greater force in Canada under Canadian law than a decree of the former Life-President in Uganda". Professor Slattery thus does not rely on the convention at all, but simply on the fact of Canadian independence as having changed one of the fundamental rules of recognition in Canadian law. With respect, his analysis seems to me to be correct.
opinion of the Kershaw Committee, a committee of the House of Commons in the United Kingdom, which reported in 1981 on the role of the United Kingdom Parliament in enacting constitutional amendments for Canada. The Kershaw Committee decided that when the United Kingdom Parliament receives a request for the amendment of the Canadian constitution the United Kingdom Parliament has "to decide whether or not [the] request conveys the clearly expressed wishes of Canada as a whole, bearing in mind the federal character of the Canadian constitutional system." To that end, the United Kingdom Parliament is "bound to exercise its best judgment" in determining whether "a sufficient level and distribution of provincial concurrence" exists; any measure which does not enjoy the level and distribution of provincial concurrence contemplated by the proposed amending formula would not qualify as a "proper request" and should not be complied with.

The Kershaw Committee did not purport to state the policy of the United Kingdom government, and in fact the United Kingdom government issued a Command paper in reply to the Kershaw Committee which strongly implied that if the need had arisen the United Kingdom government would have acted in accordance with a request from the

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85 Ibid., paras. 9-10. In the Committee's third report (op. cit., footnote 84) the Kershaw Committee recommended that the Canada Bill be enacted in spite of Quebec's dissent. This involved an abandonment of the test supplied in the Committee's first report of "a sufficient level and distribution of provincial concurrence", because under the previous proposed amending formula Quebec had a veto, and under the new formula Quebec's dissent would prevent the amendments from applying in Quebec. The Committee said in its third report that Quebec's consent was not necessary because the Supreme Court of Canada had required only "a substantial measure of provincial consent" and had stated that it was for the "political actors" to determine the degree of provincial consent. This is one reading of the Supreme Court's decision, but there are powerful arguments that Quebec's consent is necessary as part of "a substantial measure of provincial consent", and at the time the Committee reached its confident conclusion the question was already the subject of litigation in Canadian courts: see text accompanying footnote 58, supra.
Canadian federal government alone and would have urged the United Kingdom Parliament to do the same. In my opinion, the position of the United Kingdom government was correct, and that of the Kershaw Committee was incorrect. The fact which is overlooked by the Kershaw Committee in these recommendations (although lip-service is paid to it in other parts of their report) is that Canada is no longer a British colony. It is no longer appropriate that fundamental decisions regarding Canada's constitution should depend upon the "best judgment" of a legislative body whose members are not in any way accountable to the Canadian electorate. Rather, the relations between Canada and the United Kingdom should observe the same rules as those between other independent states. In Canada's relations with other states, Canada is one state and it is the federal government which has the exclusive authority to speak for Canada as a whole, notwithstanding that Canada's internal constitutional system is a federal one. The principle of Canadian independence would thus suggest that the request from Canada to the United Kingdom should come from the federal government. Moreover, that is the way in which the request has always been made in the past: since 1896 every request has taken the form of a joint address by the two federal Houses of Parliament. Even those requests which in fact enjoyed the unanimous consent of the provinces took the usual form, not even reciting in the address the existence of provincial consents. No request in the usual form has ever been rejected by the United Kingdom Parliament. When a province has requested an amendment independently of the federal government (which has occurred at least nine times) the request has always been rejected by the United Kingdom Parliament.


88 A good deal of the third report of the Kershaw Committee (op. cit., footnote 84) is taken up with argument to the general effect that the Supreme Court of Canada had vindicated the position taken by the Committee in its first and second reports. But the Supreme Court of Canada did nothing of the sort: it neither said nor implied that the United Kingdom Parliament should interpret and give effect to any Canadian convention regarding provincial consents. As the U.K. government pointed out in reply to the Committee (op. cit., footnote 87, para. 10), the court was at pains not to discuss that question. If the court had discussed the question, in my view it would have emphatically rejected the Committee's position for the reasons given in the following text of this comment.

89 The Committee invited and heard the testimony of several British constitutional lawyers, who agreed that the United Kingdom Parliament should exercise the discretion contemplated by the Committee. The Committee did not invite or hear the testimony of any Canadian constitutional lawyers.

90 Supra, footnote 1, majority opinion on law at p. 31; majority opinion on convention at p. 98.


92 Ibid., p. 19, note 30.
In sum, therefore, while the federal principle provides cogent ground for a requirement of provincial consents to constitutional amendments affecting provincial powers, that requirement is operative only within Canada. Its breach gives rise to political consequences only within Canada. At the point when the action of a foreign government is invoked the principle of Canadian independence must dominate. The United Kingdom government (and the United Kingdom Parliament) must accept the request which is made in the usual form by the Canadian federal authority. For the United Kingdom government or Parliament to listen officially to the provinces or (worse) to enter upon an inquiry into the extent and sufficiency of provincial consents must in my opinion be condemned as "an objectionable foreign interference in Canadian domestic affairs".  

On the legal issue, therefore, I end up in agreement with the seven-judge majority that there is no legal requirement of provincial consents as a prerequisite to an amendment of the Canadian constitution which would alter the powers of the provinces. My reasoning is different because I cannot accept the view that the United Kingdom Parliament's authority over Canada is as plenary as it was in colonial times. In my view Canada's accession to independence has imposed important limitations on the authority of the United Kingdom Parliament. The question for me, therefore, is whether a requirement of provincial consents is one of the limitations. The question is difficult, but I resolve it by giving priority to the principle of Canadian independence to the extent that it comes into conflict with the principle of federalism. On balance, therefore, I conclude that only the consent of the federal Houses is necessary to provide the United Kingdom with its authority over Canada.

Conclusions

1. In my view, the court was wrong to answer the question whether there was a constitutional convention requiring the consent of the provinces to a constitutional amendment affecting provincial powers. Since a convention is not judicially enforceable, no legal consequence could flow from the answer. The only consequence of an answer to the convention question could be a political one, namely, to influence the political outcome of the controversy over the proposed amendment.

93 Ibid., p. 21. The strongest form of the argument to the contrary would assert that the relationship between Canada and the United Kingdom is not an external one with respect to amendment of the B.N.A. Act. With respect to that matter (and that matter only) the relationship is part of Canada's domestic amending machinery and must take account of the federal principle. In my view, the force of this line of argument is not sufficient to override the considerations of democratic accountability and Canadian independence which are elaborated in the text.
2. Assuming that it was appropriate for the court to answer the convention question, the absence of any accepted methodology to answer the question became a big problem. In particular, what weight was to be attributed to statements by federal Ministers denying the existence of an obligation to obtain the consent of the provinces to significant constitutional amendments? The majority of the court held that these statements did not negate the existence of a convention, but merely negated a requirement of unanimity: there was a convention, but it called for only "a substantial degree" of provincial consent. The more plausible conflicting interpretations of the material in my view were either (1) that there was merely a usage lacking a normative element (which is what the three-judge minority decided), or (2) that there was a convention of unanimity (which is what the past practice would suggest). The majority's middle ground seems to me to be the least plausible of the possible interpretations.

3. Finally, the court was right to decide that there was no legal requirement of the consent of the provinces. However, the seven-judge majority should not in my view have held that there were absolutely no limitations on the authority over Canada of the United Kingdom Parliament. The better view is that there is a legal requirement of some form of Canadian consent as a precondition of the United Kingdom Parliament's authority over Canada. The only question then is whether that Canadian consent must include the provinces as well as the two Houses of the federal Parliament. The reason why provincial consents need not be included is that the relationship between Canada and the United Kingdom is that between two independent states, and it is not appropriate for the latter to take upon itself the ascertainment and effectuation of provincial opinions which form part of Canada's internal affairs.

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