The Supreme Court of Canada and Basic Constitutional Amendment An Assessment of *Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)*

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Since 28 September 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 rendered 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 two remaining provincial governments. In the winter of 1980-81, the controversy was taken to three provincial Courts of Appeal, those of Manitoba, Newfoundland and Québec. When these courts had spoken, with mixed results,[1] 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.[2] 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 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 nevertheless moved us much closer to the resolution of our difficulties by settling some important questions of method concerning the right way of doing things in the realm of basic constitutional change, as only

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[1] *Reference Re Amendment of the Constitution of Canada* (1981) 117 D.L.R. (3d) 1 (Man. C.A.); *Reference, etc. (No. 2)* (1981) 118 D.L.R. (3d) 1 (Nfld C.A.); *Reference, etc. (No. 3)* (1981) 120 D.L.R. (3d) 385 (Qué. C.A.).

[2] *Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)* (1981) 125 D.L.R. 1 (S.C.C.).

the Court of final authority for Canada could have done.[3] Look at what has happened since the judgment. On November 5, at 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 also agreed 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 Québec was not a party to this consensus. As a political fact this is a matter of general regret and continuing anxiety among Canadians, including Québecers. Nevertheless, the near unanimity of the political consensus was quite remarkable and was deemed constitutionally sufficient to enable the Parliament of Canada to go ahead. It seems clear that all governments in Canada except for that of Québec construed the critical Supreme Court majority judgments of September 28 as having been to this effect.

After making a few changes in the *Charter*, with the Québec government maintaining its general dissent, all-party support for the Joint Address to the Queen was obtained in both Houses of the Parliament of Canada, and the Address was sent to Westminster in early December. The British parliamentarians also regretted the absence of the Québec government from the otherwise complete Canadian consensus, but, in their turn, they took the view that this was not a constitutional impediment for the British Parliament. In due course, the legislation requested in the Joint Address from Canada was passed without change by both Houses of the British Parliament and became law on receiving Royal assent on March 29. Thus the British Parliament has discharged its traditional function in this respect for the last time. The legislation itself provided that it was to come into force on a day to be fixed by a proclamation issued by the Queen or the Governor-General under the Great Seal of Canada.[4] This was done by the Queen as Queen of Canada in Ottawa on 17 April 1982, with effect on that day.

Neverthless, the Québec government continues its objections, and it had earlier gone back to the Québec Court of Appeal claiming that the lack of Québec government consent would invalidate these changes, if not as a matter of constitutional law, then at least as a matter of constitutional convention. However, on 7 April 1982, the Québec Court of Appeal gave judgment unanimously rejecting this claim to a veto power.[5] Apparently the Québec government intends to appeal against this verdict to the Supreme

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[3] [1974] A.C. 127 (P.C.). See also Lederman, *Amendment and Patriation* (1981) 19 Alta L. Rev. 372.

[4] *Canada Act, 1982*, Schedule B, *The Constitution Act, 1982*, s. 58.

[5] *A.-G. Québec* v. *A.-G. Canada*, C.A. (Montréal, 500-09-001648-81), 7 April 1982.

Court of Canada, which it has the right to do. As a constitutional scholar, I very much doubt that the Supreme Court of Canada would differ from the Québec Court of Appeal, but of course I do not presume to speak for the Supreme Court of Canada.

In any event, the decision of the Supreme Court of Canada rendered on 28 September 1981 has had a great and continuing effect on the subsequent developments that have just been recounted. So it is proper for a scholar to attempt a short critical analysis of the reasons of the judges to explain this influence. Because the reasons referred to occupy well over 100 pages in the 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 may be combined with some brevity. In any event, this is what the writer will attempt to do.

In the first place, let us emphasize the magnitude of the change in the situation that was achieved in November 1981, in very considerable measure as a result of the Supreme Court decision of September 28. Both the federal government and seven of the eight provincial governments previously opposing it made major and important concessions to one another, and thus an accord was reached, as described earlier, on a new plan for basic constitutional change which carried the support of nine provinces and the federal government.

The constitutional issues to which the Supreme Court of Canada addressed itself arose out of the historical fact that, while the *B.N.A. 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 *B.N.A. Act* by an appropriate request to the Parliament of Britain from Canada. Over the years, as Canada grew to independent nationhood, certain principles or customs developed informally concerning what was an appropriate request. 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."[6]

[6] G. Favreau, *The Amendment of the Constitution of Canada* (1965), 15.

Accordingly, the questions for determination by the Court concerned primarily the constitutional status (if any) of the second customary rule just stated. Was 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 behavior in some circumstances, having no objective binding force for the governments concerned. The 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 Westminster the basic constitutional changes they proposed. In early October 1980, with this intention, 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 Parliament, primarily on the part of the Progressive Conservative Party. Furthermore, six 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. Also, by this time, largely due to the efforts of the Progressive Conservatives, the constitutional resolution had been tabled in Parliament 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 28 September 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, so it is not surprising that two majority positions and two minority positions emerged, in the form of joint opinions by the various judges in agreement on each of the four positions. I will hereafter speak of 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,[7] with Justices Martland and Ritchie dissenting in Minority Judgment I.[8] Majority Judgment II was given by Justices Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer,[9] with

[7] *Supra*, note 2, 12.
[8] *Ibid.*, 49.
[9] *Ibid.*, 79.

Chief Justice Laskin and Justices Estey and McIntyre dissenting in Minority Judgment II.[10]

The judges forming Majority I ruled that, as a matter of law, there was no requirement for any provincial consent 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 Westminster 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 consent 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 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:

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[10] *Ibid.*, 107.

(1) Given that the constitution is a combination of law 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 the 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.[11] 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 consent 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. Furthermore, they say there is no legal requirement that limits the old imperial supremacy of the British Parliament to do whatsoever it pleases about requested amendments from Canada.[12]

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

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[11] *Supra*, note 2, 29.
[12] *Ibid.*, 47.

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 1 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 (Majority Judgment II), have quite different conceptions of the nature of Canadian federalism. The minute that matter is raised, the groups of three and four just mentioned part company.

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 *Edwards* v. *A.-G. Canada*, decided in 1930,[13] Lord Sankey said: "The British North America 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 consent in a typically federal amending process as a matter of law, by necessary implication from formal legal sources — the *B.N.A. Act* itself, the *Statute of Westminster, 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.[14] 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 result reached by Justices Martland and Ritchie described earlier is realistic, but it *is* a minority judgment, and thus, 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

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[13] [1930] A.C. 124, 136 (P.C.).
[14] *Supra*, note 2, 73, 78-9.

concurred when they were part of Majority I was so incomplete that it had nothing at all to say about a basic amending process appropriate for Canadian federalism. They were nonetheless 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 that there was indeed a conventional rule requiring a substantial measure of provincial consent, as outlined earlier, 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:

> 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.[15]

We can 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 reached by Justices Martland and Ritchie as a matter of law. Moreover, this was done 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 by way 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 government and Parliament of Canada on the other. Those who read Canadian constitutional history and jurisprudence as manifesting classic, balanced federalism will naturally infer that there is, here and now, a requirement for at least substantial provincial

[15] I. Jennings, *The Law and the Constitution*, 5th ed. (1959), 136.

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's 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 in Minority Judgment II. As they read Canadian constitutional history and jurisprudence, 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 has included from the beginning some elements of a unitary state that give certain overriding powers to the Parliament 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 formal legal powers that give the Parliament of Canada superior status? Minority II emphasizes the potentially extensive overriding character of the legislative power of the Parliament of Canada under the "Peace, Order and Good Government" clause[16] of the *B.N.A. Act*, the paramountcy of that Parliament in concurrent legislative fields, the power of that Parliament to take over regulation of provincial works by declaring them to be works for the general advantage of Canada,[17] and the power of the federal cabinet to disallow provincial legislation by Order-in-Council.[18]

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[16] *The British North America Act, 1867*, 30 & 31 Vict., c. 3, s. 91 (U.K.).

[17] *The British North America Act, 1867*, 30 & 31 Vict., c. 3, s. 92.10 (U.K.).

[18] *Ibid.*, 125-6. The judges forming Minority II said: "The *B.N.A. 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 whide 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

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.

I agree in principle with both Minority Judgment I and Majority Judgment II, and 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.[19]

In any event, to come back to the judgments of 28 September 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 one the dominant type or pattern for Canadian federalism as a matter of evidence?[20]

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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."

[19] *Re Anti-Inflation Act* [1976] 2 S.C.R. 373.

[20] Between 30 January 1981 and 18 January 1982, the all-party Foreign Affairs Committee of the British House of Commons (the Kershaw Committee) published three unanimous reports on the *British North America Acts* and the constitutional position in relation to their amendment by the British Parliament. As a matter of constitutional convention binding the British Parliament, the Committee, guided by the research assistance and testimony of outstanding British constitutional experts, found in effect that Canada followed the classic federal model. Hence they said that the British Parliament should respond only to "the clearly expressed wishes of Canada as a federally structured whole". See Foreign Affairs Committee: House of Commons (U.K.). *The British North America Acts: The Role of Parliament*, First Report, 30 January 1981; Second Report, 15 April 1981; Third Report, 18 January 1982.

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 respecting the legal limitations on the powers of provincial legislatures and the Parliament of Canada that obtain, for example, by virtue of the *B.N.A. 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, and no doubt it could be implied from formal sources if full contextual historical interpretation were used, as it was 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 could be derived only by direct literal interpretation of what is contained in formal documentary cources.

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 possible existence and terms of a relevant convention because they were, so to speak, pressured into doing so by the other six in Majority II, who 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 Jenning's 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 attract 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 our federal system 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 in large part 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 sum total of rules and principles making up the constitution of Canada fall into two parts: "Constitutional conventions plus constitutional law equal the total constitution of the country."

(2) Constitutional law consists of statutes (including relevant British statutes such as the *B.N.A. 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 judicial 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 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.

For example, in law, 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 11 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:

> 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.
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> 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.[21]

This substitution of a substantial measure of consent as the requirement, rather than unanimous provincial consent, was an essential element of the decision of Majority 11 impelling the political actors to reach the federal-provincial politieal accord of November and December 1981.[22]

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[21] *Supra*, note 2, 103 [emphasis added].

[22] Substantial consent rather than unanimity had not been argued before the provincial Courts of Appeal. However, it was carefully put to the Supreme Court of Canada in late April 1981, by counsel for the province of Saskachewan in both written and oral argument.

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 dichtomy between law, narrowly defined, and established conventions — a dichtomy favoured by seven of the nine judges in the case under discussion — will last very long. Its historical legitimacy is doubtful, and even the seven judges of Majority I admit that custom and usage do make international law. Nevertheless, it must be conceded that this sharp dichotomy is standard English constitutional doctrine. Secondly, 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 is a word or two in praise of the Supreme Court of Canada. All nine judges identified the three fundamental 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 that this was so, they 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.

The province of Saskatchewan had intervened against the Trudeau government's unilateralism only at the Supreme Court level. No other province made this argument.

It may well be, however, that the judges of Majority II already had the point in mind. The Foreigh Affairs Committee of the British House of Commons (the Kershaw Committee), in their First Report published on 30 January 1981, had concluded, for purposes of advising the British Parliament of its constitutional position, that some substantial measure of provincial consent rather than unanimity was what constitutional convention required, at least so far as the British Parliament was concerned. This Report and the two that soon followed are very distinguished documents, fully researched and thoroughly argued. Obviously the Reports owe much to the guidance of leading British experts in constitutional matters who either were part of the staff of the Committee or gave testimony to it. I do not believe that the First Report was formally brought to the attention of the Supreme Court of Canada by counsel, but I strongly suspect that the judges were familiar with it anyway. See *supra*, note 20.