ANNUAL SURVEY OF CANADIAN LAW

CONSTITUTIONAL LAW

*W.H. McConnell**

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* Faculty of Law, University of Saskatchewan.

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I. INTRODUCTION

Few periods in Canadian constitutional history could have produced such dramatic changes in public law as have occurred in Canada over the last three or four years. Since these changes have related essentially to a new institutional framework for the country, Part II of the survey is devoted to institutional matters, such as language laws, the patriation of the constitution and the proposed reform of the Upper House, while Part III considers significant decisions in the division of powers and human rights areas which have usually had priority in past surveys.[1]

The centrepiece of the new constitutional reforms is of course the Canadian Charter of Rights and Freedoms, many provisions of which are similar to those of the U.S. Bill of Rights. Yet to come at future federal-provincial conferences are decisions on the division of powers, the Senate, the Crown and the Supreme Court of Canada. Whether the entrenched guarantees of the Charter will bring Canada closer to what Alexis de Tocqueville observed of the legal culture of the South in 1835 in his *Democracy in America* is conjectural: "Scarcely any political question arises in the United States," said he, "that is not resolved, sooner or later, into a judicial question."[2] The conservatism of the Canadian judiciary makes this doubtful.

II. INSTITUTIONS

A. *The Constitutional Validity of Language Legislation*

In heterogeneous federations such as Canada, Switzerland or Yugoslavia, language rights are of great importance but they are not fundamental rights.[3] They would not rank, in an entrenched declaration of rights, with the freedoms of opinion, expression, religion or association. Yet on their existence may depend the very survival of vulnerable cultural groups. Fundamental freedoms, legal rights (or due process) and equality rights relate to man in a universal sense. They seek to define the rights attributed to all persons. Language rights are narrower in scope; they are often sectorial (in Canada applying only in Quebec, Manitoba, New Brunswick and in certain federal jurisdictions) and protect the cultural rights of groups. If the groups lack cohesiveness or shared community values, they will eventually be assimilated and the language rights will become insignificant. Other rights (*e.g.*, fundamental freedoms) are of a more transcendental character in that it is difficult

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[1] Lysyk, 3 OTTAWA L. REV. 520 (1969); Lysyk, 5 OTTAWA L. REV. 124 (1971); MacKenzie, 7 OTTAWA L. REV. 138 (1975); MacKenzie, 10 OTTAWA L. REV. 313 (1978).

[2] Vol. 1, 280 (P. Bradley ed. 1980).

[3] G. BEAUDOIN, LE PARTAGE DES POUVOIRS 223 (1980).

to imagine any circumstances in which, whether entrenched or not, such rights would not in large part define the quality of political society.

The complexities of language legislation in Canada are further complicated by the fact that it is not a subject matter authoritatively allocated to either order of government in the division of powers. As Sheppard says, jurisdiction over language is ancillary to the exercise of other powers, and in complex fact situations the asserted powers may depend for their validity on the legislative functions with which they are associated.[4] A province might enact that communications within local areas (local businesses, education and provincial companies insofar as they are performing functions under provincial jurisdiction) shall be in the majority language, conceding whatever rights in the minority language or languages, barring entrenchment, that it chooses to concede as a matter of grace. The same would be true, *mutatis mutandis*, of Parliament's jurisdiction to legislate language rights.

In important recent Quebec[5] and Manitoba[6] cases the constitutional validity of provincial language laws relating, respectively, to the exclusive use of the French or English languages in those provinces was questioned. The Quebec legislation purported to declare French to be the sole official language of the legislature and courts of Quebec. The issue in the Manitoba litigation was the constitutional capacity of the Greenway government, in 1890, to make English the exclusive official language despite the apparent entrenchment of bilingualism in section 23 of the Manitoba Act, 1870.[7] In both cases the challenged provincial legislation was invalidated. The combined effect of these decisions was to delimit the scope of entrenched language guarantees in the two provinces, excluding legislative intervention in certain areas but permitting it in others.

In *A.G. Que. v. Blaikie*, the validity of sections 7 to 13 of the Charter of the French Language (Bill 101) was contested.[8] Provisions declaring French to be the exclusive official language of the legislature and courts were held to be in conflict with section 133 of the B.N.A. Act (as it then was).[9] The Court could not reconcile the terms of section 133 with section 9 of the Charter which requires bills to be drafted in French and declares that the French text (an English version was also provided for) be official. The appellants argued that section 133 required only that statutes be "printed and published" in both languages. On closer scrutiny, it was "Acts", however, which were to be printed or

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[4] THE LAW OF LANGUAGES IN CANADA 101 (1971).

[5] A.G. Que. v. Blaikie, [1979] 2 S.C.R. 1016, 49 C.C.C. (2d) 359, 101 D.L.R. (3d) 394.

[6] A.G. Man. v. Forest, [1979] 2 S.C.R. 1032, 49 C.C.C. (2d) 353, 101 D.L.R. (3d) 385.

[7] An Act to amend and continue The Act 32 and 33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba, S.C. 1870, c. 3 [hereafter cited as Manitoba Act].

[8] *Supra* note 5, at 1019-20, 49 C.C.C. (2d) at 360-62, 101 D.L.R. (3d) at 395-97.

[9] *Now* Constitution Act, 1867 *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

published, and "Acts" do not become such without enactment by legislatures.[10] Similarly, when sections 11 and 12 compel artificial legal persons to use French exclusively, and make French the mandatory tongue for "procedural documents" in judicial and quasi-judicial proceedings, there is an invalid derogation of the right to use English in Quebec courts under section 133.[11] In *Jones v. A.G.N.B.* it was held that Parliament could enlarge but not subtract from the entrenched guarantees in section 133.[12] Conversely, in *Blaikie* the issue was whether a statutory "contraction" by the province was permissible. The Court emphasized that section 133 conferred language rights which concerned not only Parliament and the Quebec Legislature but *members* of those bodies and litigants in the named courts. Moreover, in the case of regulations the Court recognized that delegated legislation had grown enormously in the present century and the requirements of section 133 would be unduly truncated if account were not taken of this: "the greater must include the lesser."[13]

The province argued that it possessed a very broad power of amendment under head 1 of section 92. The respondents would have restricted it to Part V, "Provincial Constitutions", in the B.N.A. Act, which would exclude section 133. The province asserted in rebuttal that certain provisions which were unquestionably part of provincial constitutions fell outside Part V.[14]

The interpretation of the phrase "any of the Courts of Quebec" was made in the context of the great proliferation of quasi-judicial tribunals in recent times. If such tribunals are adjudicative bodies applying legal principles, even though their procedure may be very informal, they are essentially "Courts" within the purview of section 133 and the bilingual requirements of that section apply to them. Some latitude in interpreting this section was exercised in accord with Lord Sankey's "living tree" metaphor.[15]

In a rehearing to determine more precisely the scope of section 133 with respect to delegated legislation, the Court held that the section applied to such legislation enacted by the provincial government, a minister or ministers thereof and the public service, including governmental departments and agencies. While the section would apply to orders or regulations constituting delegated legislation properly so-called, it would not embrace rules or directives of internal management which would be administrative in the narrower, managerial sense. It would apply to rules of practice enacted by courts and quasi-judicial

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[10] *Supra* note 5, at 1022, 49 C.C.C. (2d) at 363, 101 D.L.R. (3d) at 398.

[11] *Id.* at 1027-29, 49 C.C.C. (2d) at 367-68, 101 D.L.R. (3d) at 402-03.

[12] [1975] 2 S.C.R. 182, 16 C.C.C. (2d) 297, 45 D.L.R. (3d) 583 (1974).

[13] *Blaikie, supra* note 5, at 1027, 49 C.C.C. (2d) at 366, 101 D.L.R. (3d) at 402.

[14] *See, e.g.*, Constitution Act, 1867, s. 128.

[15] *Blaikie, supra* note 5, at 1028-29, 49 C.C.C. (2d) at 367-68, 101 D.L.R. (3d) at 402-03.

tribunals but not to municipal and school board by-laws.[16] The provinces were given express jurisdiction over municipal institutions in head 8 of section 92, and "the absence of any reference to them in s. 133 cannot possibly be taken as an oversight. It is a purposeful silence to which effect must be given if the intent of the Fathers of Confederation is to be respected." The Court added: "Much the same can be said, *a fortiori*, about school bodies regulations."[17]

The issue in *A.G. Man. v. Forest* was similar to that in *Blaikie* since, despite section 23 of the Manitoba Act, the Manitoba Legislature had declared English to be the exclusive official language in 1890.[18] In that year Liberal Premier Thomas Greenway's unilingual "official language" bill was enacted together with an incendiary statute establishing a system of non-sectarian public schools, which alone were entitled to public funds. The dwindling French-Catholic population of Manitoba was powerless to resist the change.

After 1890, legal pleadings in the province were exclusively in English. When the respondent Forest was charged with a parking violation with a ticket printed in English, he argued that it should have been printed in both languages. On being convicted, he used only French in his appeal documents. The issue of the validity of the 1890 legislation was thereby brought squarely before the courts.

At trial, Dureault J. held that section 23 of the Manitoba Act was similar in effect to section 133 of the B.N.A. Act. It was not a part of "the Constitution of the Province" subject to amendment by ordinary statute under head 1 of section 92.[19] On appeal, Freedman C.J., speaking for a unanimous Court, held the 1890 law inoperative "insofar as it abrogates the right to use the French language in the courts of Manitoba, as conferred by s. 23 of the Manitoba Act, 1870, confirmed by the B.N.A. Act, 1871".[20]

The decision was affirmed unanimously by the Supreme Court of Canada, it being held that, as in *Blaikie*, language rights in section 23 were not embraced within the term "the Constitution of the Province" in head 1 of section 92. The Legislature lacked power to alter those parts of the Manitoba Act establishing educational and language rights:

> If the provincial power to amend the Constitution of Manitoba did extend to the whole *Manitoba Act* it would have offered a short answer to the legal challenge of one of its schools Acts, but no such contention appears to have

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[16] Blaikie v. A.G. Que., 36 N.R. 120, at 138 (S.C.C. 1981).

[17] *Id.* at 131.

[18] *Supra* note 6, at 1035, 49 C.C.C. (2d) at 355, 101 D.L.R. (3d) at 387.

[19] R. v. Forest, [1977] 1 W.W.R. 363, 34 C.C.C. (2d) 108, 74 D.L.R. (3d) 704 (Man. Cty. Ct. 1976).

[20] Forest v. A.G. Man., [1979] 4 W.W.R. 229, at 248, 98 D.L.R. (3d) 405, at 424 (Man. C.A.).

> been raised in the two cases in the Privy Council referred to in the judgment in the Court of Appeal. . . .[21]

Accordingly, after the lapse of almost a century, the Official Language Act, 1890[22] was struck down for invalidity. As Professor Hogg points out, "it is trite law that neither lapse of time nor public acquiescence can make an unconstitutional statute valid."[23]

The Manitoba Court of Appeal, in *Bilodeau v. A.G. Man.*,[24] considered a case where a summons for a speeding charge, and the provincial statute under which it was issued, were both printed in English. The Court held that the provisions of section 23 were directory rather than mandatory. As the learned Chief Justice said, "The chaos that would result from declaring s. 23 as mandatory or imperative would be monumental."[25] Hall J.A. concurred in the result reached by Freedman C.J. Dissenting in part, Monnin J.A. observed: "I would not declare that all laws enacted between 1890 and 1979 are invalid. To do so would be lacking in judicial appreciation of a factual situation. What is gone is gone and cannot be changed. We all must live with it. . . ."[26] The two impugned statutes were therefore valid, with the learned Judge giving the seminal decision on section 23 prospective rather than retrospective effect.

In Saskatchewan, when Father André Mercure was charged with speeding contrary to subsection 139(4) of the Vehicles Act,[27] he applied to have the proceedings conducted in French, contending that an 1886 provision in The North-West Territories Act[28] permitting the use of French in the Territorial Assembly or the "Courts" was still in force in Saskatchewan.[29] Section 16 of The Saskatchewan Act of 1905[30] allowed pre-existing laws not inconsistent with the Act, or for which the Act contained no substitute, to continue in force in the new province.

Deshaye J. found the right to use French in the courts had indeed existed immediately before 1905[31] and had never been extinguished. However, the right did not require the judge to be bilingual but merely allowed litigants to use an interpreter, addressing the court in French if they so desired.[32] The requirement for "Ordinances" in the French language was contained in The North-West Territories Act, which had

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[21] A.G. Man. v. Forest, *supra* note 6, at 1038, 49 C.C.C. (2d) at 357, 101 D.L.R. (3d) at 389.

[22] S.M. 1890, c. 14 (*now* R.S.M. 1979, c. O10).

[23] *Constitutional Power over Language*, in THE CONSTITUTION AND THE FUTURE OF CANADA, 1978 SPECIAL LECTURES 241 (Law Soc'y of Upper Canada).

[24] [1981] 5 W.W.R. 393 (Man. C.A.).

[25] *Id.* at 401.

[26] *Id.* at 409.

[27] R.S.S. 1978, c. V-3.

[28] R.S.C. 1886, c. 50, s. 110 (*as amended by* S.C. 1891, c. 22, s. 18).

[29] R. v. Mercure, [1981] 4 W.W.R. 435 (Sask. Q.B.).

[30] S.C. 1905, c. 42.

[31] *Mercure*, *supra* note 29, at 443-44.

[32] *Id.* at 445-46.

been superseded, as far as law-making power was concerned, by The Saskatchewan Act, which contained no similar provision. Consequently, there was no requirement to print provincial statutes in French. "Even if I were wrong in this conclusion," Judge Deshaye added, "the failure on that segment of the public service charged with a duty to print and publish statutes in the required language does not invalidate the legislation passed."[33]

In Quebec, with its active and influential Anglophone minority, both French and English have always possessed great vitality. The same cannot be said for French in the western provinces, except for certain areas. Many western Francophones have assimilated, although with the bilingual provisions in the new Charter, there may be a renaissance of French culture in the west. Would it have been possible in a Roman-Dutch or European civil law system for the judges to have declared legal guarantees of French inoperative by reason of desuetude? The following summary of the South African position is instructive:

> Can a legislative instrument come to an end by silent consent of the community through contrary custom or desuetude? This principle of abrogation by disuse certainly applies to the common law, and no revival of a legal rule thus ended is possible through 'a change in social attitude. That would be a matter for Parliament'. In Roman-Dutch law, on the theory that legislative power derived from the people, it applied also to legislation.[34]

Supporters of bilingualism may rest easier because of the absence of such a principle in the applicable precedents.

A natural lawyer might argue that, unlike other basic rights which are declared rather than constituted by the respective human rights codes, language rights have a much closer relationship to demographic facts and are "created" by law. In a homogeneous society they are redundant, while the need for all the other rights and freedoms remains. The legal norms and the factual referents have a more intimate connection in language laws.

B. *The Reform of the Senate*

In the spring of 1978 the federal government brought forward Bill C-60,[35] its earlier comprehensive plan for constitutional reform, which included a proposal to reconstitute the Senate into a House of the Federation. The new body would be established along lines radically different from the present Upper Chamber.[36] After the defeat of the Trudeau government in May 1979, Bill C-60 was dropped. When Mr.

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[33] *Id.* at 447.

[34] H. HAHLO & E. KAHN, THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND 174 (1968).

[35] Thirtieth Parl., 4th sess., 1978-79 (first reading).

[36] *See* McConnell, *The House of the Federation: A Critical Evaluation*, 27 CAN. B. REV. 513 (1979).

Trudeau resumed office in February 1980, his government formulated somewhat more restricted constitutional proposals which centered on patriation, a charter of rights and the amending power, rather than on the reform of the Senate, the Crown and the Supreme Court, which were key elements (along with rights) in Bill C-60. Consequently, the recent constitutional accommodation has left these most important institutional questions open for future resolution by the parties under the new amending procedures.

Because of the veritable storm of controversy over Bill C-60,[37] however, the federal government paused after its release to reconsider some of its intricate provisions. A Special Joint Committee of the Senate and the House of Commons sat through August and September of 1978, hearing expert evidence on the Bill. Two able public lawyers, P. W. Hogg of Osgoode Hall Law School and W. R. Lederman of Queen's University, presented opposite points of view on the validity of the Bill.[38] Taking a broad view of the term "Constitution of Canada" in the amending provision of head 1 of section 91 of the Constitution Act, 1867, a view similar to that of F. R. Scott, Q.C.,[39] Professor Hogg contended that the requisite power to substitute the House of the Federation for the Senate clearly existed.[40] On the other hand, Professor Lederman contended that the provinces had a substantial interest in the reconstitution of the Upper House, and denied the asserted jurisdiction. Largely because of Professor Lederman's qualms, the federal government decided to submit the validity of the proposed new chamber to the Supreme Court of Canada as a reference question.[41]

The body with which Bill C-60 proposed to replace the Senate was fundamentally different from the present Red Chamber.[42] In contrast to present appointments to the 104-member Senate by the Governor General in Council, half of the 118 members of the House of Federation were to be "selected" by the provinces and the federal government, respectively, on the basis of the share of votes for each of the rival parties in the last-preceding provincial or federal elections. Its composition, unlike that of the Senate, would therefore be constantly shifting, since the tenure of its members would depend on the political fortunes of federal and provincial parties. For example, in a province awarded a total of eight seats (*e.g.*, Saskatchewan), four would be chosen by the provincial

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[37] Three critiques circulated in mimeographed form during the controversy were Senator E. Forsey's "Some Problems Raised by the Constitutional Amendment Bill (C-60)", Professor D. Kwavnick's "Comments on Bill C-60" and Dr. P. McCormick's "The House of the Federation: A Critical Review". *See also* note 36 *supra*, at 513, n. 2.

[38] Hogg, Comment, 58 CAN. B. REV. 631, at 632 (1980).

[39] *The British North America (No. 2) Act, 1949*, in ESSAYS ON THE CONSTITUTION 202 (1977).

[40] *Supra* note 38 *passim*.

[41] *Id.* at 632.

[42] For a discussion of the details of the legislative proposal which follows, *see supra* note 36 *passim*.

and federal governments respectively. A party would have to obtain in that province, in either a provincial or federal election, approximately twenty-five per cent of the total vote cast (although it might not have elected any M.L.A.'s or M.P.'s) in order to qualify for a seat on either the provincial or federal list. Although the representation of the local units would still be unequal (in contrast to the United States and Australia), an increase in the proportionate share of seats of the eastern and western regions in the new House was proposed, with Ontario and Quebec retaining their present Upper House complement of twenty-four. Bills for the raising or spending of money would still originate in the House of Commons, and section 53 of Bill C-60 made explicit that the government would continue to depend for its survival only on the confidence of the Lower House. In addition, the new chamber would possess the power only to delay and not to veto laws originating in the Commons. In stated circumstances, according to section 67, provision existed for "accelerated passage" of a Bill not approved by the Upper House. Like the U.S. Senate, it would have a new power to confirm or reject executive and judicial appointments but not the latter body's power to ratify treaties. Moreover, when confronted with measures officially characterized as being of "special linguistic significance", according to section 69, a double majority of English and French-speaking members would be needed for their passage. The altered Upper House then was to have a new role as a watchdog for protecting the interests of official language laws, with a mandatory concurrent voice for Anglophone and Francophone Senate blocs and, inferentially, a veto for either group in case of disagreement.

The unanimous, unsigned opinion of the Supreme Court, denying the existence of the asserted federal jurisdiction, examined the fundamental issue of the *purpose* of the Senate in Confederation. It cited as evidence the words of prominent framers of the B.N.A. Act in debates at Quebec City in 1865. For example, Sir John A. Macdonald had said, *inter alia*, that the institution was meant "to protect local interests and to prevent sectional jealousies",[43] and Liberal leader George Brown declared:

> But the very essence of our compact is that the union shall be federal and not legislative. Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step; and, for my part, I am quite willing that they should have it. In maintaining the existing sectional boundaries and handing over the control of local matters to local bodies, we recognize, to a certain extent, a diversity of interests; and it is quite natural that the protection for those interests, by equality in the Upper Chamber, should be demanded by the less numerous provinces.[44]

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[43] *Re*: Authority of Parliament in Relation to the Upper House, [1980] 1 S.C.R. 54, at 66, 102 D.L.R. (3d) 1, at 9.

[44] *Id.* at 67, 102 D.L.R. (3d) at 10.

"A primary purpose of the creation of the Senate, as a part of the federal legislative process," the opinion added, "was, therefore, to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation."[45]

The Court referred to the argument of the Attorney General of Canada that the power conferred by head 1 of section 91 to amend the "Constitution of Canada" was qualified only by the explicitly circumscribed exceptions referred to in the text, and that through it Parliament could amend any part of the Act (including, conceivably, even the division of powers). In rejecting this argument, the Court pointed out that head 1 of section 91 contained no power to amend the B.N.A. Act, but rather the "Constitution of Canada". "Canada" in the mentioned phrase, moreover, referred not to the geographical unit but to the federal juristic unit. "Constitution of Canada," the opinion added, "does not mean the whole of the British North America Act, 1867, but means the constitution of the federal government, as distinct from the provincial governments." The division of powers, particularly, could not be amended by invoking head 1 of section 91. The opinion indicated that there was a constitution of the provinces amendable under head 1 of section 92, a "Constitution of Canada" amendable under head 1 of section 91 and provisions relating to the division of powers (or to common institutions such as the Senate or Crown) amendable by neither unilaterally.[46] One of the "protected" areas in head 1 of section 91 is the prohibition of amendments affecting the requirement for annual sessions of Parliament, with section 17 of the B.N.A. Act contemplating a tripartite Parliament consisting of Queen, House of Commons and *Senate*.[47]

With respect to the complementary reference questions in section 2 of Bill C-60 concerning the power of Parliament to change the name of the Senate, the numbers and proportions of members represented in the Senate or the method of appointment, qualifications and tenure of senators, the Court was cautious. It attempted to answer some of the questions but found the absence of context troublesome; *e.g.*, "[t]he imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate. However, to answer this question we need to know what change in tenure is proposed."[48] The Court concluded compendiously that "it is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process."[49]

In his learned critique of the opinion, Professor Hogg concludes:

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[45] *Id.*
[46] *Id.* at 67-70, 102 D.L.R. (3d) at 10-12.
[47] *Id.* at 73-74, 102 D.L.R. (3d) at 15.
[48] *Id.* at 76-77, 102 D.L.R. (3d) at 17.
[49] *Id.* at 78, 102 D.L.R. (3d) at 18.

> (1) The court was wrong to interpolate the requirement that an amendment under section 91(1) must be 'of interest only to the federal government'; (2) even if the requirement is interpolated, the abolition or alteration of the Senate as presently constituted satisfies the requirement because the Senate does not function as a protector of regional or provincial interests; and (3) the court's decision actually precludes reforms which would convert the Senate into an Upper House which would be an effective protector of regional or provincial interests.[50]

In view of the fact that Bill C-60 was drafted exclusively by federal legal experts, is it reasonable, it may be asked, that the measures referred to in (3) above by Professor Hogg, which would effectively protect "regional or provincial interests", should be decided by the central government alone? Should the ambitious rival of the provinces alone determine what measures are best calculated to protect their interests? What if the provinces decided that equality of representation of the units, on the model of American or Australian federalism, was preferable in a reconstituted Upper House? Would the federal proposal outlined above, apportioning half the seats to Ottawa, protect their interests as effectively? Surely in a federal system the structure of such a House is a matter of mutual, not solely federal, concern.[51]

Although the Court had stated, as Professor Hogg declares in (1) above, that an amendment must be "of interest only to [the federal] government",[52] it did not interpret that restriction harshly or unreasonably. While precluding Parliament from making such amendments as would alter "the fundamental features, or essential characteristics" of the institution, it went on to say that a mandatory retirement age for senators of seventy-five[53] or, at least implicitly, the provision of senatorial representation for the Northwest Territories or the Yukon, does not alter the basic character of the Senate.[54] However, the substitution of the altogether different House of the Federation without provincial consent would do so.

Professor Hogg is rightly concerned about an unduly rigid process of institutional amendment. Conceivably, when he wrote, it was arguable that only an amendment secured from Westminster after unanimous provincial consent could alter the body. However, the intervening passage of the Constitution Act, 1982 has provided an agreed-upon formula for change. Pursuant to paragraphs 42(1)(*a*), (*b*) and (*c*) the powers, composition, numbers and residence qualifications for senators may be decided by the general amending formula in subsection 38(1).

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[50] *Supra* note 38, at 642.

[51] *See, e.g.*, K. WHEARE, FEDERAL GOVERNMENT 87 (4th ed. 1963): "Many people regard it as essential to a government if it is to be federal that the regions should have equal representation in the upper house of the general legislature."

[52] *Supra* note 43, at 71, 102 D.L.R. (3d) at 13.

[53] *Id.* at 76-77, 102 D.L.R. (3d) at 17.

[54] *Id.* at 67, 102 D.L.R. (3d) at 10.

The fact, however, that historical forces have to a large extent deprived the Senate of its intended role as a guardian of regional or provincial interests, does not signify that the provinces might not want a share in reconstituting a new Upper House better designed to protect that interest. They surely have a highly significant interest in such a matter. In fact, this is a general characteristic of federal Upper Houses. The Court, it is suggested, has asked the proper question and given the right answer. It is hard to disagree with Professor Gérald Beaudoin of the University of Ottawa in summing up the result: "Cet arrêt est capital. Il restreint la portée que certains juristes donnaient jusque-là au pouvoir fédéral d'amendement."[55]

C. *The "Patriation" Controversy*

Although the provinces and the federal government since 1927 had unsuccessfully sought to arrive at a domestic amending formula, it was only in the past decade or so that two major attempts were made to rewrite the whole constitution.

The first effort, which culminated in the 1971 Victoria Conference, almost succeeded. Opposition by Quebec, however, led to an impasse which resulted in failure. It was the position of that province that the priorities were wrong. It was argued that more attention should be given to the redistribution of powers including jurisdiction over the French language and culture, before an amending formula could be agreed upon. After that Conference foundered there was a lull until April 1975, when Prime Minister Trudeau again broached the subject with the provinces.[56] In his letter of 31 March 1976 to the premiers, the Prime Minister set out as a minimum requirement the need for simple patriation of the constitution. "Whereas unanimity of the federal government and the provinces would be desirable even for so limited a measure," he added, "we are satisfied that such action by the Parliament of Canada does not require the consent of the provinces and would be entirely proper since it would not affect in any way the distribution of powers."[57] There followed a course of negotiations culminating, in the summer of 1980, in a measure of agreement between Ottawa and the provinces on some of the twelve topics under consideration. The final sessions were presided over by Jean Chrétien, then federal Minister of Justice, and Roy Romanow, then Saskatchewan's Attorney General and Deputy Premier. While agreement was not reached in all the areas, progress had been made in about half of the matters being considered by the federal-provincial task force.

Prime Minister Trudeau then announced a federal-provincial conference on the constitution for mid-September 1980, mentioning the

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[55] *Supra* note 3, at 339.

[56] P. Fox, Politics: Canada 15 (4th ed. 1977).

[57] *Id.* at 35-36.

urgency of reaching a consensus on a new constitution in the wake of a favourable vote for continued federalism in Quebec's "sovereignty-association" referendum in May. Mr. Trudeau had intervened actively in the referendum debate which resulted in support for continued membership in Canada by sixty per cent of those voting. The Prime Minister had vowed in the campaign to bring about constitutional renewal in return for a positive result. In one way or another, he seemed to say, the constitution would have to be patriated with an amending formula.

Mr. Trudeau's desire for a constructive meeting with the premiers was, however, set back when the secret "Kirby" memorandum outlining federal constitutional strategy was leaked to the Quebec delegation just before the conference. The Quebec members then circulated the incendiary "ministers' eyes only" document to the other provinces. Among other things, the document said:

> To secure a maximum of public understanding and support, action taken after the First Ministers' Conference should appear to be a natural consequence of what has happened at the conference, not an abrupt change of direction or a new start.
>
> This places an admittedly heavy burden on the prime minister. It suggests that, while he strives for agreement, he must also shape and lead the deliberations toward *action*.
>
> In other words, the public should *expect* implementation at the end of the conference.
>
> This underlines the importance of the prime minister's closing speech which, in addition to making clear the outcome of negotiations, should pave the way for the implementation phase.[58]

The memorandum was interpreted by the premiers as representing covert bad faith by the federal government from the start; Ottawa had resolved to proceed unilaterally, whatever might result from the actual conference. According to the memorandum, the Prime Minister was to prepare public opinion for the implementation phase which would *inevitably* follow. From the premiers' perspective, the conference seemed to be directed more to the cultivation of a favourable public mood than to productive negotiations with the provinces.[59]

1. *The September 1980 Conference*

At the conference which convened in mid-September 1980, Mr. Trudeau warned participants that he was "ready to plunge ahead with changes whether or not he [got] the consent of the provinces . . . ".[60]

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[58] REPORT TO CABINET ON CONSTITUTIONAL DISCUSSIONS, SUMMER, 1980, AND THE OUTLOOK FOR THE FIRST MINISTERS' CONFERENCE AND BEYOND 55 (30 Aug. 1980).

[59] Erb, *Alleged memo on constitution stuns premiers*, Star-Phoenix (Saskatoon), 22 Aug. 1980, at 1, col. 1-2.

[60] Tierney, *Reform or else — PM*, The Citizen (Ottawa), 9 Sep. 1980, at 1, col. 5 (Capital Edition).

Premiers Lévesque of Quebec, Bennett of British Columbia, Peckford of Newfoundland and Lyon of Manitoba appeared to lead the delegations most strongly opposed to a unilateral initiative; the premiers of Saskatchewan, Alberta and Prince Edward Island also said they could accept no federal action predicated on an artificial deadline.[61] Ontario and New Brunswick were supportive of the federal government. Mr. Trudeau was alternately conciliatory and firm. He appeared to be ready to engage in negotiations with the provinces on "resources, inter-provincial trade, communications and the Senate", while deploring the disposition of some provinces in the past to withhold consent as a bargaining device. The Prime Minister took the position that the entrenchment of a charter of rights in the constitution was "non-negotiable", a stance that prompted Premier Lyon of Manitoba to accuse him of "moving Canada towards a republican system of government".[62] Premiers Blakeney and Lougheed agreed with Premier Lyon, while on this point Premier Davis of Ontario supported the Prime Minister. Mr. Trudeau "described his goal as giving 'power to Canadians to protect themselves against arbitrary and unwarranted invasion of their basic rights' by governments or anyone else".[63]

The conference was interspersed with acrimonious exchanges between the Prime Minister and Premier Lévesque, the latter denouncing unilateral patriation as a "hollow, false and misleading gesture" which would represent a betrayal of Quebec.[64] Mr. Trudeau replied that patriation would be a neutral gesture conveying no additional jurisdiction to any government but giving "more power to the people".[65]

Especially controversial were federal proposals (strongly supported by the Prime Minister) for the entrenchment of language and language education rights, with the Prime Minister arguing that provincial legislatures in the past had failed to protect adequately the Anglophone minority in Quebec or the Francophone minority in other parts of the country.[66] Here again the Quebec delegation was concerned that entrenchment could override the province's Charter of the French Language.[67]

As the conference concluded no consensus had emerged, although the parties had met in private session to engage in quiet negotiations away from the media. In these secret conversations Alberta was said to desire more power over resource management, Newfoundland jurisdic-

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[61] *See id.*

[62] McCabe, *Rights charter focus of battle*, The Citizen (Ottawa), 10 Sep. 1980, at 1, col. 4 (Final Edition).

[63] *Id.*

[64] Butler, *Lévesque, PM clash on BNA*, The Citizen (Ottawa), 11 Sep. 1980, at 1, col. 1 (Final Edition).

[65] *Id.*

[66] McCabe, *PM's language plea meets stiff resistance*, The Citizen (Ottawa), 11 Sep. 1980, at 8, col. 1 (Final Edition).

[67] *Id.*

tion over offshore resources and fisheries, and Quebec "a whole bundle".[68] Ontario, conversely, was said to be ready to urge the Prime Minister to embark on unilateral action.[69] A Gallup Poll, however, showed that only twenty-seven per cent of Canadians questioned agreed that the federal government should act unilaterally to bring the constitution home.[70] When the conference ended Mr. Trudeau said that he would defer further action until he had consulted the Liberal caucus and cabinet shortly.[71]

2. *The Aftermath of the Conference*

The conference having ended in deadlock, the Prime Minister, after making the necessary soundings, announced on 2 October that he was proceeding unilaterally with the patriation of the constitution. Mr. Trudeau said that he was acting reasonably to break a fifty-three-year impasse, and that any group opposing his initiative "would look foolish in the eyes of the world".[72] The government planned to proceed with three out of twelve items that had been discussed at the federal-provincial negotiations of the preceding summer: "patriation with a procedure for arriving at an amending formula, entrenching a charter of rights and enshrining the principle of equalization".[73] (Except for equalization, there had been little agreement on these matters during the negotiations.) Provision was to be made for agreeing on an amending formula through consensus. If no agreement was arrived at within two years a modified version of the 1971 Victoria formula was to come into effect. However, if eight provinces with eighty per cent of the population agreed in the interim on an alternative formula, a national referendum would be held to choose between it and the Victoria formula. Among matters to be included in the charter were fundamental freedoms, democratic, legal, egalitarian and language rights.[74]

In his 2 October address to the nation, the Prime Minister emphasized that for fifty-three years the first ministers had been unsuccessfully searching for a domestic amending formula. The procedure used assumed that unanimity among the federal and provincial governments was necessary in order to secure agreement. "Unanimity

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[68] McCabe & Butler, *First ministers ready to admit failure in talks*, The Citizen (Ottawa), 13 Sep. 1980, at 1, col. 4.

[69] *Id.*

[70] Butler, *Support from public for unilateral action fading, Gallup shows*, The Citizen (Ottawa), 13 Sep. 1980, at 8, col. 1.

[71] Tierney, *PM ready to act on his own*, The Citizen (Ottawa), 15 Sep. 1980, at 1 (Capital Edition).

[72] Sheppard, *Rights charter would bind provinces. NDP offers support, Tories will fight move*, The Globe and Mail (Toronto), 3 Oct. 1980, at 1, col. 5 (Metro Edition).

[73] *Id.*

[74] *Wording of Liberals' charter of rights*, The Globe and Mail (Toronto), 3 Oct. 1980, at 10 (Metro Edition).

gave each first minister a veto; that veto was increasingly used to seek the particular good of a particular region or province. So we achieved the good of none: least of all did we achieve the good of all, the common good.''[75] The recent conference had involved bargaining ''freedom against fish, fundamental rights against oil'' but freedom and rights were the common heritage of every Canadian. He emphasized the promise made to Quebeckers that in the event of a negative vote in the 20 May referendum constitutional renewal would take place.[76]

Opposition leader Joe Clark stressed in reply that the constitution was no ordinary law and could not be ''arbitrarily imposed on this nation by any one individual or government''.[77] Mentioning that he had first seen a copy of the proposed joint resolution approximately ninety minutes previously, Mr. Clark referred to the new provincial obligations it imposed in the areas of education and property and civil rights. Another invidious element was the double standard the Prime Minister envisioned for change. ''For those changes he wants,'' Mr. Clark said, ''Ottawa will act alone. For the changes that others might seek later, he requires unanimous consent for at least two years and then an unknown formula.''[78] In addition, moreover, to the formula put in place for securing amendments by governmental consensus, an alternative formula with a popular ''binding referendum'' procedure would ''ignore entirely the elected legislatures''.[79] A final weakness in the proposal was the 9 December deadline the Prime Minister was imposing on Parliament for the passage of the resolution, which gave legislators only a very short time to consider such an important measure.[80]

New Democratic Party (N.D.P.) leader Ed Broadbent declared that his party had ''long favoured the entrenchment in the constitution of a certain set of fundamental liberties''.[81] The charter would make abuses such as the mistreatment of Japanese Canadians during the Second World War, or the imposition of the War Measures Act[82] on innocent victims in October 1970 more difficult. A notable omission in the proposals, however, was the absence of provisions guaranteeing provincial ownership and control of natural resources. Thousands of Canadians in every province feel cheated because of this omission, Mr. Broadbent said.[83]

After a torrid debate extending through October and November 1980 in which Joe Clark and his Conservatives staged a filibuster, on 2 December the Prime Minister agreed to prolong constitution hearings to 6

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[75] *Leaders' comments on patriation plan*, The Globe and Mail (Toronto), 3 Oct. 1980, at 11, col. 1 (Metro Edition).

[76] *Id.*, col. 2.

[77] *Id.*

[78] *Id.*

[79] *Id.*, col. 3.

[80] *Id.*

[81] *Id.*

[82] R.S.C. 1970, c. W-2.

[83] *Supra* note 75, at col. 3.

February 1981,[84] an extension the Tories had been seeking because of inadequate time to study the convoluted proposals. Had it not been for Mr. Clark's opposition, it is very probable that the government's unilateral initiative would have succeeded by Christmas. A special Senate-House of Commons committee had by then been holding hearings for four weeks, with more than 800 groups or individuals expressing a desire to make submissions.[85] In acquiescing in the request for further study, the government may have reflected an uneasiness about the seeming abruptness of its move in the face of deeply divided public opinion, along with the fact that the intricate charter and "popular referendum" proposals were novel and had not really received much study.

One of the casualties of the prolonged acrimonious debate was the harmony existing between the federal N.D.P., which came out in support of the unilateral proposal,[86] and its powerful Saskatchewan wing headed by Premier Blakeney, the only incumbent N.D.P. premier, who strongly opposed it.[87] As reasons for his opposition, Mr. Blakeney cited the federal government's decision to give a permanent veto over future constitutional change to the Senate,[88] an institution long opposed by the C.C.F.-N.D.P., and the lack of access by the province to international trade (with unqualified paramountcy for Ottawa).[89] Mr. Broadbent had been instrumental in having section 92A added to the "package", which provided for provincial regulatory power, subject to federal paramountcy, over *interprovincial* trade, but Mr. Blakeney pointed out that Saskatchewan resources such as potash, oil, wheat and uranium enjoyed a large global market, and in the overall context jurisdiction over interprovincial trade was of very limited usefulness.[90]

The developing controversy was marked by a diplomatic *contretemps* early in February when Mr. Broadbent accused British High Commissioner Sir John Ford of lobbying two British Columbia N.D.P. Members of Parliament, James Manly (Cowichan-Malahat-The Islands) and Ian Waddell (Vancouver Kingsway) by telling them that the proposed amendment would not provide adequate protection for western resources.[91] Almost providentially, in view of the ensuing storm, Sir John's term of office was just ending and he soon left the country. It was

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[84] Sheppard, *PM agrees to prolong constitutional hearings*, The Globe and Mail (Toronto), 3 Dec. 1980, at 1 (Metro Edition).

[85] *Id.* at 2, col. 4.

[86] Simpson, *NDP gives pledge of its full backing on patriation bill*, The Globe and Mail (Toronto), 6 Feb. 1981, at 1 (Metro Edition).

[87] Humphries, *Saskatchewan willing to join in further talks*, The Globe and Mail (Toronto), 6 Feb. 1981, at 10.

[88] *See* s. 47 of the proposed Constitution Act, 1981, in the Canada Act as originally drafted: The Globe and Mail (Toronto), 14 Feb. 1981, at 12, col. 6.

[89] *Supra* note 87.

[90] *Id.*

[91] Gray, *British diplomat says it openly: 'things could go wrong'*, The Globe and Mail (Toronto), 6 Feb. 1981, at 1.

not in fact clear whether he had contravened any rule of diplomatic protocol.

3. *The Polarization of Opinion*

Opinion by academics and others on Mr. Trudeau's initiative was sharply divided. In an issue of *Queen's Quarterly* published shortly after the proposal was made, two leading academics gave the Prime Minister strong support. The distinguished historian Arthur Lower declared: "Canada should be governed from the Capital of Canada, not from ten separate power centres. That way lies destruction. . . . It is not the duty of premiers to decide the fate of Canada, but the people of Canada themselves, in Parliament assembled."[92] Former Senator Eugene Forsey, while expressing *caveats* on some of the shortcomings of the charter, queried whether unanimous consent of the provinces was legally necessary to obtain an amendment; after fifty-three years "[t]he Government of Canada has now decided that enough is enough."[93] Canvassing the different options open to the British government, Professor Hogg said, "I conclude that the United Kingdom Parliament . . . is simply to act on the request, closing its eyes to whatever events or controversies have occurred within Canada."[94] Alberta political scientist Garth Stevenson brought out the perception of the relative importance of the units in the Canadian federation that was influential with many supporters of the federal initiative: "I see Canada itself as the primordial reality . . . and the provinces only as territorial entities that are useful for certain purposes but not of the same order of importance as Canada itself."[95] He too saw no rule requiring unanimous provincial consent for amendments.[96]

Implicitly challenging Lower's and Stevenson's view that in this controversy unalloyed central leadership was essential, York University political scientist Donald Smiley observed that "[f]ederal majoritarianism is subversive of both the parliamentary and the federal dimensions of the Canadian political community."[97] For him the defect in the federal strategy was that it forced Canadians to choose between national and provincial loyalties. Both were necessary, as the earlier Mr. Trudeau who wrote *Federalism and the French Canadians* would have conceded.[98] Professor Lederman argued that the British Government and

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[92] *The Prime Minister and the Premiers*, 87 QUEEN'S Q. 560, at 565 (1980).

[93] *The Constitution Bill*, 87 QUEEN'S Q. 566 (1980).

[94] *Commentaries: Amendment and Patriation*, 19 ALTA. L. REV. 369, at 371 (1981).

[95] *Commentaries: An Overview of the Trudeau Constitutional Proposals*, 19 ALTA. L. REV. 401, at 407 (1981).

[96] *Id.* at 408.

[97] *The Challenge of Canadian Ambivalence*, 88 QUEEN'S Q. 1, at 8 (1981).

[98] *Id.* at 9.

Parliament had been constituted trustees of the amending power for the preservation of a viable Canadian federalism:

> I believe the proper analysis of their position to be that they are in the position of trustees. They are trustees of the amending power for the whole of federal Canada on basic federal union matters. We put them in that position by asking for section 7 of the Statute of Westminster and by virtue of a federal/provincial conference in which every province agreed with the federal government and Parliament that this was to be so.[99]

"Through more than a decade," wrote Trent University political scientist Denis Smith,

> Mr. Trudeau participated in constitutional meetings on the assumption that unanimity is necessary before major constitutional change can proceed. Now the prime minister declares that he can ignore the principle on the grounds that unanimity, defined on his terms, is too difficult to achieve. Does Ottawa's failure to gain *its* objectives justify it in declaring the process invalid?[100]

Referring to Mr. Trudeau's sponsorship of unilateral patriation, retired University of Toronto political economist Alexander Brady wrote:

> His federal militancy was partly a response to provincial militancy. But his proposal for unilateral action was a mistake. He thus appeared to reject flatly the federality of Canada, provoked in all provinces, except Ontario and New Brunswick, a fierce hostility, and helped to generate harsh political tensions and confusions that ultimately compelled an appeal to the Supreme Court.[101]

The Prime Minister asserted that constitutional renewal was imperative because of the favourable vote for federalism in the 20 May 1980 Quebec referendum on "sovereignty-association". While seventy-four Quebec Members of Parliament agreed with him, both the Premier and the Opposition leader in that province opposed a constitutional process from which their province was excluded and through which it had lost its veto.[102] The judicious pre-patriation assessment of Professor Edward McWhinney remains sound:

> The irony is that 'patriation' of the B.N.A. Act and insertion of an 'entrenched' bill of rights have become priority issues devised by English Canada and used by a French-Canadian Prime Minister as a response to Quebec demands that ignore these issues. These proposals should, I think, be appraised on their merits and considered as English-Canadian demands whose impact, if any, will be in English Canada.[103]

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[99] *Commentaries: Amendment and Patriation*, 19 ALTA. L. REV. 372, at 373 (1981).

[100] *Napoleon IV in the Making*, MACLEAN'S, 19 Jan. 1981, at 8.

[101] *The province and the constitution*, 88 CAN. BANKER & I.C.B. REV. 67, at 72 (1981).

[102] Sheppard, *Fits and starts on the road to autonomy*, The Globe and Mail (Toronto), 15 Apr. 1982, at P-4 (Metro Edition).

[103] QUEBEC AND THE CONSTITUTION 1960-1978, 114-15 (1979).

Ultimately history will decide whether the leaders of Parliament or the Quebec National Assembly speak for Quebec.

4. *The Response of the Dissenting Provinces*

Six dissident provinces agreed almost immediately to test the constitutional validity of the federal government's initiative before the highest provincial courts of Newfoundland, Manitoba and Quebec. The Prime Minister insisted that he had obtained expert advice to the effect that his project was constitutional and that no reference to the Supreme Court of Canada was necessary. In view of Ottawa's disinclination to submit its package to a constitutional test, the provinces were faced with the option either of acquiescing in the proposals, a course they found unacceptable, or of using the provincial reference power to send the disputed provisions to their own courts for constitutional scrutiny. The latter involved a calculated risk. Should the provincial courts reject their case entirely, they would lose credibility and would probably thereafter be able to make only a weak and unconvincing case. Given a favourable decision, or even unfavourable decisions with strong dissents, however, public opinion might swing more decisively in their favour and Ottawa would be constrained, finally, to submit the case to the Supreme Court of Canada to get an authoritative pronouncement at the highest level on its validity. (Should they lose all the cases outright, of course, they could always appeal to the Supreme Court themselves.)

In each of the three provincial references, all six of the dissenting provinces were represented by counsel and were opposed by the federal government. In none of these references did Ottawa's provincial allies, Ontario and New Brunswick, appear to reinforce the federal position. They did support federal counsel later, however, when the package reached the Supreme Court of Canada.

The Newfoundland Court of Appeal, which decided three to zero in favour of the provinces, was the only provincial tribunal to decide against Ottawa.[104] Perhaps symbolically, the Newfoundland opinion was given on 31 March 1981, the thirty-second anniversary of the province's entry into Confederation. The other two decisions, although not unanimous, supported the federal government. The Manitoba judges were divided three to two,[105] and the Quebec judges decided four to one for Ottawa.[106]

After Newfoundland's unanimous pro-provincial decision, the Prime Minister relented from his former position, agreeing to submit his

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[104] Reference *re* Amendment of the Constitution of Canada (No. 2), 29 Nfld. & P.E.I.R. 503, 118 D.L.R. (3d) 1 (Nfld. C.A. 1981).

[105] Reference *re* Amendment of the Constitution of Canada (No. 1), 7 Man. R. (2d) 269, [1981] 2 W.W.R. 193, 117 D.L.R. (3d) 1 (C.A.).

[106] Reference *re* Amendment of the Constitution of Canada (No. 3), 120 D.L.R. (3d) 385 (decision reported in French in [1981] Que. C.A. 80).

proposals by means of a reference to the Supreme Court of Canada.[107] Only in this way could public misgivings about the constitutionality of the proposals be allayed. The provinces had succeeded, finally, in securing the opportunity to present their case before the nation's highest forum. They would in any event have been able to appeal the unfavourable result of the Manitoba reference. There was always a possibility, however, that had all of the provincial references been negative, the package could have been enacted by the British Parliament before further proceedings could be initiated.

5. *The Kershaw Report*

Before the provincial reference decisions were rendered, the Foreign Affairs Committee of the British House of Commons, presided over by Sir Anthony Kershaw, reported on 30 January 1981, rejecting the Canadian Prime Minister's contention that the British Parliament must pass automatically any amendment requested by Ottawa, regardless of provincial objections. In the words of the Committee:

> If the U.K. Parliament were to proceed on the basis that it ought to accede to such requests automatically (subject only to the requirements of correct legislative form), it would be treating itself as for all relevant purposes the agent of the Canadian Government and Parliament. It would thus be treating the Canadian Government and Parliament as having, in constitutional reality, a substantially unilateral power of amending or abolishing Canada's federal system. For any one Government and Parliament to have such a unilateral power is inconsistent with the federal character of that system; nor is it in accord with the 'rules and principles relating to amendment procedures' which have 'emerged from the practices and procedures employed in securing various amendments to the British North American [*sic*] Act since 1867'.[108]

The Kershaw Report declared that the British Parliament was not bound, even in a conventional sense, to act automatically on a federal request. In ordinary circumstances, a request by the Canadian Government and Parliament would suffice to convey the wish of Canada as a whole for the desired amendment. However, where a request for an amendment or patriation would affect the federal structure of Canada, and was opposed by the provinces, something more was required. In 1931 the U.K. Government and Parliament had assumed a supervisory role over amendments which was "unpalatable and thankless" and pregnant with "embarrassing potentialities" but it nevertheless involved a responsibility to Canada as a "federally-structured whole".[109] It had nothing to do with Canada's general welfare but involved simply the responsibility of "exercising the U.K. Parliament's residual powers in a manner

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[107] Sheppard, *PCs reject Trudeau's BNA deal*, The Globe and Mail (Toronto), 1 Apr. 1981, at 1 (Metro Edition).

[108] FIRST REPORT FROM THE FOREIGN AFFAIRS COMMITTEE (U.K. House of Commons, sess. 1980-81) at xlv, para. 83 [hereafter cited as KERSHAW REPORT].

[109] *Id.* at lvi, paras. 112-13.

consistent with the federal character of Canada's constitutional system . . . ".[110] Accordingly, a request for patriation by a joint resolution which would affect significantly the federal structure of Canada should be conveyed to the U.K. Parliament with "*at least that degree of Provincial concurrence* (expressed by governments, legislatures or referendum majorities) *which would be required for a post-patriation amendment* affecting the federal structure in a similar way".[111] The Kershaw Report referred to the proposed Victoria amending formula as satisfying the requirement described.

A request for patriation and an amending formula that differed materially from the present one might, however, be granted by Westminster, even without provincial concurrence. If Canada were to seek patriation and a domestic amending formula with a view simply to (a) terminating Britain's remaining legislative powers and (b) securing an amending formula requiring such a degree of provincial support, at least, as was set out in section 38 of the proposed Act (*i.e.*, the Victoria formula), it might be proper for Britain to accede to such a request. As contrasted with the more convoluted prescriptions of the charter, which unquestionably derogated from provincial jurisdiction without provincial consent, the simpler amendment envisaged above would be acceptable because "it would not substantially affect the federal character of Canada's constitutional system," nor would it be incongruent with the United Kingdom's historical role or legal duties.[112]

In connection with strong representations made by Indians, Inuit and Métis peoples, the Committee found that all treaty obligations entered into by the British Crown had become the responsibility of the Government of Canada, at the latest with the enactment in 1931 of the Statute of Westminster. The Royal Proclamation of 1763 had never been entrenched nor protected against encroachment by the legislative power of the Canadian Parliament. It would be improper, in view of the transfer referred to, for the U.K. Parliament to discuss or deliberate on native rights because "these [were] matters for the appropriate Canadian authorities."[113] It would also be improper, because of section 4 and subsection 7(1) of the statute, for the British Parliament to enact legislation relating to native peoples in Canada without the request and consent of the Canadian Government.[114]

Although the Kershaw Report rejected the claim made by all the dissenting provinces save Saskatchewan for unanimous provincial consent prior to an amendment affecting provincial jurisdiction, its tenor was powerfully to reinforce the provincial position. It clearly indicated that the consent of only two provinces (Ontario and New Brunswick) was insufficient and it denied outright Ottawa's contention that it was

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[110] *Id.* at lvi, para. 113.
[111] *Id.* at lvi, para. 114.
[112] *Id.* at lvii, para. 115.
[113] *Id.* at lviii, para. 118.
[114] *Id.* at lviii, para. 119.

improper for the U.K. Parliament to go behind a request. The role of residual trusteeship that the U.K. had assumed in 1931 towards Canada as a "structured-federal whole" precluded automatic compliance.

In its reply to the Kershaw Report, the Canadian Government emphasized that since the Balfour Declaration of 1926, Canada had been "a totally independent nation in reality, though not in law";[115] the Dominion Governments were " 'autonomous' and 'equal in status', in no way subordinate one to another in any aspect of their domestic or external affairs, though united in a common allegiance to the Crown".[116] The 1981 Paper then explored the constitutional consequences following from the coordinate executive and legislative status of the United Kingdom and Canada since 1926.[117]

The paradox of independence in reality but dependence in law was resolved by examining "the restraint of legal power by political usage or convention".[118] Just as the regal or vice-regal power to give Royal Assent to bills is now invariably exercised, by convention, in Britain or Canada, on the advice of the incumbent Prime Minister and Cabinet, with the achievement of Canadian independence a convention arose that any remaining legal powers vested in Britain with respect to Canada would be exercised "in accordance with the wishes of the Canadian authorities".[119] Moreover, the provinces had no standing to submit requests for constitutional amendments,[120] and the Statute of Westminster, 1931 did not alter the prevailing practice; it preserved the *status quo*.[121] Both before and after 1931 the convention of invariable British compliance with a Canadian request had been consistently followed.[122] The convention was rooted in the principle of responsible government which placed "political decision-making in the hands of those who are responsible through the ballot box to the persons who will ultimately be affected by the decisions in question".[123]

The 1981 Paper criticized the provincialist bias of the witnesses appearing before the Kershaw Committee, many of whose submissions suffered from "illogicality and errors of fact". The 1915 amendment conferring senatorial representation on the western provinces was cited as an instance of the non-involvement of the British Government in Canadian affairs inasmuch as the request "significantly affected

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[115] J. CHRÉTIEN, THE ROLE OF THE UNITED KINGDOM IN THE AMENDMENT OF THE CANADIAN CONSTITUTION 5, para. 10 [hereafter cited as 1981 PAPER].

[116] *Id.*

[117] Judicial independence was only attained in 1949 with the abolition of Canadian appeals to the Privy Council: *see* A.G. Ont. v. A.G. Can., [1947] A.C. 127, at 153, [1947] 1 W.W.R. 305, at 319, [1947] 1 D.L.R. 801, at 814 (P.C.); An Act to Amend the Supreme Court Act, S.C. 1949 (2d sess.), c. 37, s. 3.

[118] 1981 PAPER, *supra* note 115, at 5-6, para. 13.

[119] *Id.* at 6, para. 14.

[120] *Id.* at 7-8, para. 18.

[121] *Id.* at 8-9, paras. 19-22.

[122] *Id.* at 9-15, paras. 23-29.

[123] *Id.* at 15, para. 30.

provincial interests, there was public provincial opposition, and some Canadian parliamentarians were calling for provincial consultation'', but the amendment was nonetheless enacted without any difficulties being raised by the British Parliament.[124] Paragraph 71 incisively summarized the 1981 Paper's criticism of the Kershaw Report:

> 71. Even if the Kershaw Committee were correct in its mistaken belief that the Constitution of Canada requires a measure of provincial concurrence before the Parliament of Canada can properly approach the United Kingdom Parliament to request a constitutional amendment 'significantly affecting the federal structure of Canada', the requirement would not apply to the proposal currently under discussion, because, as has been explained earlier, that proposal, when implemented, will not affect the 'federal structure' of Canada in any way that would be detrimental to the interests of the provinces.[125]

In its Supplementary Report of 15 April 1981[126] the Kershaw Committee took account of the Canadian Government's reply to its original report.

Despite the allegations of ''errors of fact'' in submissions to the Committee, the Canadian Government was not able ''to point to a single error of fact or mis-statement of law anywhere in the Report. Nor with one exception, does the paper refer to any fact or precedent which, in the Canadian Government's view, was overlooked by the Committee.''[127] The single exception concerned the British North America Act of 1915, giving senatorial representation to the western provinces.[128] Contrary to what the 1981 Paper asserted, no province raised any objection, nor was there any political controversy surrounding the 1915 request.[129] Furthermore, although, as the Canadian Government declared, the amendment ''significantly affected Provincial interests'' in a loose sense, ''it did not affect Provincial interests in the sense which concerned us throughout our Report, because it did not affect the rights, powers or privileges of any Provincial government or legislature.''[130]

In response to the 1981 Paper's statements that Canadian requests for amendment to the B.N.A. Act had ''always'', ''invariably'' and in ''every'' case been acted upon by the U.K. Government ''in the form requested'', the Supplementary Report cited as counter evidence Canadian requests for amendments in 1907 and 1920. In the case of the 1907 request for an amendment altering provincial subsidies, the Canadian Government repeatedly contended for the retention of the words ''final and unalterable'', which were the source of a complaint by British Columbia. In spite of representations by the Canadian Prime

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[124] *Id.* at 6-7, paras. 15-16.

[125] *Id.* at 31-32.

[126] SECOND REPORT FROM THE FOREIGN AFFAIRS COMMITTEE (U.K., House of Commons, sess. 1980-81) [hereafter cited as SUPPLEMENTARY REPORT].

[127] *Id.* at vi, para. 4.

[128] *Id.* at vi-vii, para. 5.

[129] *Id.* at vii-viii, subpara. 6(iii).

[130] *Id.* at viii, subpara. 6(v).

Minister, who was in London, the deletion of the disputed words was accepted after the U.K. Government had rejected the Canadian Government's contentions.[131] The U.K. Government had also repeatedly declined to act on the 1920 request which would have conferred extra-territorial legislative power on the Canadian Parliament.[132] Such instances refuted the Canadian argument that compliance by the U.K. Government with a request had always been automatic.

The Supplementary Report maintained the unreasonableness of the Canadian accusation of an "intolerable interference with the internal affairs" of Canada.[133] While it would be improper for the United Kingdom to consider the substance or merits of a requested amendment, it had to satisfy itself that the *process* was not contrary to the established precedents. The 1981 Paper continually stressed that only the Canadian Government and Parliament were responsible to the Canadian electorate and that objections should be dealt with in the domestic forum. However, if the U.K. Parliament enacted the package in its present form over provincial objections, it "*would stand unaffected by the election results*".[134] The provisions would then be entrenched and forever unalterable by ordinary statute.

In conclusion, it was affirmed that any proposition that the U.K. Parliament should automatically accede to a Canadian request was "inherently unreasonable".[135] "The proposition implies," the Supplementary Report added,

> that the UK authorities would be bound to accede automatically to a request even if that request were to abolish the Provinces against the protests (formally conveyed to the UK authorities) of all or most Provincial governments or legislatures, or were found by Canadian courts to be unconstitutional, or were made without electoral mandate and if enacted could not be revoked by a subsequently elected Canadian Parliament.[136]

As to the Canadian Government's assertion that while the present request directly affected the rights and powers of provincial governments, it would not be "detrimental to provincial interests", that was the type of substantive assessment that the U.K. Parliament "*ought not to make and has not made* at any time since 1867 . . . ".[137]

The Supplementary Report concluded with the admonition that "[a]ny judgment of the Supreme Court of Canada, to the extent that it deals with the matters we have canvassed, is bound to weigh heavily with your Committee and with the House."[138]

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[131] *Id.* at xviii-xix, paras. 26-27, subparas. 27(i)-(iv).

[132] *Id.* at xviii, para. 26. *See also* KERSHAW REPORT, *supra* note 108, at xxxiv, para. 62.

[133] SUPPLEMENTARY REPORT, *supra* note 126, at xx, para. 29.

[134] *Id.* at xx, para. 31.

[135] *Id.* at xxi, para. 33.

[136] *Id.*

[137] *Id.* at xxi-xxii, para. 33.

[138] *Id.* at xxii, para. 36.

6. *The Provincial References*

(a) *Newfoundland*

In a unanimous decision for the provinces the Newfoundland Court of Appeal emphasized the federal structure of Canada, affirming that "[t]he very nature of the federation requires that the rights and powers of its constituent units be protected."[139] The opinion took pains to distinguish between those categories of amendments solely affecting federal powers, which it would be proper for the Canadian Houses of Parliament, of their own accord, to request the British Parliament to enact, and those touching provincial jurisdiction, which were unamendable without the prior consent of the provinces:[140]

> By attempting to secure from the Parliament of Great Britain an amendment that would affect the fundamental rights of the Provinces without first obtaining the consent of the Provinces, the Canadian Houses of Parliament would be arrogating to themselves an authority they do not possess, an authority that would negate the plenary and exclusive power of the Provinces to legislate on matters within their competence and would provide access for Parliament into the provincial domain from which they are constitutionally excluded. They would, in fact, be asserting a jurisdiction that would enable them to obtain indirectly what they cannot legally obtain directly.[141]

In view of the fact that the charter was still undergoing amendment and that its final form was not yet determined, federal counsel had urged that it would be premature and speculative for the Court to answer the first reference question, concerning whether provincial powers would be abridged or altered if the charter was enacted by the British Parliament. This was especially the case because the first question went on to ask in what respects, if any, the powers of provincial legislatures or governments would be affected by such an enactment. Obviously, if the terms were unknown, the nature of the alteration could not be defined. While conceding that there was some merit in this position, the Court pointed to section 52, the "supremacy clause" which rendered "of no force or effect" federal or provincial legislation conflicting with the constitution. Since this provision was in general terms and "not open to change" there would necessarily be some infringement of provincial powers.[142]

Of central importance in the enquiry (and an element unique in the Newfoundland reference) was question 4, concerning whether the 1949 Terms of Union between the province and Canada could be amended "directly or indirectly", according to the proposed new amending procedure, without the consent of the government, legislature or a

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[139] Reference *re* Amendment of the Constitution of Canada (No. 2), *supra* note 104, at 528, 118 D.L.R. (3d) at 24.

[140] *Id.* at 528-29, 118 D.L.R. (3d) at 25.

[141] *Id.* at 528, 118 D.L.R. (3d) at 24.

[142] *Id.* at 530-31, 118 D.L.R. (3d) at 26-27.

majority of the people of the province voting in a referendum.[143] The text of question 4, referring particularly to Term 2 (the geographical boundaries of Newfoundland) and Term 17 (education, including an entrenched guarantee for denominational schools), revealed some of the main concerns of the provincial government. Ever since the Privy Council had rendered a favourable judgment for Newfoundland in *In Re Labrador Boundary*[144] in 1927, Quebec had disputed the fairness and legality of the award,[145] and Newfoundlanders were apprehensive that the new amending procedure might result in a revision of the boundary without their participation or consent. It was also arguable that the province, which had Dominion status before 1949, had brought a strip of territorial waters and rights to mineral resources in the appurtenant continental shelf into Confederation with it, as part of its "boundaries" or ancillary to its boundaries, and there could also be anxiety on this score.

Many Newfoundlanders looked upon the Terms of Union as perpetual and inviolable, as amounting to an unalterable agreement between essentially sovereign communities, and were suspicious of the possible effect of a unilaterally-imposed amending formula which could lead to a divestment of their rights without their consent.

While section 3 of the British North America Act, 1871 precluded the alteration of a province's boundaries without its consent (and Term 3 applied the foregoing section 3 to any proposed amendment of Term 2), there would be no reason in principle why section 3 could not be repealed by the new amending formula. If section 43, requiring the consent of a province to the alteration of a provision applying solely to it (*i.e.*, providing a provincial veto) could be repealed, then Newfoundland's territorial and educational rights could be abrogated without her consent. Although subsection 47(2) declared that the general amending formula did not apply to section 43, section 47 itself could be changed under the general amending formula and thus, circuitously, in strict law, the possibility existed of altering these vital terms without Newfoundland's consent.[146] Moreover, under the "popular referendum" formula which could be activated in cases of non-concurrence by provinces within a stipulated time under the general amending formula, amendments altering the Terms of Union were possible without the consent of the

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[143] *Id.* at 531, 118 D.L.R. (3d) at 27.

[144] 43 T.L.R. 289, [1927] 2 D.L.R. 401 (P.C.).

[145] In 1979, in a new map issued by the Quebec Lands and Forests Department, the Quebec-Labrador boundary was redrawn in a way that deviated substantially in Quebec's favour. *Cf.*: "Quebec has never before accepted the 1927 ruling. Other maps issued by Quebec until now have shown Labrador as part of Quebec and ignored the 1927 boundary or shaded Labrador the same colour as Quebec or a third colour, different from those used for Quebec and Newfoundland.": Cleroux, *Quebec map draws new Labrador border*, The Globe and Mail (Toronto), 1 Sep. 1979, at 1.

[146] Reference *re* Amendment of the Constitution of Canada (No. 2), *supra* note 104, at 533-34, 118 D.L.R. (3d) at 28-29.

legislature "but not without the consent of the majority of the Newfoundland people voting in a referendum".[147]

(b) *Manitoba*

In a carefully balanced opinion, Chief Justice Freedman of Manitoba rejected the provinces' contention that there was a conventional requirement for prior provincial consent to an amendment detracting from provincial powers:

> Is it a constitutional convention that the Federal power will not seek an amendment of the Constitution of Canada . . . without first obtaining the agreement of the Provinces? In my view there is no such constitutional convention in Canada, at least not yet. History and practice do not establish its existence; rather they belie it. That we may be moving towards such a convention is certainly a tenable view. But we have not yet arrived there. As recently as December 21, 1979, the Supreme Court of Canada in the *Senate Reference*, *supra*, could write thus at 7 D.L.R., p. 63 S.C.R.:
>
> > The practice, since 1875, has been to seek an amendment of the Act by a joint address of both Houses of Parliament. Consultation with one or more of the provinces has occurred in some instances.
>
> This is not language appropriate to the existence of convention full-blown, vigorous and operative. A convention should be certain and consistent; what we have is uncertain and variable.[148]

The Chief Justice found historical evidence counting strongly against the existence of the "compact" theory of Confederation which would have required provincial unanimity to secure constitutional amendments, holding that it was "supported neither by history nor by subsequent usage".[149] He found also that principles of amendment enunciated in the 1965 White Paper issued by Justice Minister Guy Favreau, which appeared *prima facie* to support the provincial case, did not go far

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[147] *Id.* at 535, 118 D.L.R. (3d) at 31. It is difficult to see how the Newfoundland Court of Appeal arrived at the conclusion that a majority of residents in that province would be required to approve changes under the popular referendum procedure. *See* paras. 42(1)(*a*) and (*b*) of the proposals originally drafted, *supra* note 88. The Supreme Court of Canada is surely correct when it declares:

> It was wrong to say that in a referendum under s. 42 (as it then was) of the proposed statute (now s. 47) the approval of the majority of the people in each province was required. The proper view was that only the approval of the majority of the people voting in a referendum in those provinces, the approval of whose legislatures would be required under the general amending formula, would be necessary.

Reference *re* Amendment of the Constitution of Canada (Nos. 1, 2 & 3), [1981] 1 S.C.R. 753, at 807-08, [1981] 6 W.W.R. 1, at 54, 125 D.L.R. (3d) 1, at 48.

[148] Reference *re* Amendment of the Constitution of Canada (No. 1), *supra* note 105, at 291-92, [1981] 2 W.W.R. at 213, 117 D.L.R. (3d) at 21-22.

[149] *Id.* at 293, [1981] 2 W.W.R. at 214, 117 D.L.R. (3d) at 22.

enough, especially in view of the equivocal terms in which the important fourth principle was expressed.[150]

Also finding against the provinces, Hall J.A. considered that the reference questions were not appropriate for legal response:

> the court is being asked to recognize and assert a constitutional convention of provincial agreement on constitutional reform. . . . Respecting as one must the separation of powers as between the three constituent instruments of the state, and recognizing the supremacy of the legislative bodies of the Canadian federal state, including the independence of the judiciary, it is both undesirable and otherwise inappropriate to embark on that course. In short, constitutional conventions are not a matter for Courts at all but are political and better left in that process except to the extent that they may be of assistance in the interpretation of a statute or in determining the intention of Parliament or a legislature.[151]

Consistently with his view that conventions were inherently political, Hall J.A. concluded that there was no *legal* requirement for prior provincial agreement before an amendment was obtained. Similarly, Matas J.A. considered the question of "convention" as surrounded by uncertainty, as being political in nature and as being improper for judicial resolution. If the court embarked on such enquiries it would be exceeding its proper limits and would be entering the political process.[152] The question was one for the executive and legislature rather than the courts. If it was improper to answer legally such a question, it followed "that there cannot be crystallization of a convention into a rule of law".[153] Accordingly, the federal government was not under any legal constraint in putting forward its joint resolution. Even those in the minority in the

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[150] *Id.* at 290, [1981] 2 W.W.R. at 211-12, 117 D.L.R. (3d) at 20. The principle as set out at the pages referred to above is contained in the 1965 White Paper (THE AMENDMENT OF THE CONSTITUTION OF CANADA) issued by the Honourable Guy Favreau, Minister of Justice, and is formulated as follows:

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

Of the above principle, Freedman C.J.M. said that in the reports and contexts cited above:

> The simple fact is that the so-called fourth principle contains a contradiction. Its first sentence, if it stood alone, would provide support for the proposition that "the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces." It makes clear that both the nature and degree of provincial participation in the amending process have not yet been fully defined. What appears to have been given to the Provinces in the first sentence is taken away, at least in part, by the third sentence.

[151] *Id.* at 298-99, [1981] 2 W.W.R. at 220, 117 D.L.R. (3d) at 27.

[152] *Id.* at 314, [1981] 2 W.W.R. at 234, 117 D.L.R. (3d) at 39.

[153] *Id.* at 314, [1981] 2 W.W.R. at 234, 117 D.L.R. (3d) at 40.

Manitoba reference declined to accept the "convention" argument put forward by the provinces.[154]

O'Sullivan J.A. regarded the question as one of which set of responsible ministers was empowered to advise the Queen on the exercise of the relevant constitutional powers:

> I think the principle has been well established that in all matters pertaining to federal power, when the Queen acts, she must act on the advice of her federal ministers; in all matters pertaining to provincial power, when the Queen acts, she must act on the advice of her provincial ministers. In matters affecting both, she must act on the advice of both federal and provincial ministers. It would be unconstitutional for her to act except on the advice of responsible ministers. I do not, of course, suggest that the Queen can be judged by the Courts, but her ministers can. In my opinion, the Queen's Canadian ministers would be acting unconstitutionally if they advised the Queen to act in matters for which they are not responsible to a Legislature with jurisdiction over such matters.[155]

The federal power, in other words, has "limited sovereignty which does not extend to provincial matters".[156] Referring by analogy to the abortive attempt by Western Australia to secede from the Australian Commonwealth in 1935, O'Sullivan J.A. cited the report of the British Joint Committee considering the petition from the Australian State which found unanimously that an amendment to the Australian constitution in those areas "reserved to the Imperial Parliament" could not constitutionally be made "without the consent of both State and federal authorities where the amendment affected both".[157] Consequently the agreement of all the units in the federation was required whenever an amendment altered "the fundamental terms of the union between the constituents of confederation".[158]

Concurring with O'Sullivan J.A., Huband J.A. observed that when Her Majesty was presented with a joint address by the Canadian Parliament she was acting "as the Canadian Queen. In this latter capacity, Her Majesty ought not to assent to legislation affecting the interests of the Provinces without their concurrence."[159] He added:

> The suggestion that the Government of Canada can do indirectly what it cannot do directly is abhorrent. It rests on the proposition that in spite of the Statute of Westminster, there is a residue of authority to legislate with respect to Canadian affairs which remains vested in the United Kingdom Parliament; that the Houses of Parliament will exercise that authority at the request of the Canadian House of Commons and Senate alone, and that the Queen will be persuaded to consent by her United Kingdom ministers in spite of objections from her ministers in several of the Canadian Provinces. Alternatively, it

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[154] *Id.* at 346, [1981] 2 W.W.R. at 285, 117 D.L.R. (3d) at 66 (O'Sullivan J.A.). *Id.* at 351, [1981] 2 W.W.R. at 270, 117 D.L.R. (3d) at 70 (Huband J.A.).

[155] *Id.* at 328, [1981] 2 W.W.R. at 247-48, 117 D.L.R. (3d) at 51.

[156] *Id.* at 335, [1981] 2 W.W.R. at 254, 117 D.L.R. (3d) at 57.

[157] *Id.*

[158] *Id.* at 346, [1981] 2 W.W.R. at 265, 117 D.L.R. (3d) at 66.

[159] *Id.* at 347, [1981] 2 W.W.R. at 266, 117 D.L.R. (3d) at 67.

> rests on the proposition that the United Kingdom Parliament is nothing more than a bare trustee, but that as trustee it will take direction and act at the behest of some of its beneficiaries and against the interest of others. Neither of these propositions can be accepted.[160]

While agreeing with Chief Justice Freedman that an argument based on alleged constitutional convention was insupportable, Huband J.A. found, on other grounds, that provincial agreement to the joint resolution was necessary.[161]

(c) *Quebec*

In the Quebec reference[162] Chief Justice Crete, with whom three judges agreed,[163] made an exhaustive survey of the authorities and practice, finding that "[h]owever divergent the opinions might be", of the twenty-two amendments made since 1867 only the anomalous cases of 1871 and 1875 were not made pursuant to a joint address, and that the British Parliament invariably adopted the requested amendments.[164] He concisely summarized his conclusions as follows:

> 1. Whether or not one agrees with the form or the content of the resolution before the two federal Houses, this resolution is not subject to review by the Courts and neither do the Courts have the right to decide upon what legislative measures the Parliament of the United Kingdom can or could adopt.
>
> 2. Whether or not one subscribes to the compact theory of confederation, it must be recognized that, on a judicial level, the *British North America Act, 1867*, is a statute which can only be amended or repealed by another statute emanating from the same legislative authority which adopted the initial statute, namely, the Parliament of the United Kingdom.[165]

Even if the federal government's constitutional initiative is unilateral, the precedents indicate that "on the judicial level" it is legal.[166]

Bisson J.A., in dissent, considered that the basic question was: "what is the legal nature of this country."[167] Having regard to the fact that there was no formal limitation on the amending power, could Parliament, over provincial objections, request amendments concerning provincial jurisdiction or even affecting "the status and the role of the Provinces within the federation"?[168] While conceding, as argued by federal counsel, that there was no "model federation", each federal form being *sui generis*, Bisson J.A. emphasized that certain centralizing

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[160] *Id.* at 350, [1981] 2 W.W.R. at 268-69, 117 D.L.R. (3d) at 69.

[161] *Id.* at 351, [1981] 2 W.W.R. at 269-70, 117 D.L.R. (3d) at 70.

[162] Reference *re* Amendment of the Constitution of Canada (No. 3), *supra* note 106.

[163] *Id.* (Owen, Turgeon & Belanger JJ.A.).

[164] *Id.* at 406.

[165] *Id.* at 407-08.

[166] *Id.* at 408.

[167] *Id.* at 453.

[168] *Id.* at 456.

features in the B.N.A. Act conferred upon the Canadian federation at most a quasi-federal character.[169]

Despite the high degree of centralization implicit in such provisions, they resulted from express provincial agreement emerging from the pre-Confederation Quebec and London Resolutions.[170] Moreover, a strong current of jurisprudence extending from 1883 to the present time "established the legislative sovereignty of the Provinces on the same basis and on an equal footing with the legislative sovereignty of the Parliament of Canada, in their respective areas . . . ".[171] It followed that neither jurisdiction "can act in such a way as to modify or remove any element of the legislative authority of the other without the consent of that party".[172] If pushed to the limit, the argument of the federal government would enable it to obtain an amendment centralizing jurisdiction over such strictly provincial areas as municipal institutions. To accede to the federal government's view, therefore, would legally compromise the concept of federation "consecrated legislatively in 1867",[173] and would be equivalent to saying that Canada is now a "*quasi*-unitary state".[174] Bisson J.A. challenged the resolution not only as a matter of construction but as a matter of legality, declaring "no statement supports the legal legitimacy of the action, *in the face of an objection* when matters as basic as those dealt with by the resolution are at issue."[175] Neither was the emergency power a resource the federal government could invoke since its use was limited to "exceptional circumstances as a temporary measure".[176] In short, the federal government lacked legal authority to request amendments detracting from provincial jurisdiction without the consent of the provinces.

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[169] *Id.* at 461-62. The following federal powers are listed as centralizing features by Bisson J.A. at 462:

> 1. The appointment of Lieutenant-Governors as well as, to some extent, their subordination (ss. 58, 59, 60, 67 and 90, B.N.A. Act).
> 2. The appointment of Judges to the provincial Superior Courts (s. 96 of the B.N.A. Act).
> 3. The powers of reserve [*sic*] and disallowance of provincial statutes (s. 90 of the B.N.A. Act).
> 4. The declaratory power (s. 92, para. 10*c* of the B.N.A. Act).
> 5. The emergency power which was recognized in certain cases and with certain limits by the Courts as a corollary of the preamble to s. 91 of the B.N.A. Act.

[170] *Id.* at 462.

[171] *Id.* at 464. In this context Bisson J.A. cites Hodge v. The Queen, 9 App. Cas. 117, at 132 (1883); Liquidators of Maritime Bank of Canada v. Receiver-General of N.B., [1892] A.C. 437, at 441-42; Reference *re* Legislative Authority of Parliament to Alter or Replace the Senate, [1980] 1 S.C.R. 54, at 70, 102 D.L.R. (3d) 1, at 13 (1979).

[172] *Supra* note 106, at 464.

[173] *Id.* at 465.

[174] *Id.*

[175] *Id.* at 470. Citing in support of this proposition, at 471, the four principles "from the White Paper published in 1965 under the authority of the Honourable Guy Favreau", *see particularly* the fourth general principle, *supra* note 150.

[176] *Supra* note 106, at 472.

7. *The Supreme Court's Reference Opinion*

On Monday, 28 September 1981 the Supreme Court delivered its long-awaited opinion in what must surely have been the most important reference ever decided by the tribunal.[177]

By the accidental tripping of the wrong switch by a member of the Court, the audio portion of the judgment, as broadcast over national television, was almost inaudible; the words solemnly intoned by Chief Justice Laskin were so indistinct as to cause consternation in Canadian newspaper offices from St. John's to Victoria where editorial writers strained to comprehend the complicated message.

When the import of the decision became known, it was apparent that neither the federal government nor the provinces had won a clear victory. With majority and minority opinions being rendered on both law and convention, shifting majorities had held that while Parliament had the legal power to present a joint resolution to the Queen requesting amendments which reduced provincial powers, for Ottawa to do so unilaterally would be unconstitutional in the conventional sense. The political issue of convention was therefore severed by the Court from the legal issue of standing. Viewed as an entirety, the opinion appeared to suggest that further federal-provincial negotiations on the package were necessary, since fully constitutional action required the collaboration of at least a "consensus" of the parties.

In the immediate aftermath, the adversaries sometimes engaged in special pleading by referring selectively to those parts of the opinion seeming to support their respective positions. Referring to the portion of the opinion dealing with convention, Premier Blakeney termed the holding a clear provincial victory, saying that it "clearly underlined what the federal government proposes to do is unconstitutional . . . and, in my judgment, ought not to be proceeded with".[178] Justice Minister Chrétien, on the other hand, adverting to that part of the opinion sustaining the federal government's power to proceed with its joint resolution, tended initially to minimize the holding on convention.[179] *En route* to a Commonwealth prime ministers' conference in Melbourne, Australia, Prime Minister Trudeau was in a somewhat more conciliatory mood but placed the onus on the eight dissenting premiers to make any new compromise proposals.[180] The chairman of the dissident premiers' conference, Premier Bennett of British Columbia, conversely argued that

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[177] Reference *re* Amendment of the Constitution of Canada (Nos. 1, 2 & 3), [1981] 1 S.C.R. 753, [1981] 6 W.W.R. 1, 125 D.L.R. (3d) 1.

[178] *Blakeney predicts more negotiations after court ruling*, Star-Phoenix (Saskatoon), 29 Sep. 1981, at E5, col. 1.

[179] *Id.*

[180] Gray, *PM to press on, but door ajar*, The Globe and Mail (Toronto), 29 Sep. 1981, at 1.

the opinion must be seen as a whole and that the parties should return to the bargaining table with a mutual commitment to break the impasse.[181]

In its seven to two majority ruling on "law", the Court affirmed that there was no legal limit anywhere "to the power of the Houses to pass resolutions".[182] Such venerable support of parliamentary practice as section 9 of the Bill of Rights of 1689[183] (which was "undoubtedly" in force in Canada) had provided that "proceedings in Parliament ought not to be impeached or questioned in any court or place out of the Parliament."[184] In the light of the omission of an amending formula in the B.N.A. Act, all provinces save Saskatchewan were asking the Court "to enshrine as a legal imperative a principle of unanimity for a constitutional amendment . . . ".[185] (The compact theory espoused by the majority of provinces likened the B.N.A. Act to a classical multilateral treaty which could be altered only by the unanimous consent of the original parties, or the parties later adhering to it.)[186] Saskatchewan alone argued that substantial compliance by the provinces would suffice: for example, such agreement to make constitutional changes as was needed under the federal government's proposed Victoria amending formula.[187] The Court, however, eschewed any role which would oblige it "to say retroactively that in law we have had an amending formula all along, even if we have not hitherto known it"; neither could it say that Canada possessed one amending formula before 1931 and another after that date.[188]

The Attorney General of Canada had conceded, on the footing of the adopted resolution, that were it to be enacted both provincial and federal powers would be affected. While federal legislative powers would undoubtedly be diminished, that did not "alter the fact that there is an intended suppression of provincial legislative power".[189]

An eminent constitutional scholar, W.R. Lederman, had argued that, given time and the appropriate dispositions by the political actors, practice, usage and convention could mature into law:

> we should not approach the British for basic changes concerning which there were substantial provincial dissents in Canada. In my view, not only would this be improper, it would be unconstitutional, it would be illegal. This would

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[181] *Id.* at D-1.

[182] *Supra* note 177, at 784, [1981] 6 W.W.R. at 34, 125 D.L.R. (3d) at 29-30.

[183] 1 Wm. & M. 1689, (2d sess.), c. 2.

[184] *Supra* note 177, at 785, [1981] 6 W.W.R. at 35, 125 D.L.R. (3d) at 30.

[185] *Id.* at 787, [1981] 6 W.W.R. at 37, 125 D.L.R. (3d) at 32.

[186] A classical Canadian study of the compact theory is Rogers, *The Compact Theory of Confederation*, in 3 PROCEEDINGS OF THE CANADIAN POLITICAL SCIENCE ASSOCIATION 205-30 (1931). For a more recent examination *see* Cook, *Provincial Autonomy, Minority Rights and the Compact Theory 1867-1921*, 4 STUDIES OF THE ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM (1969).

[187] *Supra* note 177, at 788, [1981] 6 W.W.R. at 37, 125 D.L.R. (3d) at 32.

[188] *Id.* at 788, [1981] 6 W.W.R. at 37-38, 125 D.L.R. (3d) at 33.

[189] *Id.* at 772, [1981] 6 W.W.R. at 23, 125 D.L.R. (3d) at 20.

> be contrary to our special constitutional law of amendment as established over the years by custom and precedent.[190]

Some of the provinces had pressed Professor Lederman's argument before the Court but the Court disagreed:

> The leap from convention to law is explained almost as if there were a common law of constitutional law, but originating in political practice. That is simply not so. What is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute. The position advocated is all the more unacceptable when substantial provincial compliance or consent is by him said to be sufficient. Although Professor Lederman would not give a veto to Prince Edward Island, he would to Ontario or Quebec or British Columbia or Alberta. This is an impossible position for a court to manage. . . .[191]

It might be argued, respectfully, that there was no necessity for the Court to reject Professor Lederman's reasoning on either of the above grounds. It might not wish to accept his conclusions for policy reasons, but the asserted reasons for denying them appear to be insufficient.

Practice, or custom, which is simply repeated practice, can and has ripened into law on many occasions. The law merchant was largely a common law crystallization of pre-existing custom:

> Of substantive rules, such as those concerning partnerships, brokerage, negotiable instruments and other branches of commercial law, little or nothing seems to appear in the custumals. Yet it appears from court rolls that the laws of agency and negotiable instruments, for example, were recognized and enforced. Merchants knew the customs that controlled their transactions by reason of their universality, and so long as the law merchant was administered in the local courts merchant they felt no need of precedent books for court keeping.[192]

The majority opinion on law must be asserting at least implicitly that there is a qualitative difference between mercantile and political practice which would deprive the latter, even though repeated and accompanied by a sense of obligation, of the character of law. It is not clear from its reasoning why this should be so. As one of the most eminent of contemporary jurisprudents, H.L.A. Hart, has observed:

> Why, if statutes made in certain defined ways are law before they are applied by the courts in particular cases, should not customs of certain defined kinds also be so? Why should it not be true that, just as the courts recognize as binding the general principle that what the legislature enacts is law, they also recognize as binding another general principle: that customs of certain defined sorts are law? What absurdity is there in the contention that, when particular cases arise, courts apply custom, as they apply statute, as something which is already law and because it is law?[193]

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[190] *Constitutional Amendment and Canadian Unity*, in CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS 103 (1981).

[191] *Supra* note 177, at 784, [1981] 6 W.W.R. at 34, 125 D.L.R. (3d) at 29.

[192] A. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 184-85 (4th ed. 1958).

[193] THE CONCEPT OF LAW 46 (1961).

In international law custom is a main source[194] and it originates to a large extent in "political practice", described by the Court as an unacceptable source of law.[195] International law is also a part of domestic legal systems.[196] If one accepts Hart's reasoning there would be no justification to exclude political practice as a source of law, if in complementary respects the criteria for establishing law were found.

While the Court rejected the argument that unanimity was *legally* required, it later agreed that as a matter of convention, concurrence between Parliament and a "consensus" of provinces (to which no number was attached) would be a sufficient basis for obtaining an amendment.[197] "What was the essential difference?" it might be asked.

If the Court had accepted Professor Lederman's argument that "substantial compliance", short of unanimity, would suffice,[198] it would have had to define the regional distribution and to declare which provinces had a veto. However, all the amendments since 1940 involving the reduction of provincial powers had been obtained with the *unanimous* consent of the provinces.[199] It could nevertheless be argued that Professor Lederman's formula, or a similar formula, was reasonable insofar as it avoided undue rigidity by requiring both a balanced regional consensus along with the consent of some of the larger and more densely populated provinces. Referring to the detailed stipulations, the Court said that this would be "an impossible position for a court to manage".[200] The Court might have decided, alternatively, that either the Victoria or the Vancouver formulas had secured broad support and stated that the consensus envisaged in those formulas would, in Professor Lederman's words, "be generally accepted by our people as a legitimate mandate for basic constitutional change".[201]

In the operative part of its judgment on convention, the Court held that "the agreement of the Provinces of Canada, no views being expressed as to its quantification, is constitutionally required for the passing of the [Joint Address]."[202] The result was that, as a matter of convention rather than law, an undefined consensus was essential to amend the constitution. The Court disagreed with Freedman C.J.M. that

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[194] *See* U.N. Charter, Statute of the International Court of Justice, para. 38(1)(*b*), which recognizes as a source of law "international custom as evidence of a general practice accepted by law".

[195] S. WILLIAMS & A. DE MESTRAL, AN INTRODUCTION TO INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 16 (1979).

[196] *Id.* at 30. The authors state: "The cases with respect to the adoption of customary international law are somewhat confused, but on balance appear to support the view that customary international law is incorporated into the law of Canada."

[197] *Supra* note 177, at 909, [1981] 6 W.W.R. at 124, 125 D.L.R. (3d) at 107.

[198] *Supra* note 190, at 100.

[199] *Supra* note 177, at 892-93, [1981] 6 W.W.R. at 109-10, 125 D.L.R. (3d) at 93-94.

[200] *Id.* at 784, [1981] 6 W.W.R. at 34, 125 D.L.R. (3d) at 29.

[201] *Supra* note 190, at 100.

[202] *Supra* note 177, at 909, [1981] 6 W.W.R. at 124, 125 D.L.R. (3d) at 107.

there was an internal contradiction in the important fourth principle in the 1965 White Paper issued by Justice Minister Guy Favreau which deprived it of much of its weight:

> With the greatest respect, this interpretation is erroneous. The first sentence is concerned with the existence of the convention, and the third sentence, not with its existence, but with the measure of provincial agreement which is necessary with respect to this class of constitutional amendment. 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.[203]

The Court conceded that there were difficulties involved in defining exactly the contents of the convention, but the difficulties were inherent in the nature of convention as contrasted with law:

> If a consensus had emerged on the measure of provincial agreement, an amending formula would quickly have been enacted and we would no longer be in the realm of conventions. To demand as much precision as if this were the case and as if the rule were a legal one is tantamount to denying that this area of the Canadian constitution is capable of being governed by conventional rules.[204]

Through the complex of precedents the Court could discern dimly, as in a *camera obscura*, the lineaments of convention. It would be for others, however, to instil the convention with substantive content: "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."[205]

When Premier Lévesque protested against the exclusion of his province from the November Fifth Accord, initiating further court action to ascertain if Quebec's consent were required, Prime Minister Trudeau seized on the logic of the above passage to argue that the degree and character of the necessary consent should be decided in the political rather than the legal forum.[206] It was the political actors rather than the Bench whose action was decisive, and nine out of ten provinces had given their consent — surely an adequate number. M. Lévesque disagreed, contending that what had happened was a breach of the principle of duality that Quebec leaders had long considered necessary for basic constitutional change.

While the Prime Minister found in the judgment a ready answer for Premier Lévesque, portions of the majority ruling on convention prompted him to seek a compromise with the other premiers. While conventions were not laws and were not enforceable in the courts, they were yet of the utmost importance. Among the examples the Court gave

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[203] *Id.* at 900-01, [1981] 6 W.W.R. at 116, 125 D.L.R. (3d) at 100. *See* text accompanying and *supra* note 150 for viewpoint of Freedman C.J.

[204] *Supra* note 177, at 904, [1981] 6 W.W.R. at 119-20, 125 D.L.R. (3d) at 103.

[205] *Id.* at 905, [1981] 6 W.W.R. at 120, 125 D.L.R. (3d) at 103.

[206] Sheppard, *PM rebuffs Levesque over patriation move*, The Globe and Mail (Toronto), 5 Dec. 1981, at 1.

was the requirement that "if the opposition obtains a majority at the polls, the government must tender its resignation forthwith",[207] or that a person appointed prime minister or premier by the Crown "should have the support of the elected branch of the legislature . . . ".[208]

Such conventions were at the very core of responsible government and were basic to parliamentary democracy. Summing it up, the Court said: "while they are not laws, some conventions may be more important than some laws. Their importance depends on that of the value of the principle which they are meant to safeguard."[209] This section concluded: "constitutional conventions plus constitutional law equal the total constitution of the country."[210] From this it was clear that unilateral action was unconstitutional. Reflecting wistfully later, Mr. Trudeau said: "Some things were given up in order to constitutionalize the amending process. The things I gave up — some of them made me sad."[211]

In their dissent on law, Martland and Ritchie JJ. emphasized that sections 2 and 7 of the Statute of Westminster, 1931 had to be read together. Standing alone, section 2, which recognized Canadian sovereignty, might be construed as conferring upon the federal Parliament sole control including, presumably, supreme legislative and amending power in the exercise of that sovereignty. The enactment of section 7 at the instance of the provinces, however, was intended to "preclude that exercise of power by the federal Parliament. . . . The powers conferred on the Parliament of Canada by the *Statute of Westminster, 1931* were restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada."[212]

References to authorities on British parliamentary procedure, such as Dicey and May, relating as they did to a unitary state, were of no help in ascertaining the limitations on procedure that might exist in a federation. "The Resolution under consideration," declared Martland and Ritchie JJ., "is not a matter of internal procedure."[213] The power to pass resolutions of any kind was said by the Attorney General of Canada to rest on section 18 of the B.N.A. Act and section 4 of the Senate and House of Commons Act,[214] the latter section providing that the Houses enjoyed "privileges, immunities and powers" similar to the United Kingdom Parliament "so far as the same are consistent and not repugnant to that [B.N.A.] Act . . . ".

> The Resolution now before us was passed [they continued] for the purpose of obtaining an amendment to the *B.N.A. Act*, the admitted effect of which is to

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[207] *Supra* note 177, at 878, [1981] 6 W.W.R. at 96, 125 D.L.R. (3d) at 82.
[208] *Id.* at 878, [1981] 6 W.W.R. at 96, 125 D.L.R. (3d) at 82-83.
[209] *Id.* at 883, [1981] 6 W.W.R. at 100, 125 D.L.R. (3d) at 87.
[210] *Id.* at 883-84, [1981] 6 W.W.R. at 101, 125 D.L.R. (3d) at 87.
[211] Gray, *Resolution is unveiled, but Trudeau bitter at compromises*, The Globe and Mail (Toronto), 19 Nov. 1981, at 1, col. 5.
[212] *Supra* note 177, at 835, [1981] 6 W.W.R. at 80, 125 D.L.R. (3d) at 69.
[213] *Id.* at 837, [1981] 6 W.W.R. at 82, 125 D.L.R. (3d) at 70.
[214] R.S.C. 1970, c. S-8.

> curtail provincial legislative powers under s. 92 of the *B.N.A. Act* but is repugnant to it. It is a power which is out of harmony with the very basis of the *B.N.A. Act*. Therefore para. (a) of s. 4, because of the limitations it contains, does not confer the power. The Senate and House of Commons are purporting to exercise a power they do not possess.[215]

The Attorney General of Canada had argued that "there were no limits of any kind" on the unfettered power of Parliament to present such a joint resolution to Westminster. Parliament by unilateral resolution could convert Canada into a unitary state. In a *reductio ad absurdum*, the dissenters added, "this argument in essence maintains that the Provinces have since, at the latest 1931, owed their continued existence not to their constitutional powers expressed in the B.N.A. Act, but the federal Parliament's sufferance."[216] In attempting to diminish provincial powers without provincial consent, Parliament through the Resolution procedure was seeking to effect indirectly what it could not do directly.[217]

In their dissent on convention, in which they argued that there was no concrete norm, even of a political character, in that area, Laskin C.J.C., Estey and McIntyre JJ. stressed that they were directing their enquiry to the proposition that the consent of *all* provinces was required before Parliament could make a request to Westminster to amend the constitution so as to affect federal-provincial relationships. While noting the contrary position of Saskatchewan, they considered that the questions asked and the general course of argument before the Court had referred typically to the legal requirement for unanimous prior provincial consent.[218] They went on to observe that "sanction for non-observance of a convention is political in that disregard of a convention may lead to political defeat, to loss of office, or to other political consequences, but it will not engage the attention of the courts which are [*sic*] limited to matters of law alone."[219] The dissenters cited approvingly Professor Hogg's statement that while they are non-enforceable, conventions do regulate the way that legal powers shall be exercised but disagreed with him that a court could raise a convention to the status of a legal principle; only a statute could do this.

Summarizing the authentic and indisputable conventions which were central to the functioning of a parliamentary system, which were recognized, "definite, understandable and understood", they remarked that, in contrast, the alleged convention of provincial participation in the amending process lacked definition or acceptance among the political actors or the public at large: "The degree of provincial participation in constitutional amendments has been a subject of lasting controversy in Canadian political life for generations. It cannot be asserted, in our

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[215] *Supra* note 177, at 839, [1981] 6 W.W.R. at 84, 125 D.L.R. (3d) at 72.
[216] *Id.*
[217] *Id.* at 846, [1981] 6 W.W.R. at 90, 125 D.L.R. (3d) at 77.
[218] *Id.* at 850, [1981] 6 W.W.R. at 126, 125 D.L.R. (3d) at 108.
[219] *Id.* at 853, [1981] 6 W.W.R. at 129, 125 D.L.R. (3d) at 111.

opinion, that any view on this subject has become so clear and so broadly accepted as to constitute a constitutional convention."[220]

While the majority opinion on conventions stressed post-1931 examples, the dissenting judges cited examples as far back as 1886, 1907 and 1915 involving Territorial representation in the Senate and House of Commons, federal subsidies to the provinces and representation in the Senate for a new "Western" division, supplementing the three historical divisions of Ontario, Quebec and the Maritime Provinces established at Confederation. These were all matters of provincial interest; the mentioned amendments related to altering the basis of provincial representation in parliamentary institutions but "[n]one had full provincial approval."[221] "It is clear," they declared, "that no support whatever for the convention may be found on an examination of the amendments made up to 1930."[222]

The conventions cited most forcefully by the provinces in support of the existence of an asserted convention of prior consent were those of 1940 (unemployment insurance), 1951 (concurrent jurisdiction over old age pensions), 1960 (compulsory retirement age for provincial superior court judges) and 1964 (supplementary death benefits relating to old age pensions). In all of these cases unanimous provincial consent was obtained. The minority found, however, the alleged support of these precedents for the alleged convention equivocal. In the 1940 amendment the incumbent prime minister, Mackenzie King, had expressed doubt concerning the need for provincial consent;[223] the 1960 case was "not considered of great significance",[224] and the two amendments (1951, 1964) relating to old age pensioners "dealt with the same matter and can stand as only one precedent favouring the existence of the convention".[225] "Only in four cases has full provincial consent been obtained," they said, "and in many cases the federal government has proceeded with amendments in the face of active provincial opposition. In our view, it is unrealistic in the extreme to say that the convention has emerged."[226]

The fourth general principle in the 1965 White Paper emphasized the need, where a proposed amendment affected federal-provincial relationships, for "prior consultation and agreement with the provinces". Although this principle was advocated strongly by provincial counsel, it met with skepticism from the dissenting judges. They cited another part of the same White Paper which characterized the "rules and principles relating to amending procedures" as not constitutionally binding.[227] There might be an evolving practice, but there was no mandatory rule. In

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[220] *Id.* at 858, [1981] 6 W.W.R. at 133, 125 D.L.R. (3d) at 115.
[221] *Id.* at 864, [1981] 6 W.W.R. at 139, 125 D.L.R. (3d) at 119.
[222] *Id.*
[223] *Id.* at 865-66, [1981] 6 W.W.R. at 140-41, 125 D.L.R. (3d) at 120-21.
[224] *Id.* at 865, [1981] 6 W.W.R. at 139, 125 D.L.R. (3d) at 120.
[225] *Id.* at 867, [1981] 6 W.W.R. at 142, 125 D.L.R. (3d) at 122.
[226] *Id.* at 869, [1981] 6 W.W.R. at 143-44, 125 D.L.R. (3d) at 123.
[227] *Id.* at 870, [1981] 6 W.W.R. at 145, 125 D.L.R. (3d) at 124.

reply to what they termed the *in terrorem* argument, raising the spectre of the possible transformation of Canada into a unitary state if the federal government had the postulated power, they looked to the instant subject matter. What did the proposed amendment purport to do? "Its effect is," they said,

> to complete the formation of an incomplete constitution by supplying its present deficiency, *i.e.*, an amending formula, which will enable the Constitution to be amended in Canada as befits a sovereign State. We are not here faced with an action which in any way has the effect of transforming this federal union into a unitary State.[228]

8. *The Impact of the Ultimate Decision*

The Supreme Court's decision, in conjunction with other factors, was a powerful inducement to compromise. Neither the provinces nor the federal government had won outright, but if the Court indicated that Parliament had the legal power to present a joint resolution to Westminster without provincial consent, it also indicated that according to the established convention such a request would be unconstitutional. In the context of the existing provincial disagreement, for Ottawa to persist in a unilateral course in the face of the Court's finding would have been to exacerbate even further the serious rift in Canadian federalism. In the period of almost exactly one year from the Prime Minister's pronouncement of 2 October 1980 to the ultimate decision of 28 September 1981, Canada was wracked with a torrent of bitter controversy. The Court's decision enabled the parties to find an honourable and graceful exit from the impasse. There had to be a *quid pro quo*. Another factor, of course, was the uncertainty that the Prime Minister would no doubt entertain about the readiness of Westminster to pass a *unilateral* measure which the anxiously awaited court decision had termed unconstitutional. Convention was, of course, at the core of the unwritten British constitution and it was on conventional grounds that the Court drew back from endorsing the federal government's unilateral initiative. The majority decision on convention was wise in that it avoided an unduly centralist interpretation of Canadian federalism and facilitated a political compromise that everybody could tolerate. It was a decision that the many British Parliamentarians who had qualms about automatically enacting a unilateral resolution would appreciate. They were no longer in the unenviable position of making a choice between Ottawa and the provinces. Trudeau had cause for anxiety about proceeding unilaterally after 28 September; his relations with Prime Minister Thatcher had deteriorated during the controversy, especially in the wake of discreet denials by her that she had ever given him assurances that a unilateral measure would be passed automatically.

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[228] *Id.* at 873, [1981] 6 W.W.R. at 147, 125 D.L.R. (3d) at 126-27.

As a result of a complex of pressures, then, including particularly the Court decision, the parties met in Ottawa early in November 1981 and arrived at a compromise result.[229] The compromise involved Ottawa and nine provinces. Quebec dissented. There were two main elements in the compromise. The first was acceptance of the Charter by the premiers, but with the insertion of a "legislative supremacy" clause in section 33 of the Constitution Act, 1982 enabling either Parliament or the provinces to override fundamental freedoms, legal and equality rights (sections 2 and 7 to 15) should they consider it desirable. Such overriding legislation, according to subsection 33(3), had to be renewed at five-year intervals if it were to continue to have vigour; it was thus emphasized that resort to the override was "exceptional". The second main element was acceptance by the Prime Minister of the premiers' preferred Vancouver amending formula in lieu of the Victoria formula set out in former section 38. Under the substituted formula, neither Ontario nor Quebec possessed a permanent veto, since amendments required only the consent of Parliament plus two-thirds (seven) of the provinces having at least fifty per cent of the nation's aggregate population. Up to three non-concurring provinces could opt out of an amendment, but as a concession the federal government demanded that fiscal compensation should be paid to the dissentient provinces only where amendments affected education or culture. Originally, the premiers had desired compensation in *any* cases where provinces opted out.[230] When it was argued that Premier Lévesque had surrendered his province's veto in agreeing to this formula, his reply was that he had regarded fiscal compensation as mandatory in *all* cases and not just in education and culture. Accordingly, because of the change, he said his prior agreement in April 1981 had no force. He argued that the altered formula would negate the duality of Canada. By section 47 the Senate's absolute veto over amendments was transformed into a 180-day delaying power. With broader provincial consensus, the Senate's veto became politically unimportant.

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[229] *See, e.g.*, Anderson, *Cement for a Nation*, MACLEAN'S, 16 Nov. 1981, at 29-32.

[230] Liberal leader Claude Ryan chastised Premier Lévesque for his abortive agreement as follows:

> Mr. Ryan said Mr. Levesque committed the gravest error of any Quebec premier in history by trading away the province's traditional right to veto constitutional changes in an agreement with seven other provinces last April.
>
> Abandoning this right was abandoning the principle of duality, which is at the very core of Canada's nature and the place Quebec occupies within it, he said.
>
> True, Quebec had exacted in that agreement the right of economic compensation for opting out, but "that is a negative right and changes nothing about his having abandoned a principle." And now even that was lost, he added.

Gibb-Clark, *Quebec left "weak, isolated" but Ryan doesn't cut P.Q. cord*, The Globe and Mail (Toronto), 11 Nov. 1981, at 10.

For several days in November, section 35 containing the guarantee of aboriginal rights and defining "Métis" for the first time as "aboriginal peoples" was removed entirely from the Charter as part of the 5 November compromise. There was also a proposal, which engendered much controversy, to have the override in section 33 apply to the guarantee of male and female equality in section 28. As a result of intense pressure by native peoples, women's groups and their allies, however, these changes were successfully resisted.[231] Section 35 was restored with the qualifier "existing" (ostensibly at Premier Lougheed's insistence) modifying "aboriginal and treaty rights", and the override was not extended to section 28.

Of deep concern to many Canadians was the isolation of Quebec from the final agreement[232] in which every other province along with the federal government participated. As the "homeland" of the vast majority of French-speaking Canadians, its assent was of the greatest importance because of Canada's bilingual heritage. Proponents of the "dualistic" view of Canadian federalism had often asserted that the concurrence of Quebec and the governments with Anglophone majorities, as representatives of the "two founding nations", was a prerequisite for meaningful constitutional change.[233] Moreover, if the conjunction of two "national" wills was essential to effect fundamental constitutional change, a proponent of dualism would argue that the absence of one of those wills would constitute a veto over such change. (The Indians, who also claim "founding people" status, implicitly make the same case.) Since Canada had never had an explicit amending formula, the above proposition was advanced on historical and philosophical premises and lacked a specific focus in positive law. It was very important, nevertheless, to Quebeckers who feared that assimilation might arise from an amending power in which they, as representative of the only government with a French-Canadian majority, were excluded. Consequently, Premier Lévesque refused to recognize the legitimacy of an amending process in which his province had not concurred. He cited instances in which amendments were not proceeded with when Quebec had refused to consent in the past, passed an order in council on 25 November 1981 registering an official protest to patriation without Quebec's assent and embarked on court action to ascertain whether the "consensus" postulated by the Supreme Court of Canada for amendment included Quebec as a necessary party. In late March the Quebec Court of Appeal decided unanimously that Quebec's consent in the amending process was not essential. To signify Quebec's continuing strong opposition to the process, Mr. Lévesque placed his Lieutenant Governor, Jean-Pierre Côté, in an embarrassing position by advising him not to

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[231] *See, e.g., Sexual equality, native rights reinstated*, Star-Phoenix (Saskatoon), 24 Nov. 1981, at 1.

[232] Gray, *Quebec alone in opposing accord; U.K. officials expect swift passage*, The Globe and Mail (Toronto), 6 Nov. 1981, at 1.

[233] *See, supra* note 230; *see also* E. BLACK, DIVIDED LOYALTIES ch. 5 (1975).

attend the 17 April ceremony at which the Queen would proclaim the new constitution. As a Lieutenant Governor by convention acts on the advice of his provincial ministers, Mr. Côté was in a dilemma. Although federally appointed and paid, he was the formal and ceremonial head of the provincial executive. Moreover, he would be attending this ceremony as a provincial representative. As his official acts are those of his ministers, if he attended the ceremony he would arguably be breaking convention. He was wise therefore not to attend. As a compromise he attended a luncheon for Privy Councillors (as a former member of the Trudeau cabinet) in a *personal* capacity immediately following the proclamation.[234]

Quebec Liberal Opposition leader Claude Ryan also boycotted the ceremony because he had "strong reservations" about a constitution achieved without the province's consent.[235] The opposition to the constitutional process in such a large, culturally distinctive and historically important province, whether or not one accepted the "duality" thesis, was bound to temper the enthusiasm of supporters of the new constitution. Some of the factors on which the Quebec opposition was based were: (1) the loss of what both the Premier and the leader of the Opposition conceived to be the province's historical veto power over constitutional change; (2) patriation without a pre-existing decision on the constitutional division of powers, a matter of great concern in Quebec; and (3) uncertainty about the possibly sweeping impact of the Charter, wielded by a federally-appointed Supreme Court of Canada, on provincial statutes. (In this last respect, Premier Lévesque said there would be no systematic attempt to overhaul provincial laws to make their provisions conform to the new constitutional standards; if the Court struck down provincial laws, the people of Quebec would perceive what had resulted from a constitutional accord from which their government had been excluded.)[236]

The extent to which Quebec would go to nullify the effect of the Charter was shown by the tabling of Bill 62 in the Assembly on 5 May 1982. This Bill included an "omnibus" provision declaring retroactively that each provincial law would operate notwithstanding the Charter's stipulations. The Quebec legislation also attempted to set aside the language-of-education provisions of the Charter, which were not made specifically subject to the "override" in section 33, by purporting to give Bill 101 priority under section 1 of the Charter, which declares that the rights and freedoms recited therein are subject to "reasonable limits prescribed by law". If the courts were to find the "omnibus" provision unconstitutional because it was not meant to apply in such a sweeping fashion, perhaps the province could incorporate a standard clause in each

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[234] Sheppard, *supra* note 102.

[235] *Id.*

[236] Malarek, *Levesque won't change laws to conform to constitution*, The Globe and Mail (Toronto), 17 Apr. 1982, at 1.

separate bill. The dilemma of the federal government is that even if the courts ruled in Ottawa's favour in a test case, Quebec could use the reversal for propaganda purposes. It might be suggested that the propriety of invoking section 1 to circumvent the educational law is questionable, since the province is using an interpretative section as a power-conferring provincial reverse paramountcy clause.[237]

Former Senator Eugene Forsey was scornful of the 5 November accommodation and particularly of the havoc wrought by the "legislative supremacy" clause in section 33. "The provinces," he said, "have shot [the Charter] full of holes: great, big, gaping holes."[238] Fundamental freedoms (section 2), legal rights (sections 7 to 14) and equality rights (section 15) "are put at the mercy of 10 provincial legislatures, which can override them at will." On the assumption, apparently, that the "notwithstanding" clause would be used frequently by the provinces he prophesied that rights would now vary from sea to sea: "This is a shattering blow to national unity."[239] His anxious concern about the prospective evisceration of native rights and the guarantee of male and female equality proved happily unfounded a few days later when those rights were left undisturbed.[240] Throughout his letter Senator Forsey emphasized that the "override" would be at the disposal of ten provinces. It should be noted that it is also at the disposal of Parliament. Other than for a bizarre symmetry, there was no need for Ottawa, in addition to the provinces, to appropriate such a power. In 1978 Ottawa adopted what might be termed a "predecessor" charter in Bill C-60, accepting unilaterally the rights provision itself, but allowing the provinces to opt in later, in their own time and at their own discretion.[241] As an inducement to accept the charter, Ottawa had agreed that it would give up its power for the disallowance of provincial statutes for each province that opted in.[242] Perhaps the federal government should have set an example here too for the unreserved acceptance of a charter that some others may have received halfheartedly.

By a vote of 264 to 24 on Wednesday, 2 December 1981, the House of Commons passed the joint resolution sending the "package" to the Upper House prior to its transmission to London.[243] The dissenters included seventeen Conservatives, five Liberals and two New Democrats. Opposition arose for diverse reasons, including "undue haste", chagrin that the language rights of many Francophones outside Quebec were not protected, apprehension by anti-abortionists that the Charter

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[237] Gibb-Clark, *Quebec bill designed to override new constitution*, The Globe and Mail (Toronto), 6 May 1982, at 1 (Metro Edition).

[238] Forsey, *Charter "Shot full of holes" by provinces*, The Globe and Mail (Toronto), 21 Nov. 1982, at 7 (Metro Edition).

[239] *Id.*

[240] *Supra* note 231.

[241] Constitutional Amendment Bill, 1978, s. 131 (first reading).

[242] Subs. 131(3).

[243] H.C. DEB., 32d Parl., 1st sess., at 13663 (2 Dec. 1981).

provisions could be too readily invoked to confer a constitutional right to abortion (Father Robert Ogle, N.D.P. member for Saskatoon-East, the Commons' only priest, abstained for this reason), and concern that the aboriginal rights clause in section 35 was vague and inadequate. Quebec greeted the resolution by lowering its fleur-de-lys flag to half-staff.[244] Six days later the Resolution was passed intact by a vote of fifty-nine to twenty-three in the Senate.[245] There was perhaps more concern in the Red Chamber about patriating the constitution without the consent of Quebec. For example, Senator Roblin (Premier of Manitoba 1958-67) contended that fiscal compensation should be extended to all categories of provincial opting out of an amendment (pursuant to section 40), and not merely in the areas of education and culture; such a substitution would more effectively replace the Quebec veto by ensuring that in no case would there be a financial penalty for provincial opting out, and would appeal to the federalists in the province.[246]

9. *The Governor General's Unexpected Candour*

Late in January 1982, with the domestic dispute over the constitution subsiding (except for the major objections to patriation still voiced by Quebec and native peoples), Governor General Edward Schreyer startled Ottawa by telling the Canadian press that had the November 1981 conference failed "the only way out . . . would have been to cause an election to be held and [have] the Canadian people asked to decide."[247] The Governor General did not say explicitly how such an election could have been brought about. He added later, in clarification, that he was speaking hypothetically and that nothing before the conference had indicated that such drastic action would be necessary.[248]

Since the advent of responsible government, however, a vice-regal representative customarily remains discreetly silent about controversial events in which his prime minister is or may be embroiled, particularly contingencies of a purely speculative character which have not actually arisen. If he has doubts about the constitutional propriety of a certain course of action he normally communicates them privately in their periodical meetings to his prime minister, not to the Canadian press. The mutual trust that should prevail between the Crown and the incumbent head of government makes this a matter of the utmost importance. It is arguable, therefore, that in these circumstances the Governor General was indiscreet. He may, perhaps pardonably, have been attempting to

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[244] Sheppard, *O Canada hails constitution victory*, The Globe and Mail (Toronto), 3 Dec. 1981, at 1.

[245] SENATE DEB., 32d Parl., 1st sess., at 3428 (8 Dec. 1981).

[246] Sheppard, *PC senators fail to delay constitutional debate*, The Globe and Mail (Toronto), 4 Dec. 1981, at 8.

[247] *Schreyer ignites constitutional row*, Star-Phoenix (Saskatoon), 22 Jan. 1982, at D1, col. 1.

[248] *Id.* at cols. 1-2.

generate discussion among Canadians on the nature and prerogatives of his important office,[249] since a redefinition of the powers of the Crown might be the next order on the constitutional agenda after patriation.

The question that the Governor General raised was nonetheless important and interesting. What indeed might he have done, had the federal-provincial conference of November 1981 ended in paralysis? According to the conventions of responsible government, the Governor General ordinarily acts only on the advice of his ministers. Constitutionally, he possesses legal powers, *inter alia*, to dissolve Parliament and issue a proclamation calling an election, to make appointments of judges and officials and to award honours, and to give Royal Assent to laws passed by Parliament. However, in contemporary circumstances, short of an emergency, he exercises his legal powers, by convention, only at the request of his constitutional advisers. Should he act solely according to his own discretion, against the wishes of his ministers, he would be violating not law (for the legal power is *his*) but convention, which requires that he use his powers as directed by others who are ultimately responsible to the electorate.[250]

The embarrassment that can arise when a vice-regal representative exercises legal powers without recourse to his advisers is illustrated by the reservation of Bill 56 by Lieutenant Governor Bastedo of Saskatchewan for Her Majesty's pleasure on 8 April 1961.[251] Prime Minister Diefenbaker soon thereafter requested that Royal Assent be given to the Bill by federal order in council, emphasizing that the provincial Lieutenant Governor had reserved the Bill without consultation or instructions from Ottawa and had Mr. Bastedo obtained these (as Mr. Diefenbaker thought was appropriate and necessary) he would have been instructed not to reserve the Bill.

In an emergency, however, a Governor General (or a Lieutenant Governor) as the ultimate custodian of the constitution possesses residual powers to ensure that major constitutional norms are not breached. If an incumbent prime minister lost an election, did not resign and was not subsequently sustained by the House of Commons, he could be dismissed by the Crown and replaced with the leader of the victorious Opposition. He might also be dismissed for other reasons.[252] In 1834, for example, William IV dismissed his Whig Prime Minister Lord Melbourne, inviting the Tories to form an administration, because he considered that changes in the ministry threatened the principle of the Anglican Establishment in Ireland to which he was committed.[253] As recently as 1975, moreover,

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[249] *See, e.g.*, P. HOGG, CONSTITUTIONAL LAW OF CANADA 154-62 (1977); W. MCCONNELL, COMMENTARY ON THE BRITISH NORTH AMERICA ACT 34-43 (1977); J. MONET, THE CANADIAN CROWN (1979); *see also infra*, note 254.

[250] *Id.*

[251] *See* Mallory, *The Lieutenant Governor's Discretionary Powers. The Reservation of Bill 56*, [1961] CAN. J. ECON. & POLITICAL SCI. 518.

[252] *See, e.g.*, J. MONET, *supra* note 249, at 55-56.

[253] J. MACKINTOSH, THE BRITISH CABINET 119-20 (3d ed. 1977).

Governor General Sir John Kerr of Australia dismissed Prime Minister Whitlam and had an election called, conceiving that Mr. Whitlam could not govern without a vote of supply which the Opposition-controlled Senate would not give him; neither would Mr. Whitlam advise a double-dissolution and election which was the only way the Crown considered the impasse could be resolved.[254] If essential official expenditures were not met by supply, of course a crisis would arise. In elections following shortly after the two above incidents, William IV was chastened by the electorate and had to send again for Melbourne, while Sir John's caretaker Prime Minister, Malcolm Fraser, was resoundingly elected. Arguably, William IV was seen as interfering in matters of policy which were not his business, while Sir John was seeking properly to ensure that a government capable of governing remained in office. Thus do the applicable conventions evolve and obtain content.

The constitutional basis of reserve powers is somewhat obscure. Perhaps the Whig interpretation of Dicey is as convincing as any. Given a crisis, the Crown might justify the exercise of reserve powers on the basis that the national welfare or the common good can, in exceptional cases, override the will of Parliament.[255] The Crown, when it invokes such powers, is implicitly appealing from its normal ministerial advisers to the nation as a whole: from the derivative sovereignty of Parliament to the ultimate sovereignty of the people.

Governor General Schreyer might conceivably, then, have contended that if the November 1981 constitutional conference had failed, after the Supreme Court in the preceding September had found unilateral patriation unconstitutional, he would have been faced with the prospect that a critically important policy of his government, although technically legal, was unconstitutional and improper. In these circumstances he would be the custodian of the constitution in a highly important sense. Mere illegality can be remedied by the courts but a breach of convention can be dealt with only by the Crown or the people. He would therefore have to consider the statement of the Court majority that "some conventions may be more important than some laws"[256] (and this one, being central to the "federal principle", surely was), along with the parallel statement that by no conceivable standard could the consent of only two of ten provinces "pass muster".[257] In surveying the total context, the Governor General might then consider that with eight

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[254] Glynn, *The Governor General's Coup d'Etat*, TIME, 24 Nov. 1975, 16-20; *see also*, *e.g.*, W. MCCONNELL, *supra* note 249, at 39-40; and for an exhaustive summary by the Governor General who dismissed Prime Minister Whitlam, *see* J. KERR, MATTERS FOR JUDGEMENT (1978). The latter work contains an epilogue by Eugene Forsey at 440-44 in which Dr. Forsey says at 442, "I do not think it can be denied that the Crown and its representatives have, in strict law, the power to dismiss a Government."

[255] A. DICEY, THE LAW OF THE CONSTITUTION 431 (8th ed. 1915); *see also* W. MCCONNELL, *supra* note 249, at 43.

[256] *Supra* note 177, at 883, [1981] 6 W.W.R. at 100, 125 D.L.R. (3d) at 87.

[257] *Id.* at 905, [1981] 6 W.W.R. at 120, 125 D.L.R. (3d) at 103.

dissentient provinces still confronting Parliament he would be compelled to act to avert a constitutional calamity. (He would also be cognizant that the Official Opposition was resolutely antagonistic to the resolution as it stood.) The calamity would be, in his perception, that given the dimensions of the opposition, if unilateral action were proceeded with, such chronic disunity and federal-provincial discord would supervene that cordial intergovernmental relations and essential public business could be impaired or forestalled for years. He could conclude that he was faced with an emergency situation precipitated by unconstitutional behaviour and likely to have catastrophic results (*e.g.*, the possible separation of Quebec or Newfoundland).

Dismissal of the incumbent Prime Minister would be of no avail since, with a majority in Parliament supporting unilateral patriation, the Crown would have no other advisers to whom it could turn. No parliamentarian opposed to unilateral patriation could command the support of the House. Seeking to avert a constitutional crisis with its unacceptable results, his only recourse would be to ask the Prime Minister to clear the air by obtaining, in a general election, a national mandate for patriation. He would therefore ask Mr. Trudeau to advise a dissolution and an election. Failing this, the Governor General would dissolve Parliament and call an election on his own initiative. If the electorate later returned the government, however, he would have been rebuked by the people to whom an appeal had been made. His future relations with his former advisers having been gravely impaired, he would probably either resign or suffer dismissal himself.

10. *The Reception of the Resolution in Britain*

In considering the Canada Bill during second reading on 17 February 1982, the Speaker of the British House of Commons ruled that while the Bill was amendable by that House, "[i]f the House were to make any amendment to the English version of the Bill, it might well become necessary, at some later stage, for a consequential amendment to be made in the French version."[258] This statement seemed to be *prima facie* at variance with section 4 of the Statute of Westminster, 1931,[259] which declared that no Act of the United Kingdom Parliament would be passed without a Dominion's request and consent. It seemed inferentially almost to reassert the jurisdiction of Westminister as an imperial legislature. The Speaker, however, was careful to take notice of Canada's bilingual character.

Whatever the "law" might be, in presenting the request of the Canadian Parliament, Humphrey Atkins, the Lord Privy Seal, cited the preamble to the Statute as setting out an "already-established constitutional convention":

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[258] H.C. DEB. (Eng.), Vol. 18, no. 59, col. 290 (17 Feb. 1982).
[259] 22 Geo. 5, c. 4.

> No law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and consent of that Dominion.[260]

Sir Anthony Kershaw summarized the gist of the conclusions reached by the Foreign Affairs Committee over which he presided:

> It was perfectly clear after hearing the evidence that the destruction or indeed the alteration, of the federal nature of the Canadian constitution was something that we could not agree to unless the Canadians asked us to do so. But it was difficult to decide how we were to judge whether Canadians were or were not in favour of the change. First, we must consider the voices of the provinces. Was one enough? Does everyone have a veto? We found no evidence that unanimity of the provinces was essential. Indeed, we could go further. Even if the Government of a province were against, the opinion of the people, expressed in a referendum or in some other way, could be taken note of. However, in our opinion we were saved from having to make a too difficult judgment, by the time eight provinces were against, it was clear that eight were too many.
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> During these months of debate the Canadian Government were maintaining that the law was clear and that no conventions could limit it. That is true in a way. The only law that the courts can administer is what is in the law books, but when because of growing opposition, not least in this House, Mr. Trudeau put the matter to the Supreme Court of Canada the court was perfectly clear that "constitutional conventions plus constitutional law equal the total Constitution of the country". It seems clear to me, therefore, that a request which violates a convention is an improper request and that we should have been right to reject the request as originally foreshadowed.
>
> The request before us today is different and has secured the support of nine of the 10 provinces. I suggest that just as eight against were too many, nine for are enough.
>
> It is indeed a pity that the dissenting province should be Quebec, a founder province and a distinctive province, because of its Frenchness. Nevertheless, there is no veto binding upon this House which precludes us from deciding that the present request in fact represents the general will of Canada regarded as a federally structured whole. I suggest, therefore, that we are not only constitutionally able, but are constitutionally obliged, by law and convention, to pass the Bill.[261]

Referring to the representations of the leaders of the Indian people, who had made several visits to London for the purpose of influencing the House of Commons' position, Sir Anthony said:

> If we did not deal at any great length with their problems in our report, that is only because we were clear in our minds that all their treaties were with the Crown of Canada. When those treaties were made the Crown was undivided. When Canada became independent the Crown became independent as between the United Kingdom and Canada. There can be no doubt about that.[262]

Among the opponents of the Bill, Sir Bernard Braine and the Right Honourable J. Enoch Powell made especially strong representations.

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[260] H.C. DEB., *supra* note 258, at col. 293.
[261] *Id.* at cols. 329-330.
[262] *Id.* at col. 330.

A former Undersecretary of State for Commonwealth Affairs, Sir Bernard deplored what he considered to be the cavalier treatment of Quebec and Canada's native peoples in the procedures and provisions of the Bill:

> The Bill is unconstitutional in its effect on one of the two founder nations of the Canadian federation. It is immoral in its effect on the native peoples of Canada. It flies in the face of the concern that this House has always felt, thank God, for minorities. We should not pass the Bill in its present form.[263]

Sir Bernard queried whether there might not have been collusion between Ottawa and the provinces, with the federal government agreeing to limit native rights in November 1981 and thereby eliminating "potential encumbrances" on provincial lands in exchange for the accord of seven out of eight dissenting provinces to the package. He referred to the initial dropping of section 35 entrenching native rights and then to its restoration as a result of a "great public outcry". Mentioning representations made by the premiers to limit such rights, he added that the insertion of the word "existing" in section 35 "was the final compromise achieved to secure accord".[264] There was, moreover, no effective permanent guarantee of native rights even with section 35. Seven out of ten provinces, according to the amending formula, could derogate from native rights without the consent of native peoples. "Native consent is not a requirement of the amending formula. It must become so if this House wishes, with a clear conscience to pass the Bill."[265]

Mr. Powell was the spokesman in the House for an "autochthonous" constitution; if Canada were to be genuinely independent, like the Americans in 1776 and 1787 she should do the job herself.

In an elliptical argument, the meaning of which was never fully elaborated, Mr. Powell said: "a sovereign Parliament can create only sovereign Parliaments — that is, that it is not in a sovereign Parliament's power to create permanently and unchargeably federal States."[266] It followed that what Canada was asking in the joint resolution was an "absurdity" and a "contradiction".[267] He appeared to be emphasizing the Austinian jurisprudential notion of "sovereignty" as a theoretically unlimited power to make and unmake laws.[268] If sovereignty in this sense inhered in the federal Parliament, as having alone international legal personality, then it was intrinsically non-self-limiting. According to Powell's abortive motion, the United Kingdom Government should

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[263] *Id.* at col. 319.

[264] *Id.* at cols. 318-19.

[265] *Id.* at col. 319.

[266] *Id.* at col. 321.

[267] *Id.*

[268] *Cf.* "[T]he power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation. . . . Supreme power limited by positive law is a flat contradiction in terms.": Austin, *The Province of Jurisprudence Determined*, in INTRODUCTION TO JURISPRUDENCE 236 (4th

decline to legislate for Canada "simultaneously with renouncing the future power to so legislate". How then could a federal constitution be achieved?

> The answer is, You alone can do it for yourselves. You alone can do it by entering into an internal compact, so binding that the very existence of the Canadian State is understood to rest on the maintenance of that contract. In other words, you must start again and create a new State upon the basis of contract, upon the basis of the will that that contract should be made and observed. You must create a contract similar to that upon which your neighbour nation, the United States of America, rests its constitution, which has no knowledge of a sovereign Parliament. It is impossible for this House to do that for you. Indeed, you cannot do it unless you cut the umbilical cord that still links your parliamentary institutions to this House and this Parliament.[269]

At ten p.m. of the same day as it was introduced, the Bill passed second reading by a recorded vote of 334 to 44.[270] It was then sent to committee for clause-by-clause study and eventually passed in the House of Lords. The measure had consumed about six hours of the time of the Lower House in this most important phase of debate.

11. *Envoi*

The Constitution Act, 1982 introduced significant changes into the Canadian constitution but it was only the first step in constitutional renewal. Yet to come at future first ministers' meetings are decisions on the Crown, Supreme Court and Senate, and on the division of powers. Perhaps the electoral system will also be changed to allocate some seats on the basis of proportional representation.

A brief summary of what was accomplished follows:

(a) A Charter of Rights and Freedoms applicable to both provincial and federal jurisdictions was entrenched, including as important subject matters:
   (i) linguistic and educational rights, entrenching French and English as official languages in defined federal areas,[271] as well as the conferring on minority Anglophones and Francophones of access to provincial school systems "where numbers warrant".[272] Also included was the "Canada Clause" which enables Anglophone Canadians from other provinces moving to Quebec to have their children educated there in English primary or secondary schools;[273]

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ed. Lord Lloyd of Hampstead 1979).

[269] H.C. DEB., *supra* note 258, at col. 321.

[270] *Id.* at col. 370.

[271] Constitution Act, 1982, ss. 16-22.

[272] S. 23.

[273] Subs. 23(1).

(ii) mobility rights, recognizing freedom of movement, but with qualifications of the "right to work" in provinces where the employment level is under the national average.[274]

(iii) Fundamental freedoms,[275] legal rights[276] and equality rights[277] were enshrined, with an "affirmative action" clause[278] in the last category, designed to avoid the danger of a judicial finding of "reverse discrimination", by expressly permitting programs or activities having as their object "the amelioration of conditions of disadvantaged individuals or groups".[279]

(b) An equalization formula was agreed upon for the reduction of regional disparities, the promotion of equal opportunities for all Canadians and providing essential public services of reasonable quality to all Canadians.[280]

(c) An amending formula was agreed to so that all future amendments could be made in Canada.[281]

(d) Aboriginal rights were entrenched and the Métis were recognized for the first time as "aboriginal peoples". Further provision was made for a conference including "native peoples" as participants to be summoned by the Prime Minister by 17 April 1983 to identify and define such rights.[282]

(e) A "natural resources" provision extended provincial marketing jurisdiction, subject to federal paramountcy, over interprovincial trade in those resources,[283] thereby overcoming some of the problems of the *Canadian Industrial Gas and Oil Ltd. v. Saskatchewan*[284] and *Central Canada Potash v. A.G. Sask.*[285] cases.

Dropped by the federal government in the final accommodation were the Victoria amending formula provisions conferring a permanent veto power on Ontario, Quebec and the Senate over future amend-

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[274] S. 6.

[275] S. 2.

[276] Ss. 7-14.

[277] S. 15.

[278] Subs. 15(2).

[279] For discussion of the well known *Bakke* case, a decision of the Supreme Court of the United States (Regents of the U. of Cal. v. Bakke, 438 U.S. 265 (1978)), which created some difficulties for affirmative action programs in the United States, *see* Footlien, Camper & Howard, *The Landmark Bakke Ruling*, NEWSWEEK, 10 Jul. 1978, at 18, and *Bakke Wins, Quotas Lose*, TIME, 10 Jul. 1978, at 8. Other U.S. cases on "affirmative" discrimination are Kaiser Aluminum v. Weber, 443 U.S. 193 (1979) and Fullilove v. Klutzwhich, 448 U.S. 448 (1980); in Canada, *see* Athabasca Tribal Council v. Amoco Canada Petroleum Ltd., [1980] 5 W.W.R. 165, 112 D.L.R. (3d) 200 (Alta. C.A.); *aff'd on other grounds*, [1981] 1 S.C.R. 699, 124 D.L.R. (3d) 1.

[280] S. 36.

[281] Part V.

[282] Ss. 35, 37; *see also* s. 25.

[283] Part VI, s. 50.

[284] [1978] 2 S.C.R 545, [1977] 6 W.W.R. 607, 80 D.L.R. (3d) 449 (1977).

[285] [1979] 1 S.C.R. 42, 23 N.R. 481, [1978] 6 W.W.R. 400, 88 D.L.R. (3d) 609 (1978).

ments,[286] and the "popular referendum" procedure which was to be used when a stalemate occurred between governments under the Victoria amending formula:[287] in that case the amendment was to be voted on by the people on a national basis, with a weighted regional majority prevailing despite provincial opposition. For their part, the premiers agreed to accept a modified charter of rights, and had their preferred Vancouver amending formula endorsed by Ottawa.[288]

The Charter creates rights and freedoms rather than new powers. Nothing in it extends the jurisdiction of any unit of government.[289] Partly because of this, some of the most vexing issues remain to be resolved. The problem of the amount of fiscal transfers from Ottawa to the provinces to pay for eductional or health costs remains, although here, at least symbolically, the equalization formula might be invoked. This formula is most useful to the less well-endowed provinces. However, whereas the problem of transfers is general, the formula cannot really be used to resolve the situation. Another need is for a new Upper House which would be a more effective voice in Parliament for the provinces and regions of Canada. A forum similar to the American or Australian Senates or the West German *Bundesrat*, which could powerfully articulate provincial grievances within the federal legislative body itself, could perhaps have overcome some of the bitter federal-provincial antagonisms of past years. Ottawa has an aura of remoteness to some provinces, and a more effective regional presence is needed in the capital. There are even prophecies that "cooperative federalism" is dying.

The alienation of many Quebecois and native peoples from the whole constitutional process is troublesome. On the day in April when the Queen proclaimed the constitition Premier Lévesque was leading a protest march of 25,000 people through the streets of Montreal. At the same time native peoples were engaging in counter-demonstrations across Canada. It is desirable that something should be done to try to alleviate their concerns. The native peoples should receive a meaningful definition of "aboriginal rights" in the conference to be convened shortly pursuant to section 37. As for Quebec, there is a great danger that its Francophone population might eventually be assimilated, and an attempt might be made to renegotiate those terms of the new constitution of which the province is fearful. A rigid amending formula, however, makes this difficult.

Although his political foes say that the separatist Premier of Quebec would have had difficulty in agreeing to a new federal constitution, he might still have agreed to a smaller package. He was naturally concerned

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[286] Part VI, s. 45, listed in *What Parliament will debate*, The Globe and Mail (Toronto), 14 Feb. 1981, at 12, col. 6.

[287] *Id.* at s. 46.

[288] *The formula as accepted by majority*, The Globe and Mail (Toronto), 6 Nov. 1981, at 13 (Metro Edition).

[289] Constitution Act, 1982, s. 31.

about educational and language rights, and the future configuration of the division of powers. It was in his interest to compromise. He might have accepted patriation and the modified Vancouver formula (which he agreed to in April 1981) without the extensive Charter provisions. After decades of wrangling, however, the other first ministers were impatient and, wanting to conclude an agreement, finally came to an accommodation without Quebec. This probably was a mistake. The political problem in Quebec lies not merely with the separatists but also with the Liberal Opposition.[290] The veto is a provincial, not just a party issue, with profound historical overtones. Successive Quebec premiers have demanded a right to participate in fundamental constitutional change. A province which remembers the execution of Riel in Regina in 1885, and the conscription riots in Quebec City in 1918, may in future have similar bitter memories of the "November Fifth Accord" of 1981.

After 54 years, a wait for another decade would have cost little. This of course assumes that M. Lévesque would have agreed to patriation and an amending formula now. If so, perhaps later a more modest rights charter could have been agreed upon. Prime Minister Trudeau was probably fearful, however, that a smaller eventual package would have excluded his cherished language and educational rights. When all the variables are considered it is difficult to say what could have been realistically negotiated.

What provokes anxiety among Canadian nationalists about the new constitution as it affects Quebec is that the Quebecois, except for Trudeau and a few others, have never been strong advocates of a rights charter. This was *not* the constitutional change they were seeking when they voted "*non*" on 20 May 1980. What the Quebecois are primarily interested in are: (a) the retention of their historical veto power; (b) self-determination in matters of language and culture in the interest of *survivance*, which the Charter undermines; and (c) a restructured division of powers enabling them to determine their own social and economic destiny. For the Prime Minister, in his latest phase more nationalist and centralist than federalist, these goals are unacceptable. The Charter with its ringing, *a priori* values is for all humanity. The Quebecois and native peoples can only regard the Charter with apprehension, for the equal rights of all persons everywhere signify assimilation. They must be particularists rather than universalists, and particularism coexists uneasily with rights codes. They reflect the universal attributes of all persons. The irony is that the renewal the Prime Minister has given the Quebecois could lead to their disappearance as a viable cultural group. It could inspire a strong *indépendantiste* reaction. Since they desire a special status resisted by others, the new, rigid amending formula, requiring seven provinces with fifty per cent of the population for change, will block the revisions they desire. If Quebec in disappointment systematically opposes future amendments under a

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[290] *Supra* note 230.

process it did not choose, the gulf between it and the other provines will increase.

Premier Blakeney was among those who also favoured a smaller package,[291] as were most of the premiers. With him an important factor was that the extensive Charter provisions would result in a major shift of policy-making powers from the elected legislatures to the appointed, and politically non-responsive, courts. Described alternately as a socialist and a populist, Mr. Blakeney retained the mistrust of midwestern American populists of the past for courts, which were regarded as citadels of privilege and elitism, the Bench of which was often selected from affluent corporation counsel. Professor Douglas Schmeiser has viewed the possible shift in power as follows:

> [T]he issue in dispute is not the presence or absence of the power of judicial review, but the extent of its operation. What must be determined in the entrenchment debate is whether our courts should be invested with power to openly invalidate the political decisions of Parliament or of the provincial legislatures, acting within their jurisdictional competence. With respect to some entrenched rights, such as educational and linguistic rights, the courts may be required to move beyond constitutional invalidation to judicial legislation and to direct administrative supervision.[292]

The issue that Professor Schmeiser speaks of is not yet conclusively determined because of the presence of section 33, which empowers Parliament or the provincial legislatures to override the most important of the libertarian provisions of the Charter. However, there may be some inhibitions to legislative bodies using such an "override" frequently because of its illiberal appearance.

With the proclamation of the new Charter, the courts have acquired far-reaching powers. Some observers consider that the most sweeping "Bill of Rights" challenges in the U.S. court system have occurred in the areas of abuse by administrative tribunals or police powers (that is, the area of "due process") rather than in broader areas of social and economic policy.[293] There is some merit in this contention but important American cases with extensive repercussions have been brought before the courts in both criminal and civil areas, for example, concerning segregation in school administration,[294] legislative reapportionment,[295] religious freedom,[296] the right to counsel,[297] accessibility of abortion[298] and capital punishment.[299] New constitutional standards have thereby

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[291] *Premiers' efforts continue*, Star-Phoenix (Saskatoon), 28 Mar. 1981, at 1, col. 6.

[292] *The Entrenchment of a Bill of Rights*, 19 ALTA. L. REV. 375, at 379 (1981).

[293] Professor Walter Tarnopolsky on C.B.C. Radio, 17 Apr. 1982.

[294] Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954); Milliken v. Bradley, 418 U.S. 717 (1974).

[295] Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).

[296] The People v. Woody, 394 P. 2d. 813 (Cal. 1964).

[297] Gideon v. Wainwright, 374 U.S. 335 (1963).

[298] Roe v. Wade, 410 U.S. 113 (1973).

[299] Furman v. Georgia, 408 U.S. 238 (1972).

been made which have often substantially limited legislative powers. Arguably, this will happen in Canada. Parliament and the legislatures are no longer supreme but must defer (short of using the "override") to the courts and the constitution.

In the new constitutional regime there will inevitably be a trend towards some features of the American presidential system. A Supreme Court presumably soon to be entrenched, armed with a Charter, will have a larger policy-making role and may more confidently confront the legislature and executive in the U.S. "separation-of-powers" or "checks-and-balances" sense.[300] Arguably, the new system will reflect more the ideas of popular sovereignty and levelling democracy of Rousseau and Jackson rather than the parliamentary elitism of Acton and Burke. The Court will become more politicized. Polarized "activist" and "conservative" blocs will develop, with counsel trying to convince particularly the less ideological and more amenable centre factions.[301]

Appointments will excite greater controversy because of the enhanced powers of the Court and could be subjected, as in the United States, to a confirmation process by a reconstituted Upper House. As one of Canada's leading experts on civil liberties, Professor Walter Tarnopolsky, has said, the selection process for judges of the Supreme Court of Canada, because of the critically important role of the judge in interpreting the Charter, will be more important than the written guarantees themselves.[302] The recent selection of the first woman to sit on the Court,[303] Madam Justice Bertha Wilson, who was sworn in on 30 March 1982 to replace Mr. Justice Martland of Alberta, was therefore of great interest. Madam Justice Wilson, who was born in Scotland, is the wife of a Presbyterian minister. She came to Canada in 1949 and was appointed to the Ontario Court of Appeal in 1975. While the appointment will make the Court more representative of its national constituency, even where women's rights are involved, gender alone does not of course determine judicial policy. President Reagan's 1981 appointment of Sandra O'Connor of Arizona to the U.S. Supreme Court was welcomed

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[300] A leading case on confrontation between the judicial and executive branches would be that involving former President Nixon's claim to executive privilege in connection with the Watergate tapes: *see* U.S. v. Nixon, 418 U.S. 683 (1974). There was also the earlier judicial invalidation of President Truman's seizure of strike-bound steel mills during the Korean War: *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); M. MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

[301] For a most readable journalistic narrative of inter-bloc relationships, *see generally* B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

[302] Strauss, *Judges' selection held most crucial*, The Globe and Mail (Toronto), 19 Nov. 1981, at 8 (Metro Edition).

[303] Montgomery, *Lavish praise welcomes first woman to Canada's top court*, The Globe and Mail (Toronto), 31 Mar. 1982, at 1 (Metro Edition).

by many legal conservatives in the light of her past decisions on the state Bench.[304]

Balancing the trend towards greater interventionism in policy by the Court may be inhibitions created on the Bench by section 33, the "override" provision of the Charter. A tribunal which is interested in maintaining its credibility may not want to make innovative decisions on the frontiers of civil liberties that can be instantly offset by countervailling provincial or federal laws.

In its wide-ranging recent study of constitutional reform, the Canadian Bar Association suggested that to promote Canadian identity the head of state should be a Canadian, but in such an emotionally-charged area perhaps all that could be expected in the immediate future would be an "evolutionary process of granting more Head of State functions to the Governor General".[305] Under the amending formula in the new constitution, the substitution of the Governor General or a reconstituted office of "Head of State" for the Queen would be very difficult, as the monarchy, along with certain other sensitive matters, still requires provincial unanimity for change.[306] The monarchy in Canada continues to be popular but if the time comes when a national consensus has developed for change, a single determined province could block it.

Perhaps, for all that, the new constitution will have a more republican flavour. A person's rights inhere in his or her citizenship status as set out in a founding document, rather than devolving upon him from above as an act of grace from the Crown, or on him as the object of the beneficence of alterable parliamentary legislation.

It is just possible that Prime Minister Trudeau, perceiving that the provinces were becoming too powerful, was attempting in fashioning the Charter to use the people, in whom rights inhered, and the courts, as "counterweights"[307] to create a more satisfactory federal equilibrium. If this were part of his design, the November Fifth Accord, which removed the "popular referendum" device and inserted a legislative override clause, would militate against it. The courts are still in a powerful position to invalidate provincial and federal laws, however, and it is conceivable that because of their very diversity the homogenizing influence of the new Charter will have its greatest impact on provincial laws.

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[304] *See, e.g.*, Kelso, *Justice O'Connor Replaces Justice Stewart: What Effect on Constitutional Cases*, 13 PACIFIC L.J. 259, at 267 (1982), where the author, after surveying a number of recent controversial court decisions said, "It does not seem likely that Justice O'Connor would have departed from the conservative position in these cases."

[305] COMMITTEE ON THE CONSTITUTION, CANADIAN BAR ASSOCIATION, TOWARDS A NEW CANADA, 34-35 (1978).

[306] Constitution Act, 1982, s. 41.

[307] P. TRUDEAU, FEDERALISM AND THE FRENCH CANADIANS, at xxiii (1968); G. RADWANSKI, TRUDEAU, at 123 (1978).

D. *Constitutional Development in the Northwest Territories*

The immense northern segment of the landmass extending from the Arctic Archipelago to the Great Plains (from which Alberta and Saskatchewan were detached in 1905), the Northwest Territories occupies some 3.3 million square kilometres in area but has a population of less than 60,000 people, being one of the most sparsely populated regions in the world. It is also among the most ethnically diverse, with Dene, Inuit, Métis and whites dwelling in widely-dispersed towns and hamlets, as well as in the present capital city of Yellowknife. The Inuit and Dene inhabit, respectively, the treeless "Barrens" of the northeast and the Mackenzie River Valley, and are subdivided into smaller groups, each having its own distinctive language and traditions. Such diversity, along with the remoteness of the sub-regions, make the Territories difficult to govern.

Some indication of the neglect from which the North West has suffered can be appreciated when it is realized that although the Territorial Commissioner named by Ottawa in 1905 (an R.N.W.M.P. officer) was to be assisted by a four-member appointed Council, no such body was actually named until 1921, when oil was discovered at Norman Wells in the central Mackenzie region.[308] In earlier days the Council sat only infrequently. In 1951 provision was made for an enlarged Council with three elected and five appointed members. At least two sessions annually were to be held, of which one was to be in the Territories. In December 1951 the inaugural Territorial session was held in Yellowknife. In 1955 a Territorial Court was established with the Honourable John Howard Sissons as its first presiding judge.[309] Before that time, the administration of justice had been the responsibility of the police and stipendiary magistrates, almost invariably without legal training.

The Carrothers Commission of the mid-sixties opposed political division of the Territories along ethnic lines, with the goal being the eventual achievement of responsible government on the racially inte-

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[308] There is an excellent and succinct discussion of the constitutional development of the Territories by Milligan and Kupsch, *Road to Responsible Government. The Evolution of the Territorial Council*, in 1976 ANNUAL REPORT OF THE GOVERNMENT OF THE NORTHWEST TERRITORIES 5 (1977). The writer has drawn on this account in briefly describing the constitutional development of the Territories.

[309] *See* J. SISSONS, JUDGE OF THE FAR NORTH (1968) for an account of Mr. Justice Sissons' career on the Territorial Bench.

grated Westminster model.[310] According to its recommendations, the Executive Committee would develop into a cabinet, the Territorial Council into a Legislative Assembly, and the Commissioner and Deputy Commissioner would respectively become Lieutenant Governor and Premier. Pursuant to another recommendation, in 1967 the administrative capital was transferred from Ottawa to Yellowknife, and the nucleus of a growing public service was established.

In 1975 the Territorial Council was increased in size from ten to fifteen, now becoming fully elected for the first time since the reconstitution of the Territories in 1905. The Council also acquired power to elect its own Speaker, with David Searle, Q.C. of Yellowknife long occupying the chair. Moreover, two elected Council members were to serve on the Executive Committee; there are now seven in addition to the Commissioner and Deputy Commissioner. The Council now numbers twenty-two elected members but because of the multifarious nature of its far-flung constituency and the calculation by Ottawa that extensive natural resources may still be undiscovered in the region, the federal government continues to play a large policy role there through its appointed Commissioner and the Department of Indian Affairs and Northern Development (DIAND).

In January 1980 the Report on constitutional development of government in the Northwest Territories,[311] presided over by the Honourable C.M. Drury was presented to Prime Minister Clark. The long-awaited sequel to the Carrothers Commission Report (which had recommended a re-examination of the Territories' constitutional status after ten years), the Report stopped short of recommending responsible government, provincial status or political division.

To counter the prevalent sentiment among Northerners that too large a policy-making role over Territorial affairs was being played by a distant and insensitive bureaucracy,the Report recommended the marked subordination of DIAND in future Terriorial administration. It was suggested that there should also be a progressive increase in the province-like jurisdictions exercised by the Legislative Assembly at Yellowknife,[312] and a closer approximation of the federal-territorial to

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[310] I REPORT OF THE ADVISORY COMMITTEE ON THE DEVELOPMENT OF GOVERNMENT IN THE NORTHWEST TERRITORIES 147 (A. Carrothers Chairman 1966): "With division there would be a very great risk that the Eastern Arctic would become sealed off, would remain dominated by the central government, and might never acquire anything more than a nominal form of self-government." The members of the Commission were: A. W. Carrothers, then Dean of Law at the University of Western Ontario; J. Beetz, then professor of law at the University of Montreal and later a judge of the Supreme Court of Canada; and J. H. Parker, then Mayor of Yellowknife and now Commissioner of the Northwest Territories. *See* Searle, *Government in the Northwest Territories: The Carrothers Commission Report*, 5 ALTA. L. REV. 299 (1967).

[311] CONSTITUTIONAL DEVELOPMENT IN THE NORTHWEST TERRITORIES: REPORT OF THE SPECIAL REPRESENTATIVE (C. Drury Chairman 1979) [hereafter cited as REPORT].

[312] *Id.* at 90-91.

the federal-provincial intergovernmental model.[313] The Minister of State for Federal-Provincial Relations would act in a liaison capacity with the Territorial Government rather than DIAND, and a proposed new federal portfolio of Native Affairs would attempt to respond more effectively to the concerns of aboriginal peoples in the Territories.[314]

In 1977 the Territorial legislators themselves desired to conduct the constitutional inquiry recommended by the Carrothers Commission, and consulted some constitutional authorities as possible directors, including Senator Eugene Forsey and Professor Lederman.[315] They were advised by Commissioner Hodgson, however, that such a proposal was unconstitutional because: (1) unlike the situation in the provinces, jurisdiction over Territorial constitutional development was still vested in Ottawa, which properly should initiate any such inquiry, and (2) a money bill would have to be presented to the Assembly to defray the expenditures of the enquiry and he would be constrained, on instructions from Ottawa, to veto such a Bill if it were presented. In addition, no prior mention of such an important measure had been made in the preceding Speech from the Throne.

Shortly afterwards, Mr. Drury, a brother-in-law of Walter Gordon who had held important portfolios in the Pearson and Trudeau cabinets, was appointed by the Prime Minister to conduct the enquiry. He met with suspicion from Territorial groups from the start because of his past close connection with the federal government. Justly or not, it was thought that he would reflect the preferences or vested interests in the federal government, rather than taking an independent and detached view of what was good for the Territories.

In 1977 the Report of the Mackenzie Valley Pipeline Inquiry[316] had recommended a ten-year moratorium on the construction of a natural gas pipeline through the Mackenzie Valley corridor, during which time the land claims settlement process could continue, environmental safeguards could be established and new political institutions could be developed. Mr. Justice Berger who presided over the Report, suggested that perhaps new political institutions might reflect the "consensus" pattern of decision-making characteristic of native groups rather than the adversarial, multi-party parliamentary system used in southern Canada. He considered that the existing administrative and political structures were dominated by whites, were not adequately cognizant of native concerns and were not authentically representative bodies in a political entity with a majority of aboriginal peoples. Of all those now living in Canada, the

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[313] *Id.* at 90.

[314] *Id.* at ch. 4.

[315] The author received much of the information which follows in a telephone conversation with David H. Searle, Q.C., the Speaker of the Legislative Assembly, when the events referred to were occurring early in 1977.

[316] I NORTHERN FRONTIER, NORTHERN HOMELAND: THE REPORT OF THE MACKENZIE VALLEY PIPELINE INQUIRY (Berger J. Chairman 1977).

aboriginal inhabitants were the only ones who did not voluntarily choose the governmental framework that was imposed upon them.

This same alienation from the governmental process among native peoples was diagnosed by Mr. Drury (whose enquiry was boycotted by the Inuit and the Dene) but he saw the remedy elsewhere. The acquisition of more provincial-style responsibilities would, he suggested, terminate the semi-colonial, client-like relationship of the Territories with a single, powerful government department, allowing the link to then be transferred largely to the Minister of State for Federal-Provincial Relations. With the development of greater parallelism between federal-provincial and federal-territorial relationships, Ottawa would encourage "greater exercise of responsible government at the territorial level".[317] Meanwhile, the Territorial Government would be invited as a full participant to federal-provincial conferences in those areas in which it exercised provincial-type jurisdiction.[318] However, participation in the modalities of "Executive-Federalism" is not responsible government, nor is "a greater exercise" of responsible government properly such. The great disappointment of the Report, at a time of constitutional renewal, was the failure to recommend this necessary advance which could be achieved short of provincial status, towards a more democratic and less colonial control of the executive by the legislature and ultimately by the people.

The dilemma that the Northwest Territories and the Yukon now find themselves in with the enactment of the Constitution Act, 1982 is that paragraph 42(1)(*f*) thereof requires the application of the general amending formula[319] for "the establishment of new provinces". There would have to be a consensus of seven provinces with fifty per cent of the total national population, accordingly, for such establishment. In contrast, the provinces were not consulted in 1949, when Newfoundland was admitted, because of Mr. St. Laurent's apprehension that Quebec would strongly oppose such admission.[320] Formerly, only the consent of the federal government and the affected Territory was needed. The Territorial Assembly in fact had in December 1981 consulted Kenneth Lysyk, Q.C. with a view to taking court action, before entrenchment, to have the section removed.[321] It is most unlikely that any legal action could successfully have impeded the entrenchment of paragraph 42(1)(*f*), and the rules for admission of provinces are now much more difficult.

One of the chief distinctions between the provinces and the Territories is that the latter do not own or control their natural resources. While Mr. Drury did recommend the transfer of the present federally administered Crown lands and natural resources to the Territories, it was

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[317] REPORT, *supra* note 311, at 90.

[318] *Id.*

[319] Constitution Act, 1982, subs. 38(1).

[320] J. SMALLWOOD, I CHOSE CANADA 316 (1973); P. GÉRIN-LAJOIE, CONSTITUTIONAL AMENDMENT IN CANADA 125 (1950).

[321] *NWT studies court action on BNA pact*, The Globe and Mail (Toronto), 4 Dec. 1981, at 8.

only with onerous restrictions. When completed the recommendation would apply to "public lands and inland waters, including subsurface rights, and rights to timber".[322] Simultaneously, the Territories would acquire jurisdiction like that contained in head 5 of section 92 of the Constitution Act, 1867 empowering it to manage and sell its public lands along with appurtenant wood and timber.[323] This is a highly significant power, for associated with it is the "management" function, involving cognate powers over conservation, production and administration. But concurrency would be the rule here, and whenever federal law clashed with Territorial law, the former would prevail. Among other important limitations would be: (a) a "cap" or limit on Territorial revenues from royalties and other resource revenues, beyond which they would have to be shared with the federal government and (b) Ottawa would reserve from land transferred to the Territories, areas for national parks, national defence and native claims beneficiaries to a maximum of ten square miles for each potential beneficiary.[324] No recommendation was made respecting the transfer of offshore resources, or the delimitation of offshore boundaries, since these were and still are "currently the subject of debate".[325]

"For the time being," the Report declares, "the federal government should continue to have access to extraordinary resource revenues in the NWT so as to ensure that all Canadians benefit equitably."[326] The position of the Territories is arguably anomalous because of its vast area and sparse population, but it should be emphasized that it is not the contemporary practice that *all* Canadians share directly from the revenues generated by the exploitation of resources. Where natural endowments among regions are unequal, disparities are ordinarily redressed through equalization payments so that all citizens will be able to enjoy a common minimum level of services. Under the above proposal, possibly the Territories would undergo a double levy on its resource revenues, first from the "cap" and other sharing arrangements, and then through equalization. "Is this fair?" it must be asked.

Local government is another important area extensively dealt with in the Report. In the next revision of the Northwest Territories Act,[327] a "first tier municipal order of government" should be recognized with

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[322] REPORT, *supra* note 311, at 94.

[323] *Id.* at 95.

[324] *Id.* at 96.

[325] *Id.* The British Columbia dispute over offshore resources was resolved in favour of the federal Crown in The Matter of a Reference by the Governor General in Council Concerning the Ownership and Jurisdiction over Offshore Mineral Rights as set out in Order in Council P.C. 1965-750, dated April 26, 1965, [1967] S.C.R. 792, 65 D.L.R. (2d) 353; and for the Newfoundland dispute, which has not yet been litigated, *see, e.g.*, Martin, *Newfoundland's Case on Offshore Minerals: A Brief Outline*, 7 OTTAWA L. REV. 34 (1975). (Editor's note: the Newfoundland case was decided by the Court of Appeal while the Survey was in the printing process.).

[326] REPORT, *supra* note 311, at 96.

[327] R.S.C. 1970, c. N-22.

paramount authority over land and resource management, education, social programs and housing.[328] In a region where local conditions differ so greatly, such adaptation seems desirable. If they so wished, local councils would be empowered to delegate powers upwards on a regional basis,[329] with as much regional control being encouraged as possible. Undue centralization has often been a criticism directed at Yellowknife by outlying centres. Yellowknife should accordingly enact laws "as broad and permissive as possible",[330] which could be adapted to local and regional needs by councils. With paramountcy being enjoyed by Ottawa over natural resources and by local governments over an array of matters, there is decentralization in two directions, and one wonders what would be left for the lawmakers at Yellowknife.

One of the final recommendations of the Report was the possible holding of a Territories-wide vote to test proposals for constitutional change.[331] One such change would be the possible division of the Territories into a northeastern area, governed by the Inuit who have pressed strongly for regional autonomy, and a more westerly region, possibly with an area governed by a separate Dene nation, including Chipewyan, Cree, Dogrib, Loucheux and Slavey peoples. The political problem of the Dene is to create unity among such different constituents. On 14 April 1982, in a plebiscite on division there was a narrow positive majority, with a much stronger sentiment for home rule among the Inuit of the Eastern Arctic.[332] On the issue of division itself, there were 5,336 "yes" votes (about fifty-six per cent) to 4,217 "no" votes. In the Inuit-inhabited areas there was a margin of seven to one in favour of division, while the turnout was lighter in the more heavily-populated west, with the substantial white-populations in Yellowknife, Inuvik and Hay River casting negative votes by substantial majorities. The federal government is not, however, bound by the result and must now decide whether to divide the Territories or continue with the racially integrated Westminster-style parliamentary system. More strongly than do others, the Inuit persist in lobbying for division and local self-government.

The Report as a whole makes clear that there will be only a gradual evolution towards responsible government, with increasingly more functions being placed under Territorial jurisdiction for an undefined period. In other areas, the federal government and Commissioner would

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[328] REPORT, *supra* note 311, at 43-46.

[329] *Id.* at 53.

[330] *Id.*

[331] *Id.* at 140.

[332] Sallot, *NWT division backed: vote shows racial split*, The Globe and Mail (Toronto) 16 Apr. 1982, at 1 (Metro Edition). In an editorial in the same issue, at 6, it was suggested: "If Ottawa has any misgivings about the narrow margin by which partition carried, these may be assuaged by reports that a no vote in some of the Dene-dominated western communities was not so much opposition in principle as concern about the ultimate location of the border. The Dene leadership had advocated a yes vote."

continue to exercise control. In some ways this framework resembles the system of dyarchy existing in the Indian Provinces after 1919.[333] Under that system, elected Indian ministers responsible to the local legislatures shared executive powers with appointed and non-responsible British governors. Especially when important financial decisions rested with "non-responsible" central control, such a regime often involved only illusory authority by elected local leaders. As one historian has observed,

> The system certainly created suspicion without and friction within. . . . The more successful joint consultation proved, the more sweetly governors charmed ministerial fears and doubts, the more the ministers were apt to be suspected of straying from the path of patriotic virtue and to find their popular position being undermined.[334]

The system proposed may not, consequently, be auspicious for the extension of significantly greater political powers to the Territories in the immediate future. Moreover, if division occurs, the resultant smaller and weaker territorial units would be even more beholden to Ottawa, and would probably continue indefinitely in a condition of semi-colonial dependency, with provincial status being deferred even further.

III. The Division of Legislative Power

A. *The General Power*

Of great interest in the next phase of constitutional reform will be the attempt to recast the "peace, order and good government" or general power clause. This expansible provision has served alternately as a residuary, emergency and national dimensions clause, which has led some critics to suggest that for the sake of greater clarity the first two functions should be severed from each other in a redrafted constitution, with the third one possibly being eliminated entirely.

The vagaries of judicial interpretation prompted one constitutional scholar to declare in 1927 that "the real residuary power is now to be found in the words 'property and civil rights', over which s. 92 gives exclusive jurisdiction to the provinces."[335] Since the emancipation of the Supreme Court from the tutelage of the Privy Council in 1949, however, there has been a marked revival of the general power.[336]

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[333] *See* Government of India Act, 1919, 9 & 10 Geo. 5, c. 101.

[334] P. Spear, The Oxford History of Modern India, 1740-1947 346 ff. (1965).

[335] Smith, *Interpretation in English and Continental Law*, 9 J. Comp. Leg. & Int'l L. 153, at 163 (1927).

[336] *Cf.* Reference *re* Anti-Inflation Act, [1976] 2 S.C.R. 373, 9 N.R. 541, 68 D.L.R. (3d) 452 (7-2 decision).

1. *The Residuary Power*

Apparently considering that there is scant textual authority for the national dimensions doctrine, the Committee on the Constitution of the Canadian Bar Association recommends the elimination of the doctrine, along with the creation of a predominantly provincial residuary power:

> Any legislative matter not expressly granted by the Constitution should be within the exclusive legislative power of the provinces, unless it is clearly beyond provincial interests, in which case it should be within the exclusive legislative power of the federal Parliament. A matter ordinarily falling within provincial competence should not fall within federal jurisdiction merely because it has 'national dimensions'.[337]

Ordinarily, residuary matters should accrue to the provinces: "only when it can clearly be established that they extend beyond provincial interests should they be federal."[338] Two residuary compartments are envisaged here, one provincial and one federal, with the former being of greatest significance. The national dimensions test, which is essentially a judicial invention first formulated by Lord Watson in the 1896 *Local Prohibition* case,[339] would no longer be used to translate subject matter from provincial to federal jurisdiction, as had been done with, *inter alia*, labour relations relating to uranium mining[340] and zoning regulations applying to the national capital district.[341] Existing matters, then, would probably be enumerated more comprehensively and would remain distributed in a more permanent way between the federal Parliament and the provinces. Presumably, only where some entirely *new* matter extended beyond provincial interests would it be confided to the central power. In all other cases, unallocated matters would go to the local units. Given such an approach, there could well be more precision and clarity in these hitherto vague constitutional provisions, but in the absence of a national dimensions doctrine it might be necessary to centralize such

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[337] CANADIAN BAR ASSOCIATION, COMMITTEE ON THE CONSTITUTION, TOWARDS A NEW CANADA 139 (1978).

[338] *Id.* at 140.

[339] A.G. Ont. v. A.G. Dominion, [1896] A.C. 348, at 361, 65 L.J.P.C. 26, at 33, 74 L.T. 533, at 537:

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

[340] Pronto Uranium Mines Ltd. v. Ontario Lab. Rel. Bd., [1956] O.R. 862, 5 D.L.R. (2d) 342 (H.C.).

[341] Munro v. National Capital Comm'n, [1966] S.C.R. 663, 57 D.L.R. (2d) 753.

matters as labour relations relating to uranium by a more cumbersome formal amending process.[342]

The Pépin-Robarts Report implicitly criticizes the Canadian Bar Association's recommendation of a divided residuary power:

> [An] alternative [proposal] advanced recently by some is a *shared* residual power in which an unlisted subject matter would be assigned according to whether it was of interest to the central or provincial government. In our view it would be difficult to avoid the impression that only unimportant residual matters would be attributed to the provinces.[343]

As in the case of most other federations, the Report recommends "in favor of assigning the residual power in a revised constitution to the provincial governments".[344]

It is impossible to predict the future ambit of the national dimensions doctrine and for the sake of coherence, as the Canadian Bar Association recommends, it should be dropped. It would seem, however, that the Pépin-Robarts proposal respecting residual powers is preferable. The consignment of residual matters to the local units in Australia and the United States has not created notable problems. On the other hand, in no federation do the courts seem to confide matters of great importance to the local units under the residuary clause. Part of the reason may be that "unallocated" matters such as aeronautics, radio and offshore resources seem more naturally to gravitate to the central government. Confided, at least in part, to Ottawa under the residuary clause, such matters are consigned by judges in other federations not to the residue, but to such enumerated central powers as "interstate commerce" or the legislative power relating to "external affairs".[345] General provisions have an elasticity which enables courts to adapt constitutional norms creatively to new exigencies. Inevitably, the judiciary is thrust into a policy role here. Such provisions may be useful, but from the point of view of coherence and order they can also be mischievous. Too much elasticity results in vagueness and controversy, and the national dimensions doctrine simply has no conceptual clarity. Constitutional draftsmen should seek to enumerate as fully as possible all the chief powers needed, and leave the

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[342] Constitution Act, 1982, subs. 38(1), *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[343] TASK FORCE ON CANADIAN UNITY, A FUTURE TOGETHER: OBSERVATIONS AND RECOMMENDATIONS 89 (1979).

[344] *Id.*

[345] *Compare, e.g.*, the similar results achieved in Canada, the United States and Australia in disputes over the ownership of offshore resources, with the federal residuary power figuring prominently in the Canadian reference (along with Canada's international personality), while the American and Australian powers over external affairs won out over the residue in the latter federations. This was, surely, a "novel" subject matter which the courts considered inappropriate to give to the local units no matter who, formally speaking, controlled the residuary power: Reference *re* Ownership of Offshore Mineral Rights, [1967] S.C.R. 792, 65 D.L.R. (2d) 353; United States v. California, 332 U.S. 19, 91 L. Ed. 1889 (1947); New South Wales v. Commonwealth, 135 C.L.R. 337, 8 A.L.R. 1 (H.C. 1975).

residue exclusively to the local units. A shared residuary power, indeed, has the same vice that the Canadian Bar Association attributes to the national dimensions test: it can be interpreted in widely varied and unpredictable ways by different judges.

2. *The Emergency Power*

Under the Canadian Bar Association's proposals, the emergency power would be divorced from the residuary clause, but in its segregated form it would be "a totally distinct power, not one buried as now in a clause of vague and uncertain content".[346] Except where swift executive action is imperative in cases of war, invasion or insurrection, real or apprehended, Parliament should make a prior formal declaration of national emergency. Where there is no emergency involving such hostilities, other emergency legislation (*e.g.*, anti-inflation measures, or possibly trans-boundary pollution measures) should "be submitted to a reconstituted Upper House representing the provinces".[347] In such cases, the temporary assumption by Ottawa of many ordinarily provincial powers makes consultation with the provinces desirable.

Suspension of a "Bill of Rights", moreover, may also be necessary during war or insurrection. Here, the Committee goes too far.[348] Even during hostilities a distinction should be drawn between rights available to an accused behind the lines where the civil courts are still operating, and rights in an actual theatre of war where there are only military tribunals.[349] In the former case, in a liberal democracy there is no need to suspend most rights provisions (although *habeas corpus* is sometimes suspended), and even in the latter case, some rights (*e.g.*, the right to counsel) could still be sanctioned without prejudicing national security.

The Pépin-Robarts Report likewise proposes a separately drafted emergency power with safeguards against abuse. The derivation of the present power from the peace, order and good government clause "violates the principle of non-subordination of the two orders of government and its abuse could endanger our federal system". "When in future Ottawa seeks emergency powers," the Report adds, "it should be required to spell out the reasons in a proclamation, to obtain approval of the proclamation by both the House of Commons and the revised second chamber . . . as soon as is reasonably possible, and to be limited for a specified duration."[350]

"*Salus populi suprema lex*," as the Romans said. In wartime virtually any local power in a federation may come under central control. At the height of such an emergency there may even be a functional

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[346] CANADIAN BAR ASSOCIATION, *supra* note 337, at 141.
[347] *Id.*
[348] *Id.*
[349] *Cf. Ex parte* Milligan, 18 L. Ed. 281 (U.S. Sup. Ct. 1866).
[350] TASK FORCE ON CANADIAN UNITY, *supra* note 343, at 93.

approximation of a federation to a unitary state. There seems to be a rough consensus that to promote coherence the emergency and residuary powers should be separated into distinct clauses; that wherever possible a proclamation should clearly declare the need for the assumption of emergency powers; that such a proclamation, again where possible, should be submitted for approval either to Parliament or to a reconstituted Upper Chamber representing the provinces; and that such powers should be temporary and not disproportionate to the need. In addition, civil liberties may be curtailed during hostilities.

B. *Trade and Commerce*

In the last Survey on this topic it was presciently remarked of the pending appeal to the Supreme Court of the *Central Canada Potash* case: "the Court will ultimately have to choose between reiterating *Carnation* and dismissing the appeal, and following its rationale in *CIGOL* and striking the regulations down. It is my feeling that the *CIGOL* rationale will be followed. . . ."[351] The Court, in fact, unanimously found the challenged pro-rationing scheme unconstitutional. The context in which the contentious Saskatchewan potash pro-rationing regulations were drafted suggested to the Court that it was dealing with a subject with international ramifications. In 1969, the political leaders of the major North American potash producing areas, Governor Cargo of New Mexico and Premier Thatcher of Saskatchewan, agreed to share the international market under a quota system for their mutual benefit. In a depressed market, the New Mexican authorities were concerned about the possible dumping of higher grade Saskatchewan ore in the United States, while Saskatchewan was fearful of the imposition of a retaliatory American tariff which would exclude its produce. Almost none of the Saskatchewan potash was marketed locally.

In the court of first instance in *Central Canada Potash*,[352] Disbery J. found the provincial regulations which fixed the floor price for a commodity, the great bulk of which was sold out of the province, an impediment on interprovincial and international trade which infringed the trade and commerce power. The lower court judgment was reversed by the Court of Appeal which laid great emphasis on provincial jurisdiction over natural resources, characterizing the scheme as one to "manage, utilize and conserve" a mineral resource produced locally.[353]

In restoring Disbery J.'s judgment (except for one tangential issue dealing with the tort of intimidation), Chief Justice Laskin emphasized the extraprovincial economic thrust of the whole project:

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[351] MacKenzie, *Annual Survey of Canada Law: Constitutional Law*, 10 OTTAWA L. REV. 313, at 326 (1978).

[352] Central Canada Potash Co. v. A.G. Sask., [1975] 5 W.W.R. 193, 57 D.L.R. (3d) 7 (Sask. Q.B.).

[353] [1977] 1 W.W.R. 487, at 518, 79 D.L.R. (3d) 203, at 228 (Sask. C.A.).

> the Government of Saskatchewan had in view the regulation of the marketing of potash through the fixing of a minimum selling price applicable to the permitted production quotas. The only market for which the schemes had any significance was the export market. . . . There was no question here of any concluded transactions of sale and purchase in the Province, as was the situation in the *Carnation* case. Out of Province and offshore sales were the principal objects of the licences and directives.[354]

The general language used by the provincial legislature caused the Court some interpretative difficulty. On the surface, the legislation was capable of being read in such a way as to fall within provincial powers. The Chief Justice held, however, that while the legislation and the conjoined regulations might be held to be *ex facie* unexceptionable, one had to regard the texture of the whole scheme:

> It is nothing new for this Court, or indeed, for any Court in this country seized of a constitutional issue, to go behind the words used by a Legislature and to see what it is that it is doing. It is especially important for Courts called upon to interpret and apply a constitution which limits legislative power, to do so in a case where not only the authorizing legislation but regulations enacted pursuant thereto are themselves couched in generalities, and the bite of a scheme envisaged by the parent legislation and the delegated regulations is found in administrative directions.[355]

Inferentially, the Court was saying that judicial notice would be taken of the manner in which a scheme was applied, if it was not patently invalid in its very terms, and such application could be taken into account in determining its validity. Perhaps, in American usage, it would be described as invalid for "overbreadth". While the Chief Justice emphasized that production and conservation, in a proper framework, were "matters within provincial legislative authority",[356] the vice of the challenged pro-rationing scheme was that it impinged on Parliament's powers over interprovincial and export trade.

In the judgment of the Supreme Court in *Central Canada Potash*, the *CIGOL* decision[357] was seen by the Court as being a more influential precedent than the *Carnation* case.[358] Chief Justice Laskin cited the words of Mr. Justice Martland in the *CIGOL* majority judgment: "[P]rovincial legislative authority does not extend to fixing the price to be charged or received in respect of the sale of goods in the export market."[359] Perhaps if the order in which the cases were decided had been reversed, the province would have been able to make a more

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[354] [1979] 1 S.C.R. 42, at 72, [1978] 6 W.W.R. 400, at 425, 88 D.L.R. (3d) 609, at 629 (1978).

[355] *Id.* at 76, [1978] 6 W.W.R. at 428, 88 D.L.R. (3d) at 631.

[356] *Id.* at 74, [1978] 6 W.W.R. at 427, 88 D.L.R. (3d) at 630.

[357] Canadian Industrial Gas & Oil Ltd. v. A.G. Sask., [1979] 1 S.C.R. 37, 80 D.L.R. (3d) 449 (1978).

[358] Carnation Co. v. Quebec Agricultural Marketing Bd., [1968] S.C.R. 238, 67 D.L.R. (2d) 1.

[359] *Central Canada Potash*, *supra* note 354, at 75, [1978] 6 W.W.R. at 427, 88 D.L.R. (3d) at 631.

forceful argument. *CIGOL* was a very difficult precedent to counter. Taken together, *CIGOL* and *Central Canada Potash* powerfully reaffirm federal control over extraprovincial trade.

By a slim five to four majority in *Dominion Stores Ltd. v. The Queen*,[360] it was held that Part I of the Canada Agricultural Products Standards Act,[361] creating national grade names that could be adopted by local traders on a voluntary basis, was beyond the federal powers. Part II of the federal Act, applying to "International and Interprovincial Trade", which was mandatory for grading produce in the stream of extraprovincial marketing was, of course, valid. The Supreme Court decision reversed judgments of the Ontario Supreme Court[362] and the Court of Appeal[363] which had upheld the legislation.

The factual background of the litigation was complicated. Under The Farm Products Grade and Sales Act[364] of Ontario, those engaged in local agricultural trading were required to use specified provincial grade names. The provincial grade names were the same as the federal ones. The accused was charged under Part I of the federal statute with offering for sale, under a grade name authorized by the federal "voluntary" statute, apples, which did not meet the requisite standard set for the grade ("Canada Extra Fancy"). The defence of Dominion Stores was that it was engaged in purely local trade and that whatever might be the origin of the apples sold, it should not be found liable under a statute which properly extended only to extraprovincial trade.

For the majority, Mr. Justice Estey found Part I of the federal statute a colourable attempt to embrace local trade:

> the appellant here offered apples for sale pursuant to an admittedly valid provincial statute. The dealer did not select and adopt a grade name prescribed by a federal statute, but rather complied with applicable, valid provincial legislation. The precise issue facing the Court in this proceeding is whether or not, in these circumstances, a charge may be laid under the federal statute. . . . Here the sequence of passage of marketing schemes was first the provincial statute, followed by a like federal statute purporting to reach down to intraprovincial trade. If, however, the Attorney General for Canada be correct, the latter is valid and the offence allegedly committed by the appellant is against the federal statute and not the provincial statute without which the federal statute would have no legal application as regards local trade. The parasite and not the host thereby becomes the bigger and more important animal.[365]

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[360] [1980] 1 S.C.R. 844, 30 N.R. 399, 50 C.C.C. (2d) 277, 106 D.L.R. (3d) 581 (1979).

[361] R.S.C. 1970, c. A-8.

[362] 17 O.R. (2d) 168, 37 C.C.C. (2d) 20, 79 D.L.R. (3d) 627 (H.C. 1977).

[363] 18 O.R. (2d) 496, 39 C.C.C. (2d) 127, 83 D.L.R. (3d) 266 (C.A 1978).

[364] R.S.O. 1970, c. 161 (*now* R.S.O. 1980, c. 157).

[365] *Dominion Stores*, *supra* note 360, at 859, 30 N.R. at 407, 50 C.C.C. (2d) at 289, 106 D.L.R. (3d) at 593.

Estey J. distinguished the *Canada Standard Trade Mark* case,[366] relied upon by the Crown, which upheld the right of Parliament to create a national trade mark usable by anyone conforming to the applicable standards, on the ground that in the instant case compliance with the federal grade names was actually mandatory when the provincial and federal statutes had identical terms and operated jointly. The whole federal statute imperatively extended to local trade:

> the statute now before the Court, unlike the Canada Standards statute, requires provincial participation in order to make the application of the federal statute inevitable in local trade. The true nature, the pith and substance, of the federal program is exposed by the circumstances and context in which it was enacted and now enforced.[367]

For the four dissenting judges, Laskin C.J.C. argued that the adoption by a local trader of the federal grade names was voluntary, but when such names were adopted the applicable sanctions for non-compliance with the standards came into play.[368] The provincial legislation was in no way involved, and was not pleaded by way of defence.

What would have happened, however, if instead of being the same, the provincial grade names for identical produce in local trade had been different? In that case, the whole scheme brought into play by Part I of the federal Act would be frustrated. Its efficacy depended essentially on dovetailing provincial legislation prescribing the same grade names and standards. Viewed from this perspective, the colourability was induced by both the province and Parliament, which facilitated the application of federal grade names to locally-marketed produce. As Estey J. suggests, the entire context discloses the operation of a scheme to apply federal norms coercively to local trade.

In a six to three decision, in which Chief Justice Laskin dissented, section 6 of the federal Food and Drugs Act[369] was found unconstitutional by a majority of the Court. In *Labatt Breweries of Canada v. A.G. Can.*, the appellant brewery asked for a declaration that its product "Labatt's Special Lite" as labelled, packaged and sold "is not likely to be mistaken for a 'light beer' within the standards set out"[370] under the above Act. The second question was whether the mentioned section 6 of the Act and Regulation B.02.134 were *ultra vires*. The applicable Regulation required that "light beer" "shall contain not less than 1.2% and not more than 2.5% alcohol by volume".[371] "Beer", conversely, according to Regulation B.02.130 was to contain not less than 2.6% and

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[366] A.G. Ont. v. A.G. Can., [1937] A.C. 405, 67 C.C.C. 342, [1937] 1 D.L.R. 702 (P.C.) (Can.).

[367] *Dominion Stores*, *supra* note 360, at 861, 30 N.R. at 409, 50 C.C.C. (2d) at 291, 106 D.L.R. (3d) at 595.

[368] *Id.* at 852, 30 N.R. at 420, 50 C.C.C. (2d) at 284, 106 D.L.R. (3d) at 588.

[369] R.S.C. 1970, c. F-27.

[370] [1980] 1 S.C.R. 914, at 922, 30 N.R. 496, at 500, 52 C.C.C. (2d) 433, at 448, 110 D.L.R. (3d) 594, at 609 (1979).

[371] Food and Drug Regulations, C.R.C., c. 870.

not more than 5.5% alcohol by volume.[372] While labelled "Special Lite", (not "Light Beer") the Labatt product had 4% alcohol by volume, which was considerably in excess of the 2.5% maximum alcohol content allowed for "light beer".

For the majority, Estey J. held that the sale of Labatt's "Special Lite Beer", unless labelled simply as "beer", was a violation of section 6.[373] Later, he added:

> In the statute now before us, the question of mislabelling arises only after the category of 'light beer' is created and the specifications for its production are assigned. When all this has been ordained, the use of the words 'Special Lite' by the appellant may be said to be misleading to the beer buying public. The contest, however, is not in respect of this second stage, but rather the first stage, that is the right in the Federal Parliament and the Federal Government to establish the standards of production and content of this product.[374]

By an elimination process,[375] Estey J. then examined the possible jurisdictional bases on which section 6 could conceivably have been upheld. The provision could not be upheld under the general power, since "quarantine" or "epidemic of pestilence" (emergency) was not involved. Criminal law (*e.g.*, "adulteration" limits) was not in question. Neither was there novel subject matter, nor a matter of "national concern". "The Regulation of Trade and Commerce" yielded no assistance, since, from the time of the *Parsons* case,[376] "minute rules for regulating particular trades" have been excluded from its reach;[377] neither did the second branch of *Parsons*, "the general regulation of trade affecting the whole Dominion", offer any help, because the regulation of a single trade or industry was clearly not within its regulatory sweep:

> even if this statute were to cover a substantial portion of Canadian economic activity, one industry or trade at a time, by a varying array of regulations or trade codes applicable to each individual sector, there would not, in the result, be at law a regulation of trade and commerce in the sweeping general sense contemplated. . . .[378]

The brewing and labelling of beer and light beer is essentially a "particular trade", with section 6 having no adequate federal jurisdictional base.

Laskin C.J.C. in his dissent would have upheld the legislation under the second, "general regulation", branch of *Parsons*, and also was

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[372] Food and Drug Regulations, C.R.C., c. 870.

[373] *Supra* note 370, at 926, 30 N.R. at 505, 52 C.C.C. (2d) at 451, 110 D.L.R. (3d) at 613.

[374] *Id.* at 934, 30 N.R. at 511, 52 C.C.C. (2d) at 457, 110 D.L.R. (3d) at 619.

[375] *Id.*

[376] Citizens Ins. Co. v. Parsons, 7 A.C. 96, 51 L.J.P.C. 11, 45 L.T. 721 (P.C. 1881) (Can.).

[377] *Labatt Breweries*, *supra* note 370, at 935, 30 N.R. at 513, 52 C.C.C. (2d) at 458, 110 D.L.R. (3d) at 620.

[378] *Id.* at 943, 30 N.R. at 520, 52 C.C.C. (2d) at 465, 110 D.L.R. (3d) at 626.

inclined to agree with Pigeon J., in his separate dissent, that the attacked Regulations "amount[ed] to no more than labelling provisions".[379] The Chief Justice added:

> it does appear to me that if Parliament can set up standards for required returns for statistical purposes, it should be able to fix standards that are common to all manufacturers of foods, including beer, drugs, cosmetics and therapeutic devices, at least to equalize competitive advantages in the carrying on of businesses concerning such products.[380]

His Lordship would have invoked section 121 of the B.N.A. Act "which precludes interprovincial tariffs, marking Canada as a whole as an economic union".[381] When *Dominion Stores* and the present case are taken together, it is apparent that Chief Justice Laskin continues on his course of economic centralism, while Mr. Justice Estey in striking down federal economic statutory provisions, is becoming an articulate theorist of the more autonomist wing of the Court. It is probably too early, however, to discern any clear blocs, especially with the recent addition of new judges. It is also to be noted that after its brief resurrection in the *Anti-Inflation* case[382] by the Chief Justice (for four of nine judges), the second, "general regulation", branch of *Parsons* shows little promise of revival.

C. *Criminal Justice*

In *R. v. Hauser*[383] the Supreme Court of Canada reversed a three to two decision of the Supreme Court of Alberta, Appellate Division, holding that the Attorney General of Canada had no constitutional authority to prefer an indictment under the Narcotic Control Act,[384] pursuant to section 2 of the Criminal Code, under which he was ostensibly authorized to institute criminal proceedings. The order of prohibition sought was therefore granted, with the mentioned section 2 being declared *ultra vires*.

The provincial argument was that the provincial attorney general's prosecutorial powers were conferred by head 14 of section 92 ("The Administration of Justice in the Province") of the B.N.A. Act, and were in no sense derived from the Criminal Code. Not having been given by the Code, neither could they be taken away by that enactment.[385] According to McGillivray C.J.A., where the Attorney General of

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[379] *Id.* at 919, 30 N.R. at 535, 52 C.C.C. (2d) at 436, 110 D.L.R. (3d) at 597.

[380] *Id.* at 921, 30 N.R. at 537, 52 C.C.C. (2d) at 438, 110 D.L.R. (3d) at 599.

[381] *Id.*

[382] Reference *re* Anti-Inflation Act, *supra* note 336, at 426, 9 N.R. at 590, 68 D.L.R. (3d) at 498.

[383] [1979] 1 S.C.R. 984, [1979] 5 W.W.R. 1, 46 C.C.C. (2d) 481, 98 D.L.R. (3d) 193.

[384] R.S.C. 1970, c. N-1.

[385] R. v. Hauser, [1977] 6 W.W.R. 501, at 509, 37 C.C.C. (2d) 129, at 137, 80 D.L.R. (3d) 161, at 169 (Alta. C.A.).

Canada, under section 2, has "instituted proceedings and is prosecuting them, he has unilaterally excluded the attorney general of the province from having to do further with the matter".[386] McDermid J.A., with whom Haddad J.A. concurred, suggested in dissent that when proceedings under the Criminal Code were instituted, they must be preferred by the provincial attorney general, but that a concurrent power existed with respect to violations under other Acts of Parliament, such as the Narcotic Control Act.[387]

In setting aside the order of prohibition and allowing the appeal, the Supreme Court held that section 2 applies in respect of offences under federal statutes other than the Criminal Code, which do not depend for their validity on the criminal law power in head 27 of section 91. Speaking for a four-member majority, Pigeon J. avoided the jurisdictional quagmire by finding power for the contentious federal legislation in the residuary extension of peace, order and good government rather than in head 27 of section 91:

> In my view, the most important consideration for classifying the *Narcotic Control Act* as legislation enacted under the general residual federal power, is that this is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in the class of 'Matters of a merely local or private nature'.[388]

He emphasized the analogy between narcotics control and other novel matters confided to the residuary clause such as aeronautics and radio.[389]

Preferable is the dissenting view of Dickson J. (with whom Pratte J. concurred) that the Narcotic Control Act was not a mere regulatory scheme, but in pith and substance criminal law, having prevalently a prohibitory character. Although it was not as pressing a problem as it later became, drug abuse was known at Confederation; it is not, therefore, a novel matter for the residuary clause. Section 2 is too broad and the provincial attorney general should retain control over what is the prosecution of an intrinsically criminal subject matter.[390]

In *R. v. Aziz*,[391] which was before the Court of Appeal of Quebec when the Supreme Court was deliberating on *Hauser*, the latter forum unanimously reversed the decision of the Court of Appeal which held that an indictment preferred by the Attorney General of Canada for conspiracy to violate the Narcotic Control Act, under paragraph 423(1)(*d*) of the Criminal Code, was unconstitutional since only the

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[386] *Id.* at 519, 37 C.C.C. (2d) at 145, 80 D.L.R. (3d) at 177.

[387] *Id.* at 532, 37 C.C.C. (2d) at 155, 80 D.L.R. (3d) at 187.

[388] *Hauser*, *supra* note 383, at 1000, [1979] 5 W.W.R. at 18, 46 C.C.C. (2d) at 498, 98 D.L.R. (3d) at 210.

[389] *Id.*

[390] *Id.* at 1054-56, [1979] 5 W.W.R. at 61-63, 46 C.C.C. (2d) at 537-38, 98 D.L.R. (3d) at 249-50.

[391] [1981] 1 S.C.R. 188, 35 N.R. 1, 57 C.C.C. (2d) 97, 119 D.L.R. (3d) 513.

provincial attorney general had jurisdiction to prefer a criminal indictment.[392] For the Court, Martland J. found *Hauser* controlling:

> The *Hauser* case has decided that in respect of the enforcement of federal statutes, whose constitutional validity does not depend upon s. 91(27) of the B.N.A. Act, the Attorney General of Canada has the right to initiate proceedings for a violation or a conspiracy to violate such statute, and a majority of the Court has decided that the Narcotic Control Act is such a statute.[393]

While the cause of action in *Aziz* arose under the Criminal Code, Martland J. added that "had it wished to do so, Parliament could have provided for a conspiracy to violate the Act in the Narcotic Control Act itself, as it has done in paragraph 239(1)(*e*) of the Income Tax Act."[394] Dickson J., who dissented in *Hauser*, apparently considered himself bound and concurred with Martland J. in *Aziz*, and while it is evident that Parliament could have enacted the legislation in question in another statute, the fact is that it did not do so. If it were enacted in such a form that it were "necessarily incidental" to narcotics control in a "segregated" statute, the whole context would take on a different colouration. It would then be arguable that, given the prior characterization of the Court that the subject matter fell under the "residuary power", the subject was one in which the Attorney General of Canada had carriage of the case. Given *Hauser*, it would not then be in relation to criminal law. The Court, however, was addressing itself to a perfectly general "conspiracy" provision in the Criminal Code, and was acting on the basis that that provision was ancillary to a hypothetically segregated Act. For the above reason, *Aziz* is somewhat troublesome. It is difficult, following Dickson J.'s dissent in *Hauser*, not to consider that the whole texture of the subject matter is one of criminal law, which according to head 14 of section 92 would mean that prosecution should be instituted exclusively by the provinces.

In *Keable v. A.G. Can.*,[395] the Supreme Court of Canada allowed in part an appeal from the Quebec Court of Appeal relating to the extent of the powers of inquiry of a provincially appointed investigating commission into criminal activities of members of the R.C.M.P. The case aroused great interest because the national police force often serves under contract as a provincial, as well as a federal, police agency. The incidents that the Commission sought to investigate involved such sensitive matters as police involvement in the October 1970 F.L.Q. crisis and the theft of the *Parti Québécois* membership list. Speaking for the Court, Pigeon J. said:

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[392] *Id.* at 190, 35 N.R. at 3, 57 C.C.C. (2d) at 99, 119 D.L.R. (3d) at 515.

[393] *Id.* at 194, 35 N.R. at 6, 57 C.C.C. (2d) at 102, 119 D.L.R. (3d) at 518.

[394] *Id.* at 195, 35 N.R. at 7, 57 C.C.C. (2d) at 102, 119 D.L.R. (3d) at 518.

[395] [1979] 1 S.C.R. 218, 24 N.R. 1, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161 (1978).

> Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force. The doctrine of colourability is just as applicable in adjudicating on the validity of a commission's term of reference or decisions as in deciding on the constitutional validity of legislation.[396]

The Court also held that the Solicitor General is not a compellable witness, since at common law "a commission of inquiry has no power to compel the attendance of witnesses," and provincial legislation could not confer such jurisdiction in respect of the Crown of Canada.[397] Pursuant to section 41 of the Federal Court Act,[398] the Minister could also, by affidavit or otherwise, prevent the production of documents sought by the Commission relating to criminal acts.[399]

In *Keable*, arguably, the Court took a more rigid position than it did in *De Iorio v. Warden of the Montreal Jail*[400] concerning the ambit of the investigative powers of a provincial commission. In *De Iorio* it proceeded on the basis that there was a considerable overlap between the federal criminal law power and provincial power over the administration of criminal justice, authorizing a broad provincial inquiry into organized crime. Delimiting lines were not much drawn. In *Keable*, the thrust of the judgment is that while the provinces have power to investigate possible criminal conduct by individual R.C.M.P. members, a commission is confined strictly by the distribution of powers in conducting its inquiry; the Minister may claim privilege and refuse to tender documents, and is not a compellable witness. Moreover, the internal administration of the R.C.M.P. is wholly forbidden territory.

In Alberta, the R.C.M.P. functions as a provincial and municipal police force: in *A.G. Alta. v. Putnam*,[401] the Supreme Court of Canada considered section 33 of the local Police Act,[402] which purported to authorize an investigation by the provincial Law Enforcement Appeal Board into the conduct of two R.C.M.P. constables. They, as members of the Wetaskiwin detachment, provided municipal police services under an agreement between the federal government and the city. The officers allegedly harassed the complainant during a narcotics investigation.

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[396] *Id.* at 242, 24 N.R. at 30, 43 C.C.C. (2d) at 68, 90 D.L.R. (3d) at 180.

[397] *Id.* at 244, 24 N.R. at 31, 43 C.C.C. (2d) at 69, 90 D.L.R. (3d) at 181.

[398] R.S.C. 1970 (2d Supp.), c. 10.

[399] *Supra* note 395, at 248-49, 24 N.R. at 36, 43 C.C.C. (2d) at 73, 90 D.L.R. (3d) at 185.

[400] [1978] 1 S.C.R. 152, 8 N.R. 361, 33 C.C.C. (2d) 289, 73 D.L.R. (3d) 491 (1976).

[401] [1981] 2 S.C.R. 267, [1981] 6 W.W.R. 217, 62 C.C.C. (2d) 51, 123 D.L.R. (3d) 257.

[402] S.A. 1973, c. 44.

When his complaint was found unjustified by the provincial commanding officer of the R.C.M.P., the complainant appealed to the Board. Both Alberta Courts considered that an order of prohibition should issue precluding provincial inquiry into what was regarded as the internal management and discipline of the force. The Province argued that, functionally, the R.C.M.P. in the present context were operating as a provincial or municipal force, essentially as local peace officers. As such, their activities might be equivalent to those of other purely provincial police agencies. Laskin C.J.C. held, however, that *Keable*[403] was controlling and that it precluded a provincial inquiry into the internal administration of the R.C.M.P.[404] While the force was functioning in a provincial capacity, the Province, in lieu of establishing its own provincial force, had by contract "simply made an en bloc arrangement for the provision of policing services by the engagement of the federal force . . .".[405]

In a well-argued dissent, Dickson J. laid considerable emphasis on the need for "public accountability" of those agencies which "affect, in a direct and important way, the daily lives of our citizens".[406] There was no cogent evidence that the implementation of section 33 would create an "impossible situation" for the force. It does not do so for other municipal forces:

> The Court of Appeal . . . ignores two essential components of any balancing process: first, the public interest served by external review of internal police disciplinary procedures; and second, the position of provincial Attorneys General, who, if the Court of Appeal is correct, have responsibility for policing within the province but no means of assuring any measure of public accountability from a large segment of those engaged in policing within the province.[407]

According to Dickson J., *Keable*[408] was distinguishable because there the provincial commissioner sought "to investigate the internal workings of the R.C.M.P. at the highest level, including the security service". In the *Putnam* case "any inquiry into the workings of the R.C.M.P. would only be incidental to inquiry in relation to the impugned conduct of a particular individual officer."[409]

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[403] *Supra* note 395.

[404] *Supra* note 401, at 272, [1981] 6 W.W.R. at 221, 62 C.C.C. (2d) at 55, 123 D.L.R. (3d) at 260.

[405] *Id.* at 278, [1981] 6 W.W.R. at 227, 62 C.C.C. (2d) at 59, 123 D.L.R. (3d) at 265.

[406] *Id.* at 298, [1981] 6 W.W.R. at 244, 62 C.C.C. (2d) at 74-75, 123 D.L.R. (3d) at 280.

[407] *Id.* at 298-99, [1981] 6 W.W.R. at 245, 62 C.C.C. (2d) at 75, 123 D.L.R. (3d) at 280.

[408] *Supra* note 395.

[409] *Supra* note 401, at 300, [1981] 6 W.W.R. at 246, 62 C.C.C. (2d) at 76, 123 D.L.R. (3d) at 281-82.

In *Glendinning v. Scowby*[409a] the Saskatchewan Court of Appeal overruled a lower court judgment which would have prevented the provincial Human Rights Commission from enquiring into allegations that the R.C.M.P. had arbitrarily detained hunters who were made to lie on the ground inadequately clothed for half an hour without reasonable cause. One of the hunters was convicted of assault, but none of the others was charged. It was not necessary to go into the internal administration of the R.C.M.P. in this case because what was being considered were specific offences under provincial law, according to Tallis J.A., to which everybody was subject. The management or administration of the Force was not interfered with. The Saskatchewan Human Rights Commission was waiting to see whether the Court of Appeal's decision would be appealed by the federal Crown before proceeding with the inquiry.

In *Boggs v. The Queen*[410] the Supreme Court unanimously held that subsection 238(3) of the Criminal Code, making it an offence for anyone to drive a motor vehicle in Canada while prohibited from doing so by, *inter alia*, "the legal suspension or cancellation, in any province, of his permit or licence . . .", was *ultra vires*. Here, the application through the Criminal Code of a suspension of a driver's licence was made contingent on the breach of a provincial statute which might have nothing whatever to do with the objects of criminal law. Breach of the provincial statute, thereby triggering the Criminal Code provision, might relate to purely civil administrative schemes such as non-payment of a provincial tax or fee. "Here," observed Estey J., "the Dominion is criminalizing an action which may have been prohibited by the province only as a coercive measure to bring about the operation of a provincial plan, be it taxation or regulation."[411] Parliament cannot, merely by attaching penal sanctions to a purely civil provincial offence, convert the latter into a valid criminal law prohibition. This case had vast administrative ramifications in that one could argue that any licence suspended under subsection 238(3) had been suspended improperly. Some provinces applied the ruling retrospectively, others did not. Estey J. emphasized that it was impossible to "read down" the section to make it valid; a court could not engage in each case in a scrutiny of the "original disqualification procedures"[412] in order to characterize the conduct in question.

The extent to which municipalities might enact laws complementary to the Criminal Code in matters concerning morality was the subject before the Alberta Court of Appeal in *R. v. Westendorp*.[413] Apparently in

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[409a] Unreported unanimous decision.

[410] [1981] 1 S.C.R. 49, 58 C.C.C. (2d) 7, 19 C.R.N.S. 245, 120 D.L.R. (3d) 718.

[411] *Id.* at 61, 58 C.C.C. (2d) at 16, 19 C.R.N.S. at 256-57, 120 D.L.R. (3d) at 727.

[412] *Id.* at 65, 58 C.C.C. (2d) at 20, 19 C.R.N.S. at 260, 120 D.L.R. (3d) at 731.

[413] [1982] 2 W.W.R. 728 (Alta. C.A.).

the wake of a considerable increase of prostitution in Calgary, the city enacted a "Street By-Law" which made prostitution on city streets a summary offence. The respondent was said to have accosted a plain clothes officer on a public sidewalk, offering for hire her company and that of another young woman with her. At first instance, Oliver Prov. Ct. J. found the by-law invalid as being a colourable encroachment on criminal law, an area in which the legislature could not delegate law-making powers to municipal bodies. His decision was unanimously reversed by the Court of Appeal which considered that the principal purpose of the by-law was to regulate prostitution as a public nuisance on city streets. Having regard to the purpose of the by-law, it was not in an area occupied by federal criminal law prohibitions. As Kerans J.A. said:

> [T]here is a type of accosting which falls short of solicitation within the meaning of the Criminal Code. . . . The purpose of the by-law is to provide appropriate sanctions for the regulation and control of such activity in the interests of the lawful users of the sidewalks and streets of Calgary.[414]

The foregoing judgment, however, was unanimously reversed by the Supreme Court of Canada, which restored the acquittal of the accused by the trial court. Laskin C.J.C. emphasized for the Court that the anti-prostitution by-law was a complete anomaly in a legal context where the city was also providing for such offences on streets and thoroughfares as "dangerous practices and obstructions", the requirements for fire escapes and laundry chutes and so forth. It was specious, moreover, to regard the anti-prostitution measure as relating to the control of streets as such. "If that were its purpose," he added, "it would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do." The Chief Justice saw an "overreaching" in the present case:

> What appears to me to emerge from Kerans J.A.'s consideration of the by-law is to establish a concurrency of legislative power, going beyond any double aspect principle and leaving it open for a Province or a municipality authorized by a province to usurp exclusive federal legislative power. If a province or municipality may translate a direct attack on prostitution into street control through reliance on public nuisance, it may do the same with respect to trafficking in drugs. And, may it not, on the same view, seek to punish assaults that take place on city streets as an aspect of street control![414a]

The value of the Supreme Court's judgment, it is suggested, resides in its preservation of the higher evidentiary and due process requirements attendant on criminal procedure for the trial of what is essentially a crime, whether or not it is presently defined as such in the Criminal Code. The simpler procedure of a civic by-law may be attractive to the

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[414] *Id.* at 744.

[414a] Unreported decision, 25 Jan. 1983, at 10.

municipal authorities, but it sacrifices due process to efficiency and this is always dangerous to the rule of law.

D. *Communication and Transportation: Labour Relations*

Construction Montcalm Inc. v. Minimum Wage Commission[415] involved the proposed application of provincial minimum wage laws to a Quebec contractor engaged by the Federal Crown to build runways on Federal Crown land at Mirabel International Airport. In this rather complex fact situation, the Court had to weigh the competing claims of federal jurisdiction over aeronautics and provincial powers over labour relations. Was the powerful current of centralizing authority from the *Aeronautics Reference*[416] in 1931 through *Johannesson v. West St. Paul*[417] decisive in allocating a case with the above elements to federal jurisdiction? In a seven to two decision (with Laskin C.J.C. and Spence J. dissenting), Beetz J. held that it was not, strongly supporting the ordinary application of provincial labour laws to building projects in the absence of special circumstances. Provincial jurisdiction in this area was the rule. Laskin C.J.C. would have applied a functional test, placing workers building a federal undertaking under federal labour law, even though their work apparently had no necessary connection with the actual operation (as contrasted with the construction) of the airport and the contractor would probably, in proceeding from job to job, find himself chiefly doing work under provincial jurisdiction.

While matters such as the site and design of airports would undoubtedly fall under federal jurisdiction, what of provincial safety regulations such as the requirement that workers wear helmets? Do these regulations have any necessary connection with the operation of federal works? Does compliance with such regulations hinder federal operating procedures? Do the wages of an independent contractor, here today and gone tomorrow, have any such connection, even though his employees may be transiently employed at a federal site? In view of the multiplicity of contracts successively undertaken by such a builder, is exclusive preoccupation with the immediate object of the contract vital in determining jurisdiction? Beetz J. held that it was not. If the contrary position were upheld:

> a worker whose job it is to pour cement would from day to day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and another on a provincial highway. I cannot be persuaded that the Constitution was meant to apply in such a disintegrating fashion.[418]

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[415] [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641 (1978).

[416] *In re* The Regulation and Control of Aeronautics in Canada (1931), [1932] A.C. 54, [1931] 3 W.W.R. 625, [1932] 1 D.L.R. 58 (P.C. 1931) (Can.).

[417] [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609 (1951).

[418] *Supra* note 415, at 776, 93 D.L.R. (3d) at 658.

In answer to other arguments, Beetz J. rejected the contention that the *situs* of the project on federal Crown land conferred jurisdiction on Ottawa. Here, as elsewhere, there is a double incidence of law, depending on the "aspect" of a particular activity. Neither did the paramountcy rule assist Montcalm, since the contractor was unable to show that obedience to provincial law would necessarily involve a violation of the federal statute.

In *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*,[419] the Supreme Court unanimously decided that two companies, although federally incorporated and doing business in several provinces in the insurance and trust fields, should be certified provincially for labour relations purposes. The two companies were subsidiaries of the appellant management company. If a purely functional test were applied, at least in the trust company's case, a strong argument could be made for federal certification. The Vice-President and General Manager of Pioneer Trust had testified that ninety-nine per cent of his company's business was identical to the business carried on by chartered banks. The case for the insurance company was less compelling because of the jurisdictional domination of the insurance field by the provinces. However, it was argued that Parliament had legal authority in this case because a federally incorporated company carrying on business in several provinces was involved, the whole business being beyond the competence of any single province. Functionally, it was difficult to make a distinction between banks and near-banks, since there was a large overlap in their business, but the Court preferred an institutional test. The trust companies did not hold themselves out to be banks, Parliament did not consider them as such and important elements of their business were fiduciary in nature, as contrasted with banks where a debtor-creditor relationship typically prevailed. Notwithstanding the fact that a federally incorporated business was carrying on operations in several provinces, if the business *per se* was provincial, its labour relations would be subject to provincial law. The converse would also be true of a provincially incorporated company engaging in an activity under federal jurisdiction such as uranium mining or certain types of communications.

The exclusive federal jurisdiction over broadcasting was qualified to a certain extent in *A.G. Que. v. Kellogg's Co. of Canada*,[420] where the Supreme Court decided that provincial consumer legislation not specifically aimed at broadcasting could apply to television, as well as to other media in which advertising was directed at children. In reversing the decision of the Quebec Court of Appeal, Martland J. sustained provincial regulations made pursuant to the Consumer Protection Act,[421] empowering the Lieutenant Governor in Council "to determine standards for advertising goods, whether or not they are the object of a contract, or

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[419] [1980] 1 S.C.R. 433, [1980] 3 W.W.R. 214, 107 D.L.R. (3d) 1 (1979).
[420] [1978] 2 S.C.R. 211, 83 D.L.R. (3d) 314 (6-3 decision).
[421] S.Q. 1971, c. 74.

credit, especially all advertising intended for children".[422] Under this power, a regulation was made prohibiting advertising intended for children which "employs cartoons". The appellant sought an injunction to restrain the respondent from using such cartoons, while the latter contended that insofar as the regulation applied to television it was unconstitutional. The trial Judge granted the injunction, but was reversed two to one on appeal by the Quebec Court of Appeal. Martland J. defined the issue narrowly as "the power of a provincial Legislature to regulate and control the conduct of a commercial enterprise in respect of its business activities within the Province".[423] Emphasizing that it was not the television station but Kellogg that was being enjoined, he added:

> Kellogg is not exempted from the application of restriction upon its advertising practices because it elects to advertise through a medium which is subject to federal control. A person who caused defamatory material to be published by means of a televised programme would not be exempted from liability under provincial law because the means of publication were subject to federal control. Further, he could be enjoined from repeating the publication.[424]

The respondent had argued that because the television advertising was prepared in Ontario for use in Quebec, the prohibitory regulation encroached on the federal power over interprovincial trade under head 2 of section 91. Martland J.'s reply was that although the impugned regulation might affect such trade, it did so only indirectly.[425] In his dissent, Laskin C.J.C. observed that "the generality of the challenged provincial legislation and regulation does not aid the Province in extending its prohibition of advertising to a medium which is outside its legislative jurisdiction."[426] The Chief Justice considered that the majority was asserting what amounted to a provincial ancillary power, "an assertion that if the Province has a legislative power base in relation to some activity or trade in the Province it may constitutionally extend its authority to embrace objects, which strictly, are outside its competence".[427] He added that there is no constitutional basis for such a power.

The decision appears to modify the holding in *Re C.F.R.B. and A.G. Can.*[428] that the federal broadcasting power embraces "content" as well as the physical means of communication. Martland J. would limit that authority to its particular facts.[429]

In *The Queen in The Right of the Province of Manitoba v. Air Canada*,[430] Chief Justice Laskin affirmed the decision of Mr. Justice

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[422] *Supra* note 420, at 218, 83 D.L.R. (3d) at 317.
[423] *Id.* at 222, 83 D.L.R. (3d) at 320.
[424] *Id.* at 225, 83 D.L.R. (3d) at 323.
[425] *Id.* at 226, 83 D.L.R. (3d) at 323.
[426] *Id.* at 215-16, 83 D.L.R. (3d) at 316.
[427] *Id.* at 216, 83 D.L.R. (3d) at 316.
[428] [1973] 3 O.R. 819, 14 C.C.C. (2d) 345, 38 D.L.R. (3d) 335 (C.A.).
[429] *Kellogg's, supra* note 420, at 220, 83 D.L.R. (3d) at 319.
[430] [1980] 2 S.C.R. 303, [1980] 5 W.W.R. 441, 111 D.L.R. (3d) 513.

Morse[431] that airspace above the province through which overflights passed was not "in the province" for provincial taxation purposes:

> Merely going through the air space over Manitoba does not give the aircraft a *situs* there to support a tax which constitutionally must be 'within the Province'. In the case of aircraft operations, there must be a substantial, at least more than a nominal, presence in the Province to provide a basis for imposing a tax in respect of the entry of aircraft into the Province.[432]

Neither would the "momentary transitory presence" of aircraft landing in the province bring them under the latter's taxing authority.[433]

It is still too early to say how the test of "substantial presence" as a foundation for provincial jurisdiction might be applied in other areas. Would it mean, for example, that no provincial "aspect" of pollution controls or of ground safety regulations would ever apply to aircraft unless they had a "substantial presence" within the province? The definition of the standard is somewhat troublesome, turning as it does on questions of degree.

E. *Courts and the Judiciary*

1. *Generally*

In *Reference re The Residential Tenancies Act, 1979*,[434] the Supreme Court considered the validity of a legislative code enacted in 1979 by the province of Ontario in part to reduce the large volume of landlord and tenant cases handled by the courts. The legislation conferred powers on the Residential Tenancies Commission to make eviction and compliance orders. The Ontario Court of Appeal found that the power to order eviction was similar to the historical judicial power to order ejectment of a tenant, while the power to order compliance with statutory obligations was similar to the power to award damages or specific performance or to issue injunctions.[435] These powers were broadly conformable to the type of jurisdiction exercisable at Confederation by judges of the county or superior courts appointed by the Governor General pursuant to section 96 of the B.N.A. Act, and could not constitutionally be conferred on administrative agencies or courts established by the provinces. Both the Ontario Court of Appeal and the Supreme Court of Canada held that it was not within the legislative authority of Ontario to empower the Commission to make eviction and compliance orders. Although the Residential Tenancies Act contained a

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[431] *Re* Air Canada and Manitoba, [1977] 3 W.W.R. 129, 77 D.L.R. (3d) 68 (Man. Q.B.).

[432] *Supra* note 430, at 316, [1980] 5 W.W.R. at 452, 111 D.L.R. (3d) at 521-22.

[433] *Id.* at 319, [1980] 5 W.W.R. at 454, 111 D.L.R. (3d) at 523.

[434] [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554.

[435] 26 O.R. (2d) 609, at 631, 105 D.L.R. (3d) 193, at 215 (C.A. 1980).

number of powers, the two mentioned powers were at the very core of its whole operation.

Surveying the precedents, Dickson J. proposed a three-step inquiry to determine whether the powers conferred by a legislature on a provincial agency or tribunal could validly be exercised by such a body.[436] The first step is to ascertain whether the power or jurisdiction conferred upon the agency conforms to the power or jurisdiction exercised by superior, district or county courts at Confederation. If not, that is the end of the matter since the provincial body will not then be arrogating jurisdiction improperly to itself. If the impugned power *is* identical or analogous to a power exercised by a section 96 court at Confederation, then it is necessary to take the second step in the inquiry.

"Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a 'judicial' function?"[437] The criterion of acting judicially is that the tribunal "is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality . . . ".[438] To borrow the terminology of Professor Ronald Dworkin, the judicial task typically involves questions of "principle" or the competing rights of individuals and groups, as contrasted with "policy involving competing views of the collective good of the community as a whole".[439] If the power is *not* being exercised "judicially", then the enquiry is terminated, since the power "no longer conforms to a power or jurisdiction exercisable by a s. 96 court and the provincial scheme is valid".[440]

If, however, power is being exercised in a judicial way, the third and final step is taken, which involves "review [of] the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context".[441] The Court in *Residential Tenancies* explained that in *Tomko v. Labour Relations Board (Nova Scotia)*,[442] although the Board was authorized to issue a "cease and desist" order analogous to a mandatory injunction issuable by a section 96 court, it was found, in its institutional setting, to be "merely one aspect of a broad legislative scheme for the peaceful regulation of collective bargaining, an area which the courts had not entered".[443] The challenged "judicial power" was ancillary to general administrative functions for "the achievement of a broader policy goal of the legislature".[444]

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[436] *Supra* note 434, at 734-36, 123 D.L.R. (3d) at 571-73.
[437] *Id.* at 734, 123 D.L.R. (3d) at 571.
[438] *Id.* at 735, 123 D.L.R. (3d) at 571-72.
[439] *Id.* at 735, 123 D.L.R. (3d) at 572.
[440] *Id.*
[441] *Id.*
[442] [1977] 1 S.C.R. 112, 14 N.S.R. (2d) 191, 69 D.L.R. (3d) 250 (1975).
[443] *Supra* note 434, at 732, 123 D.L.R. (3d) at 569.
[444] *Id.* at 736, 123 D.L.R. (3d) at 572.

Applying these three tests in *Residential Tenancies*, Dickson J. found that the powers in the provincial statute broadly conformed to the powers exercised historically by superior, county or district courts.[445] Viewing the powers in their institutional setting (step two), His Lordship concluded that the powers concerned remained judicial in such a setting, involving a *lis inter partes* between legal adversaries:

> The Commission decides contractual and property rights between individual landlords and tenants and in so doing determines not only the right to land and property, but also other rights. In each case, there is an analysis of the law, an application of the applicable law to the particular facts, and then a judicial decision and a consequent order. It is difficult to conceive that when so acting the Commission acts otherwise than as a curial tribunal. In substance the tribunal is exercising judicial powers roughly in the same way as they are exercised by the Courts.[446]

Finally, regarding the tribunal's function as a whole, how was such a function to be appraised in its entire institutional context? There was not here, as there was in *Tomko*, a "judicial power" ancillary to a broad legislative scheme or policy in an area which the courts had not entered. This would have saved the Ontario legislation. Instead, the chief function was an adjudicative, not an administrative, one. "The administrative features of the legislation," observed Dickson J., "can be characterized as ancillary to the main adjudicative function."[447] The Act transferred a large body of landlord and tenant law from the section 96 courts to a provincial administrative tribunal acting essentially as a court. Consequently, the whole scheme foundered.

More fortunate was the fate of the Saskatchewan Agricultural Implements Act, which gave a provincial board power to compensate farmers, through an insurance fund, for losses attributable to a delay in repairing implements.[448] Farmers were protected up to a stated maximum, without necessarily having to establish a legal foundation for their claims, since reimbursement might be obtained under subsection 6D(1) for loss arising without "any person's fault in a legal sense".[449] Laskin C.J.C. emphasized in the unanimous judgment that even if the Board's powers were regarded as broadly conformable to the powers of a section 96 court at or after Confederation, "the Board's functions in the institutional setting in which it operates distinguish it markedly from a s. 96 court."[450] The Chief Justice continued:

> There is no limitation to legal considerations in fixing compensation, although they may be present in some cases; there is no *lis inter partes* in the traditional sense in which one exists in an action, and the Board has a clear

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[445] *Id.* at 738, 123 D.L.R. (3d) at 574.

[446] *Id.* at 744-45, 123 D.L.R. (3d) at 579.

[447] *Id.* at 747, 123 D.L.R. (3d) at 581.

[448] Massey-Ferguson Indus. Ltd. v. Government of Sask., [1981] 2 S.C.R. 413, [1981] 6 W.W.R. 596, 127 D.L.R. (3d) 513.

[449] *Id.* at 427, [1981] 6 W.W.R. at 610, 127 D.L.R. (3d) at 525.

[450] *Id.* at 429, [1981] 6 W.W.R. at 611, 127 D.L.R. (3d) at 526.

> investigatory function, independently of what may be brought before it by others, unlike the neutral process of a court. The Board's authority is integrated into a regulatory scheme, itself beyond constitutional challenge, and under it offers limited protection to farmers through what is essentially an insurance fund.[451]

These features were sufficient to establish the predominantly "administrative" character of the Saskatchewan scheme and to distinguish it from the unconstitutional residential tenancies legislation.

In *Minister of Justice* v. *Borowski*,[452] the Supreme Court of Canada decided seven to two that the plaintiff did have standing to seek a declaration that the therapeutic abortion provisions of the Criminal Code (subsections 251(4), (5) and (6)) were inoperative by reason of the Canadian Bill of Rights. The plaintiff, an ardent anti-abortion activist and former Manitoba N.D.P. cabinet minister, argued that the exculpatory provisions of the Criminal Code, exempting physicians and women from the abortion offences in subsections 251(1) and (2), were contrary to the guarantee of life in section 1 of the Canadian Bill of Rights, and hence inoperative.

According to Martland J., who spoke for the majority, the *Thorson*[453] and *McNeil*[454] cases, which established the right of taxpayers to bring such actions, decided that:

> to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.[455]

Borowski had met this test. There was no reasonable way to attack the legislation (especially where unborn foetuses were involved) unless some interested citizen instituted proceedings. Doctors, who are protected by the legislation, and women who invoke it to terminate pregnancies, obviously are not disposed to attack it, and it is unlikely that even a husband who disapproved of his wife's pending abortion would bring an action: "[t]he progress of the pregnancy would not await the inevitable lengthy lapse of time involved in Court proceedings. . . ."[456] Either the abortion would have taken place or the child would have been born before the judgment was rendered.

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[451] *Id.*

[452] [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 64 C.C.C (2d) 97, 130 D.L.R. (3d) 588 (S.C.C. 1981).

[453] Thorson v. A.G. Can., [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1 (1974).

[454] Nova Scotia Bd. of Censors v. McNeil, [1976] 2 S.C.R. 265, 12 N.S.R. (2d) 85, 55 D.L.R. (3d) 632.

[455] *Supra* note 452, at 598, [1982] 1 W.W.R. at 117, 64 C.C.C (2d) at 115, 130 D.L.R. (3d) at 606.

[456] *Id.* at 597, [1982] 1 W.W.R. at 116, 64 C.C.C. (2d) at 114, 130 D.L.R. (3d) at 605.

Laskin C.J.C., with whom Lamer J. concurred, would have denied standing to the plaintiff, holding that Borowski was neither directly affected by the legislation nor threatened with its sanctions. "Mere distaste," he added, "has never been a ground upon which to seek the assistance of a Court."[457] The Chief Justice contended that the interest of doctors and hospitals, for example, was a more concrete one because the establishment of a therapeutic abortion committee at a hospital, whatever the outcome, could create tensions.[458] The granting of standing in *Blaikie*,[459] pressed by the plaintiff, was not analogous since the plaintiffs in that case, as counsel representing principally English-speaking clients before Quebec quasi-judicial tribunals, had a direct interest in the language of advocacy.[460]

Insofar as the expansion of the scope of the doctrine of standing purports to give interested citizens an avenue to challenge legislation on constitutional grounds that they did not have before, Martland J.'s judgment is preferable to that of Laskin C.J.C. With respect, it is difficult to agree with the Chief Justice that a longtime pro-life activist has less "interest" in determining the validity of the relevant law than "doctors and hospitals" might have.

2. *The Berger Affair*

On 18 November 1961, Mr. Justice George Addy of the Federal Court complained to the Canadian Judicial Council that Mr. Justice Thomas Berger of the British Columbia Supreme Court had publicly expressed opinions on politically controversial matters "capable of doing incalculable harm to the independence of the judiciary, the administration of justice and the maintenance of the principle of the separation of powers".[461] The complaint of *non se bene gesserit*, if considered well founded by the Council, would lead to the initiation of proceedings by Parliament for the removal from the bench of Mr. Justice Berger by the Joint Address procedure under subsection 99(1) of the Constitution Act, 1867.

In November 1981, during the acrimonious patriation controversy, Berger J. had deplored the removal from the Charter of section 35 containing the guarantee of "aboriginal and treaty rights" for Indian, Inuit and Métis peoples. As counsel in the celebrated *Calder* case,[462] he

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[457] *Id.* at 578, [1982] 1 W.W.R. at 100, 64 C.C.C. (2d) at 100, 130 D.L.R. (3d) at 591.

[458] *Id.* at 585, [1982] 1 W.W.R. at 105, 64 C.C.C. (2d) at 105, 130 D.L.R. (3d) at 597.

[459] A.G. Que. v. Blaikie, [1979] 2 S.C.R. 1016, 101 D.L.R. (3d) 394.

[460] *Supra* note 452, at 586, [1982] 1 W.W.R. at 106, 64 C.C.C. (2d) at 105-06, 130 D.L.R. (3d) at 597.

[461] REPORT OF THE COMMITTEE OF INVESTIGATION TO THE CANADIAN JUDICIAL COUNCIL 2 (MacKinnon J. Chairman 1982) [hereafter cited as REPORT].

[462] *Calder v. A.G.B.C.*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145.

had strongly affirmed the legal existence of such rights and he was deeply concerned about the November Fifth Accord between Prime Minister Trudeau and the provinces which would have removed those rights. "If the new Constitution and the Charter acknowledge the claims of the two founding peoples," he asked, "then how can they refuse to acknowledge the place of the native people?"[463] He also suggested that Quebec should retain its historic veto power and that the federal government should compensate the provinces whenever lands under provincial control were conveyed to aboriginal peoples. An incensed Prime Minister Trudeau observed, "I just regard that as the judiciary getting mixed into politics. . . . I hope the judges will do something about it."[464]

Further to the complaint, a three-member panel of the Council met to consider whether Parliament should be asked to initiate proceedings for removal from office.[465] Berger J. refused to appear before the Committee, saying, "[t]he Council has the evidence. . . . I do not intend to participate in this exercise."[466] A judge has a right, he added, or even a duty, to speak out on questions of human rights and fundamental freedoms, particularly where minority rights are involved. If the Council viewed the matter differently, it has "the statutory power to recommend my removal from office".[467] There was no note of penitence in Mr. Justice Berger's statement. Neither was there much question that in similar circumstances he would speak out just as forcefully again.

The Committee began its deliberations by stressing that:

> The doctrine of the separation of powers and the notion of judicial independence was not achieved without a long, arduous struggle that was only completed in England in the late 18th century. There is now general agreement in common law countries that appointed judges should not intermeddle in politics while on the bench, and we do not believe that Justice Berger disagrees with that general principle. The more difficult problem is to establish where the line should be drawn in any particular case.[468]

After a detailed historical review, the Committee referred to Berger J.'s contentious statement describing the federal government's decision to "abandon" native rights as being "mean-spirited and unbelievable",[469] adding that in his newspaper article "he criticized the loss of Quebec's veto and argued for one amending formula in preference to another."[470] His defence was that at a time of constitutional renewal, such issues transcended partisan politics. The fact that Berger J.'s alleged indiscre-

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[463] Berger, *Steps that'll give Canada a fairer form of constitution*, The Globe and Mail (Toronto), 18 Nov. 1981, at 7.

[464] *Judiciary holds back on Trudeau charge*, The Globe and Mail (Toronto), 26 Nov. 1981, at 9.

[465] *See* REPORT, *supra* note 461.

[466] Statement by Hon. T. Berger dated 6 Apr. 1982.

[467] *Id.*

[468] REPORT, *supra* note 461, at 7-8.

[469] *Id.* at 18.

[470] *Id.*

tions were not isolated may have been disconcerting to the Committee. Citing Mr. Justice Berger's statement, the Committee continued: "He refers to the late Mr. Justice Thorson and Chief Justice Freedman speaking on public issues. We do not have the facts with relation to those matters and are not in a position to comment on them."[471] (Berger J. later remarked that since Freedman C.J. himself was a member of the Council, it would have involved little difficulty for that body or its Committee to obtain the facts with regard to his alleged statements.)[472]

"Justice Berger's views," the Committee continued, "are not in issue. What is in issue is his use of his office as a platform from which to express those views publicly on a matter of great political sensitivity."[473] Berger J.'s views, moreover, were given more publicity because he was a judge rather than "merely a politician", and "judges, of necessity, must be divorced from all politics."[474] However, they concluded that while "the complaint of *non se bene gesserit* is well founded . . . we do not make a recommendation that Justice Berger be removed from office."[475]

In extenuation of Mr. Justice Berger's conduct, they mentioned that as soon as Chief Justice MacEachern had spoken to him of his utterances, he had "disengaged himself from the constitutional debate".[476] While regarding the matter seriously, the Committee noted that:

> There are circumstances which make this case unique. As far as we are aware, this is the first time this issue has arisen for determination in Canada. It is certainly the first time the Council has been called on to deal with it. It is possible that Justice Berger, and other judges too, have been under a misapprehension as to the nature of the constraints imposed upon judges. That should not be so in the future. We do not, however, think it would be fair to set standards *ex post facto* to support a recommendation for removal in this case.[477]

The Committee's *Report* is disappointing in that while it begins by querying "where the line should be drawn in any particular case",[478] its consideration of Berger J. ends up without establishing any ascertainable guidelines at all. All that one might infer from the *Report* is that *any* political statement whatsoever by a judge is impermissible and could constitute cause for removal from office. This blanket prohibition is too sweeping. Within limits, judges should be able to make statements on economic, social and political matters. They should be held to account, of course, for politically partisan behaviour. Berger J., however, was not speaking in support of a party but a vulnerable minority. In doing so, he

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[471] *Id.*
[472] Letter from Hon. T. Berger to Rt. Hon. Bora Laskin, 21 May 1982, at 2.
[473] REPORT, *supra* note 461, at 19.
[474] *Id.* at 20.
[475] *Id.* at 23-24.
[476] *Id.* at 22-23.
[477] *Id.* at 23.
[478] *Id.* at 8.

left the refuge of the judicial forum, laid himself open to criticism and received it, notably from Prime Minister Trudeau.

The separation of powers, which is seen as a basis for the independence of the judiciary in the *Report*, has never existed in the common law world in an absolute or unalloyed form.[479] In the United Kingdom, the Lord Chancellor who is at the apex of the British judicial hierarchy, is a member of the legislature, executive and judiciary, and his continued tenure depends on his party's fortunes at the polls.[480] The law lords, who are members of Britain's highest court of appeal, have the right to debate and vote in the House of Lords. In the United States, judges such as Frankfurter, Byrnes, Douglas and Fortas JJ. have advised presidents about political matters while sitting on the United States Supreme Court. Douglas J. was actively considered for the vice-presidential slot on the Truman ticket in 1948. When impeachment proceedings are involved, the United States Senate may become a judicial forum, trying the president, judges, or other officials. In Canada and Britain, of course, the more rigorous American separation of three co-equal branches does not exist; there is actually a "fusion of powers" with the cabinet also forming part of the legislature. To be sure, the judiciary is separate, but the separation may not be as rigid as suggested. Through the reference device, which does not exist in the United States or England at the highest level, the federal Cabinet can transmit sensitive political issues to the Supreme Court for adjudication, in effect making the tribunal a political umpire of the federation. Through these references, such controversial political issues as the constitutional validity of Prime Minister R.B. Bennett's 1934-35 "New Deal" social legislation,[481] the 1975 anti-inflation legislation,[482] the British Columbia[483] and Newfoundland[484] offshore resource ownership issues and the 1980 attempt to patriate the constitution unilaterally[485] were dispatched to the Court for resolution. Where the composition of the bench, as not infrequently happens, reflects preponderantly a particular political tendency, such issues in such a forum must be seen to be "politically sensitive" indeed.

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[479] *Cf.* Dickson J. in *Residential Tenancies*, *supra* note 434, at 728, 123 D.L.R. (3d) at 566: "Our Constitution does not separate the legislative, executive, and judicial function and insist that each branch of Government exercise only its own function."

[480] REPORT, *supra* note 461, at 17.

[481] *See* McConnell, *The Judicial Review of Prime Minister Bennett's 'New Deal'*, 6 OSGOODE HALL L.J. 39 (1968).

[482] Reference *re* Anti-Inflation Act, *supra* note 336.

[483] Reference *re* Ownership of Offshore Mineral Rights, *supra* note 345.

[484] Two references on the ownership of Newfoundland offshore resources were argued in Oct. 1982. One was referred to the Court of Appeal of the Supreme Court of Newfoundland on 12 Feb. 1982 and the other was referred to the Supreme Court of Canada on 19 May 1982.

[485] Reference *re* Amendment of the Constitution of Canada (Nos. 1, 2 and 3), [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1.

The *Report* emphasizes that "[t]here is now general agreement in common law countries that appointed judges should not intermeddle in politics while on the bench. . . ."[486] In some common law countries, the separation of powers has been much modified. In others it has many critics. In none does it exist in the hypothetically airtight form that Montesquieu[487] discussed:

> Separation of powers is a cardinal feature of American democracy, but it has many critics. Some think that one, or more than one, of the branches can acquire too much influence. They complain, for instance, that the President has acquired too much authority in the international field and often dominates Congress by use of television, radio, motion pictures, press conferences, patronage, and a large bureaucracy. Critics also allege that the President, by administrative decrees and control over judicial appointments, often gains the upper hand over the judicial bench. The courts often are accused of usurping authority which properly belongs to the other two branches.[488]

If, as the above passage suggests, American presidents appoint to the courts those in broad ideological sympathy with their political programs, the tendency to make partisan appointments is even more marked in Canada. In the United States, during the thirty-six year period from 1945 to 1981 (to allow for full terms in the case of U.S. presidents), Democratic presidents held office for twenty years and Republicans for sixteen. In the same interval in Canada, Liberal prime ministers were in office for over twenty-nine years and Conservatives for less than seven. Given the tendency of the executive to make partisan appointments in both countries, the result is much more one-sided in Canada. Berger J., a former British Columbia N.D.P. leader, was an exception to the general practice of appointing judges with Liberal Party associations. Being ideologically more to the left than the vast majority of the Council, he would be subjected to a forum of centrist, establishment judges whom he could only view in an adversarial fashion. In such a context, would there be any impression among the discerning public of fair process? Perhaps the hesitation of the Council's Committee to recommend parliamentary action is understandable.

Security of judicial tenure, the Committee's *Report* says, was guaranteed by the Act of Settlement in 1701;[489] thereafter, a Joint Address was needed to remove judges, a procedure rarely, if ever, used. Before 1701, judges were often dismissed at the whim of the sovereign. In 1616, Coke was dismissed by James I as Chief Justice of King's Bench for refusing to defer to the Crown on pending judicial matters.[490] Throughout the seventeenth century there were turbulent political convulsions marked by the English Civil War and Cromwell's protector-

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[486] REPORT, *supra* note 461, at 8.

[487] DE L'ESPRIT DES LOIS, Book XI, chs. 3-6 (1748).

[488] J. FERGUSON & D. MCHENRY, THE AMERICAN SYSTEM OF GOVERNMENT 45 (13th ed. 1977).

[489] REPORT, *supra* note 461, at 10.

[490] *Id.* at 9.

ship. The Bloody Assizes of Judge Jeffreys, a pliant tool of James II, witnessed the sentencing of 200 of his monarch's enemies to hang and 800 to be transported to the colonies, culminating in the 1688 Glorious Revolution which deposed James from the throne. The debasement of the judicial office by the executive throughout the century would strongly impel the revolutionaries in their new constitution to sever the judicial arm from the Crown's influence. This they did in the 1689 Bill of Rights and the Act of Settlement in 1701. In that context, a stronger version of the separation of powers is understandable. In our more tranquil political era, the historical purpose of the original doctrine having been attenuated, greater latitude might be given to the judges who feel constrained to speak in a non-partisan sense on pressing political or social issues. If such utterances, as might occasionally happen, revealed bias on some issue that later came before the court, the Chief Justice could always ask the judge concerned to recuse himself. It is very probable that judges would not speak out often. Even Berger J. did so only on one matter.

The Committee placed some emphasis on the uniqueness of Justice Berger's statement.[491] Was it really, however, so unique? The deliberations by the Committee were unique, but were the kind of incidents it considered unprecedented? Without attempting to be in any way exhaustive, the following cases in the common law world may be cited:

(1) Chief Justice Samuel Freedman of Manitoba went on television in October 1970, during the F.L.Q. terrorist crisis in Quebec, to declare his support for the invocation of the War Measures Act.[492]

(2) On 2 September 1981, Berger J. himself spoke *in support of* the not yet eviscerated Constitution and Charter of Rights at the annual convention of the Canadian Bar Association in Vancouver. (If opposition to the modified Charter is censurable, should not support for the unmodified one be also?)[493]

(3) Chief Justice Deschênes of Quebec in 1982, in Vancouver, criticized the failure of Parliament to entrench the independence of the judiciary in the new Constitution. He also published an address he delivered on the rights of unborn children (a politically controversial topic) in a collection of his speeches to which Chief Justice Laskin wrote the foreword.[494]

(4) Mr. Justice Thorson of the defunct Exchequer Court of Canada participated, while in office, in the campaign for nuclear disarmament, a

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[491] *Id.* at 10.

[492] *Supra* note 472, at 2.

[493] *Id.* at 3.

[494] *Id.* at 2; *see* J. DESCHÊNES, *The Rights of the Child*, in THE SWORD AND THE SCALES, at 141-51, especially at 150-51 (1979).

matter normally within the purview of the External Affairs Department.[495]

(5) During the adjudication of the "New Deal" cases in 1937, R.K. Finlayson, K.C., the executive assistant to ex-Prime Minister R.B. Bennett, whose defeated government had enacted the legislation, was sent by Mr. Bennett to Chief Justice Sir Lyman Duff, to explain and, in effect, lobby for its sustainment. Duff C.J.C. gave him a full hearing and upheld some, though not all, of the "New Deal" measures.[496]

(6) Lord Denning, both as a law lord and as Master of the Rolls, has spoken and written on a wide range of political and social issues. For example, in 1979, on the occasion of his visit to Vancouver to open the new Court House, he told lawyers that trade unions in England were a threat to the freedom of that country.[497]

(7) While Lord Chancellor during the war years, Lord Simon suggested to the Churchill government that war criminals be shot without trial. He also interviewed Rudolf Hess, after the latter flew to Scotland, to ascertain what the German conditions were for a negotiated peace.[498]

(8) Bruce Murphy, an American political scientist, has documented that Supreme Court Justice Louis D. Brandeis kept his close friend Felix Frankfurter on an annual retainer to promote "joint endeavours for the public good". Frankfurter, who later warned his judicial colleagues to "stay out of the political thicket", felt little compunction in his earlier non-judicial years in doing errands under a veil of secrecy for a judge who obviously considered that it would be improper to do them openly himself. The whole arrangement was contrived so that Brandeis J. could stay active politically while on the bench without fear of reprisal. These two outstanding American judges apparently saw little wrong with such a procedure.[499]

(9) During President Roosevelt's 1937 court-packing plan, U.S. Chief Justice Charles Evans Hughes vigorously opposed the Roosevelt administration's attempt to expand the United States Supreme Court bench from nine to fifteen members. His opposition was effective, in part, in frustrating the legislation.[500]

(10) Before the ultimate decision in the 1954 school desegregation case, President Eisenhower, hoping to influence Chief Justice Warren, argued the anti-desegregation position to Warren C.J. who presided over

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[495] Statement, *supra* note 466, at 2; *see also* the valedictory editorial in the Winnipeg Free Press, 12 Jul. 1978, at 43, which cites, in addition to Thorson J.'s involvement in the nuclear weapons debate, his opposition to apartheid in South Africa.

[496] McConnell, *supra* note 481, at 82-83.

[497] *Supra* note 492, at 2.

[498] J. HEYDECKER & J. LEEB, THE NUREMBERG TRIAL: A HISTORY OF NAZI GERMANY AS REVEALED THROUGH THE TESTIMONY AT NUREMBERG 258-59 (1962).

[499] *Judging Judges, and History*, The New York Times, 18 Feb. 1982, at A22.

[500] Kaufman, *Judges Must Speak Out*, The New York Times, 30 Jan. 1982, at A23.

the case.[501] Should Warren C.J. not have recommended the President's censure, at least? Or did his silence imply that he did not regard such a "breach of the separation of powers" on a pending case of much importance?

(11) United States Supreme Court Justice William O. Douglas, while on the bench, was a persistent and strenuous advocate of environmental causes and took many strong political positions. He did this over a career of thirty-five years, the longest incumbency of any member of the tribunal, without untoward consequences, although Gerald Ford once threatened him with impeachment. In his 1970 book, *Points of Rebellion*, Mr. Justice Douglas strongly criticized President Lyndon B. Johnson, holding that men had a right to rebel against an intolerable government. When parts of the book were published in *Evergreen* magazine, Congressman Ford attempted to launch impeachment proceedings against Mr. Justice Douglas.[502] Later in 1970, however, a Special Subcommittee of the House Judiciary Committee presided over by Emanuel Celler, reported that all the charges were groundless.[503]

(12) Chief Justice Richard Neely of the West Virginia Supreme Court of Appeals, in his recent book, declared:

> I spend an inordinate amount of my time with the legislature. I write to every legislator four times a year and maintain constant personal communication when the legislature is at the capitol. . . . Whenever I admit that a substantial proportion of my January, February, and March is spent smoking and joking with the legislature, other judges stick up their noses because I insufficiently appreciate the pristine Olympian function of the judiciary. Nevertheless, I usually get my clerks, typewriters, and process servers without being too much of a whore in the bargain.[504]

(13) In 1981, United States Chief Justice Warren Burger spoke out for preventive detention while bail test cases were on their way to the U.S. Supreme Court.[505]

In the light of instances like the above, some of which might be criticized and others not, might the investigating committee not have applied an absolute and harsh standard on Berger J. which was not warranted by the precedents? After all, Mr. Justice Berger was censured, even though his removal from the bench was not recommended.

Chief Justice Laskin and the investigating panel were understandably concerned about maintaining the independence of the judiciary and the integrity of the bench by preventing the improper political involvement of the judges. Laskin C.J.C. reiterated his concern at the annual meeting of the Canadian Bar Association in Toronto in September 1982, when he said of the widespread support for Berger J.: "Would the

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[501] Brown v. Bd. of Educ., 347 U.S. 483 (1954). *See* E. WARREN, THE MEMOIRS OF EARL WARREN 291 (1977).

[502] W. DOUGLAS, THE COURT YEARS, 1939-1975 361 (1980).

[503] *Id.* at 375.

[504] HOW COURTS GOVERN AMERICA 146-47 (1981).

[505] *Judging Judges, and History*, *supra* note 499.

same support be offered to a Judge who intervenes in a political matter in an opposite way? Surely there must be one standard, and that is absolute abstention, except possibly where the role of a Court is itself brought into question.''[506] While the Chief Justice's concern for the institution over which he presides is understandable, such a clinical separation of the judiciary and the political branches is impracticable and needless. Even he makes an exception where the Court is under attack. Lines must be drawn, for while some conduct by judges is censurable, non-partisan political or social comment should be allowed.

Mr. Justice Duff's audience with Mr. Finlayson, K.C., for example, may have enhanced his awareness of the legal operation of Bennett's ''New Deal'' legislation[507] — always a difficult matter in an abstract reference, and Chief Justice Neely's almost perennial lobbying of the West Virginia legislature certainly increased his Court's capacity to deliver services promptly and efficiently.[508] Neely C.J. adds that he does not consider that his close association with legislators made him any more subservient to their views on pending cases. His actions have led to no call for his removal from office, although he discusses them with utmost candour in his book.

Since judges ordinarily possess maturity and discretion, it is difficult to think that political contacts like those mentioned would detract from their independence or impartiality. In the present atmosphere of political cynicism, it is improbable that the public expects much higher standards from judges than it does from others. Judges should be persons of integrity and impartiality, but extra-judicial statements of a non-partisan character, especially on matters within the range of their experience, could be quite valuable at times.[509] Where an issue is a monopoly of a particular party, however, a judge would be indiscreet to take a public position on that issue. In the heyday of Social Credit, public espousal by a judge of Social Credit monetary theory would have been objectionable. On issues which, in Mr. Justice Berger's words, transcend party politics, such as the environment, native or minority rights, or civil liberties generally, the public remarks of judges on devising effective standards should be welcomed as a catalyst for debate.

The Berger incident took place, of course, before the Canadian Charter of Rights and Freedoms was proclaimed by the Queen on 17 April 1982. With the reception of the Charter, the Supreme Court acquires more power, will decide cases having greater social and

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[506] Speech by Rt. Hon. Bora Laskin, Canadian Bar Association Meeting, at 10, Sep. 1982.

[507] McConnell, *supra* note 481.

[508] *Supra* note 504.

[509] *Cf.* ''In the public interest, judges may — and, indeed, must — give legislators the benefit of their special expertise gained during years of wrestling with specific legal problems,'' Kaufman, *supra* note 500. (The author is a judge of the U.S. Court of Appeals for the Second Circuit and was Chief Judge of that Court from 1973 to 1980).

political reverberations and will generally assume a position of importance that it has never had before. While it is unlikely that it will ever attain the exalted place in the Canadian federal system which its American counterpart holds in the United States, a comparison with the more politicized and factionalized American Court is now possible. Section 2 of the Charter entrenches "freedom of expression" in terms even more extensive than the First Amendment. American judges have never been as inhibited in their comments as the Canadian judiciary. The whole ambience of the Charter is the conferment of *universal* rights. In the Saskatchewan provincial election, on 26 April 1982, for example, some judges who were hitherto barred by statute from voting claimed the right to vote under section 3 of the Charter and were granted it. It is submitted that "openness" is an important value that could be promoted by occasional political statements by judges. The spirit of the Charter is to encourage such openness. Where the public becomes more aware of the issues at stake in adjudication, the Court becomes more relevant in a democratic framework and may ultimately gain more influence.

F. *Indians and Indian Lands*

From the time Prime Minister Trudeau announced his unilateral constitutional initiative in October 1980, he met with a wary, sometimes even hostile, reception from Indian peoples; the Inuit of the "Barrens" in the Northwest Territories were more receptive. There is much in the Charter, however, in which aboriginal peoples (now including "Métis" by definition in section 35) can find encouragement. Paragraph 25(*a*) mentions "rights or freedoms that have been *recognized* by the Royal Proclamation" of 1763 and promises not to abrogate or derogate from any rights or freedoms acquired by way of land claims settlements. The term "recognized" in section 35 implies that "the rights already existed in the form of aboriginal title before the Proclamation was made."[510] It suggests that as far as these rights are concerned, the Charter is declaratory rather than constitutive. It is, in effect, acknowledging rights always possessed by aboriginal peoples. Subsection 35(1), likewise, recognizes and affirms aboriginal and treaty rights; it does not create new rights but entrenches existing rights in the Constitution.[511] As a result of the Prime Minister's November Fifth Accord with the premiers, which broke the impasse on patriation, section 35 was removed temporarily from the Charter, but was restored later in November as a result of strong criticism by aboriginal peoples and their allies. The restored section 35 had the qualifier "existing" added before the words "aboriginal and treaty rights", but Justice Minister Chrétien insisted that the change made little practical difference.

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[510] K. McNeil, Constitutional Entrenchment of Native Rights, at 2 (unpublished Report No. 5, Native Law Centre, Univ. of Sask. 1980).

[511] *Id.* at 3.

But what does the term "aboriginal and treaty rights" embrace? There is no definition of the term in the Charter, and the courts may have to embark on a historical inquiry to determine its content. The term would include hunting and fishing rights, aboriginal land title and, where the foregoing right conferred a right to exclusive occupancy of land, it might confer an associated right to self-government, which has been a feature of aboriginal life in the past. By Charter section 37, the Prime Minister is obliged to call a conference to which aboriginal peoples will be invited, by 17 April 1983, at which such issues will be considered.

Section 52 makes the Charter, *inter alia*, "the supreme law of Canada" and gives it retroactive effect. The Charter might revive rights which have been extinguished or diminished by prior legislation. It is possible, however, that the above-mentioned qualifier "existing", in section 35, could militate against this possibility, but the intent of that word is as yet undefined. It might congeal such rights as existed on the date the Charter was proclaimed. Assuming that there is an entrenched, retroactive guarantee of aboriginal and treaty rights, what might its effect be on past laws?

> [F]ederal statutes, such as the *Migratory Birds Convention Act*, R.S.C. 1970, c. M-12, and the *Fisheries Act*, R.S.C. 1970, c. F-14, which have restricted treaty rights relating to hunting and fishing, would be invalidated to the extent that they conflict with those rights. Legislation which has taken away aboriginal rights unilaterally would suffer the same fate. If this interpretation is correct, the *Canada Mining Regulations*, which were held by Mr. Justice Mahoney in *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518, [1979] 3 C.N.L.R. 17 to have diminished the aboriginal rights of the Inuit of Baker Lake, would be invalid to the extent that they are inconsistent with those rights. Arguably, the pre-Confederation legislation in British Columbia which Mr. Justice Judson (Martland and Ritchie JJ. concurring) viewed as having extinguished aboriginal title in that province in *Calder v. Attorney-General of British Columbia* (1973), 34 D.L.R. (3d) 145 (S.C.C.) would also be invalid to the extent that it is inconsistent with the aboriginal rights of the Indians of British Columbia.[512]

If this interpretation is upheld by the courts, the possible impact of the Charter on laws relating to aboriginal peoples could be quite extensive.

Despite the possibly broad acknowledgment of aboriginal rights by the Charter, Indians especially were among the most vocal opponents of patriation in the form in which it was announced, making several trips to London to lobby British parliamentarians either to make the proposed guarantees more effective or to reject the package. There were several reasons for their opposition. As the original inhabitants of what is now Canada, they considered that they should have had a more formal role in drafting the entrenched provisions that would protect their rights and so closely affect the survival of their culture. They felt the proposed guarantees were vague, lacked clear substantive content and could be eroded, as were their treaties, by restrictive statutory provisions or

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[512] *Id.* at 4.

executive bad faith. Some of the original treaties and undertakings had been made by the British Crown, and the Indian peoples considered that the British Crown should continue to be responsible for, or at least guarantee the performance of, any promises made in such agreements. The Canadian government insisted that with the Statute of Westminster, 1931,[513] at the latest, all subsisting treaty and other obligations had been transferred from the British to the Canadian Crown, though for the Indians this had all been done without their knowledge or consent. There was no mutuality. Solemn undertakings made in bilateral treaties had been undermined, without the Indians' consent, by provincial and federal law. Lastly, since the aboriginal peoples did not have any voice in the amending formula, even the existing guarantees could be diminished by a weighted majority of which they formed no part.

Because of such considerations, the Indians sought a remedy in the British courts for a patriation process that they considered could imperil their rights. In April 1982, in the Court of Appeal, they eought a declaration that treaty obligations entered into by the Crown were still owed to the Indian peoples of Canada by Her Majesty in Right of Her Government of the United Kingdom.[514]

While expressing great sympathy with the concern of the Indian peoples, the Court unanimously (three to zero) rejected their application. As Lord Denning conceded, there was historical substance in the Indians' case, for the Crown had once been one and indivisible throughout the Empire, but since the Balfour Declaration and the Statute of Westminster, 1931, which declared Britain and the Dominion to be "equal in status in no way subordinate to one another", the Crown "was no longer single and indivisible". "It was separate and divisible for each self-governing dominion or province or territory."[515] Pursuant to such a development, it was held in 1967 that the Queen was now the Queen of Mauritius and could issue passports in such a capacity to its citizens.[516] Attendant, also, on this constitutional change, Denning M.R. was of the opinion that "those obligations which were previously binding on the Crown simpliciter are now to be treated as divided. They are to be applied to the Dominion or Province or Territory to which they relate: and confined to it."[517] The Indians, therefore, could not insist that the British had either a primary obligation to fulfil treaties they had formerly entered into, or even a secondary obligation to attempt to enforce compliance by those to whom the treaties were transferred.

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[513] 22 Geo. 5, c. 4 (U.K.).

[514] R. v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Indian Ass'n of Alta., [1982] 2 W.L.R. 641, [1982] 2 All E.R. 118 (C.A.).

[515] *Id.* at 651, [1982] 2 All E.R. at 128.

[516] R. v. Secretary of State for Home Dep't, *Ex parte* Bhurosah, [1968] 1 Q.B. 266, [1967] 3 All E.R. 831 (C.A. 1967).

[517] *Ex parte Indian Ass'n of Alta., supra* note 514, at 652, [1982] 2 All E.R. at 128.

In terms of private contract, the process could be likened to subrogation without the consent of one of the parties. Lord Denning, nevertheless, tried to reassure the Indians:

> It seems to me that the Canada Bill itself does all that can be done to protect the rights and freedoms of the aboriginal peoples of Canada. It entrenches them as part of the constitution, so that they cannot be diminished or reduced except by the prescribed procedure and by the prescribed majorities [in the amending formula]. In addition, it provides for a conference at the highest level to be held so as to settle exactly what their rights are. That is most important, for they are very ill-defined at the moment.[518]

For the Indians, consoling as these words might be, the experience was a frustrating one.

In *Baker Lake v. Minister of Indian Affairs and Northern Development*,[519] Mahoney J. held that the conferment of mining rights by federal licence in the Northwest Territories conveyed valid rights to the licencees, even where such a licence derogated from existing aboriginal rights. The Inuit of the Baker Lake area were able to show that they did have an aboriginal right to hunt caribou in the vicinity and claimed that exploration activities by the mining companies under federal licence were interfering with the accustomed migratory path of the herds. Mahoney J. affirmed their aboriginal right to hunt, but found no substantial interference occasioned by the mining operations. The Court held that the plaintiffs might be entitled to compensation for the diminution of their aboriginal rights through the granting of the federal licences, but in this case they were seeking a declaratory judgment rather than compensatory damages. They would therefore receive nothing. He disagreed with the plaintiffs' contention that extinguishment had to be effected *explicitly*; such a common law right could be extinguished by pertinent legislation, although title was not directly referred to, as long as the legislature's intention was clear. The Court listed four elements which were necessary in order to substantiate aboriginal title: (1) the claimants and their ancestors must have been members of an organized society; (2) the society must have occupied the specific territory over which title is asserted; (3) occupation must be to the exclusion of other organized societies; and (4) the occupation must have been an established fact at the time sovereignty was asserted by England.[520]

From the point of view of promoting a just result, the great shortcoming of the above fourfold test is that it reflects too much the stability and sedentary character of European society. Because of the inhospitability of the climate and the vagaries of the food cycle, northern aboriginal peoples were perforce nomadic. They were compelled in years of famine to travel far to obtain food. It is, therefore, sometimes difficult to show a more or less permanent connection of the aboriginal society

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[518] *Id.* at 653, [1982] 2 All E.R. at 129.
[519] [1980] 1 F.C. 518, [1979] 3 C.N.L.R. 17 (Trial D. 1979).
[520] *Id.* at 558, [1979] 3 C.N.L.R. at 45.

with a particular site. Without written records, the historical or anthropological evidence, especially if it must go back to 1670 or earlier, may be scanty. In the *Baker Lake* case, however, the test was met successfully.

G. *Taxation*

An issue of prime importance in Canadian federalism was resolved by the Supreme Court of Canada in 1982 when, by a six to three decision, it affirmed the unanimous judgment of the Alberta Court of Appeal[521] that a federal excise levy on distributors of natural gas, including the provincial Crown, was *ultra vires* insofar as it applied to the province.[522] Section 125 of the B.N.A. Act[523] had extended an intergovernmental immunity to both the federal and provincial governments, incapacitating either of them from imposing a tax on the publicly owned property of the other.

In the Alberta reference decision, the contentious federal legislation was described as follows:

> The amended *Excise Tax Act* would provide by s. 25.13 that 'there shall be imposed, levied and collected on the receipt of marketable pipeline gas by a distributor' the tax therein provided. By s. 25.12 [the section] is binding on the Crown in the right of Canada or of a Province. Under s. 25.1(2) an exporter who has not paid tax is deemed to be a distributor and to have received the gas at the time of export.[524]

The Supreme Court majority emphasized that the above levy was not a regulatory measure to control the trade or export of natural gas, which might have been upheld under the trade and commerce power, but was a federal tax simply to raise revenue. The majority said:

> Faced with the general constitutional taxing competence of the federal parliament under s. 91(3) of the Act, it was important for the survival of the provinces and of Canadian federalism that this vital source of provincial revenue be protected from erosion through taxation. Section 125 thus gives legislative recognition to that constitutional value. . . . The immunity conferred by s. 125, moreover, must override the express powers of taxation contained in ss. 91(3) and 92(2).[525]

Federal counsel had argued that the tax was on "exported" gas and was analogous to a customs duty, similar to the federal duty on provincial

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[521] Reference *re* Proposed Federal Tax on Exported Natural Gas, [1981] 3 W.W.R. 408, 122 D.L.R. (3d) 48 (Alta. C.A.).

[522] Reference *re* Proposed Federal Tax on Exported Natural Gas, 42 N.R. 361, 136 D.L.R. (3d) 385 (S.C.C. 1982).

[523] Section 125 of the B.N.A. Act (*now* the Constitution Act, 1867) reads: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation."

[524] *Supra* note 521, at 412, 122 D.L.R. (3d) at 52.

[525] *Supra* note 522, at 387, 136 D.L.R. (3d) at 435.

whiskey imports upheld in the *Johnny Walker* case.[526] The majority rejected this argument, noting that the tax was not levied exclusively on exported gas, and that it was the deemed receipt and not the export that triggered liability to the tax. In addition, it was impossible to divine a statutory intention that the tax was imposed in a regulatory manner to reduce or eliminate the export of natural gas. Even if the tax were aimed at export, provincial property would be protected unless the federal legislation were regulatory.[527] Although the Court laid primary emphasis on the words of the taxing provision, it mentioned the thrust of the federal government's National Energy Program, 1980, aiming at revised revenue sharing arrangements with more of the proceeds going to the federal government. The tax was imposed to increase Ottawa's share of the revenues derived from energy and that very purpose rendered the proposed tax invalid.[528]

In their dissent, Laskin C.J.C., McIntyre and Lamer JJ. urged the need to reconcile the broad immunity from taxation of provincially owned property conferred by section 125 with the exercise of federal legislative powers in section 91. Such immunity should be confined "within the province, or in respect of intra-provincial transactions".[529] In the context of the *Johnny Walker* case[530] they stressed "the association of customs duties with the federal trade and commerce power",[531] querying whether it made sense to sever the challenged export tax from the National Energy Program: "The plain fact is that the matters are very much related, as both the order of reference and the proposed legislation indicate. They are parts in a mosaic, a combination of elements in an integrated program."[532] Possession of property and movement of property are fundamentally distinct, with an export tax being on an entirely different basis than a tax on property *simpliciter*. The present legislation is admittedly an excise tax and is similar to the excise tax in *Reader's Digest Ltd. v. A.G. Can.*,[533] where it was held that the taxing law was used partly to raise revenue and partly to protect Canadian trade and commerce. Even the peace, order and good government power, the dissenters held, could possibly be invoked. To the extent that revenue raising can "assist in distributing and equalizing economic burdens and benefits, it transcends intrusion into any particular trades in a province or into any control of a provincial resource when there is a careful limitation

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[526] A.G.B.C. v. A.G. Can., [1924] A.C. 222, [1924] 4 D.L.R. 699 (P.C.) (Can.), *aff'g* 64 S.C.R. 377, [1923] 1 D.L.R. 223 (1922).

[527] *Supra* note 522, at 392, 136 D.L.R. (3d) at 439.

[528] *Id.* at 391, 136 D.L.R. (3d) at 438.

[529] *Id.* at 423, 136 D.L.R. (3d) at 408.

[530] *Supra* note 526.

[531] *Supra* note 522, at 426, 136 D.L.R. (3d) at 411.

[532] *Id.*

[533] [1966] Que. B.R. 725, 59 D.L.R. (2d) 54 (1965).

to taxation at the export level if a province should choose to enter that market".[534]

With respect, the minority seems to be straining excessively to find a nexus between the challenged excise tax and the federal trade and commerce and general powers. The argument needs more clarification and substantiation: the link just does not seem to be there. For example, *any* revenue raising measure can be used to redistribute and equalize economic burdens, but that alone does not validate any export taxing provision under the peace, order and good government power. As the majority emphasizes, it is also difficult to find a genuine regulatory purpose in the federal excise tax.

IV. Civil Liberties

When the Gay Alliance Toward Equality, a group of Vancouver homosexuals, asked the *Vancouver Sun* to insert an advertisement in its classified columns advertising the magazine *Gay Tide*, the newspaper refused. The appellant organization then complained to the Human Rights Commission that the *Sun* had violated section 3 of the Human Rights Code,[535] which stipulated that "no person shall deny to any person . . . any . . . facility customarily available to the public . . . unless reasonable cause exists for such denial." The Commission appointed a board of inquiry which then decided that there had been a breach of section 3. On appeal, the trial Judge, held that the term "reasonable cause" in section 3 was a question of fact on which the board was entitled to exercise its judgment, and that such a question was unappealable under the Code.[536] In a two to one decision, however, the Court of Appeal reversed the decision, maintaining either that an honest prejudice against homosexuals (concerned as it was with "public decency") was "reasonable"[537] or that the newspaper might rightly anticipate economic loss by readers cancelling their subscriptions on account of the insertion of the advertisement, and such an apprehension was "reasonable cause" for refusal.[538] Seaton J.A., who dissented, was not persuaded that the Board had erred in law and would have dismissed the appeal.[539]

In a six to three decision upholding the Court of Appeal's judgment, Martland J. declared that there was no right which the appellants could

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[534] Reference *re* Proposed Federal Tax on Exported Natural Gas, *supra* note 522, at 432, 136 D.L.R. (3d) at 416.

[535] S.B.C. 1973 (2d sess.), c. 119 (*now* R.S.B.C. 1979, c. 186).

[536] Vancouver Sun v. Gay Alliance Toward Equality, [1976] W.W.D. 160 (B.C.S.C.).

[537] Vancouver Sun v. Gay Alliance Toward Equality, [1977] 5 W.W.R. 198, at 207-08, 77 D.L.R. (3d) 487, at 494 (B.C.C.A.) (Branca J.A.).

[538] *Id.* at 210, 77 D.L.R. (3d) at 496 (Robertson J.A.).

[539] *Id.* at 223, 77 D.L.R. (3d) at 506.

invoke to place an advertisement in the classified section of a newspaper, since that was *not* a facility or service "customarily available to the public".[540] The *Sun* had "reserved to itself the right to revise, edit, classify or reject any advertisement submitted to it for publication and this reservation was displayed daily at the head of its classified advertisement section".[541] Freedom of the press, moreover, entailed that the proprietors of newspapers could exercise their discretion in selecting material for publication: "A newspaper published by a religious organization does not have to publish an advertisement advocating atheistic doctrine. A newspaper supporting certain political views does not have to publish an advertisement advancing contrary views."[542] Such freedom of the press stems alike from paragraph 1(*f*) of the Canadian Bill of Rights and the American First Amendment. Surely, however, the judgment of Martland J. is too sweeping. If one generalized the alleged right of newspapers not to run advertisements contrary to religious or political viewpoints, a state could be converted into a totalitarian regime or a theocracy, or both. And as Dickson J., dissenting, rightly observes, the real threat to press freedom comes not from attempts to throttle the classified section, but to suppress the editorial content.[543] It is the classified section, conversely, which offers the "service".

The Court might have reconciled the appellant's right to free speech with the respondent's right to a free press, indirectly, by holding as did the provincial Supreme Court that "reasonable cause" to refuse a facility or service was an unappealable issue of fact, in this case properly decided in favour of the appellants by the Board of Inquiry. While such a holding would have given access to the classified section to the appellant, it would have involved little peril to the respondent's freedom of the press on the editorial pages, where that freedom is ordinarily exercised.

The possible collision between freedom of the press and freedom of speech in the Canadian Bill of Rights arose in *CKOY Ltd. v. The Queen*,[544] but the substantive content of those concepts was little canvassed in a six to three decision, in which Spence J. delivered the majority opinion. Both the majority and minority addressed the question in terms of the statutory powers of the Canadian Radio-television and Telecommunications Commission (C.R.T.C.) under the Broadcasting Act.[545] It was alleged by the Crown that the accused radio station had contravened a regulation made by the C.R.T.C. which prohibited the broadcasting of telephone interviews without the oral or written consent of the person interviewed. The accused was successful in the lower

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[540] Gay Alliance Toward Equality v. Vancouver Sun, [1979] 2 S.C.R. 435, at 455, [1979] 4 W.W.R. 118, at 125, 97 D.L.R. (3d) 577, at 591.

[541] *Id.*

[542] *Id.*

[543] *Id.* at 469, [1979] 4 W.W.R. at 146-47, 97 D.L.R. (3d) at 601-02.

[544] [1979] 1 S.C.R. 2, 90 D.L.R. (3d) 1.

[545] R.S.C. 1970, c. B-11.

court,[546] but the decision was overturned by the Ontario Court of Appeal. Section 5 of the C.R.T.C. regulations containing the above "consent" provision was derived from section 16 of the Broadcasting Act, which directed the Commission to enunciate broadcast policy as set out in section 3 of the statute, providing for: "balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard. . . ."[547] What did the term "high standard" mean here? Spence J. held that "programming" was more than broadcast words; it was a total process of gathering, assembling and putting out programs. The Commission could have properly concluded that a broadcaster seeking reasonably balanced viewpoints would be unlikely to achieve that result unless it granted confidentiality to the person interviewed. Without this, apparently, the program would be less likely to be balanced, since without confidentiality those interviewed might not be candid and forthcoming.[548] Martland J. for the minority (Laskin C.J.C. and Estey J. concurring) held the applicable regulation was not derivable from any of the C.R.T.C.'s listed powers. Both judgments turn, therefore, on the statutory interpretation of delegated powers. One might have hoped that, even if by way of *obiter dicta*, the judges could have analyzed and explored the content and relationship between the freedom of the press asserted by the accused and the freedom of speech that was possibly violated in the case of the person interviewed.

In *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*,[549] which was decided before the advent of the Charter, the issue of the permissibility of "affirmative action" under provincial legislation was first canvassed. The respondent oil companies had joined together in the Alsands project to manufacture synthetic crude oil from bitumen deposits in northeastern Alberta. The estimated cost was some four billion (1978) dollars. The consortium applied to the Energy Resources Conservation Board (E.R.C.B.) under The Oil and Gas Conservation Act[550] for approval of the project. Under this legislation a public hearing was required prior to approval or disapproval, and a lengthy hearing was held in June 1979. The chiefs of five Indian bands, comprising the Athabasca Tribal Council, and their band members, lived in the general area where the tar sands plant was to be situated. Other persons, both native and white, also lived in the area. In its submission to the E.R.C.B. the Tribal Council gave conditional approval to the project provided, *inter alia*, that their members were given employment opportunities. The companies agreed to help, but the E.R.C.B. concluded that an affirmative action program would be discriminatory and would infringe the provincial

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[546] R. v. CKOY Ltd., 9 O.R. (2d) 549, 25 C.C.C. (2d) 333 (H.C. 1975).
[547] *Supra* note 544, at 6, 90 D.L.R. (3d) at 4.
[548] *Id.* at 12, 90 D.L.R. (3d) at 10.
[549] [1981] 1 S.C.R. 699, 124 D.L.R. (3d) 1.
[550] R.S.A. 1970, c. 267 (*now* R.S.A. 1980, c. O-5).

Individual's Rights Protection Act.[551] There was seen to be a conflict between individual and collective rights.

It was thought that an affirmative action program would infringe subsection 6(1) of the foregoing statute, prohibiting employers from discriminating "against any person with regard to employment or any term or condition of employment", and subsection 7(1), prohibiting any person from circulating applications for work expressing directly or indirectly any limitation or preference in relation to, *inter alia*, "race".

The Court of Appeal upheld, two to one, the decision of the Board.[552] The Tribal Council then appealed to the Supreme Court. In the ultimate judgment Ritchie J. held, for a unanimous Bench, that the Court of Appeal had erred in holding that affirmative action based on racial criteria violated the Individual's Rights Protection Act, but added that the E.R.C.B. had no jurisdiction to attach, as a condition for the approval of the program, an "affirmative action" plan. Ritchie J. dismissed the contention that "affirmative action" involved racial discrimination:

> In the present case what is involved is a proposal designed to improve the lot of the native peoples with a view to enabling them to compete as nearly as possible on equal terms with other members of the community who are seeking employment in the tar sands plant. With all respect, I can see no reason why the measures proposed by the 'affirmative action' programs for the betterment of the lot of the native peoples in the area in question should be construed as 'discriminating against' other inhabitants. The purpose of the plan as I understand it is not to displace non-Indians from their employment but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited.[553]

The disadvantaged group, it would appear, is simply being given assistance through the program to enable it to compete on a plane of greater equality with other, more favoured groups.

The continuing vitality of provincial human rights commissions seems to be foreshadowed by the Supreme Court of Canada's unanimous reversal of the Ontario Court of Appeal's decision in *Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology*,[554] in which Wilson J.A. (as she then was) found that the plaintiff could maintain an action for the putative tort of discrimination against the defendant College.

The plaintiff, Pushpa Bhadauria, was a woman of East Indian origin with a Ph.D. in Mathematics, a provincial teaching certificate and seven years' teaching experience. From June 1974 to May 1978, she applied for ten vacancies, advertised in the Toronto press, on the teaching staff of the defendant College, but was never granted an interview. Instead of filing a complaint under section 4 of the Ontario Human Rights Code,[555]

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[551] S.A. 1972, c. 2 (*now* R.S.A. 1980, c. I-2).

[552] Athabasca Tribal Council v. Amoco Canada Petroleum Co., 5 W.W.R. 165, 1 C.N.L.R. 35, 112 D.L.R. (3d) 200 (Alta. C.A. 1980).

[553] *Supra* note 549, at 711, 124 D.L.R. (3d) at 10.

[554] 27 O.R. (2d) 142, 11 C.C.L.T. 121, 105 D.L.R. (3d) 707 (C.A.).

[555] R.S.O. 1970, c. 318 (*now* R.S.O. 1980, c. 340).

she issued a writ claiming damages for discrimination and for breach of the relevant provision in the Code. At first instance, Mr. Justice Callaghan, under Rule 126 of the Rules of Practice, struck out her statement of claim as failing to show any reasonable cause of action.

Wilson J.A. held, essentially, that there were complementary remedies for discrimination which the plaintiff could pursue either under the Code or at common law:

> I do not regard the Code as in any way impeding the appropriate development of the common law in this important area. While the fundamental human right we are concerned with is recognized by the Code, it was not created by it. Nor does the Code, in my view, contain any expression of legislative intention to exclude the common law remedy. Rather the reverse since s. 14a [enacted 1974, c. 73, s. 5] appears to make the appointment of a board of inquiry to look into a complaint made under the Code a matter of ministerial discretion.[556]

If the plaintiff could establish that she had been discriminated against because of her ethnic origin, the common law would provide a remedy in the form of damages for the tort of discrimination. Wilson J.A. candidly admitted the novel status of the claim: "While no authority cited to us has recognized a tort of discrimination, none has repudiated such a tort. The matter is accordingly *res integra* before us."[557]

In unanimously reversing the lower court judgment, the Court through Laskin C.J.C. emphasized the existence of a statutory duty and remedy for the injury alleged:

> What we have here, if the Court of Appeal is correct in its conclusion, is a species of an economic tort, new in its instance and founded, even if indirectly, on a statute enacted in an area outside a fully recognized area of common law duty. . . . It is one thing to apply a common law duty of care to standards of behaviour under a statute; that is simply to apply the law of negligence in the recognition of so-called statutory torts. It is quite a different thing to create by judicial fiat an obligation — one in no sense analogous to a duty of care in the law of negligence — to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection, and solely on the basis of a breach of statute which itself provides comprehensively for remedies for its breach.[558]

The Chief Justice laid considerable emphasis on the fact that there was already in place an enforcement scheme involving the Ontario Human Rights Commission, ranging from "administrative enforcement through complaint and settlement procedures to adjudicative and *quasi*-adjudicative enforcement by boards of inquiry".[559] Appeals could be taken, where necessary, to provincial appellate tribunals or to the Supreme Court of Canada. This, in Chief Justice Laskin's estimation,

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[556] *Supra* note 554, at 150, 11 C.C.L.T. at 133, 105 D.L.R. (3d) at 715

[557] *Id.* at 149, 11 C.C.L.T. at 131, 105 D.L.R. (3d) at 714.

[558] 37 N.R. 455, at 463, 17 C.C.L.T. 106, at 115, 124 D.L.R. (3d) 193, at 199-200 (S.C.C. 1981).

[559] *Id.* at 467, 17 C.C.L.T. at 119, 124 D.L.R. (3d) at 203.

involved the proper role for such outside bodies; the Legislature's purpose, at least in the preliminary stage, "being one to encompass, under the Code alone, the enforcement of its substantive prescriptions".[560]

The remedy for a violation of human rights provisions in a provincial Code accordingly lies initially with the relevant Commission; one must first exhaust the public remedy in that forum before resorting to other courts by way of appeal. Where a Code has created a statutory offence, the courts in future will be loath to infer or invent a novel, independent private tort action in the same area. One factor that may have prompted the plaintiff to seek a remedy in the regular court system was the relative infrequency with which the Commission had set up boards of inquiry in the past. This, however, was an extra-legal factor beyond the scrutiny or concern of the Supreme Court. The decision takes cognizance of the fact, at least incidentally, that the various Human Rights Commissions will continue to play the primary adjudicative role in the area of their particular competence. If a collateral remedy in the regular court structure had been recognized even in areas where a statutory duty was established under the Code, forum shopping would have resulted, and the Commissions created by the Legislature for the purpose of furthering human rights would have been undermined. This was an important policy factor underlying the decision.

In two other important cases decided by the Supreme Court, the plaintiffs were unable to show that they had been deprived of "equality before the law" under paragraph 1(*b*) of the Canadian Bill of Rights, which could otherwise have rendered inoperative certain statutory provisions applying to them.

In *Bliss v. A.G. Can.*,[561] the appellant was unable, as a result of her pregnancy, to obtain unemployment insurance by the conjoint operation of sections 30 and 46 of the Unemployment Insurance Act, 1971.[562] Section 30 set out the conditions for obtaining special benefits during pregnancy. If an applicant qualified under that section, the entitlement period began eight weeks before and ended six weeks after confinement. Such benefits were payable irrespective of whether the applicant was capable of and available for work. Provided she had the ten weeks of insurable employment referred to in section 30, she qualified for the benefits. However, section 46 stipulated that, in view of the extended benefits conferred by section 30, no other benefits were available to pregnant women. Mr. Justice Ritchie, who delivered the unanimous decision of the Court, looked on the two sections as a comprehensive Code applying to pregnant women. Although the plaintiff had sufficient weeks of insurable employment to obtain regular benefits, because her employment was interrupted by pregnancy, she was precluded by section

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[560] *Id.*

[561] [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417.

[562] S.C. 1970-71-72, c. 48.

46 from applying for anything other than the extended pregnancy benefits. However, she lacked the time necessary to qualify for these. Consequently, if both sections were regarded as valid and operative, she would qualify for neither set of benefits. She obtained nothing. In the words of Ritchie J., "[a]ny inequality between the sexes in this area is not created by legislation but by nature."[563] He later added,

> There is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of *Regina v. Drybones*, . . . and legislation providing additional benefits to one class of women, specifying the conditions which entitle a claimant to such benefits and defining a period during which no benefits are available.[564]

Essentially, as in *A.G. Can. v. Lavell*,[565] Ritchie J. was saying that there was no discrimination or inequality with respect to the treatment of the individuals within a narrowly defined class. With respect, however, the Court's analysis is too narrowly focussed. Bliss's argument was that, at the relevant time, she was available for and capable of work, and that a similarly situated male would obtain regular benefits in those circumstances. Being otherwise qualified, section 46, which precluded her from receiving such benefits, deprived her of equality before the law on the basis of sex and was rendered inoperative by the Canadian Bill of Rights. This argument, it is suggested, is a cogent one and should have prevailed.

The second case arose under the National Defence Act[566] which deals with a wide array of "service offences". Among them are offences relating to discipline or misconduct peculiar to the Armed Forces, but section 120 subjects servicemen to punishment by service tribunals for violations of "Ordinary Law" including the Criminal Code. Under section 120, the accused was found guilty by a Standing Court Martial on several charges relating to trafficking in a narcotic contrary to subsection 4(1) of the Narcotic Control Act.[567] The service tribunal sentenced him to sixty days' detention. The Court Martial Appeal Court affirmed five of the charges against the accused, setting aside one of them. On appeal to the Supreme Court,[568] it was asked (1) whether trial of criminal offences committed by servicemen in Canada offended the Canadian Bill of Rights and (2) whether inasmuch as the National Defence Act permits the institution and conduct of criminal proceedings before service tribunals by a military prosecutor and not the Attorney General, the Act was *ultra vires* the Parliament of Canada.

For a five member majority of the Court, Ritchie J. emphasized that the jurisdiction of the civil courts is never ousted by the National Defence

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[563] *Supra* note 561, at 190, 92 D.L.R. (3d) at 422.

[564] *Id.* at 191, 92 D.L.R. (3d) at 423.

[565] [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 (1973).

[566] R.S.C. 1970, c. N-4.

[567] R.S.C. 1970, c. N-1.

[568] MacKay v. The Queen, [1980] 2 S.C.R. 370, 54 C.C.C. (2d) 129, 114 D.L.R. (3d) 393.

Act, and that military law is also part of the law of the land. Moreover, it is not inconsistent with the "equality before the law" provision for Parliament, in furtherance of sound reasons of legislative policy, to make a law applying to one class of persons and not to another. Nor was there any evidence that, as the appellant alleged, the service tribunal had deprived him of trial by an independent and impartial tribunal. There was accordingly no contravention of the Canadian Bill of Rights. The Court cited its decision in *R. v. Hauser*[569] as support for the proposition that, where an offence fell within federal competence, the prosecution could be conducted by a federal agent. Concurring with the majority result, McIntyre and Dickson JJ. laid greater emphasis in their reasons on the "equality before the law" provision. Parliament could treat different groups or classes in society differently, as long as it did not act arbitrarily, capriciously or unnecessarily. In the present case, trafficking and possession of narcotics could undermine the discipline and efficiency of the service and the legislation sought to further a valid federal objective in combatting such practices.

Laskin C.J.C. (with whom Estey J. concurred) dissented, holding essentially that when one regarded the structure of the tribunal there was no fair process:

> [I]t is fundamental that when a person, any person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, he or she is entitled to be tried before a court of justice separate from the prosecution and free from any suspicion of influence of or dependency on others. There is nothing in such a case . . . that calls for any special knowledge or special skill of a superior officer. . . . It follows that there has been a breach of s. 2(*f*) of the *Canadian Bill of Rights* in that the accused, charged with a criminal offence, was entitled to be tried by an independent and impartial tribunal.[570]

The dissent is attractive in that it affirms that where there are no special circumstances which would justify a departure from the application of general criminal law by ordinary tribunals, the more normal civilian procedure, which at least has a greater appearance of impartiality and independence, should prevail. In all distinctive service offences, however, courts martial could continue to adjudicate.

V. Conclusion

The adjudication of the Supreme Court of Canada over the last three years or so has revealed considerable fragmentation in important constitutional cases, with Chief Justice Laskin often dissenting. In the cases surveyed above, he dissented, for example, in *Labatt Breweries of*

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[569] *Supra* note 383.

[570] *MacKay*, *supra* note 568, at 380, 54 C.C.C. (2d) at 137-38, 114 D.L.R. (3d) at 402.

Canada,[571] *Dominion Stores Ltd.*,[572] *Kellogg's*,[573] *Reference re Tax on Exported Gas*,[574] *Borowski*,[575] *Vancouver Sun*[576] and *MacKay*.[577] In the first four cases his economic centralism was not persuasive to a majority of his colleagues, and in the last two, his almost habitual isolation in human rights cases continued. In fact, his dissent in *Borowski* seems almost aberrant in light of his earlier important judgments in *Thorson*[578] and *McNeil*.[579] He also dissented in the significant "convention" portion of the patriation reference.[580]

There has never been a strong tradition of judicial leadership on the Canadian Supreme Court, as there was, for example, on its American counterpart in the Hughes Court (especially after 1937), or on the succeeding Stone or Warren Courts but the dissonance between the present Chief Justice and a majority of his brethren in important cases is remarkable. Nobody in Canada would speak of a Laskin Court, as Americans do of a Marshall, Hughes or Warren Court. There is nothing wrong, of course, with dissent, or with a Chief Justice dissenting. Dissent can promote a beneficial dialectical process. The dissent of one age becomes the accepted doctrine of the next. Such factionalism at this particular time, however, is disconcerting. The question that inevitably arises now is whether the Chief Justice will be able to provide stronger leadership in the articulation by the Court of the new norms of the Charter. If not, the public expectations inspired by that document may be sadly disappointed. The heritage of parliamentary supremacy, influential with many judges, is one that could militate powerfully against a more generous application of the Charter's terms. A whole new approach must be taken by the judiciary to give the Charter's provisions real significance.

What also augurs badly for the Charter is the arid conceptualism sometimes found in the Court's judgments. In the *Bliss*,[581] *CKOY*[582] and *Vancouver Sun*[583] cases, for example, the Court majorities never adequately grappled with the notions of "equality before the law", "freedom of the press" or "freedom of speech". They exhibited, rather, an almost microscopic craftsmanship in statutory interpretation. In the *Putnam*[584] case, Mr. Justice Dickson bemoaned in dissent the absence of

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[571] *Supra* note 370.
[572] *Supra* note 360.
[573] *Supra* note 420.
[574] *Supra* note 522.
[575] *Supra* note 452.
[576] *Supra* note 540.
[577] *Supra* note 568.
[578] *Supra* note 453.
[579] *Supra* note 454.
[580] *Supra* note 485.
[581] *Supra* note 561.
[582] *Supra* note 544.
[583] *Supra* note 540.
[584] *Supra* note 401.

any effective balancing test by the majority, who seemed to have applied the *Keable*[585] precedent uncritically in an inappropriate context.

If the Charter is to be meaningful, the Court will have to develop better interpretative techniques. Perhaps Mr. Justice Stone's dicta in the 1937 *Carolene Products*[586] case in the United States would provide a superior methodological framework. Stone J. put forward a twofold test, the application of which depends on the nature of the legislation. On his analysis, legislation of a purely economic character need meet only a "rational basis" test:

> regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[587]

The test to be applied to legislation on sensitive human rights is defined in his famous "footnote four", in which Stone J. suggested that:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.[588]

In other words, where the libertarian standards of the U.S. Bill of Rights (the first ten Amendments, applied selectively to the States by the Fourteenth) are involved, the law challenged on constitutional grounds for undermining rights must meet a higher standard than the ordinary "rational basis" test. "Strict scrutiny" and a rigorous balancing of state against individual interests is then required. For example, political freedoms such as the First Amendment freedoms of speech, press, assembly, association and religion are given priority over economic or other rights, and must be afforded greater protection because they are more basic to a liberal democracy. They may, to be sure, be curtailed by legislation, but because of their assigned priority, the government which curtails them must show some *compelling state interest* which overrides the normal guarantees in the Bill of Rights.

The Supreme Court of California, for example, applied the "compelling state interest" test in the celebrated case of *California v. Woody*.[589] In that case a majority of six judges held that the peyote (a narcotic normally proscribed by California law) used by Navajo Indians to induce mild hallucinations in their pre-Columbian religion, was protected by the First Amendment guarantee of freedom of religion when used for *bona fide* religious purposes. There was no question that the

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[585] *Supra* note 395.
[586] United States v. Carolene Products Co., 303 U.S. 144 (1938).
[587] *Id.* at 152.
[588] *Id.*
[589] 394 P. 2d 813 (1964).

drug was a central element in a genuine religious ritual, comparable to the use of wine in a Catholic mass. The Court found that the mild effects of the forbidden peyote consumed in the religious ceremony, weighed against the possible infringement of the accused's religious freedom, created a balance in favour of the latter. The State had not shown the "compelling state interest" essential to enforce the narcotics law. It is suggested that if, instead of the use of moderate amounts of peyote, the practice were one of "snake handling" as a test of faith, as is the case with certain fundamentalist sects, the balance would have been decisively in the opposite direction, with the State demonstrating a compelling interest because of the threat to the life of the sectaries.

It is of interest that in the 1976 *Anti-Inflation* reference,[590] some years before the advent of the Charter, Chief Justice Laskin applied a "rational basis" test in upholding the legislation. It would be a real feat of judicial leadership if, in future cases involving human rights, he could persuade the Court to adopt the "compelling state interest" test. It is suggested that this would induce greater conceptual clarity and more effective reasoning in civil liberties cases.

The years covered by the Survey have been unusual ones in that public figures who have not customarily exercised free speech in the past have spoken out forcefully about controversial features of the patriation debate. Thus, Governor General Schreyer was criticized for suggesting that he might have called an election without his prime minister's advice in order to resolve a constitutional impasse, while nothing offensive was seen in Judge Berger's intervention in the same debate to have the temporarily deleted provision on "aboriginal rights" restored.[591] It is submitted that there is no inconsistency in criticizing Governor General Schreyer and absolving Berger J. The situations appear to be very different. It is submitted that there is a political relationship subsisting between the Crown and the prime minister which does not exist between a judge and the executive or the public. After Edward VIII executed the Instrument of Abdication on 10 December 1936, in his broadcast to the nation, he declared that for the first time he was at liberty to speak to the public in his own words. Before his irrevocable act of renouncing the throne for himself and his successors, his words and acts were necessarily those of his ministers. Except in a clear case of emergency, he could express no independent policy or political views of his own. By convention, a constitutional monarch, or Her Canadian representative, executes the will of Her ministers. To assert the contrary, except in the case of a veritable emergency when she might resort to her reserve powers, would be to revert to the days before the convention of responsible government originated. Such a practice would resonate with the archaic overtones of divine right. The trouble with Governor General Schreyer's intervention was that it was wholly needless and potentially

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[590] *Supra* note 336, at 425-26, 9 N.R. at 589, 68 D.L.R. (3d) at 498.

[591] *See* text accompanying notes 461-509 *supra*.

mischievous. He was speaking in purely hypothetical terms in such a manner as to cast doubt on his prime minister's past policies, and so to publicly undermine the trust that should have existed between them, when there was no need for him to air his anxieties in public. Of course, had the impasse *not* been resolved on 5 November, and had he genuinely apprehended a prolonged convulsion of the body public in the wake of unilateral action, he could have made out a strong case for calling an election without advice; he could have asked the electorate to resolve a crisis where the First Ministers had failed to do so. That was not, however, the case; when he spoke, any conceivable impasse was over.

In the Berger case, no similar relationship existed between the judge and other political actors. It was suggested, respectfully, that the Canadian Judicial Council's interpretation of the doctrines of the separation of powers and judicial independence was too harsh and absolutist in tendency.[592] The tenor of the Committee's findings and of Chief Justice Laskin's remarks, was that *any* political comments by a judge were impermissible and could give rise to proceedings for his removal from the bench. The Committee referred to the abstention from political comment of judges in other common law countries, but it is suggested that there are many historical examples in the United States and Britain which point in the opposite direction. In neither of those forums are judges punished for exercising political speech within limits. Of course, partisan behaviour by a judge would be censurable. It might be suggested, nevertheless, that if there were more Douglases, Dennings and Neelys in Canada, public awareness of the stakes involved in adjudication would be heightened and respect for the judiciary would be enhanced. At a time when the Charter speaks of the guarantee of *universal* rights, especially in an area as basic in a democracy as freedom of expression, the traditional inhibitions surrounding judicial utterances could be relaxed without harmful consequences. The need is to demarcate acceptable boundaries rather than to issue blanket prohibitions.

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[592] *See* text accompanying note 478 *supra*.