

# THE COURT AND THE CONSTITUTION

Comments On The Supreme Court Reference  
On Constitutional Amendment

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The Court and the constitution: comments on the Supreme Court Reference  
on constitutional amendment

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# FOREWORD

September 28, 1981. Never before had there been such a day in the

so firmly into the heart of a political crisis of the first order.  
Never had a decision been awaited with such intensity, and delivered

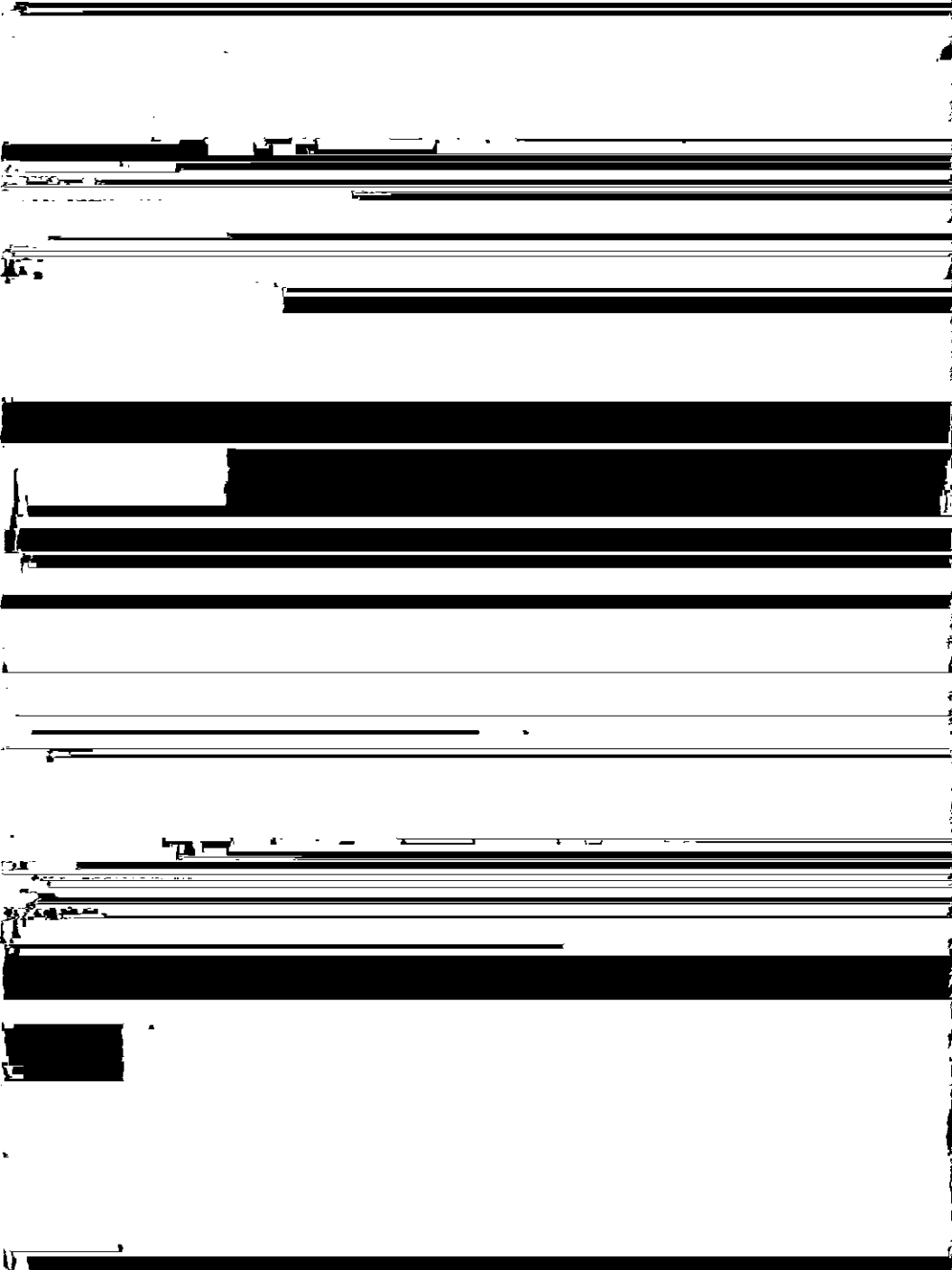
The production of this volume within months of the Court's judgment required the cooperation of many people. In particular, we would like

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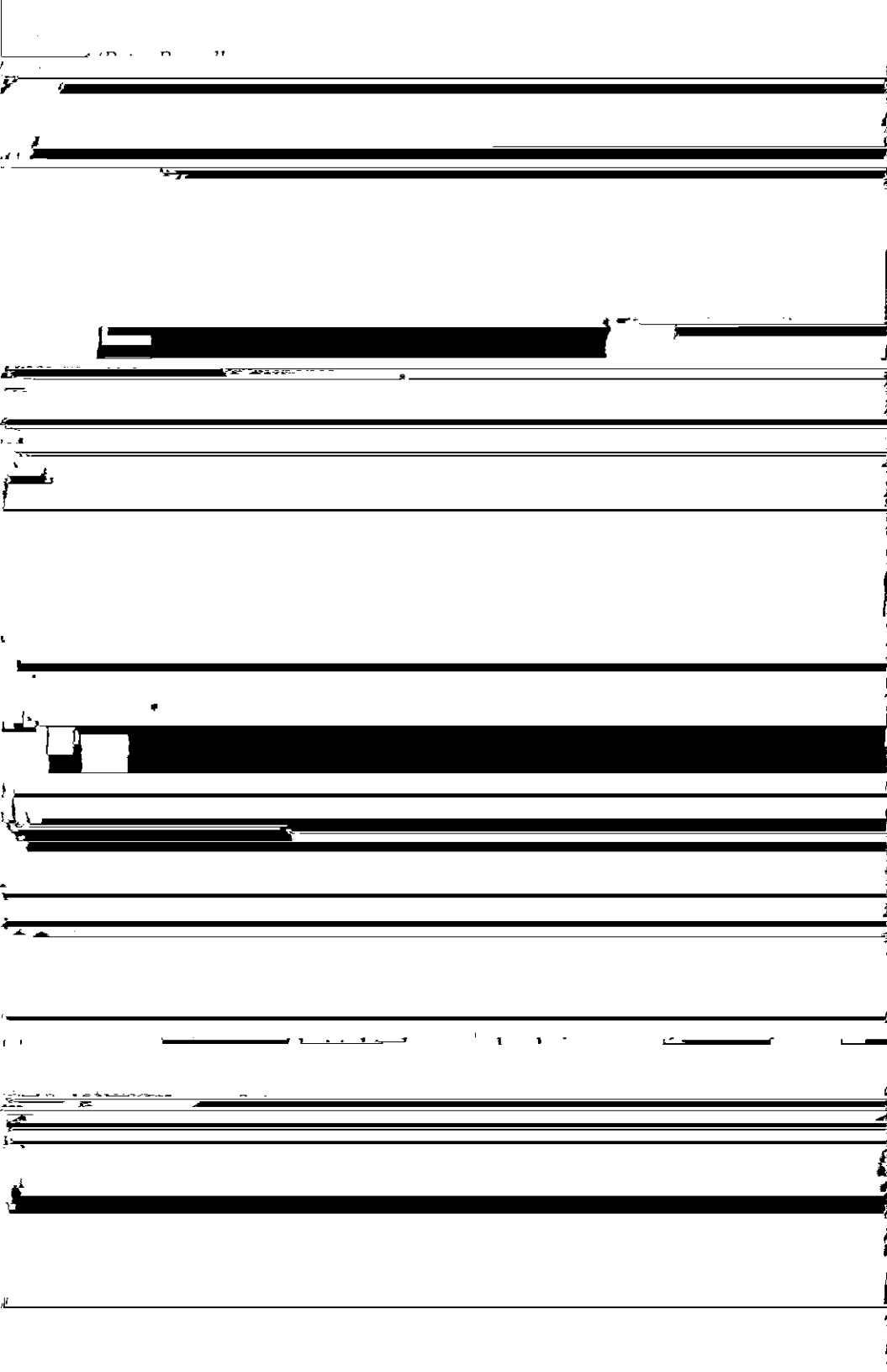
# THE SUPREME COURT DECISION:



greatly influenced by the arguments the Supreme Court judges advanced







be inappropriate for judicial determination. As recently as the *Senate Reference* of 1980, the Supreme Court had refused to answer several questions about Parliament's power to make certain changes in the Senate because these





In the case at hand, where the very foundation of Canada's constitution and a major change in its system of government—a constitutional charter of rights—were at issue, it was in the country's interest to resolve doubts about the constitutionality of these changes before rather than after they were made. Having said this, it must be admitted that the Court's decision was such as to retain the possibility that the

politicians to be unconstitutional but also held by a majority of the Supreme Court to be unconstitutional. This was surely the great risk inherent in the Court's decision: that Canada might find itself in the predicament of having an unconstitutional constitution.

### The Nature Of Convention

For Canada, and indeed for all democracies whose constitutions combine "unwritten" conventions with "written" constitutional instruments, the Court's holdings on the nature of constitutional conventions have en-

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

In a federal state where the essential feature of the Constitution must be the distribution of powers between the two levels



area. Now if significance here is meant to have only a quantitative meaning, no one could seriously quarrel with the point. In countries which, unlike Britain, have written constitutions a smaller proportion of important constitutional rules will take the form of conventions. But

How can we best use the information we have about the world?

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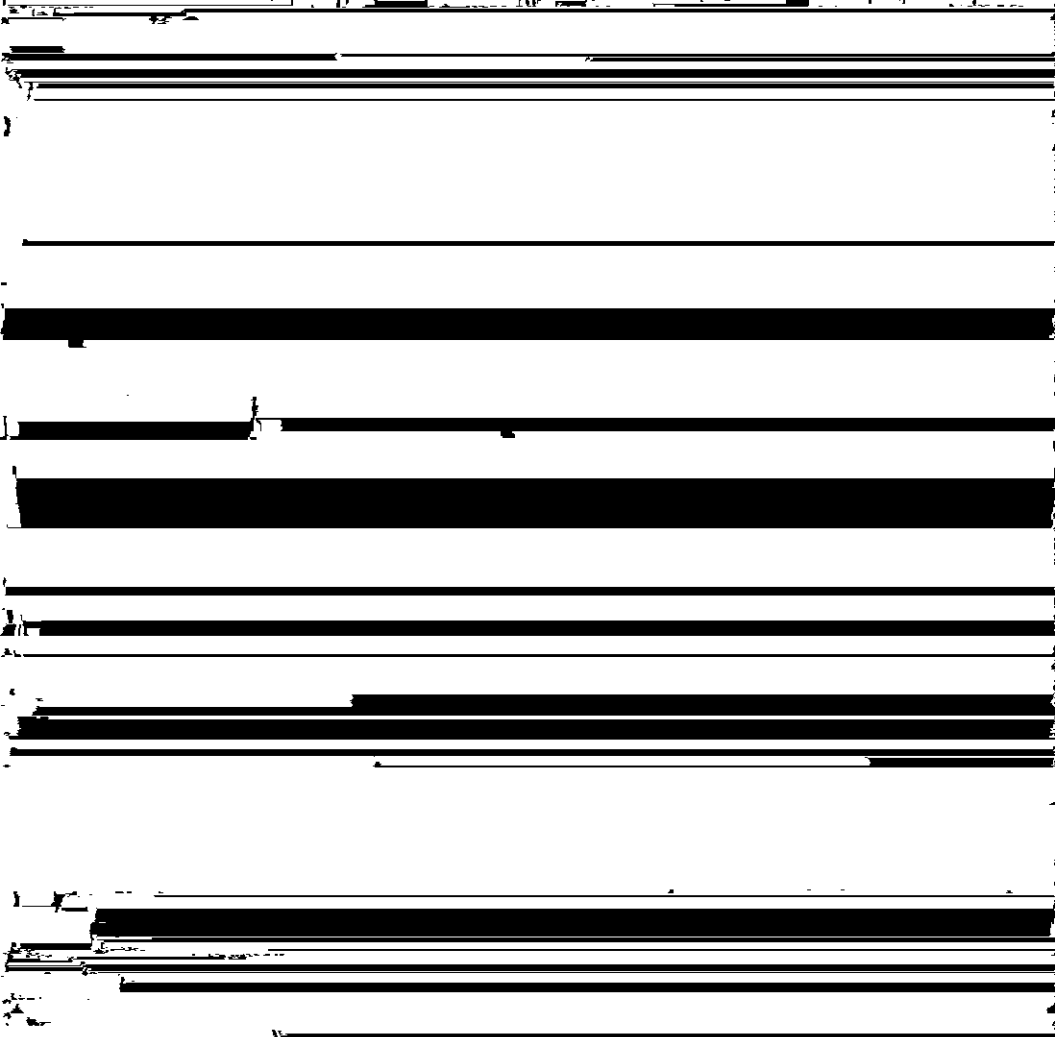
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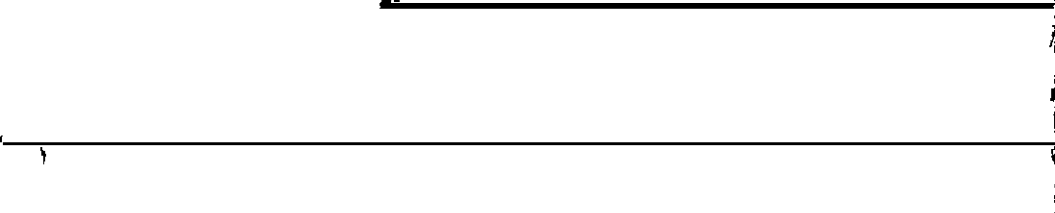
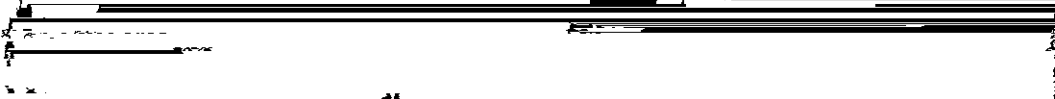
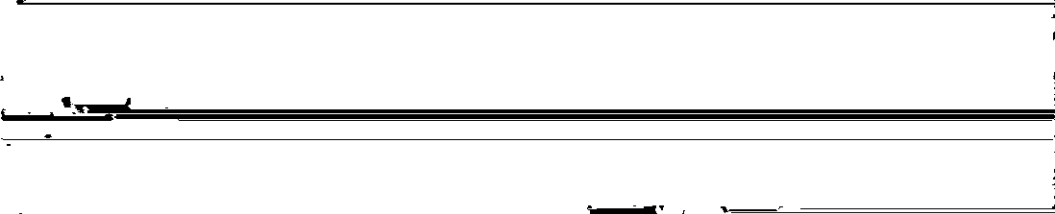
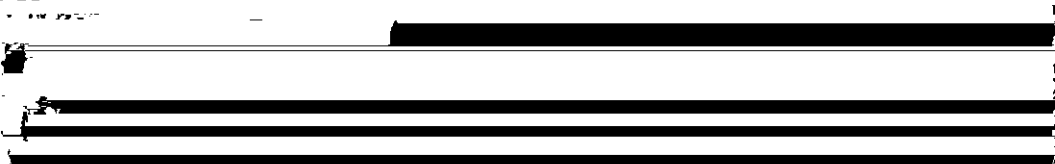
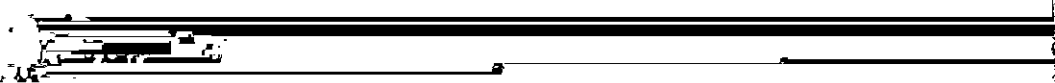
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which the convention at issue in this case is based as fundamental to the Canadian constitution should agree with the majority that it is

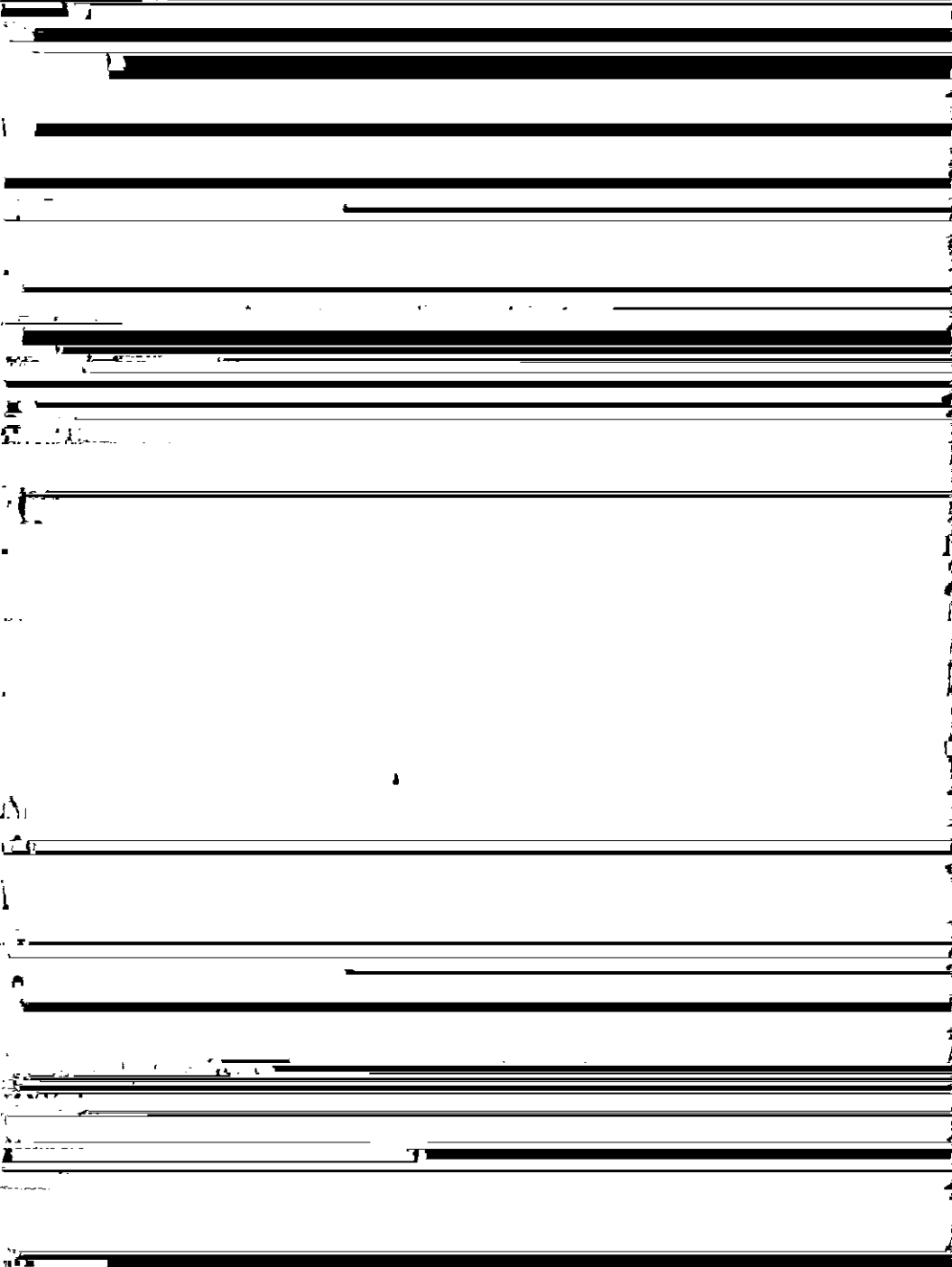
ple—they come to very different conclusions in applying each part of the test. The majority opinion follows closely the report of the British Kershaw Committee<sup>30</sup> and the submissions made to the Court by Dean Lysyk



How these indices had taken historical context into account.



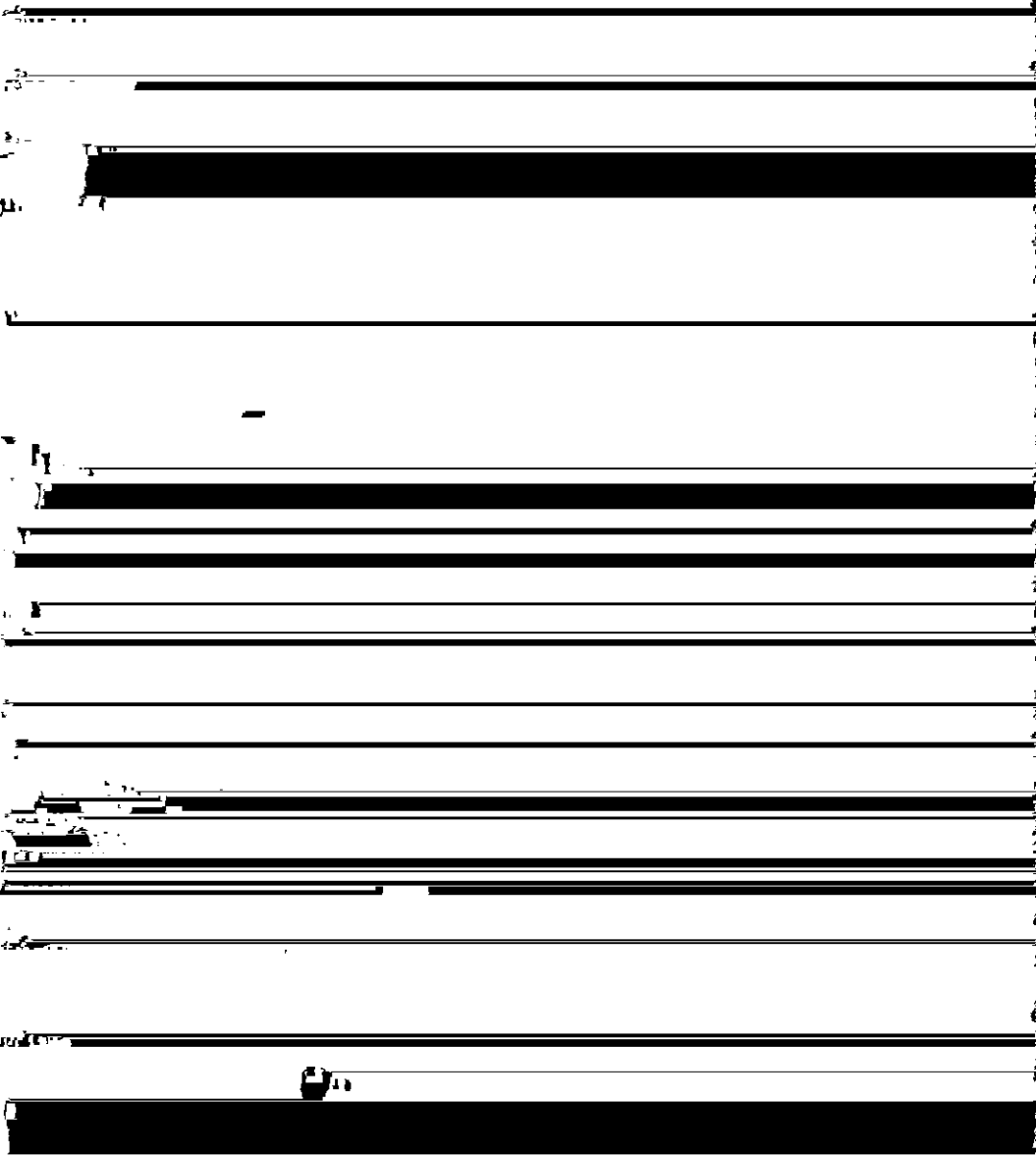
lost does not prove that there is no convention requiring the government







South Korea) acknowledged that a convention requiring provincial consent for amendments affecting provincial powers had existed.<sup>50</sup> However, he



But pointing out this difference between law and convention does not

of ministerial responsibility as one of its reasons for not going behind  
a detention order. In these cases conventions were given legal effect to

[REDACTED]

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The Supreme Court tried to explain away *Jonathan Cape* on the grounds that the court was simply "applying its own legal principles as it might

A case reaction of [redacted] [redacted]

Perhaps there are good answers to all of these questions. But until I find acceptable answers I am not persuaded that conventions must be denied any legal status because normally courts do not enforce them. Dicey who as much as any other writer made a distinction between con-

not go as far as the Supreme Court. While he distinguished constitu-

the Canadian constitution might be said to be incomplete such as judi-  
cial review, the inter-delegation of legislative powers and Canadian

this objection if it were to deal with the possibility of an

[REDACTED]

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words, it would appear doubtful that the enactment of changes in Canada's constitution by the British Parliament, regardless of the wishes of the autonomous Canadian community, is all that is needed to give such changes legal status in Canada.<sup>82</sup> The Supreme Court majority,

82. See, for example, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 3, 10-11 (1998).



Notes

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

"Is Quebec's consent necessary, by convention, for adoption by the House of Commons and Senate of a resolution which states that..."

- 19 For a discussion of the role and status of such conventions in Canada's constitutional system see R. MacGregor Dawson, *The Government of Canada*, 4th edition, University of Toronto Press, 1963, ch. 4.
- 20 (1982), 125 D.L.R. (3d) at 115.
- 21 See K. C. Wheare, *Modern Constitutions*, Home University Library, 1950.

37 Ibid., 101.

38 Ibid. 121

41 *Supplementary Report on the British North America Acts: The Role of Parliament*, House

42 A different point is developed in Saskatchewan's written factum. There it is argued (pp. 37-38) that traditionally in exercising judicial review courts have ruled that in the particular circumstances of the case government activity violates the constitution without providing a comprehensive and precise formulation of a constitutional rule covering all circumstances. For example in the *Anti-Inflation Act*

60 *Ibid.*, p. 149.

61 [1942] A.C. 206.

82 For an analysis of "autochthony," the process whereby Commonwealth countries give force of law to their constitutions through action taken in their own territories, see K. C. Wheare, *The Constitutional Structure of the Commonwealth* (1963), 196-201.

# 2 LE POUVOIR JUDICIAIRE FACE AU JEU POLITIQUE

*Robert Décary*

Les Défis de la Cour

Le rôle de la Cour suprême sur la constitutionnalité du projet

fondatrice qui, de tout temps, s'est opposée à toute modification, sans son consentement, de ses pouvoirs législatifs, ces trois juges ne pouvaient pas faire abstraction du mouvement très fort de contestation qui agitait le Québec, s'ils n'y participaient pas; déjà, eux-mêmes, en

Ainsi, par exemple, la majorité ne définit pas ce qu'est une "résolution" et prend pour acquis qu'il suffit de désigner un acte accompli par le mot "résolution" pour le rendre inattaquable devant les tri-

~~bu-  
naux.  
L'acte accompli par le mot "résolution" est l'acte~~



Canada, de la Nouvelle-Ecosse et du Nouveau-Brunswick ont exprimé le désir de contracter une Union fédérale," il y a un raccourci par trop facile et un côté romantique.

[The page contains approximately 25 lines of text that have been almost entirely obscured by heavy black redaction bars. Only a few faint fragments of text are visible, including the words "L'ÉPIQUE" and "L'ÉPIQUE" on separate lines.]

de valeur, semble avoir pour but d'amoiner l'effet de cette partie de la décision qui traite des lois. Elle a été citée à profusion par le

1. Il n'est pas certain que le Cour ne pourrait ignorer qu'il en serait ainsi

1. On ne peut pas dire que le Cour mentionne ces "et les précédents"

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



Le Pouvoir Judiciaire/41

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# THE SUPREME COURT OF CANADA AND BASIC CONSTITUTIONAL AMENDMENT

*William Lederman*



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2. the Canadian Parliament would not request "an amendment directly affecting federal-provincial relationships without



land, Ritchie, Dickson, Beetz, Chouinard and Lamer; with Chief Justice

Justice ...

[REDACTED]

[REDACTED]

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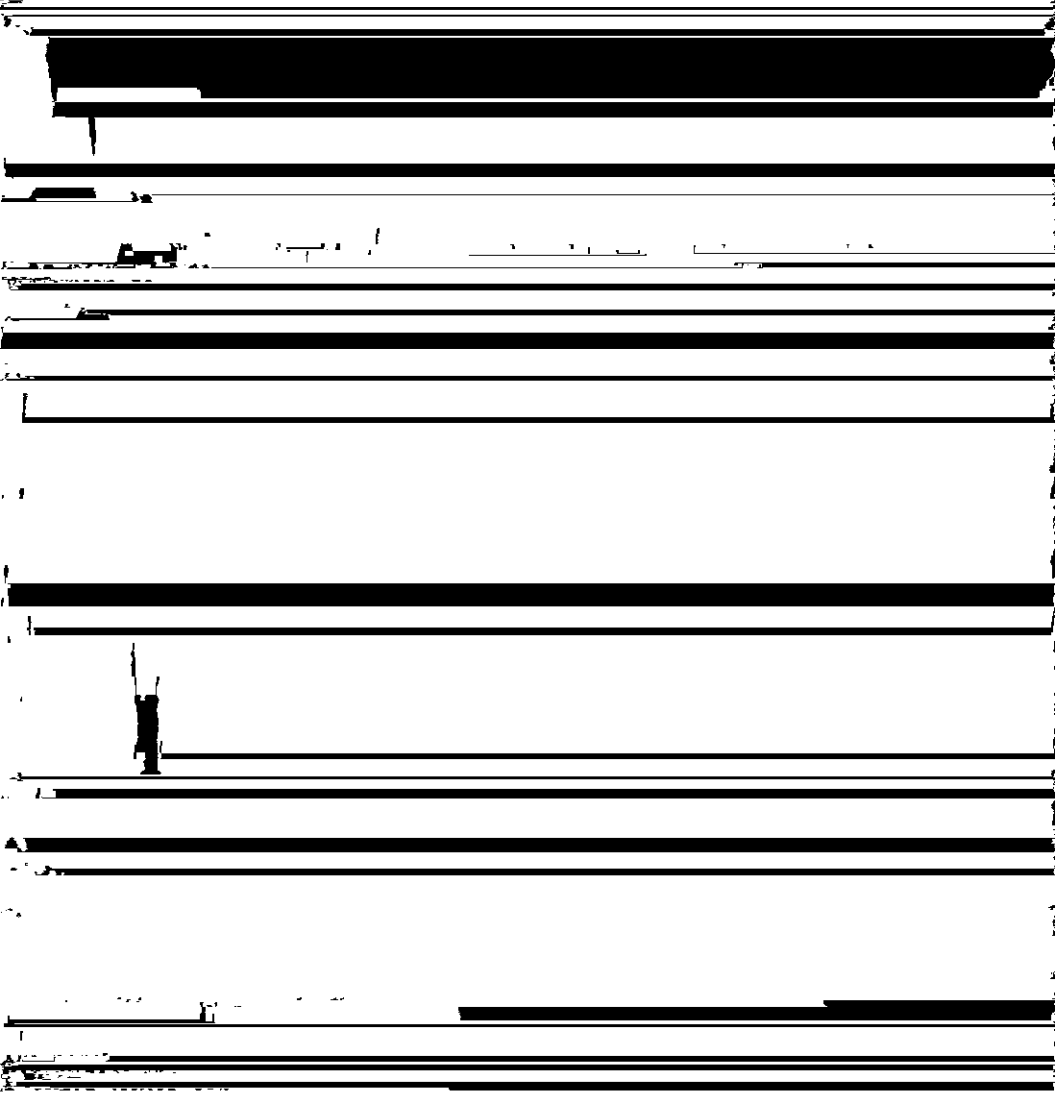
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1. Given that the ...

[REDACTED]

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



appropriate for Canadian federalism. They were however willing to com-

[REDACTED]

[REDACTED]

the other. These are the two main types of the "other" in the

among these groups in French Canada has been and still is the classic

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

Re: [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible]

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

1. The total of rules and principles making up the constitution of Canada falls into two parts: "Constitutional

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

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

It would not be appropriate for the Court to devise in the abstract a specific formula which would indicate in positive

convention to be complied with. Conventions by their nature

mental theoretical issues that had to be faced as a matter of constitu-

Notes

1 On January 18, 1982, the Foreign Affairs Committee of the British House of Commons

HEALTH AND SAFETY COMMISSION REPORT ON THE ACCIDENT AT THE

## 4

# CONSTITUTIONAL THEORY AND THE MARTLAND—RITCHIE DISSENT

*Noel Lyon*

The dissenting opinion of the Justices Martland and Ritchie as to the legality of the 1981 Joint Resolution should not be tossed on the scrap heap of legal history simply because it was the view of only two judges against seven. The majority and dissenting opinions may reflect fundamentally different conceptions of the law of the Canadian Constitution and the significance of that difference is not necessarily confined to this one controversy. That is, while the patriation issue is no doubt the most critical legal question the Supreme Court has ever faced, we

will continue to live in a federal system built on the English par-

liamentary model. The relative importance of the federal principle and the principle of legislative supremacy, and the proper way to blend them in the distinctive Canadian constitutional system will persist as fundamental questions for jurists. And they are questions of great import-

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The absence of a model, in turn, results from a belief, made dogma through long and uncritical repetition, that the Canadian Constitution is just the English Constitution with a federal division of legislative

Parliament of Canada was created and empowered by the constitutive act  
it could then free itself of that Act and ...



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

It is equally subversive of the federal constitution, upon which the Parliament of Canada is totally dependent for its existence and, I submit, its powers, to permit the central government to support its claim with section 18 of the British North America Act which authorizes

What is the point of going on at such length to matter of C. 1. 1. 1. 1.

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

The legality of the spending power has never been determined by the Supreme Court of Canada and a test may yet come. If it does, and if the Court simply says that spending money is not the same as making laws so that the central government may spend its money in any way it chooses

of federal division of public property from which we can derive federal law for new questions that arise concerning property rights as between



Notes

1 [1967] S.C.R. 792.

5  
THE OPINIONS OF  
THE SUPREME COURT:  
SOME UNANSWERED QUESTIONS

*Dan Soberman*

Such is the fluidity of the constitutional position in Canada that less

important opinion in 100 years,<sup>1</sup> that opinion seemed to recede into

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or decisional body where all provinces have an equal vote, such as in the Senate of the United States. Not in our Senate, nor in the



eliminating any role for Prince Edward Island, since any two of the

[REDACTED]

[REDACTED]

Can we best understand ourselves and the human condition by looking to Canada? And

[REDACTED]

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

from earlier practices. Whether the departure is justified may be difficult to answer. To use the Court's own language, the departure must

However, the Court did not, and probably ought not, discuss whether there were countervailing reasons that would justify disregarding the federal principle in the circumstances. For instance, might it have

Court directly raised the importance of the British role. Nevertheless, the opinion of the majority of the Court on the third question, whether

[REDACTED]

[REDACTED]

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

The Court does not consider—it is not evident that counsel for any of the eleven governments invited it to consider—whether the intervening fifty years might have effected a change in the legal authority of the

mula and present it with an appropriate preamble to the Governor General with a request that he proclaim it at once as our new constitutional amendment procedure." And suppose all agreed and followed this



lateral, Canadian declaration: despite unanimous agreement we should

constitution was patriated. Indeed, the federal government in particu-  
lar looked to consent in London to add C. 11(1) to the Constitution.

Notes

References: Amendment of the Constitution of C. S. I. (1980) 307 D.L.R. (3) 101

livered September 28, 1981. Further references to this case will be by page number alone.

2 The Court handed down four opinions, one majority and one dissenting on each of two questions described in the text.

3 P. 102 (The six judges in the majority were: Chief Justice, Justice, Justice, Justice, Justice, Justice)

- 25 P. 12.
- 26 P. 84.
- 27 P. 87.
- 28 Pp. 103-106.
- 29 P. 103.
- 30 P. 104.
- 31 Ibid.
- 32 P. 106.
- 33 Ibid.
- 34 P. 86.
- 35 P. 12. (The seven judges in the majority were Laskin, C.I.C., Dickson, Beetz, Estey

McIntyre, Chouinard and Lamer.)

- 36 22 George V. c. 4 (U.K.).
- 37 Ibid., S. 2.
- 38 P. 37.
- 39 P. 39.
- 40 P. 38.
- 41 P. 41.
- 42 P. 42.
- 43 P. 47.
- 44 [1969] 1 A.C. 645.
- 45 P. 22.
- 46 [1969] 1 A.C. 645, at 723.

47 [1969] 1 A.C. 645, at 723.

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