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Supreme Court brings down divided decision on Canadian Constitution

The Supreme Court of Canada handed down, on September 28, its decision on the federal government's proposed resolution on the Constitution.

The court held by a vote of 7-2 that from a strictly legal point of view the consent of the provinces is not required for amending the Constitution of Canada even though such amendment affects federal-provincial relations or alters the powers, rights or privileges of a Constitution. On the other hand, the Court held, by a vote of 6-3, that for such amendment provincial consent is, by convention, an essential ingredient for constitutional change. The Court's decision, however, did not indicate what constituted "provincial consent".

A proposed resolution for a joint address to the British Parliament seeking changes to the Canadian Constitution was introduced in both Canadian Houses of Parliament in October 1980, following a First Ministers meeting on constitutional reform which took place in September 1980 and at which the Prime Minister and his provincial counterparts were unable to reach agreement.

Patriating the Constitution

The fundamental text of the Canadian Constitution is the British North America Act (BNA) by which the Canadian federation was established in 1867, uniting what were then British colonies. The BNA Act is a statute of the British Parliament. In 1931, the Statute of Westminster recognized Canada's equal status with Britain and full sovereignty as a country.

However, at that time, no agreement was arrived at in Canada as to how the BNA Act should be adopted as a Canadian law subject to amendment in Canada; hence, at Canada's request, the Statute of Westminster purposely left amendment of the British North America Act formally with the British Parliament. This anomaly has continued as the Canadian federal and provincial governments have sought unsuccessfully to arrive at an acceptable formula for amending the Constitution in Canada.

The federal government's proposed constitutional resolution was designed to overcome the deadlock. However, only two provinces, Ontario and New Brunswick, supported the federal initiative for amending the Constitution. The other eight provinces argued that the federal constitutional package infringed on provincial rights, took powers over education, resources and language that were within provincial jurisdiction.

The Supreme Court of Canada was asked last April to settle the dispute between the federal and provincial governments over the constitutional amendments, following seven months of debate and a number of legal challenges on the issue in provincial courts. (See *Canada Weekly* dated May 13, 1981.)

Response to provincial cases

The decision of the Supreme Court was in response to three reference cases initiated by the provinces in three different courts of appeal: Manitoba (October 1980), Newfoundland (December 1980) and Quebec (December 1980). The Manitoba Court of Appeal and the Quebec Court of Appeal both held that provincial consent was not legally required, while the Newfoundland Court of Appeal ruled in favour of the provinces on this issue.

The federal government decided not to refer to the Supreme Court of Canada, as it could have, on the question of the legality or constitutionality of its proposed resolution. Consequently, the cases placed before the court for consideration were based on questions framed by the dissenting provinces.

The three questions put before the Supreme Court for ruling were:

— whether federal-provincial relations or the powers, rights or privileges of the provinces would be affected by the constitutional proposals;

— whether it is a constitutional conven-

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