



The Supreme Court of Canada justices (top row, left to right) Julien Chouinard, Willard Estey, William McIntyre and Antonio Lamer. (Front row, left to right) Robert Dickson, Ronald Martland, Chief Justice Bora Laskin, Ronald Ritchie and Jean Beetz.

tion to ask for the consent of the provinces before requesting the British Parliament for the adoption of a constitutional amendment affecting federal-provincial relations or altering the powers, rights or privileges of a province; and — whether the agreement of the provinces is otherwise required before the adoption of any such constitutional amendment.

Unilateral patriation legal

The decision brought down by the Supreme Court notes that in the absence of provisions in the British North America Act for amending the significant part of the Act, such amendment can only be made by the British Parliament following a resolution of the two Houses of the Canadian Parliament.

In the 168 pages of reasoning that followed the main decision, the Supreme Court said: "What is central here is the untrammelled authority at law of the two federal houses to proceed as they wish in the management of their submission to Her Majesty for action thereon by the United Kingdom Parliament."

"The British North America Act does not, either in terms or by implication, control this authority or require that it be subordinated to provincial assent," it said.

The decision also notes that, although in the past when changes to provincial legislative powers have been made, the

political practice followed has been to obtain the consent of the provinces, there is no legal requirement for such consent. In its judgment the Court said that the passing of the federal resolution without provincial agreement "would be unconstitutional in the conventional sense". The court noted: "It would indeed offend the federal principle that (quoting a 1931 federal-provincial conference report) 'a radical change to the Constitution be taken at the request of a bare majority of the members of the Canadian House of Commons and Senate'."

The court also noted that conventions are political practices which can sometimes be in conflict with the law but there is "no parental role to be played by the courts in deciding their legal force".

The Supreme Court's decision means that the procedure for the patriation of the Constitution can now legally be completed. If the federal government's proposed resolution now is endorsed by the Canadian House of Commons and Senate, the Canadian Parliament will request the British Parliament to transfer to Canada authority over all the provisions contained in British constitutional statutes relating to Canada.

The Canadian parliamentary request also asks the British Parliament to enact provisions which would include in the Canadian Constitution a Charter of Rights and Freedoms as well as a procedure (or formula) according to which the Consti-

tion could be amended in the future within Canada — without reference to the British Parliament.

Reactions to the decision

Prime Minister Trudeau who was on an official visit to South Korea when the Supreme Court judges passed down their decision said "it clearly indicated there is no legal barrier to London acting to patriate the Canadian Constitution". The Prime Minister said his government had "no alternative but to press on" with its package of constitutional reforms despite the divided verdict by the Supreme Court. He said failure to act soon and decisively would be "a betrayal of the government's responsibilities".

"We must be prepared to do what the Supreme Court has clearly and massively indicated we have the legal authority to do," he said. The Prime Minister insisted that his reliance on legal authority rather than the convention of agreement was not legal trickery but a matter of law. Those who undermine the law by too heavy a reliance on convention are undermining the law for practical purposes, he said. He also opened the door to further discussions with the provinces on the resolution, particularly if they are prepared to reach some compromise.

Federal conservative party leader Joe Clark said after the Court's ruling he would fight any attempt by the federal government to patriate the Constitution unilaterally. He said he hoped Prime Minister Trudeau would have "sober second thoughts" about proceeding with the constitutional decision. Mr. Clark urged that it was possible to find "men of good will" and that an amicable settlement among the provinces and the federal government would help unify the country.

The federal New Democratic Party, under leader Edward Broadbent, announced on September 30 that it had withdrawn its support for the constitutional package until the Prime Minister and premiers meet once more. The party caucus unanimously decided that if the government brings its constitutional resolution forward in the House of Commons before such a federal-provincial conference, the New Democrats would vote against it.

Mr. Broadbent said after the caucus meeting that while unanimous provincial consent for any constitutional change is not necessary, provincial consensus is. He would not say how many provinces should agree to constitutional change to make

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