Appendix II

Reference re: Amendment of Constitution of Canada*

IN THE MATTER OF An Act for Expediting The Decision of Constitutional and Other Provincial Questions, King Chapter C180, C.C.S.M.;
AND IN THE MATTER OF a Reference pursuant thereto by the Lieutenant Governor in Council to the Court of Appeal for Manitoba, for hearing and consideration, the questions concerning the amendment of the Constitution of Canada as set out in Order-in-Council No. 1020/80.

[1981] M.J. No. 95

117 D.L.R. (3d) 1

[1981] 2 W.W.R. 193

7 Man.R. (2d) 269

7 A.C.W.S. (2d) 329

Manitoba Court of Appeal

Freedman C.J.M., Hall, Matas, O'Sullivan and Huband JJ.A.

Heard: December 4, 5, 8, 9, 1980.
Judgment: February 3, 1981.

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James L. Thistle and John J. Ashley, for the Attorney-General for Newfoundland.

D'Arcy McCaffrey, Q.C., and M.B. Nepon, for the Four Nations Confederacy Inc.

Separate reasons for judgment were delivered by Freedman C.J.M., Hall, Matas, O'Sullivan and Huband JJ.A.

1 **FREEDMAN C.J.M.**: Canada is a sovereign nation. It is so recognized throughout the world. But one vestige of colonialism still adheres to her national status, namely, that she is unable to amend her constitution. Such an amendment can only be made by the Parliament of the United Kingdom. The procedure for securing a desired amendment is for the Senate and House of Commons, in parliament assembled, to pass a resolution for a Joint Address to Her Majesty the Queen requesting Her Majesty to cause to be laid before the Parliament of the United Kingdom a measure embodying the amendment. The measure in question will then in due course be enacted by the parliament of the United Kingdom.

2 Some say that the vestigial badge of colonialism, rightly considered, does not really detract from Canada's sovereignty. For, they point out, the restriction on the amending power is not something imposed upon Canada by the United Kingdom, but is entirely self-imposed by Canada. Let Canada come to Her Majesty the Queen with a request for the last

British North America Amendment Act, that request would be granted, and Canada would emerge as a completely sovereign nation, capable thereafter of amending her own constitution at her own time and in her own way. The difficulty heretofore has been in securing agreement among the 11 jurisdictions (the Federal power and the 10 Provinces) on a suitable amending formula.

3 Whether Canada's slightly diminished sovereignty is more a matter of appearance than of fact is something on which I need not linger. Even an appearance of incomplete sovereignty is something that calls for correction. This is especially so when it is realized that the process of effecting a change in the appearance is itself fraught with difficulty. So one should not underestimate the importance or the gravity of the constitutional problem here involved.

4 In his chapter on "Constitutional Law in Great Britain and the Commonwealth Countries" contained in his book entitled "Judicial Review in the English-Speaking World", 3d ed., 1965, Professor Edward McWhinney summarized the Canadian constitutional situation in the following words:

> P. 9 "Since the Constitution of Canada, as enacted by the United Kingdom Parliament in 1867, contained no provision for its own amendment, any amendments have accordingly had to be affected over the years by resort to the United Kingdom Parliament. In fact there developed over the years an elaborate set of conventional rules governing the making of such amendments. The United Kingdom Parliament, it was said, would act only at the request of the national Parliament of Canada, though there was considerable conflict of authority and practice as to what degree, if at all, the national Parliament of Canada was bound to consult the provinces prior to making requests to the United Kingdom Parliament for amendments. In 1949, moves began for the devising of a procedure for amendment of the Canadian Constitution, to be located and operated wholly within Canada. These moves were partially

> realized by a constitutional amendment passed by the United Kingdom Parliament in 1949 at the request of the Canadian government, but the successful completion of the whole project seems now to have been postponed indefinitely, owing to difficulty in obtaining any agreement between the national government and the provinces as to the exact nature of the final procedure for amendment to be adopted for the future".

5 In the intervening 15 years since those words were written further attempts were made to find an amending formula that would be acceptable both to the Federal authority and to the Provinces. The last (or should I say, the latest?) of such attempts occurred during the summer of 1980 when The Continuing Committee of Ministers on the Constitution was instructed by First Ministers to attempt to reach consensus on an amending formula, along with 11 other items of constitutional reform. But no consensus on an amending formula was reached.

6 It is against this background of events that on October 2, 1980 the Prime Minister of Canada introduced into the Parliament of Canada a "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada". This was followed, on October 6, 1980, by a motion introduced in the House of Commons by the minister of Justice of Canada to establish a Special Joint Committee of the Senate and the House of Commons

> "to consider and report upon the document entitled 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada' published by the Government on October 2, 1980, and to recommend in their report whether or not such an Address, with such amendments as the Committee considers necessary, should be presented by both Houses of Parliament to Her Majesty the Queen".

7 The object of the Proposed Resolution for a Joint Address is to patriate the Canadian Constitution - that is to say, to bring it home to Canada and to make Canada the only place where the Constitution can

be dealt with in the future. The Resolution requests Her Majesty "to cause to be laid before the Parliament of the United Kingdom a measure containing the recitals and clauses hereinafter set forth". Then follows Schedule A, which is an Act to amend the Constitution of Canada. Section 4 of that Act declares that it may be cited as the Canada Act. Section 1 of the Canada Act enacts the Constitution Act, 1980, which is set out in Schedule B thereto. Section 1 further declares that the Constitution Act, 1980 shall have the force of law in Canada and shall come into force as provided in that Act. Two features of the Constitution Act, 1980 should be especially noted. One is that the Act contains a "Canadian Charter of Rights and Freedoms". The other is that it also contains an interim amending procedure as well as provisions for amending the Constitution over the long term.

8 On October 24, 1980 the Government of the Province of Manitoba, declaring its concern as to whether amendment to the Constitution of Canada affecting Provincial powers, rights and privileges can be made by a Joint Address alone or requires, in addition, the agreement of the Provinces, enacted Order-in-Council No. 1020/80, by which, pursuant to An Act for Expediting the Decision of Constitutional and other Provincial Questions, C.C.S.M. Cap. C180, it referred three questions to this Court for hearing and consideration. These questions are as follows:

"1. If the amendments to the Constitution of Canada sought in the 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada', or any of them, were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and if so, in what respect or respects?

2. Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by

the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?

3. Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?"

9 On the same day, upon the application of counsel for the Attorney-General for Manitoba, I made an Order for Directions which, among other things, directed that the three questions be heard and considered by this Court at a sitting commencing on Thursday, December 4, 1980, at 9:30 o'Clock in the forenoon. The Order further directed that the Applicant, by registered mail, serve notice of the hearing upon the Attorney General of Canada and the Attorney-General of all the Provinces, other than Manitoba. In the result appearances were filed by the Attorney General of Canada, who took the position that the questions, if answered at all, should be answered in the negative, and by the Attorneys-General of Quebec, British Columbia, Prince Edward Island, Alberta, and Newfoundland, who took the position, supporting Manitoba, that the questions should be answered in the affirmative.

10 Subsequently on an application made by Four Nations Confederacy Inc. (the successor of the Manitoba Indian Brotherhood) I directed that that body be given notice of the hearing, thereby entitling it to be heard thereon. (Vide, Section 4(1) of "An Act for Expediting the Decision of Constitutional and other Provincial Questions," supra.) At the hearing of the Reference counsel for this Indian group, in his helpful submission, aligned himself with the position taken by the appearing Provinces, submitting that the three questions should be answered in the affirmative.

11 Before proceeding with the consideration of the three questions I deem it useful to define the boundaries within which our inquiry should be conducted. Those boundaries are best defined negatively - that is to say, by indicating what does not fall within their scope. And clearly what does not fall within their scope is the political wisdom or unwisdom of what is contained in the Joint Address. The attempt by the Federal power to

patriate the constitution unilaterally may be an act of high statesmanship or of political folly. That is not a determination that we are called upon to make. Indeed during the very period when we were hearing this Reference and still continuing since then, the Special Joint Committee of the Senate and the House of Commons, referred to above, has been holding its hearings, publicly televised, on the matters referred to in the Proposed Resolution for a Joint Address. But the proceedings and objectives of that Committee differ sharply from ours. The members of that Committee are concerned, deeply and properly I would add, with questions of policy and wisdom. Unilateral patriation of the Constitution of Canada may be regarded by them as wrong, undesirable, unwise. Or, on the other hand, it may be regarded as correct, necessary, and desirable. What the ultimate recommendations of that Committee may be I have no means of knowing and no disposition to guess. It is enough to say that the role of that Committee provides a clear contrast with that of this Court. We are concerned not with the wisdom or policy of the Proposed Resolution but only with its constitutional legality. We continue to function on this Reference as a court of law.

12 I turn now to Question 1. For convenience I re-state it here.

> "1. If the amendments to the Constitution of Canada sought in the 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada', or any of them, were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and if so, in what respect or respects?"

13 A threshold problem must first be considered, namely, should this question be answered at all? Counsel for the Attorney General of Canada points to "the tentative nature of the contents of the proposed Resolution" and submits that any answer we might give would therefore be "speculative and premature".

14 In my view there is merit in this submission. The proceedings before the Joint Committee have already led to public declarations by the Attorney General of Canada that amendments to the subject matter of the

proposed Resolution will be made. Indeed one of the undoubted purposes of the deliberations of the Joint Committee is to examine the proposals set forth in the Constitution Act, 1980 and to recommend such changes therein as the Committee deems desirable. The very language of the motion appointing the Joint Committee makes this clear. I quote the following paragraph from House of Commons, Votes and Proceedings, October 6, 1980:

> "That a Special Joint Committee of the Senate and of the House of Commons be appointed to consider and report upon the document entitled 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada' published by the Government on October 2, 1980, and to recommend in their report whether or not such an address, with such amendments as the Committee considers necessary, should be presented by both Houses of Parliament to Her Majesty the Queen". (Emphasis mine).

We therefore face a real likelihood that the amendments sought in the Proposed Resolution may be altered, deleted, or supplanted by other amendments before the Resolution is deemed ready for transmission to Her Majesty. In this situation there is a danger that if we answer Question 1, with the proposed amendments in their present form, we may later find that we have answered matters no longer before us and have not answered matters that emerged in their stead. The Court should not be exposed to the risk of such an adventure in futility.

15 In saying this I am not being critical of either the Dominion or the Province. Manitoba brought this Reference before us on the only material that was then available to it. The Proposed Resolution tabled in Parliament was the basis of the Reference, and of course its subject matter had to be considered as it stood, even though it might later undergo alteration, perhaps even substantially so. As for the Dominion it had to make a start somewhere, and the Constitution Act, 1980 represented that start. But to be wedded to every last provision of that document as rigid and unalterable would be to assume a posture unbecoming to a democratic state. So it accepts the idea of change.

16 Since the above was written the Minister of Justice of Canada, on January 12, 1981, placed before the Joint Committee a list of amendments to the proposals originally set forth. During the hearing before this Court I had referred to this very possibility and I invited counsel to indicate whether, in such case, we should deal with the original material or with the substituted material, always bearing in mind that in the latter case we would not have had the benefit of counsel's argument. Mr. Twaddle, for Manitoba, stated that we should deal with the original material, since it was that material alone which was referred to in the Reference.

17 I agree, and merely add that this strengthens the characterization of Question 1 as "tentative and premature". I therefore do not answer that question.

18 I move on to Question 2. Again for convenience I re-state it here.

> "2. Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?"

We are asked to declare whether there is a constitutional convention that in matters affecting provincial rights the Federal power will not act without the agreement of the Provinces.

19 Counsel for the Attorney General of Canada submits that the question is essentially a political one and therefore should not be answered. Indeed he says it is "purely political". In my view this submission goes too far. Its characterization of Question 2 as "purely political" overstates the case. That there is a political element embodied in the question, arising from the contents of the Joint Address, may well be the case. But that does not end the matter. If Question 2, even if in part political, possesses a constitutional feature, it would legitimately call for our reply.

20 In my view the request for a decision by this Court on whether there is a constitutional convention, in the circumstances described, that the Dominion will not act without the agreement of the Provinces poses a question that is, at least in part, constitutional in character. It therefore calls for an answer, and I propose to answer it.

21 What is a constitutional convention? There is a fairly lengthy literature on the subject. Although there may be shades of difference among the constitutional lawyers, political scientists, and judges who have contributed to that literature, the essential features of a convention may be set forth with some degree of confidence. Thus there is general agreement that a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom. There is also general agreement that "a convention is a rule which is regarded as obligatory by the officials to whom it applies". Hogg, "Constitutional Law of Canada", (1977), P.9. There is, if not general agreement, at least weighty authority, that the sanction for breach of a convention will be political rather than legal. Relevant to this last point Professor Colin R. Munro has said:

> "Collective or individual ministerial responsibility might be scorned by a Minister with legal impunity, but his political career might be ruined. More than any other factor, a principle no higher than political self-interest accounts for the observance of conventions".
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> (1975) 91 Law Q.R. 218 at P. 221.

22 Hogg (op. cit.) at P. 7 throws light on the nature of conventions by citing some fundamental examples, one of which concerns the power and status of the Governor General of Canada. Under the B.N.A. Act the Governor General is given wide powers, but a convention exists that he will execute those powers only in accordance with the advice of the cabinet or in some cases the Prime Minister. That is one of the strongest conventions that one is likely to encounter in Canadian constitutional law.

23 Conventions most often evolve from practices followed over a long period of time. Exceptionally they may arise from agreement by the relevant officials to adopt a particular rule of constitutional conduct. An example of such an "instant convention", if I may so describe it, is given by Hogg at P. 10 where he cites the agreement in 1930 of the Prime Ministers of the self-governing dominions of the Commonwealth that thenceforth the King (or Queen) would appoint the Governor General of a dominion solely on the advice of the government of the dominion. The convention referred to in the present Reference falls within the former class (i.e., evolution) rather than the latter (i.e., instant).

24 Is there then a constitutional convention that, in matters falling within the scope of our Reference, the Federal power should not act without the agreement of the Provinces? In the context of the present case, that means the agreement of all the Provinces. To answer that question one must look at the precedents, one must examine what has gone before.

25 Since the year 1867, when Canadian nationhood began, there have been 21 amendments to the British North America Act. Not all of them are of equal strength or importance. Some indeed were minor in character, effecting statute revisions of a purely formal nature. These would have little weight in our quest for determination of the constitutional role of the Provinces in the making of amendments. From an examination of the record of the amendments that have been enacted to date some observations of a general character may however be made, namely:

> (1) There has been no instance to date of a refusal by the United Kingdom to enact a requested amendment because of Provincial objection.
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> (2) There has been no instance to date of the United Kingdom enacting an amendment to the B.N.A. Act at the sole request of a Province or Provinces. There have been at least nine such requests, none of them successful. (Gerin-Lajoie, "Constitutional Amendment in Canada", (1950) P. 138 et seq; Eugene Forsey (1967) 12 McGill L.J. 397; Hogg, op. cit., P. 19, note 30).

> (3) There have been numerous instances to date of amendments enacted by the United Kingdom without prior agreement with the Provinces and often without prior consultation with them. Hogg, at P. 20, writes:
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> > "There have been fifteen important amendments to the B.N.A. Act, which have been requested by the federal Parliament and enacted by the United Kingdom Parliament; of these only four (1940, 1951, 1960, and 1964) had the unanimous consent of the provinces, and only one other (1907) was passed after prior consultation with all the provinces (British Columbia did not agree); the other ten amendments were requested by the federal Parliament and enacted by the United Kingdom Parliament without prior consultation with the provinces".

The fifteen amendments referred to in the above quotation are set forth in greater detail by Makin in "Canadian Constitutional Law", 3rd. ad. 1969, at P. 33-34, as follows:

> "It is a matter of record, however, that amendments to the B.N.A. Act have been made which have affected the provinces (although not in respect of legislative power) and yet they were not previously consulted. The following have been the important amendments to the Act:
>
> (1) 1871, 34 & 35 Vict., c. 28 (resolving doubt as to power of the Dominion Parliament to create new provinces out of western territories; amendment passed at request of Dominion government; provinces not consulted);

(2) 1875, 38 & 39 Vict., c. 38 (resolving doubt as to power of the Dominion Parliament to determine its privileges; amendment passed at request of Dominion government; provinces not consulted);

(3) 1886, 49 & 50 Vict., c. 35 (power given to Dominion Parliament to provide for representation of territories in federal houses; amendment passed on joint address of Senate and House of Commons; provinces not consulted);

(4) 1907, 7 Edw. VII, c. 2 (increase and settlement of subsidies payable by Dominion to provinces; amendment passed on joint address of Senate and House of Commons; address based on resolutions of provincial conferences held in 1887, 1902 and 1907 but resolutions not referred to in address; amendment enacted despite opposition of British Columbia);

(5) 1915, 5 & 6 Geo. V, c. 19 (alteration of senatorial representation; amendment passed on joint address of Senate and House of Commons; provinces not consulted although representations which were not accepted were made by Prince Edward Island to a committee of the House of Commons);

(6) 1916, 6 & 7 Geo. V, c. 19 (term of Parliament extended one year; amendment passed on joint address of Senate and House of Commons; provinces not consulted; amendment repealed in 1927 in statute law revision);

(7) 1930, 20 & 21 Geo. V, c. 26 (natural resources returned to western provinces; amendment passed on joint address of Senate and House of Commons;

previous agreements with provinces concerned but no general consultation);

(8) 1940, 3 & 4 Geo. VI, c. 22 (power to Dominion Parliament in relation to unemployment insurance; amendment passed on joint address of Senate and House of Commons; unanimous consent of provinces);

(9) 1943, 7 Geo. VI, c. 30 (postponement of readjustment of representation in the House of Commons in accordance with decennial census; amendment passed on joint address of Senate and House of Commons; provinces not consulted but Quebec protested against the measure);

(10) 1946, 10 Geo. VI, c. 63 (s. 51 of B.N.A. Act replaced by new provision for representation In House of Commons; amendment passed on joint address of Senate and House of Commons; provinces not consulted although question raised in House of Commons);

(11) 1949, 12 & 13 Geo. VI, c. 22 (Newfoundland becoming tenth province; amendment made on joint address of Senate and House of Commons; provinces not consulted but previous agreement between Dominion and Newfoundland);

(12) 1949, 13 Geo. VI, c. 81 (power to Dominion Parliament to amend the 'constitution of Canada', designed (with specified exceptions) to give Dominion same power as provinces have under s. 92(1) of B.N.A. Act (but the scope given to Parliament is much broader); amendment passed on joint address of Senate and House of Commons;

provinces not consulted although question raised by some provincial governments); see Scott, The British North America (No. 2) Act, 1949, (1950) 8 U. of T.L.J. 201;

(13) 1951, 14 & 15 Geo. VI, c. 32 (power to Dominion in relation to old age pensions but provincial competence in relation thereto maintained; amendment passed on joint address of Senate and House of Commons; unanimous consent of provinces);

(14) 1960, 9 Eliz. II, c. 2 (re-enactment of s. 99 qualifying security of tenure of judges of provincial superior courts by provision for compulsory retirement at age 75; amendment passed on joint address of Senate and House of Commons; unanimous consent of provinces);

(15) 1964, 12-13 Eliz. II, c. 73 (amending s. 94A, originally enacted in 1951, supra, so as to confer on Parliament power to legislate not only in relation to old age pensions but also in relation to 'supplementary benefits, including survivors' and disability benefits irrespective of age', but otherwise provision remains the same; amendment passed on joint address of Senate and House of Commons; unanimous consent of provinces). See, generally, on the amendments made to the B.N.A. Act, Favreau, The Amendment of the Constitution of Canada (1965), pp. 4 et seq."

26 Amendments altering the distribution of legislative power stand on higher ground than other forms of amendment. What is an amendment "altering the distribution of legislative power"? I take it to mean, for example, a transfer of a legislative power possessed by a Province under Section 92 so as to make it a power of the Dominion either under Section 91 or under some other section. That is precisely what occurred in 1940

with regard to unemployment insurance. Prior to 1940 legislative power over that subject resided in the Provinces. Not, I must add, in specific terms, because in 1867 unemployment insurance was not yet engaging the attention of parliamentarians. But by 1940 and earlier it was deemed to be a subject falling within the scope of Section 92(13) - Property and Civil Rights in the Province. The amendment of 1940 put "Unemployment Insurance" within Section 91 under a new sub-heading 2A. The agreement of the Provinces to that amendment had been obtained.

27 So too with regard to old age pensions, a subject which was deemed to be within Provincial jurisdiction. The amendment of 1951 gave the Dominion jurisdiction.in this field, but not exclusively since Provincial authority was expressly continued. The amendment became Section 94A of the B.N.A. Act. The related amendment of 1964 dealt with supplementary benefits to old age pensions. Both amendments had received the prior agreement of the Provinces.

28 I stated earlier that only four amendments had received the unanimous consent of the Provinces. Three of these - enacted in 1940, 1951, and 1964 - I have already touched on. The remaining one, enacted in 1960, provided for compulsory retirement of Judges of the Superior Courts at age 75. It is not a good example of an amendment altering the distribution of legislative power. Although the Provinces have jurisdiction, under Section 92(14), over the Administration of Justice in the Province, including the Constitution, Maintenance, and organization of Provincial Courts, it is the Dominion alone which, under Section 96, had and continues to have power to appoint the Judges of the Superior, District, and County Courts. The fixing of an age at which such Judges should cease to hold office is an aspect of the power to appoint. The change in the period of tenure of these Judges, brought about by the 1960 amendment, was accomplished without in any way subtracting from any power previously possessed in that field by the Provinces - for the Provinces had no such power. For that reason I do not look upon this amendment as an appropriate illustration of an alteration in the distribution of legislative power.

29 This leaves us with three amendments falling within the category which I am presently considering. Indeed an examination of these amendments and of the circumstances surrounding their enactment

reduces their number to two, if not indeed to one. Let me pursue this for a moment.

30 When the question of unemployment insurance was being debated in the House of Commons, in 1940, the following interchange took place:

> "Mr. Mckenzie King:
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> We have avoided anything in the nature of coercion of any of the provinces. Moreover we have avoided the raising of a very critical constitutional question, namely, whether or not in amending the British North America Act it is absolutely necessary to secure the consent of all the provinces, or whether the consent of a certain number of provinces would of itself be sufficient. That question may come up but not in reference to unemployment insurance at some time later on.
>
> ...
>
> Mr. J. T. Thorson (Selkirk):
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> I shall be only a few moments in my advocacy of this resolution. Unemployment insurance is a very important part of the programme of national reform upon which this country must embark. I wish, however, to dispute the contention that it is necessary to obtain the consent of the provinces before an application is made to amend the British North America Act. In my opinion there is no such necessity. on the other hand, it is the course of wisdom to advance as advances may be properly made, and I am sure that every hon. member is very glad that all the provinces of Canada have agreed to this measure. But I would not wish this debate to conclude with an acceptance, either direct or implied, of the doctrine that it is necessary to obtain the consent of the provinces before an application is

made to amend the British North America Act. Fortunately, this is an academic question at this time.

Mr. LaPointe (Quebec East): May I tell my hon. friend that neither the Prime Minister nor I have said it is necessary, but it may be desirable.

Mr. Thorson: The Prime Minister (Mr. Mackenzie King) has made it perfectly clear that the question does not enter into the discussion, in view of the fact that all the provinces have signified their willingness that this amendment should be requested."

(House of Commons Debates, 1940, PP. 1118 and 1122)

31 These statements are important in light of the submissions made by Manitoba and the other Provinces that, with regard to amendments of the constitution affecting Provincial rights, a convention exists requiring the agreement of the Provinces. We must remember that, as stated earlier, "a convention is a rule which is regarded as obligatory by the officials to whom it applies". How can the 1940 amendment be cited as an example of such a convention in face of the clear and express declarations by the sponsors of the Bill that the agreement of the Provinces was not regarded as necessary but at most only "desirable"? The existence of a convention of the nature claimed will have to rest on stronger support than the 1940 amendment provides.

32 So we are left with the amendments of 1951, regarding old age pensions, and of 1964, regarding supplementary benefits thereto. Both amendments relate to the same subject matter. Indeed they appear as one section, namely, 94A of the British North America Act. It is not surprising that the 1964 amendment was effected in the same manner as the 1951 amendment had been, namely, with the consent of all the Provinces. It would be surprising if it had been otherwise. Indeed the desirability of securing Provincial agreement to amendments involving the distribution of legislative power has hardly ever been doubted. What has been and continues to be a subject of debate is whether Provincial agreement in such cases is necessary. That Provincial agreement was sought and

obtained in the matter of old age pensions and supplementary benefits is admittedly a circumstance supporting the contention of the Provinces on this Reference. But the amendments, whether considered as two in number or as two aspects of a single subject, do not in themselves constitute a pattern of parliamentary or legislative conduct, nor do they possess the vigour, warranting the ascription to them of a constitutional convention.

33 One matter stressed by counsel for the Provinces was a White Paper published in 1965 under the authority of the Honourable Guy Favreau, then Minister of Justice for Canada, entitled "The Amendment of the Constitution of Canada". This document was noted by the Supreme Court of Canada in the Reference to it by the Governor in Council concerning the legislative authority of the Parliament of Canada in relation to the Upper House, (1980) 1 S.C.R. 54, the so-called Senate Reference. The opinion of the Supreme Court of Canada on that Reference need not concern us here, since the issue now confronting us is a different one from that which there faced the Supreme Court. But in that Reference the Court, at P. 64, spoke as follows:

> "The White Paper, after reviewing the procedures followed in respect of amendments to the Act, went on to state four general principles, as follows:
>
> The first general principle that emerges in the foregoing resumé is that although an enactment by the United Kingdom is necessary to amend the British North America Act, such action is taken only upon formal request from Canada. No Act of the United Kingdom Parliament affecting Canada is therefore passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted.
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> The second general principle is that the sanction of parliament is required for a request to the British Parliament for an amendment to the British North America Act. This principle was established early in

> the history of Canada's constitutional amendments, and has not been violated since 1895. The procedure invariably is to seek amendments by a joint Address of the Canadian House of Commons and Senate to the Crown.
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> The third general principle is that no amendment to Canada's Constitution will be made by the British parliament merely upon the request of a Canadian province. A number of attempts to secure such amendments have been made, but none has been successful. The first such attempt was made as early as 1868, by a province which was at that time dissatisfied with the terms of Confederation. This was followed by other attempts in 1869, 1874, and 1887. The British Government refused in all cases to act on provincial government representations on the grounds that it should not intervene in the affairs of Canada except at the request of the federal government representing all of Canada.
>
> 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 the degree of provincial participation in the amending process, however, have not lent themselves to easy definition."

34 It is the fourth general principle which is of special concern here. And the first comment I wish to make on it is that, although the rights and powers set forth in the other three principles are declared in terms that are certain and without qualification, the rights and powers embodied in the fourth principle are by its very language uncertain and qualified. 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". But the third sentence negates that proposition. It makes clear that both the nature and the degree of provincial participation in the amending process have not yet been fully defined. What appears to have been given to the Provinces by the first sentence is taken away, at least in part, by the third sentence.

35 The explanation for the resultant contradiction may reside in the fact that the White Paper is, as I see it, both a political and a constitutional document. The first sentence expresses the salutary political principle that the Canadian Parliament will not seek an amendment, of the nature there mentioned, without prior provincial agreement. That of course is always a laudable political objective. Every Canadian Parliament would rather have provincial agreement to a proposed amendment than provincial opposition. But the White Paper is also a constitutional statement. Hence it must consider questions involving the nature and degree of provincial participation in the amending process. Is unanimous consent of the Provinces required? Will a bare majority suffice? Or should a weighted formula based on considerations of population and of regionalism be applied, assuming such a formula can be found and accepted? These are questions which for over half a century have eluded satisfactory answer. Our constitutional history and experience may perhaps warrant the assertion in the second sentence that the principle of provincial agreement "has gained increasing recognition and acceptance". But even if so warranted, it is only increasing recognition and acceptance, and not total recognition and acceptance, that have been achieved. So the final sentence of the fourth general principle, declaring that "The nature and the degree of provincial participation in the amending process ... have not lent themselves to easy definition", makes it clear that constitutionally we are still at an intermediate stage in this matter.

36 The White Paper, therefore, does not go far enough to support the claim made for it by counsel for the Provinces.

37 I return to the question, which I am now ready to answer. Is it a constitutional convention that the Federal power will not seek an amendment of the Constitution of Canada, of the nature described in Question 2, 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:

> "The practice, since 1875, has been to seek 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 a convention full-blown, vigorous, and operative. A convention should be certain and consistent; what we have is uncertain and variable.

38 I therefore answer Question 2 in the negative.

39 I deal now with the last question. I need only summarize it: Is the agreement of the provinces constitutionally required for amendment, of the nature there stated, of the Constitution of Canada? Question 2 called upon us to determine whether there is a convention as claimed. Question 3 takes the matter one step farther. It rests on the submission that the convention has ripened or crystallized into a constitutional rule of law: or alternatively, that the convention has gained acceptance as an operative principle of our constitution, so that the Court should itself now crystallize it as a rule of law.

40 This argument need only be pursued if a convention has been found to exist. In that respect - and dealing with the questions as they have been submitted to us, and giving full effect to the main thrust of the argument submitted on behalf of the Provinces - I believe that the third question stands or falls on the answer to the second question. An affirmative answer to Question 2 paves the way for consideration of Question 3. But a negative answer to Question 2 - and I have given such an answer - requires the giving of a similar answer to Question 3. No convention, no rule of law. The matter is as simple as that.

41 My opinion could end here. But before leaving the matter in that way I wish to add some further observations.

42 Half a century ago a commentator wrote of "the constitutional formula or legend which has come to be known as the compact theory of Confederation". (Norman McL. Rogers "The Compact Theory of Confederation", ([1931] 9 Can. Bar Rev. 395). That theory has re-emerged on this Reference.

43 The essential meaning of the compact theory is that Confederation was brought about by a compact between its constituent parts. Any change in the nature of the union requires the consent of those parts. That is to say, it requires unanimity on the part of the Federal power and of the Provinces. Otherwise there would be a breach of the compact (or contract, or treaty) which was the basis of Confederation.

44 In my view the theory in question is supported neither by history nor by subsequent usage. If we look at the original union effected between Ontario, Quebec, Nova Scotia, and New Brunswick the only basis on which the compact theory can be claimed to rest would be the 72 resolutions devised at the Quebec Conference of 1864. But this claim is in fact unsupportable, because the 72 resolutions were never adopted by the Legislatures of New Brunswick or Nova Scotia. And, I may add, those resolutions were later expressly rejected by the Legislature of Prince Edward Island. (Vide, Rogers, op. cit. at P. 400; and Gerin-Lajoie, "Constitutional Amendment in Canada", P. 208 et seq.)

45 Nor can the compact theory rest on subsequent practice. It cannot be said that the process of securing amendments to the constitution represented a recognition or affirmation of the compact theory. Indeed the opposite is the case. Reference to the amendments that were actually made (and the principal ones have been listed earlier in this opinion) shows that in the majority of cases provincial agreement was not obtained, notwithstanding the so-called compact theory. I share the view expressed by Professor E. R. Alexander who, in an article entitled "A Constitutional Strait Jacket for Canada", (1965) 43 Can. Bar Rev. 262, says at P. 264:

> "The compact theory of Confederation has been effectively destroyed".

46 The proposed Resolution for a Joint Address has been attacked as an attempt on the part of the Federal power to do indirectly what it cannot do directly. Mr. Robinette has met that attack head-on, and I am pleased to quote the following paragraph from Canada's factum:

> "The Attorney General of Manitoba alleges that because the Parliament of Canada cannot legislate to amend the Constitution of Canada in certain respects, it, therefore, cannot request that the Parliament of the United Kingdom, which has full legislative authority, to legislate. It is claimed that to do so would be to do indirectly what cannot be done directly. This is a complete misapplication of a well-known maxim. The fact is that nothing is being done indirectly and nothing is proposed to be done indirectly. Should the Senate and House of Commons decide to send the proposed Joint Address to Westminster, they would be doing directly exactly what they have always done directly in such cases, and the United Kingdom Parliament, in acting upon the request, would be doing directly exactly what it has always done directly when given such a request."

47 The presentations on behalf of the Provinces, following Manitoba's lead, took the form of a progression through the questions posed in this Reference. Question 1 asked if the enactment of the amendments contained in the Joint Address would affect Federal-Provincial relationships or the rights of the Provinces. Answering that question in the affirmative, the Provinces then moved on to the second question, namely, whether it is a constitutional convention that the Federal power will not seek such an amendment or amendments without the agreement of the Provinces. The Provinces, on the basis of usage and precedent, concluded that such a convention does exist. That brought them logically to the third question, namely, whether that convention had crystallized into a rule of law. The Provinces said that it had. In a word, there had been an evolution from usage to convention to law. That evolution received added credibility, in the opinion of some of the Provinces, by the fact that the Provinces enjoy legislative sovereignty within their sphere, a sovereignty that may not constitutionally be altered without their consent.

48 My learned brother O'Sullivan, virtually rejecting the evolutionary approach, says that the answer to the questions posed is not simply to be found in a line of precedents which create a convention which has

crystallized into law. Rather it is to be found in the nature of Provincial sovereignty itself, a sovereignty that rests in each Province separately. Provincial consent is necessary because of the very nature of the powers that constitutionally belong to the Provinces and to the Queen in right of the Provinces. My brother Huband agrees in substance with O'Sullivan, J.A.

49 Let us note that we are dealing here with something that is not the product of evolution. Moreover it is something that goes beyond the legislative sovereignty of the Provinces under Section 92 of the B.N.A. Act. No one disputes the existence of Provincial legislative sovereignty of that character and within that domain. But the Provincial sovereignty here asserted appears to me to be something in the nature of an inherent right flowing from the fact of union. As such, it bears a direct relationship to AM compact theory, on which I have already expressed my views.

50 In the result I certify to the Lieutenant Governor in Council my answers to the questions posed to us on this Reference, namely:

Question 1 - Not answered because it is tentative and premature.

Question 2 - No.

Question 3 - No.

FREEDMAN C.J.M.