Notes for a Statement by Quebec

THE SUPREME COURT OF CANADA

The constitution of 1867 contains no provision on the Supreme Court. However, section 101 of the British North America Act provides that the Parliament of Canada may set up a general court of appeal for Canada. In 1875, the federal parliament created the Supreme Court of Canada with general jurisdiction for appeal on civil, criminal and constitutional matters. However, it was only in 1949 that a federal law abolished appeals to the Privy Council and bestowed jurisdiction of last resort on the Supreme Court.

This situation had various consequences. On the one hand, the status and role of the court are determined by a law which can be altered at any time by the parliament in Ottawa, which means that there is no guarantee for the court's continuing existence. On the other hand, the members of the court are appointed in the same way as the judges of the provincial superior, district and county courts, that is, by the federal government.

In short, the main criticisms that are made of the Supreme Court of Canada are for the most part a result of the fact that neither its existence nor the independence of its members is guaranteed by the constitution. Furthermore, its jurisdiction, particularly with respect to the constitution, and the process by which the judges of which it is composed are appointed, are solely the responsibility of the federal government, which is one of the parties potentially involved in a constitutional dispute.

These various problems are particularly important in a federal system like ours in which the judiciary is responsible for interpreting the distribution of legislative jurisdiction between the parliament in Ottawa and the provincial legislatures. In this respect, note that in the absence of express mention in sections 91 and 92 of the BNAA, 1867, it is the courts which gave the federal parliament legislative jurisdiction over air services, radio communications, labour relations in federal activities and agencies and so on.

Fairly or not, the court's credibility has been affected by these problems. An attempt has been made to solve them by reforming the process by which court members are appointed.

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This is why Quebec, in keeping with the positions is has traditionally defended, while attacking the problem of the distribution of powers, suggests putting an end to this anomaly and formally recognizing in the constitution the existence and the composition of the highest court of the land, and the procedure for appointing members.

In this respect, the new constitutional provisions we propose, besides formally establishing the Supreme Court, would confirm the present composition of the court of nine members and the practice developed over the years of having at least three judges from Quebec on the court. In addition, if, for practical reasons, the members of the court must continue to be appointed by the federal government, the constitution would nevertheless provide that the federal Minister of Justice should obtain the agreement of the Quebec Minister of Justice before appointing judges from Quebec, or of the Minister of Justice of the province concerned in other cases.

The provisions that Quebec suggests incorporating in the constitution would also specify that the Supreme Court is the court of last resort in Canada, in both civil and criminal cases. However, when the Court is required to make a decision on Quebec civil law, a civil bench will be formed with a majority of Quebec judges. At the same time, the procedure of directly seeking an opinion from the Supreme Court, which is only used by the federal government at the moment, would be henceforth open to the provinces.

Quebec also envisages officially enshrining in the constitution a rule by which the Chief Justice of the Supreme Court should come alternately from Quebec and from elsewhere in Canada.

In response of the criticisms which have been made an occasion, notably considering the court's role as interpreter of the constitution, and to strengthen the recognition of the principle of the dual nature of Canada, Quebec proposes creating a constitutional bench in the court composed half of judges from Quebec and half of judges from other parts of Canada. This bench would be chaired by the Chief Justice of the Supreme Court. If, for a variety of reasons, there were not

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enough Quebec judges to decide on a constitutional matter, the Chief Justice could designate one or several judges from the Quebec Court of Appeal or from a provincial superior court as a substitute, with the agreement of the Quebec and federal Ministers of Justice. The bench could be set up at the request of the parties, of the Attorney General of one or more provinces or of the Attorney General of Canada.

Finally, as the Pépin-Robarts Commission pointed out in its report in 1979, the appointment by the federal government of judges to the provincial superior courts is an anachronistic vestige of federal centralization. It must also be recognized that the law these courts are responsible for applying is largely provincial law. That is why Quebec proposes altering section 96 of the BNAA, 1867, in such a way as to give the provinces the power to appoint judges to superior, district and county courts.

APPENDIX

Quebec's proposal

The Supreme Court of Canada

Changes proposed by Quebec

(Unofficial translation)

1. Change section 101 of the BNAA, 1867, by removing from the two lines after the words "provide for" the words "the Constitution, Maintenance and Organization of a general Court of Appeal for Canada and for". In the fifth line of the same section, omit the words "any additional".

2. Add after section 101 in the BNAA, 1867, the following sections:

101A. Is established a general Court of Appeal for Canada named the Supreme Court of Canada.

101B. The Supreme Court of Canada is composed of a chairman who has the title of Chief Justice of the Supreme Court and eight other judges. The Chief Justice of the Supreme Court is chosen alternately from the jurists from the Province of Quebec and from those from the other provinces of Canada.

101C. The members of the Supreme Court are appointed by the Governor General. For this purpose, the federal Minister of Justice must obtain the agreement of the Minister of Justice of the Province of Quebec before making an appointment if a judge from Quebec is involved, or of the Minister of Justice of the province concerned in the other cases.

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101D. (1) The members of the Supreme Court of Canada are appointed from among individuals who, for at least ten years, consecutive or not, after having become members of a provincial bar, have been judges of a court in Canada or members of the bar of a province.

(2) At least three members of the Supreme Court are appointed from among individuals who, for at least ten years, consecutive or not, after having become members of the Quebec bar, have been either judges of a Quebec court or of a court constituted by parliament or members of the Quebec bar.

101E. The Supreme Court judges receive life appointments and they cease occupying their positions at the age of seventy years; the Governor General may, however, remove them from their positions at the joint request of the two federal houses of parliament.

101F. The federal parliament establishes the salary, allowances and the pension of the Supreme Court judges, and allocates the funds to pay them.

101G. The Supreme Court is the court of appeal of last resort in civil and criminal matters, in Canada and for Canada.

101H. The Governor General in Council of Canada or the Lieutenant Governor in Council of a province may request from the Supreme Court an opinion on any question he considers advisable.

101I. The federal parliament may, through legislation, provide for the administration of the Supreme Court of Canada.

101J. (1) When a dispute arises about the interpretation of the BNAA, 1867 and others, and their alterations, or the procedure for changing the constitution, or the Governor General in Council or the Lieutenant Governor of a province requests an opinion, the Attorney General of Canada, or of one or more provinces, or one of the parties, may request that a bench of five judges be set up composed of two judges from Quebec, two judges from other provinces and of the Chief Justice acting as chairman.

(2) If one or more of the positions for judges from Quebec are vacant, or if one or more justices are incapable of acting, the Chief Justice of the Supreme Court designates one or more judges of the Court of Appeal or of the Superior Court of Quebec as a substitute, after having obtained the consent of the federal Minister of Justice and of the Quebec Minister of Justice.

101K. Matters bearing on legal problems related solely to the application of Quebec civil law are under the authority of a court composed of five judges, at least three of who qualify under section 101D or, with the consent of the parties, a court composed of four judges, at least two of whom meet these qualifications.

3. Repeal section 96 of the BNAA, 1867, and replace it by the following:

96. The Lieutenant Governor of each province appoints the judges of the superior, district and county courts, including those of the Courts of Probate in Nova Scotia and New Brunswick.

Add after section 96 of the BNAA, 1867, as replaced, sections 96A and 96B as follows:

96A. No provincial law can interfere with the existence of the superior, district and county courts, or the courts of probate.

96B. The provincial legislative assemblies may, through legislation, provide for the administration of the superior, district and county courts, including the courts of probate.

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