British Columbia's Constitutional Proposals

Paper No. 4
REFORM OF THE
SUPREME COURT OF CANADA

Province of
British Columbia

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". . . the Supreme Court of Canada is an institution whose very existence, as well as its composition and jurisdiction, are entirely dependent on the Federal Government. . . . How can a Court subject to these constraints fairly fulfil its role as impartial umpire of the Federal system?"

Introduction

The course of political events in Canada in the 1970's, the decisions rendered by the Supreme Court and the increasingly sophisticated studies conducted by constitutional experts have converged to make politicians and the public aware that the Supreme Court of Canada is a very significant policy-making institution in the area of federal-provincial relations.

Prior to 1970 both the normal Canadian conception of the nature of the judicial function and the approaches to federal-provincial relations adopted by the two levels of government resulted in the Supreme Court having a low institutional profile. The normal Canadian conception of the nature of the judicial function paralleled the British view of the role of the courts. Courts were not seen as an institution involved in the public affairs of the day. Court solved legal problems by the application of legal standards to particular fact situations. If one of the consequences of that process was that a particular judicial decision has an impact on an important current public issue this was usually viewed as accidental, incidental and, generally, unfortunate.

Today, this rather simplistic view of the role of courts, particularly final courts, is being replaced by an awareness that many crucial issues of public policy are being considered and resolved in the judicial arena. There is, therefore, a renewed interest in Canada in the theoretical role and actual performance of the Supreme Court of Canada.

The second reason for this revival in interest is the changes that have taken place in the resolution of federal-provincial issues in the political arena in the past decade. Throughout the 1960's the operation of Pearsonian co-operative federalism kept almost every potential constitutional issue out of the courts. But, after 1968, the combination of Prime Minister Trudeau's more rigid approach to federalism and the growth of expertise, confidence—and power—in the provinces has meant that it has not been possible to work out, on a co-operative intergovernmental basis, an increasing number of federal-provincial issues. Accordingly, in recent years (particularly the last three) a large number of important federal-provincial issues have found their way to the Supreme Court of Canada.

Another reason for the increased prominence of the Supreme Court is that, prior to the mid-1970's, even if a particular issue could not be resolved through the political process there was no guarantee that the issue could find its way to the Supreme Court. Until 1974 the Court itself imposed very stringent limitations on the types of issues and the parties it was willing to hear. Then, in two important cases, *Thorson* and *McNeil,* the Court upset fifty years of established law and made it much easier for a private citizen to raise a constitutional issue before it. Accordingly, at precisely the time that the political process was showing signs of stress—namely, an inability to solve certain fundamental issues of federalism—the Supreme Court made it easier for a private citizen to bring those issues before the Court for resolution.

The result of the convergence of these developments has been a great increase in the volume of constitutional cases. In the years 1950–1974 there were, on average, slightly less than four such cases per year. Most of these were not particularly significant. From 1974–1977 there were six cases per year. In 1978 there are twelve constitutional cases being argued before the Court. But numbers alone tell only part of the story. What is particularly significant is not so much the increasing number of cases the Court is deciding but rather the significance of the Court's role in the great importance of the issues it is considering. In the past two years the Court has made decisions (or is about to make them) on issues unrivalled in significance since the famous judicial decisions of the Privy Council invalidating much of Prime Minister R. B. Bennett's New Deal legislation in 1937. The constitutionality of the entire federal Anti-Inflation program (upheld), of Saskatchewan's mineral royalties and taxation scheme (struck down), of provincial jurisdiction over movie censorship (upheld), of provincial jurisdiction over "off-air" cablevision (struck down), of Quebec's attempt to investigate RCMP security operations in Quebec (pending), of provincial jurisdiction to initiate prosecutions under the Narcotic Control Act and other federal statutes (pending), and of jurisdiction over east coast offshore waters off Newfoundland have all been decided in the past two years or will likely be decided by the Court in the near future. These are fundamental federal-provincial issues and they are being resolved by an institution not in the mainstream of the political process. It is appropriate, therefore, that serious attention be devoted to this institution in any process of constitutional review.

I. Criticisms of the Supreme Court of Canada

In the past decade a good deal of attention has been focused on the structure and functions of all federal institutions (indeed British Columbia has played a leading role in this analysis). The Supreme Court of Canada, which is a federal institution, has not escaped this attention.

A good starting point for an analysis of the recent criticisms of the Supreme Court is the Tremblay Report, the famous study commissioned by the Quebec Government in 1956. According to that Report a true federal system has three essential features:

(1) the sharing of power between two autonomous orders of government
(2) the supremacy of the Constitution
(3) the authority of the courts as guardians and interpreters of the Constitution.

The Report elaborated on the third proposition as follows:

> "In order for the Supreme Court to fulfil worthily and efficiently its role of impartial arbiter, it is necessary to guarantee it a position of independence which places it beyond the reach and influence of either order of government . . . it is fundamentally repugnant to the federative principle that the destinies of the highest tribunal of a country be surrendered to the discretion of a single order of government."

Tremblay then concluded that the Supreme Court could not fulfil its umpiring function because it was dependent on the central government from the threefold point of view of its existence, composition and jurisdiction. Here Tremblay was referring to the crucial fact that the Supreme Court of Canada was created by *ordinary federal legislation.* The existence, composition and powers of the Court are not provided for in the present Constitution. Section 101 of the *B.N.A. Act* provides:

> The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Acting pursuant to this section, Alexander MacKenzie's Liberal Government established the Supreme Court in 1875. Subsequent federal statutes have increased the size of the Court (from six to seven to nine) and expanded the Court's jurisdiction. But the establishment, size, method of appointment and jurisdiction of the Court are entirely depen-

dent on the pleasure of the federal government. The provinces have no role in these matters and there is nothing in the Constitution to circumscribe the absolute role of the federal government.

Tremblay's analysis of this problem was picked up by many of the provinces as interest in constitutional review blossomed in the 1960's. For example, at the 1960 Federal/Provincial First Ministers' Conference Premier Lesage said:

> "The fundamental principle of this federal system requires that neither one nor the other of the two levels of government may interfere with the distribution of powers established by the constitution. It follows that the arbitrator of conflicts in this matter must not be exclusively dependent on either of them."

To summarize then: the essence of provincial criticism of the Supreme Court is that it is an institution whose very existence, as well as its composition and jurisdiction, are entirely dependent on the federal government. The provinces ask: how can a Court subject to these constraints fairly fulfil its role as impartial umpire of the Federal system?

It should be pointed out that the federal government has not been entirely insensitive to these criticisms. Indeed the basic federal position —as enunciated in the 1969 position paper entitled *The Constitution and the People of Canada,* in the 1971 Victoria Charter proposals and in the 1978 package of constitutional proposals—seems to comprehend a willingness to provide for the Court in the Constitution, a willingness to allow a limited and secondary provincial role in appointments and, generally, an *un*willingness to narrow the jurisdiction of the Court.

Against the background provided by this brief survey of the current position, and historical and contemporary criticisms of the Court, the Government of British Columbia states its proposals concerning the Supreme Court of Canada. There are three key issues that must be addressed, namely:

(1) the position or status of the Court;
(2) the structure or composition of the Court;
(3) the jurisdiction of the Court.

Each of these will be considered in turn.

II. The Position or Status of the Supreme Court of Canada

The basic issue here is should the position, structure and jurisdiction of the Court be provided for in the Constitution or should these continue to be subject to ordinary federal legislation?

The Government of British Columbia believes that it is important to provide for the Supreme Court in the Constitution. The Court's primary role is to act as an impartial umpire of the federal system. If it is to exercise that role legitimately it is essential that its status and jurisdiction be kept out of the hands of *both* levels of government.

There are those who contend that the fact that the Court is dependent on ordinary federal legislation is irrelevent because the principle of judicial independence results in the Court not being dependent on either level of government, including the level that creates it. But in a federal society public perceptions are just as important as legal niceties. Although the principle of judicial independence does guarantee the impartiality of the Court in fact, in the public mind its impartiality is called in question if its very existence is dependent on ordinary federal or, for that matter, ordinary provincial legislation. It is instructive to note that other countries have recognized this fact—indeed the practice in all other federations is to provide for the Court in the Constitution. British Columbia recommends that Canada adopt a similar practice.

III. The Structure and Composition of the Supreme Court of Canada

There are two basic issues to be considered here. Who should appoint the judges of the Supreme Court and what should be the size of the Court?

Appointment of Judges

There are six possible methods of appointing Supreme Court judges:

(1) Appointment by the federal government;
(2) Appointment by provincial governments;
(3) The Victoria Charter method;
(4) Nomination by the Federal Government plus confirmation by a reconstituted Senate;
(5) The combined Victoria Charter-Senate confirmation method;
(6) Initial intergovernmental consultation plus nomination by the Federal Government plus confirmation by the Senate.

The first two methods suffer from the same defect. British Columbia believes that the judges of the highest court in the land, whose chief role is as umpire of the federal system, should not be subject to unilateral appointment by one level of government. An umpire must not only be neutral he must in all respects appear to be so. Appointments by one level of government, whichever it may be, compromise that neutrality in the eyes of the other level of government and in the eyes of the public.

The third, the Victoria Charter appointment system had the merit of allowing both levels of government to play a role in the appointment process. The scheme would require consultation between and agreement by both the Attorney-General of Canada and the Attorney-General of the appropriate province of residence of the prospective judge prior to the appointment of the judge. Only the federal Attorney-General could propose nominees. If the two Attorneys-General could not agree on a nominee, the federal Attorney-General had the right to opt for a committee consisting of all the Attorneys-General in Canada or of one composed of the two Attorneys-General involved and a chairman. Names could be submitted to either kind of nominating committee only by the federal Attorney-General and only from among those he had already submitted to the provincial Attorney-General for approval. The committee would then make a recommendation to Cabinet which presumably would accept the recommendation.

British Columbia believes that the Victoria Charter scheme has three major defects. First, it is a cumbersome, and probably time-consuming, apparatus. Secondly, it raises the rather unseemly spectre of judicial appointments being arrived at through a process of intergovernmental arbitration. Thirdly, there is a possibility that the provincial role in the appointment process could be quite limited—or even illusory. For example, assume that the federal government was strongly inclined to appoint Black, a British Columbia lawyer, to the Supreme Court. Assume also that the Attorney-General of British Columbia disapproved of this proposed appointment. The federal government could then put forward the names of some very weak candidates, White and Green. The Attorney-General of British Columbia would, correctly, disapprove of them. These names (Black, White and Green)—and no others, would then be submitted to the arbitration committee. The likely result? Black is appointed—exactly what the federal government wanted in the first place.

The fourth method of appointment—nomination by the federal government plus confirmation by a reconstituted Senate—has the advantage of allowing both levels of government to play a genuine role in the appointment process. It also would probably open the judicial appointment process to public scrutiny. Presumably the Senate would hold hearings before confirming a Supreme Court nominee. This might have the same beneficial effect that Senate confirmation hearings have in the United States—namely, the denial of high judicial office to persons of less than great ability and good reputation.

The only disadvantage of this method is that provincial participation in the appointment process is not as direct as under the Victoria Charter scheme. If the federal government wanted to appoint a British Columbia lawyer to the Supreme Court, under the Victoria Charter procedure, only the two governments would be involved. Under the Senate confirmation procedure, British Columbia's voice would be only one of many. Presumably British Columbia's Senators would no doubt take a leading part in the confirmation hearings and presumably the other Senators would show some deference to B.C.'s view as to the suitability of the nominee. But neither of these occurrences is guaranteed.

The fifth method of appointment is the one recommended by the federal government in its recent package of constitutional proposals. This is the combined Victoria Charter-Senate confirmation method which requires that a nominee go through, cumulatively, the steps in *both* the Victoria Charter and Senate confirmation methods discussed above.

Of the six possible appointment methods, this method allows the greatest provincial participation in the appointment process. In spite of this advantage the Government of British Columbia believes that it is overly cumbersome and unnecessary. In addition, the criticisms made above of the Victoria Charter method standing alone apply with equal force to a combined Victoria Charter-Senate confirmation procedure.

This brings us to the sixth method of appointment which is, in effect, a slight variation of the federal nomination-Senate confirmation method. Although British Columbia believes that it is essential that there be provincial participation in the appointment process, B.C. does not think that the duplication of provincial participation caused by the combined Victoria Charter-Senate confirmation method is necessary or desirable. Provided that it is reformed along the lines suggested by British Columbia (*see* Paper No. 3), the Senate can provide an effective forum for regional participation in the appointment process, if there is a simple provision in the Constitution that the federal government must consult with that province before putting a name before the Senate. It would be expected that such consultation will be carried out in good faith by both governments without the necessity of spelling out in the Constitution precisely how this consultation should be carried out.

In summary, British Columbia recommends a three-step appointment method—first, consultation between the federal government and the Government of the province of the proposed nominee; then nomination by the federal government; then confirmation by the reformed Senate. This procedure is not cumbersome; it has the advantage of allowing participation by both levels of government (with provincial participation being shaded slightly in favour of the proposed nominee's province); and, in our view, it is likely to result in appointments being made in a non-partisan atmosphere conducive to the selection of judges of high ability and reputation.

Size of the Court

Turning to the overall size of the Court, from 1875 to 1978 the Supreme Court of Canada has consisted, at various times, of six, seven and nine judges. In our modern age a six or seven-person bench would be too small to deal with the great range of complex legal problems that arises every year. A nine-person court can probably manage the workload and is probably an effective size for collegial consultation. But, unfortunately, the constitutional conventions that have evolved in relation to Canada's nine-person court have precluded meaningful representation from some of the regions of Canada. Because Quebec (by direct constitutional provision) and Ontario in practice always have three members on the court, the other three regions have generally been underrepresented. For example, British Columbia has not had a judge on the court since 1962 and cannot expect one on the basis of past practice until at least 1982.

British Columbia believes that there is no real conflict between those who advocate that the members of the Court should be appointed *solely* on the basis of merit, without regard to geographic factors, and those who favour a Court composition based, at least in part, on geographic considerations. Persons of substantial merit and judicial promise live in all regions of the country—certainly the quality of the Court would not be compromised by minimal geographic requirements. On the contrary, a constitutional provision ensuring representation on the Court from all regions of the country would probably contribute to the better development of the legal communities in the regions because each community would have as its leader a member of the highest court in the land. Accordingly, British Columbia recommends that the Supreme Court be composed of eleven members consisting of *at least one* person from each of Canada's five regions.

Other possible sizes that have been suggested for the Supreme Court are ten, eleven, thirteen, fourteen, and fifteen. British Columbia recognizes that a ten-person court (indeed any even-numbered court) can present serious problems, particularly in constitutional cases. If all ten judges sit, the possibility of a 5–5 split is obvious. If less than ten sit, a party losing a close case, say by 5–4 or 4–3, may feel that it lost, not on the merits, but because of the luck of the draw in assigning judges to that case. This is certainly not conducive to the development of an enhanced respect for the Court and its decisions.

British Columbia believes that thirteen, fourteen, and fifteen-member courts would be cumbersome in size and unlikely to contribute to effective hearings at the oral argument stage or effective collegial consultation and opinion-writing at the decision-making stage.

In British Columbia's view, a court of eleven members is sufficiently large to accommodate the geographic factors discussed above and to handle a large and difficult caseload in an efficient fashion. On the other hand it is not so large as to make the argument, consultation and opinion-writing stages of a case overly cumbersome and inefficient.

IV. The Jurisdiction of the Supreme Court of Canada

The jurisdiction of the present Supreme Court of Canada is very broad. The Court exercises appellate jurisdiction in all types of cases—constitutional and nonconstitutional. In addition the jurisdiction of the court is not limited to cases involving the interpretation of federal statutes; the court also has the final word on the meaning of provincial statutes. This broad jurisdiction has been criticized on two counts.

The criticisms, which emanate primarily from lawyers and academics in Quebec, are:

(1) The court should be a specialized Constitutional Court with a jurisdiction limited to cases involving constitutional issues;
(2) The court's appellate jurisdiction should be limited to cases involving the interpretation of federal statutes. Provincial superior courts should exercise final appellate jurisdiction in cases involving the interpretation of provincial statutes.

Each of these proposals will be considered in turn.

A Constitutional Court?

The starting point for most French Canadian academic analysis of the Supreme Court is an acknowledgment that judicial control or umpiring is basic to the effective working of federalism in Canada. Yet, French Canadian academics view the Supreme Court of Canada with distrust—they believe its structure and jurisdiction is foreign to the basic theory of federalism as well as to the fundamental interests of French Canada.

Most French Canadian academics—Jacques Yvan Morin devoted a good deal of attention to this problem in his professorial days and his views are representative of the French Canadian academic community—regard a European-style Constitutional Court as being the best solution to the problems of the present Supreme Court.

The basic elements of most proposals for a constitutional court are as follows:

(1) European Constitutional Courts have worked well; so has the American Supreme Court which is a *de facto* Constitutional Court.
(2) Specialization in other areas of the law is regarded as desirable and seems to result in better judicial decisions. A similar improvement in constitutional decisions could be anticipated if Canada had a specialist Constitutional Court.
(3) The Constitutional Court could either be a chamber within the present Supreme Court (other chambers might be Common Law and Civil Law) or it could have independent status.
(4) The existence, composition, appointment procedures and jurisdiction of the Constitutional Court should be provided for in the Constitution.
(5) The basic jurisdiction of the Constitutional Court would be over-all constitutional matters. When a constitutional issue arose it would automatically be referred to the Constitutional Court—irrespective of the court level or stage of litigation at which the issue arose.
(6) Appointments to the Constitutional Court would come from a much broader spectrum than the present Supreme Court. Members of the bench, bar, civil service and academic community (including, presumably, some non-lawyers) would be prime candidates for appointment.
(7) Since, it is argued, Canada is a bi-national country and since our important national institutions should reflect this fact the Constitutional Court should have an equal number of French and English judges.

Advocates of a Constitutional Court structured along these lines assume that the judges of the Court, before appointment, would be experts in constitutional law. This initial expertise coupled with a case-load consisting of only constitutional cases would result, they believe, in constitutional decision-making of a high quality—certainly better, it is argued, than the decisions being rendered by the current non-specialist Court.

In spite of these suggested advantages, British Columbia believes that there should not be a separate Constitutional Court in the Canadian judicial system. In our view there are two serious disadvantages of such a body.

First, it is often impossible to separate constitutional and non-constitutional issues. Neither can be examined in the abstract. They can be considered only in the context of a concrete fact situation—and many fact situations present elements of both types of issue. We agree with the assessment of former Justice Minister John Turner:

> "We believe also the court should not be compartmentalized. The jurisdiction of the court should be integral or entire and it should not be a specialized body merely hearing constitutional issues. In the adversary process a case of law is a case between two individual litigants and it may involve questions of the civil law and questions

of the federal statutes and items of a constitutional nature all wrapped up together in the same selection of facts and involving the whole panorama of the law."

Secondly, even if legal issues could be separated into constitutional and nonconstitutional issues, British Columbia believes that it would not be desirable to do so—for two reasons:

(*a*) It could result in a great many more public issues of the day being decided by the Court on *constitutional grounds*. If, at an early stage of a case, constitutional issues are separated from the rest of the case and referred to the Supreme Court the Court is precluded from deciding the case on nonconstitutional grounds. And, once the Court is obliged to decide a case on a constitutional basis, this may preclude governments effectively dealing with the matter through a process of intergovernmental negotiation and compromise. Take, for example, a difficult case involving potential federal jurisdiction on the basis of its *broadcasting* power and potential provincial jurisdiction under its *education* power. Perhaps the issue is so crucial that neither level of government can afford to lose the case in its entirety. The present Supreme Court might be able to decide the specific case on a narrow statutory interpretation, administrative law or common law point leaving the broader head-on broadcasting-education conflict for resolution at a later date. This in turn would give the respective governments more time to work out a *political* solution which, by definition, would be a compromise in which neither government would completely lose. This is a good process.

(*b*) There is a value in Supreme Court judges seeing the "whole panorama" of the law. The experience of decision-making in private law cases will make the judges better constitutional decision-makers.

Jurisdiction Limited to Federal Statutes Only?

The present Supreme Court of Canada now exercises appellate jurisdiction in cases involving the interpretation of federal and provincial statutes. There are some lawyers and academics, again primarily in Quebec, who believe that final appellate jurisdiction in cases involving provincial statutes should rest with provincial superior courts. They assert that a provincial superior court with local judges is better able to interpret provincial statutes because of their understanding of the needs of, and experience in, the provincial community. In addition the believe that there is no good reason for a national body to interpr provincial laws. Provincial governments were created, and provinci laws are enacted, to provide localized solutions to localized problem Dissimilar legislative responses to local problems are the raison d'et of provincial governments. These dissimilar legislative responses shoul be encouraged—not discouraged or diluted by allowing a national jud cial body to pass judgment on similar provincial legislation, with th likelihood that those provincial laws will be interpreted and enforced i a uniform fashion.

These arguments have an added dimension in Quebec with its uniqu system of private law. Many Quebec lawyers and academics belie that Quebec's civil law should be interpreted by judges trained in th civil system rather than by the Supreme Court of Canada with only minority of civilian judges.

As far as the interpretation of provincial statutes in the common la provinces is concerned, British Columbia does not believe that the ca for nine separate appeal courts exercising final appellate authority particularly strong. Most of the provinces do not want or need nir different "common laws" in the country—which is what we might g if the Supreme Court of Canada could not play its current supervisor role. Whereas the special features of the civil law in Quebec requi preservation and should not be diluted by inapplicable common la principles, a basic uniformity of interpretation of similar provinci legislation in the common law provinces is desirable. The existence one national appeal court interpreting such legislation contributes si nificantly to the realization of that goal.

Summary of Proposals

The Government of British Columbia recommends:

(1) The existence, composition and jurisdiction of the Supreme Court of Canada should be provided for in the Constitution so that these attributes of the Court will not be subject to unilateral change by either level of government.

(2) There should be a three-stage procedure for appointments to the Supreme Court of Canada:
   (*a*) Consultation between the federal government and the government of the province to decide upon the proposed nominee;
   (*b*) Nomination by the Federal Government;
   (*c*) Confirmation by a reconstituted Senate.

(3) The Supreme Court of Canada should be composed of eleven members. Membership should be based primarily on merit but should be drawn from all the five regions of Canada.

(4) The Supreme Court of Canada should continue to exercise final appellate jurisdiction in constitutional *and* nonconstitutional cases.

(5) The Supreme Court of Canada should continue to exercise final appellate jurisdiction in relation to both federal statutes and provincial statutes.