Department of Justice Canada | Ministère de la Justice Canada

Security Classification – Cote de sécurité

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RAPATRIEMENT DE LA CONSTITUTION: MEMORANDUM

CONFIDENTIAL

November 20th, 1981.

MEMORANDUM FOR THE MINISTER

RE: PATRIATION RESOLUTION - AMENDING FORMULA AND THE SUPREME COURT

It is possible that the treatment of the Supreme Court in the amending formula provisions will raise questions.

Section 40 provides that unanimous consent is required for an amendment to the Constitution of Canada dealing with the matters listed in that section. One of those matters is "(d) the composition of the Supreme Court of Canada".

Section 41(1) provides that the general amending formula (section 37(1)) is to be used for an amendment to the Constitution of Canada for the matters listed therein, one of which is "(d) subject to paragraph 40(d), the Supreme Court of Canada".

The issue that arises is whether the whole Supreme Court Act is thereby entrenched in the Constitution and can hereafter only be changed by constitutional amendment, whether only some sections of that Act are so entrenched, or whether none of the Act is entrenched and subsection 41(1)(d) refers only to section 101 of the B.N.A. Act, 1867.

Section 101 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 the Establishment of any additional Courts for the better Administration of the Laws of Canada."

The first alternative above would be hard to sustain since the Supreme Court Act contains a large number of detailed provisions, for example, dealing with the office of the registrar of the Court, the length and time of the sessions of the Court, payment of costs, interest on judgment, procedure on appeal, etc..

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Also, the Supreme Court Act is not one of the statutes listed either in the Schedule or in section 51(2) as being part of "the Constitution of Canada".

The third of the above-listed alternatives, that is that only section 101 of the B.N.A. Act, 1867 is referred to by the provisions of the amending formula, also does not seem a very reasonable conclusion. Section 101 would have been amendable by the general amending formula without specific reference. Thus, on this interpretation section 41(1)(d) would become redundant and therefore unnecessary, and section 40(d) entrenching the composition of the Court would have no meaning.

It is suggested that the appropriate interpretation is that section 40(d) entrenches the composition of the Court, that is its size, and the requirement under section 6 of the Supreme Court Act that three judges come from Quebec; and that section 41(1)(d) entrenches the existence of the Court as the final Court of Appeal in Canada, but that it does not entrench the whole Supreme Court Act.

This would seem to be borne out by the explanatory notes which accompanied the Premiers' April Accord. That which accompanied what is now section 40(d) reads in part:

> "This clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or Bench of Quebec and are, therefore, trained in the civil law."

That which accompanies, what is now section 41(1)(d), reads in part:

> "This clause refers to all amendments relating to the Supreme Court of Canada except the composition of the Court ... The Supreme Court of Canada is established by a law of Parliament under section 101 of the B.N.A. Act and not by the Constitution itself. This clause anticipates constitutional amendments relating to the Court. Such amendments would apply nationwide."

Roger Tassé