Constitutional Reform

The Supreme Court of Canada

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Government of Canada
Gouvernement du Canada

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Introduction

The Constitution and jurisdiction of the Supreme Court of Canada have been much discussed in recent times in the context of constitutional reform. The discussions have revolved around four principal issues:

(a) the fact that the existence of the Court, its jurisdiction and the tenure of its judges are dependent upon federal statutory law and are not guaranteed in the Constitution;

(b) the method of appointment of members of the Court; the fact that they are appointed exclusively by the federal government;

(c) the size of the Court, and whether there should be any formal recognition of the present informal practice of appointing judges from different geographical regions;

(d) the Court's jurisdiction, that is whether it should be transformed into a specialist body dealing only with constitutional questions, and whether it should continue to hear appeals on questions of provincial law, particularly with respect to the civil law of Quebec.

The *Constitutional Amendment Bill*, tabled by the government in the House of Commons on June 20, 1978, includes proposals respecting these issues. In summary, the proposals are that the existence of the Court be entrenched in the Constitution, provincial governments and the new House of the Federation be given some role to play in the appointment of Supreme Court judges, the size of the Court be increased from nine to 11 members, some degree of formal recognition be given to the present informal practice of geographical appointments, and a special procedure be established for appeals in Quebec's civil law matters.

The first section of this paper, entitled Constitutional Entrenchment, deals generally with the proposal to give the Supreme Court constitutional status. The next three sections, entitled Appointing Mechanism, Composition, and Jurisdiction, deal with the remaining three more controversial issues.

Constitutional Entrenchment

At present the Constitution makes no provision for a Supreme Court other than to give Parliament (in section 101 of the *BNA Act*) a power to establish one and to define its jurisdiction. In exercise of that legislative authority, Parliament established the Supreme Court by Act of Parliament in 1875, eight years after Confederation. The structure and jurisdiction of the Court continue to this day to be provided for only by a federal statute (section 19 of the *Supreme Court Act*) and its judges are appointed by the federal government (section 4 of the *Supreme Court Act*).

For all practical purposes the existence and independence of the Supreme Court is as secure as it would be if it were entrenched in the Constitution, that is, not subject to alteration by Parliament alone. Nevertheless, it is most appropriate for the Court, both as a general court of appeal and as the final court in constitutional matters, to have its existence and role set forth in the Constitution. This is generally agreed by all commentators. The Government of Canada proposed such a change in 1969. During the Constitutional Review process of 1968-71 the provinces and the federal government all agreed that the Supreme Court should have such constitutional status, and the Victoria Charter contained provisions to this effect. The Special Joint Committee of the Senate and the House of Commons on the Constitution, in 1972, also recommended constitutional entrenchment of the Court.

Under the present proposals for constitutional reform, set out in the Constitutional Amendment Bill, entrenchment would not of course occur immediately but once the necessary constitutional amendment processes are applied by agreement with the provinces, entrenchment would be effected. In the meantime, instead of being set out in the *Supreme Court Act*, provisions respecting the Court would be declared by Parliament to be part of the Constitution. When ultimately entrenched, the Supreme Court provisions would not be amendable by Parliament alone but by constitutional amendment procedures requiring the involvement of the provinces—

either the present procedures or a new formula yet to be agreed upon.

Appointing Mechanism

The method of appointing Supreme Court judges has long been the subject of serious discussion. In the view of some people, members of the Supreme Court, as the final judges of constitutional disputes, should not be nominated solely by the federal government. It is clear that the independence of the judges is not affected by the present system of appointment. Nevertheless, it has been widely recognized that the provinces might be given some role to play in the appointment process. The government, in 1969, in its publication "The Constitution and the People of Canada" stated that in its view it would be preferable to have some form of participation on behalf of the provinces. It proposed, at that time, that nominations of potential appointees be submitted for approval to a restructured Senate that would include persons appointed by provincial governments.

The federal and all provincial governments, in 1971, tentatively agreed in the Victoria Charter to a consultative mechanism whereby, in general appointments would not be made without the agreement of the Attorney General of the province from which the judge came. The Special Joint Committee of the Senate and the House of Commons, in 1972, supported this proposal in principle.

Various Mechanisms for Appointments

There are a variety of mechanisms which have been suggested as appropriate for appointing the judges of the Supreme Court. The more important of these will be considered briefly below.

1. *Federal Appointment with Second-Chamber Approval*

As noted above, a mechanism that can provide for some provincial participation in the appointment process is to require that Supreme Court appointments be ratified by the upper house either by a simple majority, or by some special majority such as a two-thirds vote. Models are found in the Constitutions of the United States, Argentina, Brazil and Mexico.

The attractiveness of this mechanism is related to changes made in the composition of the Senate or its successor. If that chamber clearly reflects the interests of the regions, as it is hoped it would do if restructured as set out in the Constitutional Amendment Bill, approval of appointment by that body would mean that all regional concerns would be more evidently expressed in the approval of all Supreme Court appointments. In so doing it would recognize the concern of other parts of the country in an appointment from a particular province.

Of course it is recognized that, by its very nature, a legislative body resorts to public debate and inquiry in ratifying appointments (as does the U.S. Senate). It is argued by some that the attendant publicity does not accord well with our tradition that detachment from public debate and controversy is an essential characteristic of our judiciary. It is said that it is possible for such publicity to destroy the credibility of a potential appointee and thus, regardless of whether his appointment is ultimately approved, the reputation of a judge could be impaired by irresponsible publicity making his appointment undesirable. However, an opposite and more compelling view is that the record of potential judges should be subject to public scrutiny, since only persons of undoubted credibility should be appointed to a position having the importance of a Supreme Court judgeship. According to this view, it is preferable that any "Achilles heel" become public before rather than after a person is appointed. Equally, it is desirable that prospective appointees have an opportunity to answer publicly, any doubts cast on their suitability to be judges, an opportunity which they do not now have.

2. *Nominating Commissions*

Nominating commissions, variously composed, have been suggested as the appropriate vehicle for

nominating Supreme Court judges. Such commissions can be composed of members of the legal profession, members of the judiciary, as well as representatives of the federal and provincial governments and members of the public. (Some of the suggestions that have been made respecting the composition of such a body are listed in the appendix.) Such commissions could nominate a designated number of candidates from which the federal government would make an appointment. Alternatively, such a commission could nominate candidates for the consideration of the federal and provincial Attorneys General who would be required to agree upon one of them; in the absence of agreement, a nominating council along the lines of those suggested in the Constitutional Amendment Bill might select the appointee.

A commission might either be a "national" one selecting candidates for all appointments, or a regional one, constituted on a regional or provincial basis, to select the appointee from that particular province or region.

An advantage of a nominating commission is that the selection of judges would be removed from the political arena, so that neither the federal nor the provincial governments could be accused of choosing judges predisposed to their point of view. It would not turn the Court into a body negotiating the interests of the various governments as it is thought direct appointment by provincial governments would do. (This is discussed in more detail with reference to the next alternative.)

However, such a system of appointment would constitute a departure from our traditional system of political responsibility for judicial appointments: the commission would be accountable to no one, neither the electorate directly, nor to its elected representatives. Yet the governments would remain accountable to the public for the quality of the administration of justice.

3. *Direct Appointments by the Provinces*

Direct appointment exclusively by the provincial governments has been proposed from time to time. There are variants of the proposal which have been discussed, e.g., the federal government appointing one-half of the members of the Court and the provincial governments appointing the other half; or the federal government technically making the appointments but from a panel of candidates chosen by the provincial governments.

Appointment procedures of this kind would probably undermine the Court as a judicial body and undermine the impartiality of the judges. Implicit in such a procedure is recognition and acceptance of the view that the judges do, and perhaps should, represent the interests of the government by which they are appointed. Therefore, it is thought that such a change would likely convert the Court into a body negotiating such interests. The judges would be seen as being appointed, and would presumably feel an obligation, to represent the provinces or regions or the central government (if there were some purely federal appointees) in the same manner as members of arbitration tribunals represent their nominees (e.g., in labour or international arbitrations).

The least attractive of the variations on the methods of direct appointment by provinces is that which suggests the provinces should appoint half the members of the Court and the federal government the other half. It would go the furthest in converting the judicial process into a negotiation process with the Court deciding between federal and provincial interests.

4. *Federal Appointment with Agreement of the Provinces*

Agreement of either all or some of the provinces to a proposed appointment by the federal government is another mechanism.

As noted earlier, the federal and all provincial governments agreed in the Victoria Charter that an appropriate appointing procedure would be for agreement to be reached between the Attorney General of the province from which a proposed nominee came and the federal Attorney General. The Joint Parliamentary Committee Report of 1972 approved of this procedure in principle.

Such a procedure means that the appointment of judges becomes a co-operative venture. The provincial governments are given some but not decisive control over appointments. The federal government is required to obtain the consent of the province; the co-operation of both governments is required, and there is a balance between their respective powers. The Court is not turned into a negotiating body since a unified mechanism for appointment is retained.

The mechanism, however, is open to abuse by obstructionists or to unacceptable delays due to failure to agree. Accordingly, a provision to break deadlocks is required.

The one agreed to in the Victoria Charter was that when agreement could not be reached on a proposed nomination, the Attorney General of Canada would have the right to convene a nominating council to make the choice. The Attorney General of the province would have the right to choose which of two types of nominating council should be convened. He could choose one consisting of the federal and all 10 provincial Attorneys General in Canada or their nominees (11 members), or one composed of the two Attorneys General (federal and provincial) or their nominees and a chairman agreed upon by both of them (three members). In the latter case, if the two Attorneys General could not agree on a chairman, the Chief Justice of the province would choose one. At least three names from among those already submitted to the provincial Attorney General by the Attorney General of Canada would be submitted by the latter to that council for ultimate selection. The first type of council would have the advantage of ensuring country-wide regional input into every appointment but would undoubtedly be more cumbersome. Generally the opposite could be said about the second type of council.

Choosing an Appointment Mechanism

Being aware of the various alternatives mentioned above, the government chose in the Constitutional Amendment Bill the appointment mechanism agreed to by the federal and all provincial governments in the Victoria Charter (modified by the addition of a requirement of ratification by the House of the Federation). The Victoria procedure was chosen because, as noted above, it retains a unified system of appointment, yet it allows for a sharing of authority. Also, the fact that it had already been agreed to in principle by all governments, after considerable discussion, was a crucial consideration.

One difficulty with the Victoria formula, however, can be said to be that it allows the federal Attorney General and his counterpart from a given province to agree on a Supreme Court appointment which is unacceptable to the rest of the country. The fact that all regions of the country have an interest in every Supreme Court appointment was recognized by the federal government in its 1969 proposal suggesting that there be Senate ratification of all appointments. When the 1969 proposal for Senate reform was dropped during the course of the Constitutional Review process of 1968-71, the idea of a ratification procedure also had to be dropped. With the adoption of the proposals for a new House of the Federation in the Constitutional Amendment Bill, however, it was possible to reinstate a ratification requirement. Such a requirement recognizes the fact that all regions of the country have an interest in every Supreme Court appointment.

It should not be expected that a ratification procedure in the House of the Federation will lessen in any way the quality of judges appointed. There is no reason to assume that a well-qualified nominee, already approved by the Attorneys General or a nominating council, will think it necessary or find it advantageous to "campaign" for House approval. Nor can it be assumed, as some commentators seem to do, that less-qualified candidates will somehow be at an advantage in this process. Indeed, fully-qualified nominees will surely more readily accept and welcome the opportunity to have their nominations openly ratified, as an antidote to the innuendos which sometimes emerge in a more closed method of appointment. The quality of judges appointed to the U.S. Supreme Court has not suffered as a result of the procedure of Senate ratification used in that country.

Although the appointment mechanism set out in the Bill seems long and cumbersome, it is not. Its essence is (1) agreement by the federal and appropriate provincial Attorney General on a proposed nominee, and (2) ratification of that choice by the House of the Federation. It is not likely that the deadlock-resolving mechanism of a nominating council will be invoked often; it is to be expected that the Attorneys General will usually be able to reach agreement on a suitable candidate. Indeed, the length of time for the whole appointment process to take place has been shortened considerably from what was agreed to in Victoria by building in strict time constraints. Under the Victoria Charter proposals, the whole procedure could have taken up to 10 months. Under the present proposals, time limits have been imposed to ensure that the whole process, including ratification by the House of the Federation, will normally be completed within two to three months.

The Joint Parliamentary Committee of 1972 stated in its report that while it supported the Victoria Charter proposals, it thought that where the provincial Attorney General and the federal Attorney General failed to agree, both should be able to suggest names to the nominating council. The Joint Committee's proposal has been considered but not adopted since it is thought that such a change would substantially alter the essential features of the appointment mechanism as well as the balance of authority between the two Attorneys General. It would probably turn a reasonably expeditious procedure into a more protracted and cumbersome one. It could be anticipated that the provincial Attorney General would in most cases refuse to agree with the federal Attorney General on all proposed nominees in order to force the use of the nominating council. This is particularly true since the provincial Attorney General would be entitled to choose the type of nominating council to be convened. However, under the scheme proposed in the Bill and agreed to at Victoria, it was expected that resort to a nominating council would be infrequent. Agreement between the two Attorneys General would usually be forthcoming, the provincial Attorney General having the opportunity to suggest candidates at that time. Thus a change as suggested by the Joint Committee would probably convert the appointment procedure from one essentially consisting of agreement by the Attorneys General into one essentially consisting of choice by a nominating council.

Composition of the Court: Regional Distribution And Size

By tradition, three of the nine judges are appointed to the Supreme Court from Ontario, one from the Atlantic region, and two from the West. Three are legally *required* by section 6 of the *Supreme Court Act* to be appointed from the Bench or Bar of the Province of Quebec.

This system of appointment is in part geographic and in part legal. While the judges are appointed from the various regions they are not appointed to act as "representatives" of the provinces or regions. They are chosen in this manner so that they may bring to the Court an understanding of the social and economic nature of the region from which they come. The formal requirement that three judges be appointed from the Bench or Bar of Quebec is to ensure adequate presence on the Court of members trained in the civil law system; those judges are not appointed formally to "represent" the Province of Quebec anymore than the other judges formally represent their provinces.

The question arises whether there should be in the Constitution any formal recognition of the present informal practice of geographic appointment. Related thereto is the question of the size of the Court.

British Columbia in recent years has objected to the fact that the informal system of appointing two judges from the West has resulted in no judge on the Court from British Columbia since 1962, and a "Western" vacancy (barring unforeseen circumstances) is unlikely for some time yet. Consequently, it can be argued that the present composition of the Court does not adequately reflect the importance of the West or parts thereof.

Consequently, there seems to be adequate reason for increasing the size of the Court in order to allow for more adequate regional distribution. Thus, it is proposed to increase the size of the Court from nine to 11 members. In doing so, however, it becomes necessary to increase the complement of Quebec judges from three to four, in order to protect the relative complement of the civil law judges on the Court. Another advantage to increasing the size of the Court is that it can allow for more flexibility in the administration of the Court since there will be an increased number of judges to share the workload.

The Victoria Charter did not contain any express requirement that the judges would be appointed from distinct regions or provinces, other than Quebec. It did stipulate that the requirement for three Quebec judges be constitutionally entrenched. The Victoria proposals did contemplate that the present informal system of geographical appointment would continue, since the appointment mechanism it proposed called for agreement between the federal Attorney General and the "appropriate" provincial Attorney General.

Expressly providing in the Constitution for appointment from the other regions, as well as from Quebec, gives expression to the regional nature of the country. At the same time, it simply converts the present conventional practice into a visible legal requirement. As such, it is part of the philosophy adopted elsewhere in the Bill, the philosophy of articulating to the fullest extent possible our unwritten constitutional conventions. In this way it is hoped that our written Constitution can present a relatively accurate picture of the real institutional framework of our Constitution.

A disadvantage to express regional allocation of all judges is, however, that population changes or other factors at some distant time in the future might make the regional allocation anachronistic, yet being constitutionally entrenched it might be difficult to amend. Therefore, a compromise was adopted: that of requiring "at least" one judge to come from the four common law regions. This builds less rigidity into the Constitution than would be the case if all judges were specifically allocated while at the same time it recognizes that there should be members on the Court from all regions in Canada.

Requiring that "at least" one judge will be appointed from the Province of Ontario does not mean that there is any intention of changing the present conventional practice of appointing three from that province, nor does the requirement that "at least" one judge be appointed from the Prairie provinces mean that only one will be appointed from that region. At present under the *Supreme Court Act*, Quebec is assured three judges while none of the other provinces is assured any. The proposal formally recognizes part of what is present practice with respect to those regions of the country other than Quebec, while leaving the other part to operate informally as at present.

The limited requirements for regional appointment built into the Bill will not detract from finding the best people for the job. It does not differ from present practice, except that opportunity for additional appointments from British Columbia and Quebec are provided for. The requirement is not rigid since it is to ensure "as near as reasonably may be" at least one judge from the designated areas.

As in the past the judges will be appointed from the respective regions, in order to bring to the Court an understanding of the social and economic conditions of the region from which they come, but they will not be appointed as a representative or advocate of that region. It is recognized that to do so would undermine the impartiality of the Court.

Jurisdiction

Two questions relating to the jurisdiction of the Court which arise in any discussion of reform of the Supreme Court are: (1) whether the court should be transformed into a constitutional court, and (2) whether it should continue to hear appeals on matters of (a) Quebec's civil law and indeed (b) provincial law generally.

Why No Constitutional Court?

The proposal for a constitutional court (or the creation of a special constitutional chamber or panel) is often put forward. In the 1950 Federal-Provincial Conference, it was suggested that constitutional or intergovernmental matters should be judged by such a court. At the 1960 Federal-Provincial Conference the establishment of a constitutional court was again discussed. In 1968, during the Constitutional Review process of that year, Quebec proposed the establishment of a purely constitutional court: a court that would deal only with questions involving the interpretation of the Constitution or matters directly related thereto (e.g., distribution of powers, fundamental rights, etc.).

Suggestions for a constitutional court are usually inspired by the West German model which is the only major federation to have such a court, although several European unitary states have such bodies. (Yugoslavia and Austria are federal countries having such courts; Italy, France, Turkey and Cyprus are among the unitary states having constitutional courts.) Constitutional courts developed in Europe, it seems, in response to two factors: the unsatisfactory operation of judicial review respecting constitutional matters in a legal system having no rule of *stare decisis* (i.e., the rule that court decisions are binding as precedents on subsequent decisions), and a belief that decisions on constitutional issues were more a legislative than a judicial function and should not be determined by the judicial process.

The West German constitutional court is composed of 16 judges, eight elected by the upper house of the federation (Bundesrat) and eight elected by the lower house (Bundestag). The upper house is itself composed of representatives of the constituent states of the federation (Länder). The court's jurisdiction comprises political and constitutional questions: actions involving the prosecution of the President or a judge for violations of the Constitution, or other federal laws; actions banning anticonstitutional political parties or depriving individuals of their fundamental rights in cases where these have been misused; disputes between the federation and the individual constituent states; disputes between constituent states; disputes between political parties or deputies; disputes in electoral matters; disputes between the legislative and executive branch of government; questions relating to the constitutionality of legislation (referred to it by a lower court, the federal or provincial government, or one-third of the members of the federal lower house), and questions of fundamental human rights (on petition by individuals). The last two categories comprise the bulk of the court's work.

Usually the term "constitutional court" is used in Canadian debate to designate a court, the *judges* of which have been *appointed by the provinces* (or a percentage appointed by the provinces and a percentage by the federal government) and who are *specialists in constitutional law* and related matters. A model sometimes suggested is a 15-member court with one-third of the members appointed by Quebec, one-third by the other provinces and one-third by the federal government.

As noted above, there are very persuasive reasons for rejecting a court composed of appointees of the various governments since there would be a great tendency for that kind of a body to be appointed, and to consider itself appointed, to "represent" the various governments. This tendency would be even more pronounced if that court's jurisdiction were confined to constitutional issues. It would not likely function as an independent judicial body interpreting the Constitution but more as a body or tribunal negotiating the interests of the various governments.

It is to be noted that in the West German model the judges are not appointed directly by the constituent states but by an assembly of representatives of those states. Indeed the proposal in the Constitutional Amendment Bill which requires agreement between the federal and appropriate provincial Attorneys General on a given appointment would seem to give the individual provincial governments a greater opportunity for direct influence over such appointments than does the West German model.

Additional reasons for rejecting proposals for a constitutional court appear when the practical operation of such a court is examined. A constitutional court could be given jurisdiction over constitutional and related issues once these issues had reached the highest provincial appellate tribunal to which they are entitled to go, or such a court could be given a broader jurisdiction so that any lower court could refer a constitutional issue raised before it to the constitutional court for determination, before the lower court decides finally on the case as a whole. Based on the present experience of the Supreme Court, a constitutional court having jurisdiction of the first kind noted above would hear five to six cases a year (a rather thin jurisdiction). Yet a court having jurisdiction of the second kind would appear to be somewhat impractical.

A court of the second kind seems impractical because our system of law requires that decisions in a case be related to all the factors involved, including the facts and the other relevant law. Experience has shown that more workable interpretations of the Constitution emerge in the context of an immediate and practical application of principle to a real fact situation. An artificial division would be involved in separating out constitutional issues, when they arise in the lower courts, in order to refer them to a special court. This might not be conducive to the sound development of the law or of the Constitution. Also, such a procedure could involve considerable delays in the administration of justice since trial of the case as a whole in the lower court would have to be stayed pending decision by the constitutional court of the constitutional issue. The present method of having all courts decide on all legal issues, including constitutional ones, result in only the most contentious constitutional issues being appealed to the Supreme Court and allows them to be decided in reference to the factual situation and the case as a whole.

As noted above, what is usually meant by a constitutional court is that only those present members of the Court (or others especially appointed for the purpose) having *special expertise* in constitutional law should decide constitutional cases. However, it must be questioned whether "better" constitutional decisions are rendered when they are decided only by constitutional experts. It has long been thought that there is merit in having constitutional issues decided by judges having a broad legal experience. Those eminent jurists who are members of the Supreme Court are chosen for their overall legal ability; the fact that many may not have been experts in constitutional law before their appointment to the Court has not proved a disadvantage. Our system is not one of specialization; we do not require that only experts in criminal law decide criminal law cases, or that only experts in commercial law decide commercial law questions. The technique and skills of adjudicating various legal questions are similar and in fact it is thought to be an advantage to sound constitutional decision-making for judges to have varied experiences and backgrounds.

While not impossible to implement, the establishment of a constitutional court, with jurisdiction on appeal to decide only questions of constitutional and related law, is initially unattractive.

Civil Law Appeals

Another issue of jurisdiction which requires discussion in the context of constitutional reform is the treatment of appeals in matters of Quebec civil law. A large part of Quebec's provincial law concerning private rights derives from French law which in turn finds its roots in Roman law. The corresponding law in the other provinces derives from the English common law system. The French law or civil law, as it is called, differs in concept and approach from the common law. For this reason, it has frequently been suggested that Quebec civil law cases should either be eliminated from the jurisdiction of the Supreme Court or decided by a special chamber or division of the Court composed exclusively of judges of civil law training.

The criticism of the present system may be summarized as follows. The participation of judges of

common law training in the determination of civil law issues, sometimes in the majority, has led to the infiltration of common law doctrines and attitudes in the interpretation and application of the civil law by the Supreme Court with consequent "erosion" of the civil law. A specific criticism is that common law judges have approached the interpretation of the civil code as if it were a typical statute, and reference has also been made to the inappropriateness of the doctrine of *stare decisis*—the ruling force of decisions which establish a binding precedent in subsequent cases—in a civil law system.

It is very difficult to estimate the weight of the charge that there has been an "erosion" of the civil law. While evidence suggests that such effects are rare, the fears and criticisms are certainly real.

The Victoria Charter addressed this concern by providing that where a case came before the Supreme Court involving *a question of civil law and no other question of law*, it should be heard by a panel of five judges, at least three of whom were the civil law judges of the Court. If three were not available, the Court was to have authority to name *ad hoc* judges as necessary from among the civilian judges (judges trained in the civil law of Quebec) serving on the Federal Court or on the Court of Appeal of Quebec. Commentary on that proposal since it was proposed in 1971 has made it clear that such a procedure would be infrequently used since few cases come before the court where only civil law issues are involved. Thus the procedure agreed upon at Victoria has, in the Constitutional Amendment Bill, been modified to take account of this concern.

The procedure set out in the Bill recognizes, instead, that most cases will contain a mixture of issues and a full panel of judges will sit to hear the whole case. However, only the decisions of the civil law judges will govern the Quebec civil law issues arising in the case; all other issues will be decided by the full Court. Of course, in those few cases where only civil law issues arise, only the civil law judges as a practical matter will probably sit since only they can adjudicate on those issues.

No doubt there are some difficulties with the proposal in the Bill. For example, it may not always be easy to decide what is and what is not "a question relating to the civil law of Quebec." This will be a matter the Supreme Court itself will have to decide. But, making such decisions should be no more difficult than drawing distinctions in other areas of law which the Court is continually called upon to do.

It has been noted that when the Court sits as a full bench of 11 members, four of whom are civilians, there will be the possibility of a split decision on civil law issues in which case the decision of the Quebec Court of Appeal would prevail. Also, it has been noted that on occasion the Quebec Court of Appeal sits more than three members and thus it would be possible for a decision by five members of that Court to be overruled by three members of the Supreme Court.

There is no doubt that these are consequences of the provisions set out in the Bill, but the alternative is to have as now a larger number of judges hearing civil law cases, with some being untrained in the civil law. On balance, it seems that the difficulties are not so great that they outweigh the advantages.

It has been suggested that, to be "even handed," civil law judges should not be allowed to decide issues of common law: it is said that "what's sauce for the civil code goose is sauce for the common law gander." This may be so; however, it must be noted that the decision of the common law judges can never be outweighed as can that of the civilians. The civilians always comprise a minority of the Court. Also, the civilian judges have considerable acquaintance with the approach and techniques of the common law since most federal law (laws enacted by Parliament) derives from that system as does some Quebec law. Thus, the civil law judges have an acquaintance with, indeed are knowledgeable in areas of the common law, while the common law judges do not necessarily have a comparable acquaintance with the civil law.

As noted above, the proposal contained in the Victoria Charter provided that a panel of five judges, at least three of whom were civilians, would hear cases consisting of civil law issues alone. When three civilians were not available *ad hoc* judges were to be appointed. The Joint Parliamentary Committee Report of 1972 was not in favour of co-opting *ad hoc* judges from the lower courts. It suggested instead that provinces be given the right to withdraw appeals in matters of strictly *provincial law* (all laws regulating matters within provincial jurisdiction by virtue of section 92 of the BNA Act) from the Supreme Court, vesting final decision on those matters in the provincial Courts of Appeal. It is to be noted that the Committee's recommendation was not merely that questions of Quebec civil law (that derived from French law which concern Private rights) should be removed from the Supreme Court's jurisdiction but that all matters of provincial law could be so removed, by any province if it so decided.

Others also argue that matters of provincial law should be removable, at the option of the provinces, on the ground that it is an anomaly for the Supreme Court to be the final appellate tribunal for the interpretation of provincial law. It is argued that as a matter of principle, judicial power should be divided on the same basis as legislative and executive power; that it is consistent with the exclusive jurisdiction of the provinces over their own systems of law for them to be able to regulate who is to interpret those laws if they so wish.

Thus it is argued that every province should be empowered to provide that no appeal concerning a matter of provincial law should be heard by the Supreme Court of Canada. A case could be disposed of first, in its entirety, in the provincial courts, and then only the non-provincial law or constitutional aspects could be appealed to the Supreme Court. It would be left to the Supreme Court of Canada to decide in any particular case whether the appeal really involved matters other than provincial law over which the Court would have jurisdiction.

Cutting off appeals in matters of provincial law would, however, drastically alter the Supreme Court's jurisdiction. If all provinces acted to restrict such appeals, the Court's jurisdiction would be diminished by approximately 50 per cent. The Court is now a general Court of Appeal for both federal and provincial laws, standing at the top of an integrated system of courts which hears disputes respecting both federal and provincial laws. Removing the Supreme Court's jurisdiction over provincial law appeals would convert it into a court dealing only with federal and constitutional law, comparable to the U.S. Supreme Court. It would no longer stand at the apex of an integrated system of courts. Changing the Court's jurisdiction in this way could be seen as a step towards converting our present generally integrated Court system into a dual one, similar to that of the U.S., where one system of courts primarily hears questions of provincial law and another system of courts primarily hears questions of federal law. While a dual system of courts conforms theoretically to a federal system, it is generally recognized that such systems are often more theoretical than real. Also, they tend to be filled with complexities and delays. In practice legal issues do not come packaged in discrete units so that cases involve only issues of federal law or only issues of provincial law. For example, in the Canadian context, a case might very well involve questions of both bankruptcy law (federal) and contract law (provincial), or of income tax law (federal) and the law relating to succession (provincial). Such systems can of course be made to work as the U.S. system demonstrates, but even there the number of cases of concurrent jurisdiction is numerous and the complexity of the system is often criticized.

When the Joint Committee made its recommendations in 1972, that appeals in provincial law matters might be removed from the Supreme Court, leave to appeal to that Court was as of right for cases involving claims over a certain monetary value. Thus the Court was compelled to hear many cases which really did not involve significant issues of law. Since that time the appeal rules of the Court have been

changed. Now the Court basically only hears appeals when either a provincial Court of Appeal has given leave or when the Supreme Court itself has given leave because the legal issue is one of public importance.

The government has thought that there is merit in retaining our present integrated system of courts, with the Supreme Court at its apex and with that Court hearing issues of both federal and provincial law which involve legal questions of significant public importance. Therefore, it seemed preferable to make provision for special treatment by that Court of issues involving civil law questions rather than providing for the removal of all matters of provincial law from the Court's jurisdiction. At the same time, the latter is an alternative which should be explored and debated in any further consideration of these issues.

Conclusion

The provisions in the Constitutional Amendment Bill which deal with the Supreme Court are largely identical to what was agreed to in principle by the federal and all provincial governments in the Victoria Charter of 1971. Some modifications have been made to those provisions because the content and objectives of the present constitutional proposals seem to require them, or because further study and comment since 1971 indicated that alteration should be made. A requirement of ratification by the House of the Federation was added to the Victoria appointment mechanism to recognize the fact that all regions of the country have an interest in every appointment to the Supreme Court and because it was possible to add such a requirement in the context of a revised second chamber. The present informal practice of regional distribution of appointees is expressly articulated since one of the objectives of the Bill is to structure our written Constitution so that it more accurately describes the actual operation of our governmental institutions. The size of the Court is increased from nine to 11 to allow for better regional distribution. Minor changes were made to the procedures agreed upon at Victoria for the treatment of Quebec civil law issues, to allow such issues to be decided by civil law judges alone, not only when those issues are the only issues in a case but also when they arise in a case containing a mixture of issues. Thus the provisions in the Bill respecting the Supreme Court are basically built on the foundation constructed by the federal and all provincial governments in the Victoria Charter.

APPENDIX

Types of Nominating Commissions

(a) A council consisting of:

(i) a member of the executive council of the province, selected by the Lieutenant Governor in Council;

(ii) a judge of the Appeal or Supreme Court of the province, selected by the Lieutenant Governor in Council;

(iii) three members of the Bar chosen by the federal Attorney General.

(b) A council consisting of:

(i) the Chief Justice of the highest superior court in the province;

(ii) the Attorney General of the province or another member of the provincial Cabinet chosen by that Cabinet;

(iii) another resident of the province appointed by the provincial Cabinet;

(iv) two other residents of the province at least one of whom must be a member of its Bar, chosen by the federal Attorney General.

(c) A council consisting of:

(i) the Attorney General of Canada or person designated by him;

(ii) the Attorney General of the appropriate province or person designated by him;

(iii) the Chief Justice of Canada or next senior judge of the Supreme Court;

(iv) the Chief Justice of the appropriate province or next senior judge of the Court.

(d) A national nominating council consisting of:

(i) the Attorney General of Canada and the Attorneys General of each of the 10 provinces.

Government of Canada Gouvernement du Canada