THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

VOL. XLIII DECEMBER 1965 DECEMBRE NO. 4

A CONSTITUTIONAL COURT FOR CANADA

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I

Until 1949, Canada possessed a final court of appeal, which was independent of both the federal government and the provinces and therefore quite impartial in its approach to the interpretation of the Canadian Constitution. That court was the Judicial Committee of the British Privy Council, which came into existence by an Act of the Imperial Parliament in 1833[1] and was authorised by a further Act of 1844[2] to hear appeals from colonial courts.

The Judicial Committee decisions drastically limited the general powers which the Fathers of Confederation thought they had entrusted to the central government in the Resolutions which led to the British North America Act. This influence of the Committee was seen with much suspicion by the advocates of a strong and expanding federal authority, especially during and after the depression years. There developed in English Canada and even in some sections of French Canada what Dean F. R. Scott has called a "cupboard love of the national government" and a feeling that "security comes more from national policies than from provincial policies".[3] When the Privy Council handed down its famous

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[1] 3 & 4 Will. IV, c. 41. [2] 7 & 8 Vict., c. 69.

[3] A Survey of Canadian Federalism (1952), 4 International Social Science Bulletin 71, 87.

1937 decisions, in particular the *Natural Products Marketing Act* case,[4] the *Employment and Social Insurance Act* case[5] and the *Labour Conventions* case,[6] there was a veritable uprising among the *honoratiores* of the Canadian legal profession. Dean (later Mr. Justice) Vincent C. MacDonald spoke for many when he wrote that the decisions revealed the "necessity of full consideration of the propriety of abolishing appeals to [the] Committee in constitutional cases".[7] As a result, a movement was launched which brought about, within twelve years, the abolition of all appeals to the Privy Council.[8]

S. P. Aiyar, the Indian scholar who has studied federalism in relation to social change, points out that Canadian nationalism —that is, basically Anglo-Canadian nationalism—has influenced Canadian federalism in a direction exactly opposite to that envisaged by the decisions of the Privy Council.[9] The main purpose of the termination of appeals was, in the minds of its advocates, and in the words of Dean W. P. M. Kennedy, "to get rid of all the past decisions of the Judicial Committee, for they will hang round the necks of the judiciary . . . in that uncanny stranglehold with which *stare decisis* seems doomed to rob the law of creative vitality".[10] The Supreme Court of Canada therefore became the final court of appeal in constitutional matters, with all the hopes of English Canada hanging around the necks of its judges.

When this respectable body was created, in 1875, under the authority of Section 101 of the B.N.A. Act, as a general court of appeal in "Common Law and Equity" for Canada, it was not envisaged as the final arbiter in constitutional matters; this role belonged to the Judicial Committee. Having dismissed the latter for lack of understanding of the Canadian Constitution, the federal government was left with a court of its own making composed of judges nominated by the Governor in Council.

It was as if Canada were turning towards the American model

[4] [1937] A.C. 377. [5] [1937] A.C. 355.

[6] [1937] A.C. 326. Note that in the first two decisions, the Judicial Committee merely affirmed the judgments of the Supreme Court of Canada; in the *Labour Convention* case, the Supreme Court of Canada was divided equally.

[7] The Canadian Constitution Seventy Years After (1937), 15 Can. Bar Rev. 401, at p. 427.

[8] S.C., 1949 (2nd Sess.), c. 37, s. 3; Supreme Court Act, R.S.C., 1952, c. 259, s. 54.

[9] Federalism and Social Change (1961), p. 46.

[10] W. P. M. Kennedy, The B.N.A. Act: Past and Future (1937), 15 Can. Bar Rev. 393, at p. 399. See also Report to the Hon., the Speaker of the Senate by the Parliamentary Counsel (W. F. O'Connor) (1939), pp. 11-13.

for inspiration. Since the New Deal, the Ottawa Establishment and many of our scholars have had a tendency to look to Washington for solutions to our own problems, especially in the field of economics. Many features of American federalism, such as grants-in-aid and "co-operative federalism" have simply been transplanted in Canadian soil. Similarly, an American-type Supreme Court and the instrumentalist theories of law, which as Professor Edward McWhinney describes them, "refuse to regard the constitutional text as frozen once and for all and which insist on reading legal rules against a background of social facts in concrete problem situations",[11] have gained favour among the legal profession of English Canada.

It took a few years before French Canada realised what had happened. The operation had taken place under the patronage and direction of the Right Hon. Louis St.-Laurent and this had contributed to smooth things over—but only for so long. Wary French-speaking lawyers and scholars began reading in legal periodicals that the Supreme Court would now be in a position to correct the trends of the past. They understood that the guarantees they had come to expect from the imperial institutions had come to an end. This, along with the partial repatriation of the amending process, which was voted unilaterally by Parliament in 1949, may have been one of the initial factors that launched the profound movement of self-determination which is developing in Quebec.

II

When the Tremblay Commission filed its report, in 1956, it contained three short but revealing pages on the Supreme Court as constitutional arbiter. It recognized that judicial control is essential to the working of federalism. However, the Canadian Constitutional Court, added the report, must be independent of both the central government and the provinces. Quoting K. C. Wheare, the Commissioners felt that the Judicial Committee had performed the function of an independent and impartial tribunal; now that this body was gone, "the last word in settling disputes must not rest either with the general government alone or with the regional governments alone".[12] Unfortunately, they were not very precise as to how this could be achieved and were content with stating

[11] Edward McWhinney, Constitutionalism in Germany and the Federal Constitutional Court (1962), p. 20.

[12] Rapport de la Commission royale d'enquête sur les problèmes constitutionnels (Province de Québec) (1956), Vol. 2, p. 105.

that nominations to the Supreme Court should not be made exclusively by the federal Executive.

It was enough for the Commission, however, to have stated the problem. Basically, it is one of deep distrust towards an institution which, it was felt, was foreign to federalism as well as to the fundamental interests of French Canada. This feeling runs so deep that Premier Lesage, during his first months in office, endorsed fully the position of the Commission. At the 1960 federal-provincial Conference, he said:[13]

> 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.

What are we to do, then, in order to restore the confidence of a goodly number of the Canadian population in the judicial process as a means of adjusting constitutional disputes and, more widely, in the constitution itself? This is no light question, for there can hardly be any allegiance where there is no confidence. I would like to make a few suggestions as to:—(a) the possible status and structure of a future Canadian Constitutional Court; (b) the process by which the members of this body would be selected and nominated, and (c) the attitude of the Court with respect to its role as interpreter of the law.

III

The Constitutional Court should be established under the Constitution and not under a federal statute. As K. C. Wheare puts it, "what is essential to federal government is that some impartial body, independent of general and regional governments, should decide on the meaning of the division of powers".[14] If you have a court which is a federal organ, there is always a danger, as A. V. Dicey remarked long ago, that the judges should wrest the Constitution in favour of the central power; just as a court created by a province would be tempted to wrest it in favour of State rights or interests.[15]

Should the present Supreme Court be modified in order to make it a true constitutional court? Having heard much about the erosion to which the Civil Law has been subjected by the Judicial Committee of the Privy Council and by the Supreme Court,

[13] Conférence fédérale-provinciale (1960), p. 33 (author's translation).
[14] Federal Government (3rd ed., 1953), p. 66.
[15] The Law of the Constitution (10th ed., 1960), p. 159.

I would agree with Professor Paul-A. Crépeau, as to the merits of setting up of separate Common Law and Civil Law chambers.[16] As Professor Louis Baudouin remarked in one of his writings on this subject, English judicial interpretation is at the antipodes from French interpretation and even from the French Canadian view; in reality, it is not French thought which has prevailed in the Supreme Court and, as a result, the thinking behind the Common Law has crept into more than one corner of the Civil Code.[17] The British North America Act is, of course, a British statute and one might argue that what was bad for the Civil Law was excellent for the Constitution. I would answer to this that the English spirit and form of the Act are precisely one of the main reasons which make it foreign to French Canada. I would say that the future constitution of this country will have to make place for the French Canadian legal and political philosophy, both in its fundamentals and in its form. Thereafter, it should be interpreted by a bench composed equally of Common lawyers and Civil lawyers, possibly drawn from the two chambers which were suggested.

However, there might be more to say about a specialised constitutional law tribunal, such as there exists in the Federal Republic of Germany. As Professor McWhinney aptly puts it, it has been "something of a fetish" in the Commonwealth countries that final appellate tribunals should be courts of comprehensive, all-embracing jurisdiction.[18] There is something to be said, indeed, for specialisation in all major fields of the law,—Civil Law, administrative and finance,—as the existence of the Exchequer Court and numerous administrative tribunals shows.

All the arguments in favour of specialisation in these fields become even stronger when the interpretation of such a basic document as the Constitution is involved. It may be argued that this type of specialisation belongs to Continental Europe and is foreign to Common Law countries, but my point is that we would improve our Constitution by adopting the Continental system. As a matter of fact, the Supreme Court of the United States has specialised itself in practice by concentrating almost exclusively on public law cases.

Why not, then, a *Bundesverfassungsgericht* for Canada, which

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[16] Professor Crépeau made this suggestion at the Conference on Federalism and the Supreme Court, Toronto, November 1964.

[17] Louis Baudouin, Conflits nés de la coexistence juridique au Canada, Canadian Dualism (1960), pp. 106, 109.

[18] *Op. cit.*, footnote 11, p. 21.

could either be a chamber within the Supreme Court or else have independent status? All constitutional issues which would arise in any Canadian Court, federal or provincial, would be sent immediately to this Federal Constitutional Court and proceedings would be suspended until a decision was handed down.

IV

An equally important question is: who nominates the judges and what are the criteria for selection? Under the present Supreme Court Act, the federal Executive makes the choice and they are selected on a basis of general experience: ten years as a Superior Court judge or as a lawyer.[19] The only restriction as to choice is that three members of the court must be selected from the Province of Quebec, which means that the civilians hold a third of the seats. Obviously much discretion is left to the federal government in its appointments; a certain element of such discretion would remain under any system. Nevertheless, the criteria should be made more precise and exacting as to scholarship and experience. Perhaps we should look to the provisions of the Austrian and German federal constitutions which set up special constitutional courts: judges are selected not only from the Bench, but from the civil service and academic life as well. If the Canadian court is to be a specialised one, no doubt much would be gained in terms of experience and knowledge by adopting a similar width of choice.

The creation of the Constitutional Court cannot be completely isolated from other essential modifications of the Canadian Constitution. I have said elsewhere that the basic fact about the Confederation of the future is that it should rest on the recognition of the bi-national character of the country.[20] I do not think any stability can be achieved without some kind of constitutional dualism which would establish the legal equality of the two nations at the federal level and the special status of Quebec as the motherland of the French Canadians. If this is so, the Constitutional Court should also be given a bi-national character, the judges being selected in an equal number throughout English Canada and French Canada. This would be a strong element in recovering

[19] Supreme Court Act, *supra*, footnote 8, ss. 4 & 5.

[20] J.-Y. Morin, The Need for a New Canadian Constitution (1964), 44 Canadian Forum 64; Liberté nationale et fédéralisme (1964), 50 Thémis 91; Towards a New Constitutional Equilibrium for Canada, The Banff Conference Papers (1964), p. 45; Crépeau and Macpherson, ed., Vers un nouvel équilibre constitutionnel au Canada, in The Future of Canadian Federalism (1965), p. 141.

the allegiance of the French Canadians to federal institutions.

The judges could be elected by the Senate, if the latter were transformed into a bi-national Upper House, and it could be provided that a two-thirds majority is required in order to obtain election (these suggestions could apply to the Common Law and Civil Law chambers of the Supreme Court as well). Should it be found that the creation of a Constitutional Court can be obtained before other, more far-reaching and pervasive changes advocated in the federal institutions (such as a new Senate), it could be provided that the French-speaking part of the Court would be nominated jointly by the federal and Quebec governments.

V

Once you have settled the status and structure of the Constitutional Court, there remains the basic issue as to whether the function of the court should be to interpret strictly a constitutional document or to adopt the more instrumentalist attitude which tends to adapt the law to changing social and economic circumstances.

Of course, the interpretation of such a basic document can never escape entirely the influence of political circumstances *lato sensu.* However, there should be limits to the discretion of constitutional judges. What has happened in the United States, for instance, is one of the things that must be avoided *in this* country, at least in relation to Quebec. The essential *raison d'être* of federalism, in a bi-national country like Canada, should be to protect the values and rights of the constituent groups and their autonomy, even against the will of the majority group. If you introduce into the Constitution a "principle of growth", such as that which has been developed in the United States, and the techniques of interpretation which are corollaries of this principle, you can have no stability in constitutional matters and no feeling of security, at least in French Canada. The adaptation of the fundamental law to new circumstances should be left to the responsibility of the constituent organ of the federation and of the political arm of the government. If these do not assume this responsibility, it should not be within the province of the Constitutional Court to fill the shoes of the legislator.

What I have said with reference to Canada could well be said of all federations, existing or yet to come. It is the whole future of federalism as an instrument of political integration which could be jeopardised by the instrumentalist technique of interpretation.

Hardly any difficulty will arise where the social, economic and psychological integration of the peoples of a federation is far advanced, such as in Australia, for instance; but perhaps by that time federalism has outlived its usefulness in any case. The situation is much different where the federation comprises distinct ethnic groups which have their own political and social philosophies; in this case, the instrumentalist theories, which usually go hand in hand with the movement towards centralisation, can only bring crisis upon crisis. Similarly, it is open to question whether the prospect of a court which takes too "dynamic" a view of its role will not hinder the birth or shorten the duration of new federations at the international level.