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Article abstract

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Constitutional Procedure and the Reform of the Supreme Court of Canada

W. R. LEDERMAN *

L'auteur nous trace l'évolution de la Cour suprême du Canada créée en 1875 ainsi que des implications pour cette Cour, de la venue de la Loi constitutionnelle de 1982, spécialement des articles 41(d) et 42(1)(d). Il exprime son point de vue quant au nombre de juges qui doivent siéger, aux quotas régionaux, aux méthodes de sélection. Il examine aussi la question de savoir si la Cour suprême doit continuer d'être le tribunal général d'appel au Canada ou si elle devrait se spécialiser en droit public et constitutionnel.

During the later 1970's and the early 1980's Canadians have been actively debating basic constitutional change across the whole spectrum of our federal system and our main governmental institutions. Inevitably, in this debate, the Supreme Court of Canada has come in for its share of attention, because it is the apex of our country's judicial system. It has final appellate judicial power over the interpretation of the laws and the constitution of Canada and the Provinces. It is true that the basic constitutional changes of April 17, 1982, were primarily concerned with patriation of the constitution by putting into effect new domestic amending procedures, and with the establishment of a specially entrenched « Canadian Charter of Rights and Freedoms ». ¹ There were no direct changes to the judicial system involved, but, nevertheless, there were important implications for the courts, especially for the Supreme Court of Canada, in the events of April 17, 1982. In the first place, the Charter of Rights and Freedoms of that date has to be authoritatively interpreted, and the Supreme Court of Canada is the final tribunal of interpretation for this purpose. So the importance of what the

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1. *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11.

Court does has been very significantly enhanced in the country, and Canadians are accordingly becoming more concerned with how well and how effectively the Court performs its high duties in this as well as in other respects.

In the second place, it may be said that the new amending procedures of 1982 have in effect « constitutionalized » the Supreme Court of Canada itself. Originally, the Court was established in 1875 by an ordinary statute of the Parliament of Canada, as authorized by section 101 of the old *British North America Act* of 1867², which reads as follows :

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.

Thus, changes affecting the Court could be implemented by simple amendments of the *Supreme Court Act*³, and, until April 17, 1982, that was indeed the way this was done from time to time over the years. On the latter date, however, the Supreme Court of Canada was named in the new special amending procedures as subject to them. Under Section 41(d) of the *Constitution Act, 1982*, it is provided that any changes to « the composition of the Supreme Court of Canada » require the consent of the Parliament of Canada and the consents of all the legislatures of the ten provinces. Under sections 38(1) and 42(1)(d) of the *Constitution Act, 1982*, any other basic changes respecting « the Supreme Court of Canada » require the consent of the Parliament of Canada and the consents of seven out of the ten legislatures of the provinces, provided the consenting seven have at least 50% of the population of all the provinces.

In other words, on April 17, 1982, certain essential elements of the *Supreme Court Act* of the Parliament of Canada were removed from the ordinary statutory process in that Parliament and were raised to superior constitutional status as indicated. To the extent that it is inconsistent with this result, the original section 101 of the *B.N.A. Act* of 1867 must be taken to have been rendered inoperative on April 17, 1982, by necessary implication. All the provisions of the *Supreme Court Act* as they stood on that date continue, but certain sections of it that are basic now rest upon the superior constitutional foundation afforded by the new and special amending processes in the *Constitution Act, 1982*.

2. *British North America Act* 1867, 30-31 Vict., c. 3 (U.K.), now designated the *Constitution Act, 1867*.

3. The *Supreme Court Act*, R.S.C. 1970, c. S-19. Amendments: R.S.C. (1st Supp.) c. 44; 1974-75-76, c. 18 and 19; 1976-77, c. 25, s.s. 19 and 20. This is the Act as it stood on April 17, 1982.

To be more precise, what are the detailed implications of sections 41(d) and 42(1)(d) of the *Constitution Act, 1982*? To an important degree they are clearly inconsistent with the first part of section 101 of 1867 which deals with « a General Court of Appeal for Canada ». Section 52(2)(a) of the *Constitution Act, 1982* puts sections 41(d) and 42(1)(d) in force from April 17, 1982, because they are part of « this Act ». But also, section 52(2)(b) of the *Constitution Act, 1982* declares that section 101 of 1867 continues in force, with 1867 as its date of origin, because it is included in Item I of the Schedule to the *Constitution Act, 1982*. Thus we end up with specially entrenched constitutional provisions of different dates of origin that are to an important degree simply inconsistent with one another. There is no way restrictive definitions of key words can be used to eliminate the conflict altogether. To the extent of the inconsistency, the respective constitutional provisions of the two different dates cannot live and operate together. In these circumstances, the governing rule of interpretation to solve the issue is that, to the extent of the inconsistency, the later provisions (those of 1982) override and render inoperative the earlier provision (that of 1867).⁴

In detail, I submit that the results of applying this rule of interpretation are as follows:

- (a) The references in sections 41(d) and 42(1)(d) to « the Supreme Court of Canada » are necessarily references to essential sections of the *Supreme Court Act* of the Parliament of Canada as it stood on April 17, 1982.
- (b) The override rule of interpretation just given means that we must now characterize each of the one hundred and two sections of the *Supreme Court Act* as falling into one of three categories.
 - (1) Those sections that have to do with the basic composition of the Supreme Court of Canada. Examples are:

Section 4. The Supreme Court shall consist of a chief justice to be called the Chief Justice of Canada, and eight puisne judges, who shall be appointed by the Governor in Council by letters patent under the Great Seal.

Section 6. At least three of the judges shall be appointed from among the judges of the Court of Appeal, or of the Superior Court, or the barristers or advocates of the Province of Quebec.

4. E.A. DRIEDGER, *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983, p. 226-235. If it is argued that this rule applies only to ordinary statutes and not to entrenched constitutional provisions, I reply that the constitutional provisions in conflict here are formally sections in ordinary statutes of the British Parliament having different dates. Anyway, the rule expresses what is common sense in these circumstances.

Section 9. (1) Subject to subsection (2), the judges hold office during good behaviour, but are removable by the Governor General on address of the Senate and House of Commons.

(2) A judge ceases to hold office upon attaining the age of seventy-five years.

- (2) Those sections that have to do with basic elements of the Court other than composition. Examples are :

Section 3. The court of common law and equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name as a general court of appeal for Canada...

Section 35. The Supreme Court shall have, hold and exercise, an appellate civil and criminal jurisdiction within and throughout Canada.

Section 54(1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada ; and the judgment of the Court is, in all cases, final and conclusive.

- (3) Those sections which are secondary or incidental provisions of the *Supreme Court Act*, having to do with detailed administration or operation of the Court, given that its essential elements have been settled by the sections falling within categories (1) and (2) above. Most of the one hundred and two sections of the *Supreme Court Act* would fall within this residual category, according to my reasoning. Examples are :

Section 8. The judges shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within 40 kilometres thereof.

Section 103. (This section provides that the judges of the Supreme Court, or any five of them, may make general rules and orders regulating procedures, whereby the functions of the Court may be carried out. The full text of the section should be consulted.)

The residual category arises because I am reading section 42(1)(d) of the *Constitution Act, 1982* in a restrained way. It says that the special amending process it calls for applies, « subject to paragraph 41(d) », to « the Supreme Court of Canada ». I am construing this to mean that the special amending process for section 42(1)(d) applies to « basic elements of the Supreme Court of Canada other than composition of the Court ». It does not make sense to

consider that all one hundred and two sections of the present *Supreme Court Act* of the Parliament of Canada are now specially entrenched by the joint operation of sections 41(d) and 42(1)(d) of the *Constitution Act, 1982*. Moreover, this reading down of section 42(1)(d), if that is what it is⁵, has the effect of reducing the extent of the inconsistency between section 101 of 1867 and section 42(1)(d) of 1982. It leaves an important area of jurisdiction still operative for the Parliament of Canada as a matter of ordinary statute by virtue of section 101 of the *Constitution Act, 1867*. But sections 41(d) and 42(1)(d) of the *Constitution Act, 1982* do have their intended effect. They guarantee the continued existence of the Supreme Court by special entrenchment of its basic elements as those elements are manifested in *some* of the sections of the *Supreme Court Act* of the Parliament of Canada as it stood on April 17, 1982.

If I am right in my opinion that I have correctly identified the distinctions to be made, the question arises: Who decides these issues? Under the Constitution, who assigns the respective provisions of the *Supreme Court Act* to one or other of the three categories? The answer is the present Supreme Court of Canada itself makes these decisions. It has the final and authoritative power to interpret the specially entrenched provisions of the constitution that I have been discussing, whenever the matter is properly raised before the court; as it could be, for example, by a reference to the Court by the Governor in Council under section 55 of the *Supreme Court Act*⁶. Unless and until this task is carried out by the judges of the Supreme Court themselves, the Parliament of Canada will not know the extent of its residual statutory power respecting the Court. I have argued earlier in this analysis that some such power remains for Parliament in secondary matters.

This is not a new type of distinction for the Supreme Court of Canada to be making. In the *Senate Reference Case* of 1979⁷, the Court made precisely this kind of distinction between basic and secondary elements of the Senate for purposes of determining the validity of proposed amendments to the nature of that institution by ordinary statute of the Parliament of Canada. The Court distinguished between elements of the Senate basic to Canada's federal union, and what it called «housekeeping» matters.

5. It may be argued that this is not really «reading down»; that rather it is full context interpretation. The context comes from the history of our superior courts in general, and the nature of the combined statutory and special constitutional arrangements usually made for them. Compare provincial superior courts in Canada under section 92(14) of the *Constitution Act 1867*, as modified by sections 96 to 100 of that Act.

6. *A.G. for Ontario v. A.G. for Canada*, [1947] A.C. 127 (P.C.). See also LEDERMAN, «Amendment and Patriation», (1981) 19 *Alberta L. R.* 372.

7. *Reference, Re: Legislative Authority of the Parliament of Canada*, [1980] 1 S.C.R. 54.

I respectfully suggest that there are other considerations that would also help in distinguishing the basic from the incidental concerning the Supreme Court as an institution. We should consult English legal history. The Supreme Court of Canada is pre-eminently a superior court on the English model — the *Act of Settlement* model from the Eighteenth Century — which is our judicial inheritance in Canada. Added to this are necessary powers and functions for our final court because we are a federal country, because we have a specially entrenched *Charter of Rights and Freedoms*, and because we adhere to the rule of law.

Finally on this point, I do not complain about special constitutional status having arrived in 1982 for the Supreme Court of Canada. I welcome it⁸. In the constitutional reform discussions of the late 1970's and the early 1980's, the one thing that was generally agreed upon about the Supreme Court of Canada was that it should be given superior constitutional status, and that it should not be even in form a statutory court. Now this change has been made, so that item is no longer on the reform agenda. But the other items on the reform agenda of the late 1970's and the early 1980's are still there to be dealt with. I refer to the following issues.

- (1) Should the membership of the Court be increased? Are more Supreme Court judges needed to keep up with the work-load of the Court?
- (2) Should there be regional quotas for the membership of the Court? Should each of the main regions of Canada be guaranteed a portion of the total number of judges?
- (3) Should the methods for selecting judges to be appointed to the Supreme Court of Canada be reformed?
- (4) Should the Court continue to be a court of general appellate jurisdiction on all subjects, or should it be specialized in constitutional law and public law?

8. Constitutional authorities do not all agree with my position that the Supreme Court of Canada has been constitutionalized. Professors Ronald Cheffins and Joseph Magnet do agree, though they do not elaborate the analysis to the extent I have done. Professor Peter Hogg disagrees with me. He contends that section 101 of 1867 is still in full force and that the operation of sections 41(d) and 42(1)(d) of 1982 is somehow in suspension. Dr. Barry Strayer (now Mr. Justice Strayer of the Federal Court) recognizes the problem but is non-committal about the proper solution. However, he leans to the same view as Professor Hogg. (At this point, I adopt the words of Sir George Jessel: « I may be wrong, but I have no doubts ».)

See: CHEFFINS, (1982) 4 *Supreme Court Law Review* 43; MAGNET, *Constitutional Law of Canada*, Toronto, Carswell, 1983, p. 39; HOGG, *Canada Act 1982 Annotated*, Toronto, Carswell, 1982, p. 92-94; STRAYER, *The Canadian Constitution and The Courts*, 2nd ed., Toronto, Butterworths, 1983, p. 32-33.

These issues were much discussed in the late 1970's and the early 1980's, and now we should return to them. However, I remind you that basic reforms can no longer be implemented by simple statutory amendment in the Parliament of Canada. A much wider federal-provincial consensus is now needed for change, as specified by the new amending procedures. Unanimous federal-provincial consent is now needed for changes respecting the size of the Court, regional quotas for membership, and probably for changes in the present methods of selection for appointment to the Court.

Since the main purpose of my prepared comments is to lay down a foundation for discussion, I shall only sketch the nature of each of these issues and my own opinions about them, so as not to seem to foreclose further questions and answers.

Concerning the size of the Court, the present full membership of the Court is nine judges. The minimum quorum is five, and often seven judges or the full nine sit. The case load of the Court is heavy, and I understand is showing a considerable increase at the present time. My personal opinion is that the Court definitely needs more judges to share the work. I would say that its size should be increased to eleven, or even to fifteen judges. With a minimum quorum of seven or nine, the fifteen judges would be better able to carry out the vital mission of the Court, to give judicial leadership of high quality to the whole country. The Court performs this function with great distinction now, but if it is to continue to do this in the face of an increased number of important appeals pressing for attention, more judges are needed⁹.

As for regional quotas respecting membership in the Court, I consider them inevitable and necessary in a federal country like Canada. The Province of Quebec is at present guaranteed three of the nine appointments by the terms of the *Supreme Court Act*. As I explained, this provision is now specially entrenched and so could not be changed without the consent of Quebec, the consent of the other provinces of Canada, and the consent of the Parliament of Canada. The other quotas are customary only and are thus outside the formal constitution. Under them, the Atlantic Provinces usually have one judge, Ontario three judges and the Western Provinces two judges. Given the independence of each of the judges as guaranteed by their security of tenure in office, I do not think the regional quotas are prejudicial to the proper functioning of the Supreme Court of Canada. Indeed, they improve the Court as the final judicial tribunal for our federal country¹⁰.

9. See : LEDERMAN, « Current Proposals for Reform of the Supreme Court of Canada », (1979) 57 *Can. B. R.* 688. Reprinted in my collected essays : *Continuing Canadian Constitutional Dilemmas*, Toronto, Butterworths, 1981, 213.

10. See footnote 9.

The third issue I listed asks whether the methods of selecting persons to be appointed to the Supreme Court of Canada should be reformed. The present method, specified in section 4 of the constitutionalized *Supreme Court Act* is in effect selection and appointment by the Governor in Council, that is, by the Federal Cabinet of the day. In fact the process whereby the Federal Government of the day settles on a person to be appointed to high judicial office, in the other high courts of the Country as well as in the Supreme Court of Canada, has been secretive and mysterious, at least so far as ordinary members of the public are concerned. Everyone would agree that, in the words of a recent Special Committee of the Canadian Bar Association on the Constitution, we should seek for the Courts generally, and especially for the Supreme Court of Canada, the best and most sensitive judicial minds the nation has to offer. But it is far from obvious how best to do this.

My own view is that the process should be less secretive than it is now and more collegial, but that also it should be kept within the mainstream of the public politics of our parliamentary bodies at both the Provincial and the Federal levels. It may be that, if the Canadian Senate were to be reformed in appropriate ways, then ratification there of nominations for high judicial office by the Federal Government of the day might be required. This is done in the Senate of the United States. Or, special official nominating councils might be composed to recommend suitable persons for high judicial office to the Federal Cabinet. The federal government might be confined as a matter of law, or at least as a matter of usual practice, to appointing from the recommended list. I favour the idea of a judicial nominating council myself, but there are many issues about exactly how it might be composed to ensure that the public interest would be uppermost and bias toward the governing federal political party neutralized¹¹. I emphasize that, in considering these issues, I am talking of systems and their implications. No disparagement of any Supreme Court judges past or present is intended. The Supreme Court of Canada has been and is now a very distinguished judicial tribunal that has served the country well indeed. The questions we are considering are whether it could be made even better and more effective by some well-calculated reforms to its constitution.

Finally, there are issues whether the Supreme Court of Canada should continue to be the final court of general appellate jurisdiction for the country on all subjects, or whether it should be specialized in constitutional law and public law. Certainly it should continue as the final court in important

11. See footnote 9.

constitutional issues concerning the federal division of legislative powers and the *Canadian Charter of Rights and Freedoms*. Also, there are other critical issues concerning the rule of law itself that should reach it. However, I believe the Supreme Court will perform these vital functions better if it also remains a general appellate tribunal on most if not all other legal subjects. This is because the vital constitutional and rule of law issues, when they do occur, themselves arise in contexts that range over the entire legal system. No one can be perfect as a generalist in the law, but I respectfully submit that the Supreme Court judges are better able to perform their functions if they keep their hands in, so to speak, by the making of decisions which from time to time range over the whole of the legal and constitutional system.

There are certain further points to be made about jurisdiction, which I express in words I used when writing about the matter in 1979¹².

Moving on now from special constitutional issues, we find that there are other respects in which final judicial decisions with country-wide impact are essential or at least highly desirable. The case is obvious for such uniform and final interpretation of important issues arising from regular statutes of the central Parliament of Canada, for example the Criminal Code. At present about twenty-five per cent of appeals decided by the Supreme Court of Canada are criminal appeals. But what about provincial statutes on subjects assigned to the provincial legislatures, and the corresponding matters covered by the common law in the common law provinces and by the Civil Code in Quebec? One of the purposes of a federal constitution is to continue old diversities and to permit new ones, province by province, in these respects. Does it not follow then that the several provincial courts of appeal are the proper final tribunals for issues arising under valid provincial laws in their respective provinces? There is considerable force in this proposition up to a point, but only up to a point. Because many transactions and relations are inter-provincial, though based on provincial laws, relevant precedents from a final national appellate court are at least in the highly beneficial category.

Among other things, we are now touching upon problems of private international law (alternatively known as the conflict of laws). For example, contractis generally a provincial legislative subject, but in a private commercial transaction between a resident of Ontario and a resident of Quebec, is Ontario law to be applied or Quebec Law, where the respective provincial contract laws differ critically in the result they would mandate for the two parties? The rules of conflict of laws have been developed, mainly by the courts, to resolve these complex and difficult problems. Thus, in the example given, if the transaction is more closely connected with Quebec than Ontario, Ontario courts as well as Quebec courts will apply Quebec contract law, and so the results of action in court in either province would be the same. The converse proposition is true if the transaction were more closely connected with Ontario than with Quebec. But this beneficial reciprocity depends on a uniform definition in the conflict of

12. See LEDERMAN, collected essays, footnote 9; Chapter 11, p. 215–217.

laws rules of what constitutes « closer connection » for each province. To ensure this uniformity, interpretation needs in the end to be in the hands of a final national appellate court which can issue precedents binding for all the provinces in this respect.

We have just been speaking of an inter-provincial situation where the applicable provincial laws are different. But also there are other inter-provincial situations where the applicable provincial laws are the same. For example, in the areas of company law or insurance law, the statutes of different provinces frequently have common provisions. There are a great many inter-provincial relations and transactions between persons to which such uniform laws are relevant, and hence it is beneficial to those persons to have one consistent national interpretation of their meaning. In our system, the appropriate final appellate court for this is the Supreme Court of Canada.

Now we may look again at the proposition stated earlier that, up to a point, it is logical for the provincial court of appeal to be the final court for the province concerned on issues arising under provincial laws. Almost invariably this would seem to be proper when a given case raises issues only under provincial laws and the determination of them would have no wider significance beyond the boundaries of that province. To a large and growing extent, this is already the position, because such a case is most unlikely to be accepted for appeal by the Supreme Court of Canada. Since 1975, in most types of cases, a litigant must have the consent of the Supreme Court of Canada, or that of the provincial Court of Appeal involved, before being permitted an appeal to the Supreme Court of Canada. Usually this means the consent of the Supreme Court itself, after a brief hearing of the would-be appellant by three judges of the court. Unless the applicant for leave to appeal can show very quickly that some issue of genuine national importance is involved in his case, he is refused leave and the decision of the provincial Court of Appeal concerned stands as the final disposition of the case. So, referring to points made earlier, we find that leave to appeal is almost certain to be refused if (i) the issues in the case arise under the provincial law only, (ii) there is no basic constitutional question about the original validity of that law, and (iii) there are no inter-provincial dimensions to the case in terms either of private international law or uniformity with the provincial laws of other provinces.

This concludes my comprehensive overview of principal issues concerning reform of the Supreme Court of Canada. The purpose has been to provide a background for discussion. Of course there is much more to be said, but space and time do not permit that in this paper.