

SPECIAL SERIES ON THE FEDERAL DIMENSIONS OF REFORMING THE SUPREME COURT OF CANADA

Supreme Court Appointments: By Parliament, Not PM; and Shorter

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The role of a Supreme Court for Canada has been played, in varying measure at varying times, by three distinct institutions. In this as in some other respects, for Canada as for many countries, the reality of the public business differs from the words of the Constitution.

Canada was created in 1867 “with a Constitution similar in principle to that of the United Kingdom”. That statement of the BNA Act was, on the surface, nonsense. The U.K. was at the time a strictly unitary state; its Parliament was in all matters supreme. Canada, however, was to be a federation, its Parliament limited by the “exclusive powers” conferred on provincial legislatures.

Except ... The founding genius of the new nation had no intention that its government should be hampered by lesser legislatures. Their powers might be listed as extensive and exclusive, but Sir John A. Macdonald had his version of a “notwithstanding” clause to ensure that provincial politicians never had the final say on anything that the national authority considered important. Every provincial statute had to be sent to Ottawa, where the Cabinet had a year within which to decide whether to let it be or make it null by Order-in-Council.

Thus, from the provinces’ viewpoint, the federal government was like a Supreme Court sitting over their legislation, though a court bound not by judicial interpretation of the law but by political judgement of the national interest.

Except, again ... Even Macdonald could not out-manoeuvre all the lawyers. The BNA Act was a U.K. statute, subject to judicial interpretation at Westminster. In the British style of parliamentary supremacy, that meant by the Law Lords of the upper chamber, comprising the oddly named Judicial Committee of the Privy Council. They were men in the small government mode of Britain at the time, not in tune with an activist government creating railways, erecting tariffs, subsidising immigrants, for the development of a new Dominion from sea to sea.

The British Lords might have responded differently if it had been Quebec that led the charge against federal suzerainty, but for most Quebecers Ottawa, where they had votes, was more palatable than Westminster. The champion of provincial rights was the English ex-colony of Ontario, whose politicians found in the Law Lords the most willing of allies. The provinces were soon given all the jurisdiction that dedicated judicial interpretation could squeeze from the language of the BNA Act. The intent of its founding fathers was perverted.

The Lords were ingenious. One of their ways of inflating provincial powers was to interpret away the distinction between direct and indirect taxation. Nevertheless, they could not throw out the federal power to disallow provincial legislation. It was too plainly worded for even the most far-fetched interpretation to get round it. But our federalism had been made so decentralised, provincial authority so enlarged, that exercise of the power became increasingly impracticable politics. Disallowance withered to complete dormancy sixty years ago.

By then the Lords had done their work on the BNA Act and could be retired from Canada. Our own Supreme Court replaced them as the ultimate arbiter. For three decades, however, the change had little political significance. Decentralisation had gone as far as was constitutionally possible. The political mood was for a shift the other way, to a more active national government, but there was little wish to go to Westminster for constitutional amendments. The war-time precedent of unemployment insurance was followed only for OAS (old age security) in 1951. Otherwise nation-wide measures were established by federal subsidisation of provincial programs. Some provincial governments grumbled that their priorities were thereby distorted, but that did not

prevent them from using money for which they did not have to impose the taxes. Neither then nor since have provinces (other than, at times, Quebec) tried to challenge the federal spending power.

In this situation the Supreme Court was a quiet place, its composition of little political interest, until in 1982 the Charter of Rights and Freedoms destroyed for Canada the supremacy of Parliament. The basic constitutional principle that John Hampden and many others had fought and died to establish in Britain disappeared on this side of the Atlantic. Parliament and provincial legislatures became subject to the Court, in the sense that their laws must conform to the Charter as the justices interpret it.

Again, except ... The “notwithstanding” provision makes it possible for Parliament and legislatures to sustain what they have enacted despite the Supreme Court’s disapproval.

Except, yet again ... This provision is, outside Quebec, of virtually no account. In 27 years the federal government has never used it. Even the most notoriously irresponsible of the Court’s opinions has gone for years uncorrected. In consequence, any person from anywhere has only to set foot in Canada and ask for residence in order to become entitled in advance to the legal rights of a resident when asserting a claim to be in danger of mistreatment or deprivation elsewhere.

The result is not only to distort the rational immigration policy so important to Canada. It is also a gross, uncaring injustice to the most deprived victims of violence and oppression who have no way to set foot here. Yet no government has had the courage to use, no opposition to urge, Parliament’s power to correct the folly of the Court.

The reason is all too plain. The mistakes of politicians are frequent and often exaggerated by the media. Those of justices are somewhat fewer and much less apparent. The Court therefore stands considerably the higher in public esteem. Confrontation with it is unlikely to be politically rewarding. And this is reinforced by the contorted form of the notwithstanding clause that was wrung from a reluctant Trudeau. In effect, Parliament (or a legislature) must “expressly” recognise that the Court is correct in ruling that an item of existing legislation does not conform with the Charter. It can then pass new legislation to keep the previous law operative. But this special measure is inferior to normal legislation. It is not permanent law, effective indefinitely unless Parliament takes some new initiative. It is good for only five years, then dies unless it is enacted again.

This contorted formulation was clearly designed to discourage use of the notwithstanding provision, and it has succeeded. It does not effectively preserve the supremacy of Parliament, of elected democracy. To do so, two amendments are required. First, it should be clear that no judicial finding automatically invalidates an existing legal provision or practice. Rather, it should be notice from the Supreme Court to Parliament (or the relevant legislature) that a legal change should be made within some defined period, normally no more than a year. Second, if elected politicians choose instead to use the notwithstanding provision, that law should be as good as any other; that is, it should have no time limit but stand until repealed or amended.

Those may be dismissed as formalistic changes. They certainly would not produce a mass of “notwithstanding” legislation. They would undo a subterfuge. The 1982 Constitution was supposed to be a commendable Canadian compromise, safeguarding the rights and freedoms of Canadian citizens without destroying their ultimate authority to assert, through their elected representatives, the collective interest of people in society.

That compromise in principle was the wisdom of the politicians of the time, but it seems that the lawyers who contrived the detail were determined to minimise the concession of judicial prerogative. They certainly succeeded in wrapping the notwithstanding provision in the shrouds of shame-faced burial for an unwanted progeny. Another generation of politicians should at last bring it into the open and free it for effective use when the public interest requires assertion over the occasional folly of justices.

Yet that is the lesser item of the business that the 1982 constitution-makers left unfinished. The major item is how the justices of the Supreme Court are appointed.

They are unique among public officials of such great authority. Others of comparable importance are in some way accountable, either to electorates directly or indirectly through those who are. A member of the Supreme Court, once appointed, is independent of everyone, of everything except his or her personal understanding of Canadian law.

So it should be. The independence is crucial to a free society. Equally crucial, therefore, is how this unique independence is bestowed. How does a democracy select the few people best fitted for such responsibility? In nothing is it more important not only that justice be done but that it be seen to be done in a manner that merits public trust.

As yet there has been no such visibility. The appointment of a Supreme Court justice remains the prerogative of the Prime Minister of the day. How wide are the consultations that precede the decision, what considerations are weighed, what alternatives considered: all this is obscure. No doubt Prime Ministers always consider carefully, but they decide by their own lights, in their own styles.

This is, of course, a hangover from the days when the Court's proceedings were of little general import and only some major scandal or demonstration of massive incompetence would have roused wide interest in the subterranean way justices come to be. But the continuation of that way became an undemocratic enormity when the Court was elevated to a major role in our public business.

Initially, the fault could be attributed to an accident of personality, to the dominance of a remarkable politician. Trudeau's determined dedication to the Charter was joined with scant regard for most of politics and its practitioners. Willing as he was to upset many applecarts, the existing concentration of authority in the Prime Minister was to him the natural order of things. Amid the constitution-making turmoil of 1981 there were no voices strong enough to say him nay.

That does not explain, however, the inertia that has now sustained the Prime Ministerial prerogative for 27 years of Supreme Court activism. As in many other areas of public policy, reform loses the name of action in the quagmire of federal-provincial confusion. The prominent objection to the present appointment process comes from provincial governments. Since the Supreme Court rules on their legislation as well as Ottawa's, they can reasonably claim that the premier of the province from which a justice is to come should share in the making of the appointment. The Mulroney government, desperate to change "Trudeau's constitution", was willing to concede more than a share. If the Meech Lake "Accord" had held, the provinces would have gained primacy. The relevant province would have listed a few lawyers it considered acceptable to fill a vacancy; the Prime Minister's prerogative would have been reduced to picking one of them.

Few compromises have been more plainly flawed. There was no mechanism to resolve the deadlock if, for example, a PQ government nominated only declared separatists for a Quebec justice on the Court. Short of that extreme, disagreements between federal and provincial governments of different stripes could well introduce partisanship inappropriate to judicial appointments.

The underlying issue is broader. Even if partisanship were always shunned, shared responsibility would do nothing for democratic accountability. On the contrary, it would be yet another addition to the confusion of federal and provincial responsibilities that so often militates against decisive public policy. The Supreme Court is a federal institution. To convert it to another neither-one-thing-nor-the-other is not the way to ensure responsible quality in its functioning.

Nevertheless, it remains true that provincial governments have an entirely valid objection to appointments solely by the leader of whatever federal party is the government of the day. The cure is not, however, to muddy the water with the leaders of provincial parties. The cure is to take appointment to the Supreme Court out of the hands of all governments, federal and provincial. It should be where democracy places national sovereignty. That is in Parliament as a whole, not one side of it. Judicial review now somewhat qualifies, but in no way destroys, the basic role of Parliament. It remains the authority higher than the Supreme Court. It is therefore the one body that can appropriately take responsibility for appointments to the Court.

That is recognised, after a fashion, in the kind of reform most often discussed, that the Prime Minister's appointee be submitted to questioning by a parliamentary committee. The suggested procedure is shaped, however, by desire to avoid the intensely partisan grilling that comes with the power of the U.S. Senate to confirm or reject presidential nominees. The alternative presumes that Canadian MPs will be polite provided they are powerless. That is, the justice chosen by the Prime Minister would be open to questioning but not to rejection. The hearing would matter only in the unlikely event that it led the Prime Minister, in his wisdom, to change his mind and cancel the appointment. The clumsy process would risk overt partisan debate while keeping the monopoly of power intact.

The change with which the Harper government toyed in 2008 would have been a shift of initiative. The review of candidates would have started with a parliamentary committee charged to produce a short list of three. The Prime Minister would presumably have then limited his choice to which of the three he liked best. This procedure would almost certainly have been divisive without achieving any reform of principle. The Prime Minister's prerogative would have been restricted but not removed. It is not surprising that there was hardly a squeak of protest when the proposal was dropped and the latest justice appointed like his predecessors.

Reform will be substantive only if it entirely removes government from the appointment process. The problem is to transfer the authority to the House of Commons, where it properly belongs, in a way that rules out partisanship. Suppose, for example, that when a vacancy is pending, the Commons should by motion authorise a special committee to which it delegates the appointment. Each recognised parliamentary party would be authorised to appoint one of its members to the committee. They (at present the four) would ask the Canadian Bar Association to nominate a chairperson acceptable to them all. The normal selection process, privately reviewing candidates, would proceed until there was an agreed short list. Three might be the normal number, but it could be more or less. Each would then be interviewed by the committee in public. Its final choice would always be unanimous, in the sense that the members and chair would be bound by the Commons, in the terms of their appointment, not to say otherwise. While the choice

would be, formally, a recommendation, it would be as binding on the Governor in Council as the Prime Minister's appointments have hitherto been.

This suggestion may be improved upon, but it establishes the crucial point. Supreme Court justices can be appointed by MPs collectively, with democratic authority, through a procedure as free from partisanship as is ever possible. It would show that MPs can be more than automatic cheer-leaders or yapping critics of government, that they can work together not only in vague, do-good rhetoric but in a specific item of major national business.

Such a change in the way appointments are made could well be combined with a simpler reform to strengthen the Court. Retirement at age 75 now ensures that it is well endowed with the wisdom of experience. There is equal need for lively minds in tune with the changing norms of our society. The two requirements are at present hard to balance. Unless appointees to age 75 are people already well into their sixties, the turnover of membership is slow; the refreshment of change comes rarely to the Supreme Court. A more consistent combination of talents would be achievable if appointment was for a term of, say, 15 years, or to retirement at age 70 if that came earlier.

A somewhat younger and more flexible Court, looking more in tune with current attitudes, would enhance the public respect that the Court generally merits but which grows harder to maintain in an increasingly questioning society. It would complement a parliamentary procedure for appointments that could do much to restore the respect for politicians which has been of late so greatly impaired. And at the same time the muddle in the relationship between Parliament and Court could be removed by clarifying the notwithstanding power.

That package of three related reforms would be solid progress towards a Canadian federalism more able to cope with the contemporary demands on public policy.