

THE SUPREME COURT APPOINTMENTS PROCESS: IMPROVED FEDERAL-PROVINCIAL RELATIONS VS. DEMOCRATIC RENEWAL?

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I. INTRODUCTION

As Harvey Lazar has perceptively observed, there are two distinct institutional reform agendas underway in Canada which are being pursued independently of each other, and whose interconnection remains unclear and urgently needs to be explored. The first is the so-called democratic renewal agenda, and the second is the effort underway to improve intergovernmental relations (IGR), principally between the federal government and the provinces. I want to argue that these two agendas, as they have been framed thus far, are deeply in tension, because they point in opposite directions with respect to the relationship between executives and legislatures. Without sorting out this tension, one agenda will likely prevail over the other. For example, in the case of the reform of the Supreme Court of Canada appointments process, the democratic renewal agenda has prevailed over the IGR agenda, notwithstanding that Supreme Court appointments have long been of concern to the provinces. To achieve gains for both democracy and federalism, governments must become institutionally creative and adopt hybrid mechanisms of decision-making. If they do not, improving Canadian federalism and enhancing Canadian democracy will be at cross-purposes.

II. FRAMING THE QUESTION

The idea that Canadian democracy needs renewal, and that our institutions of Parliamentary democracy are in dire need of reform, captures a number of distinct but related policy initiatives. Ontario's Democratic Renewal Secretariat, for example, has a sweeping agenda which includes electoral reform (e.g. alternative

voting systems, campaign finance reform, fixed election dates), reshaping the operation of the legislative assembly to enhance the power of individual members (e.g. enhanced committee powers, weaker party discipline), increased transparency and accountability in the workings of government (e.g. extension of freedom of information legislation, value-for-money audits in universities, hospitals and schools) and increased citizen engagement (e.g. a citizens' assembly to redesign electoral democracy in Ontario). Democratic renewal is currently on the political agenda in several provinces (British Columbia, Ontario, Quebec, New Brunswick) and at the federal level. Although the scope of these initiatives varies across jurisdictions, they share a common goal -- to re-engage a citizenry that has grown detached from our democratic institutions and electoral politics.

Alongside the democratic renewal agenda, Canadian governments are also in the process of launching a "new era" of intergovernmental relations (IGR), precipitated by the election of Premier Charest in Quebec and the accession of Prime Minister Martin in Ottawa. The new IGR agenda is defined as a deliberate and dramatic departure from federal-provincial relations in the 1990's. The 1990's is described as being characterized by conflict and federal unilateralism. The oft-cited example is the introduction of the Canada Health and Social Transfer (CHST) by the federal government in 1995, which fundamentally altered the landscape of fiscal federalism without advance notice to or consultation with the provinces. The new IGR agenda responds to the legacy of the 1990's in an interesting way. The fiscal decentralization of the federation could have been used as the starting point for an exercise in further disengagement and disentanglement, consisting of a careful definition of the respective spheres of federal and provincial jurisdiction into the watertight compartments of classical federalism, followed by the reallocation of revenue raising powers to match policy responsibilities. Instead, the new IGR agenda promotes intergovernmental collaboration and cooperation through various forms of joint decision-making. The Council of the Federation, created in December 2003, promises to serve as forum for

joint provincial/territorial (P/T) decision-making, both to address issues lying within P/T jurisdiction (e.g. barriers to inter-provincial economic mobility arising from divergent regulatory standards) and to formulate common negotiating positions vis-à-vis the federal government. However, the agenda is broader than that. Thus, the renewed First Ministers' Meetings (FMMs) can be understood as vehicles for joint F/P/T decision-making – witness the Health Summit in September 2004. And the institutional permutations are not limited by past practice. For example, they can even include municipalities, such as the F/P/M table on immigrant settlement issues involving the City of Toronto.

Although both institutional reform agendas are currently underway, little thought has been given to how they should interact. Thus, the improvement of IGR has been pursued without much thought to how considerations of democracy should influence our choice among various options on the table, and vice versa. I think that this way of structuring the relationship between the two agendas – one of utter and complete disconnection, exemplified by how policy practitioners in these areas conceptualize the terrain – is deeply mistaken. As the Supreme Court of Canada observed in the *Quebec Secession Reference*, federalism and democracy are two pillars of our constitutional structure, neither of which takes priority over the other. Both democracy *and* federalism are integral to making sense of our legal and political practices. And so the most attractive account of each incorporates the other – so that, for example, the best account of what our democracy should aspire to must take to heart our commitment to federalism.

Accordingly, I want to suggest that the following pair of premises serve as the starting point for approaching the problem of how the IGR and democratic renewal agendas should relate to one another. First, our federation is a *democratic* federation, because the constituent units of Canada are Parliamentary democracies. As a consequence, one cannot fully understand federalism and assess efforts to improve it without understanding the relationship of

federalism to democracy, and the impact of changes to the workings of our federation on the functioning of our Parliamentary institutions. Second, our democracy is a *federal* democracy, so that one cannot fully understand Canadian democracy and understand efforts to improve it without exploring the relationship of federalism to democracy, and the impact of changes to the workings of our democracy on the functioning of the federation.

This way of framing the question highlights a serious problem – that the IGR and democratic renewal agendas are deeply in tension. It is not hard to see why. The combination of Parliamentary democracy and federalism, as Donald Smiley famously observed, lead to the rise of executive federalism. Executive federalism has enhanced the power of executives with respect to legislatures, and has diminished the relative role of legislatures in determining policy outcomes. The IGR agenda can be understood as an attempt to make executive federalism more efficient and effective, by institutionalizing it and increasing its importance in public policy formation. The Council of the Federation, for example, is a P/T body to facilitate interaction and joint decision-making among provincial and territorial executives. Provincial and territorial legislative assemblies have no role in the Council of the Federation's operations. And so the IGR agenda, if successful, will further diminish power of legislatures.

But the democratic renewal agenda has one of its central goals the resurrection of Parliamentary democracy, through measures that redistribute power from executives to legislatures. Consider the reforms announced by the federal government with respect to the functioning of the House of Commons. These include the loosening of party discipline, for example, by limiting the use of a three-line whip to matters of confidence and other matters of fundamental importance to the government. As well, the federal reforms encompass the strengthening of the role of committees in the legislative process, by proposing to send a large number of bills subject to a one- and two-line whip to committees for serious and substantive

scrutiny. Moreover, the reforms have increased the opportunities for private members bills to reach the floor of the House of Commons. Taken together, the goal is to make legislative input into policy development more meaningful, and to loosen the control of the executive on the legislative process.

Put together, the IGR and democratic renewal agendas point in different directions – the former striving to perfect executive federalism, and the latter seeking to diminish executive power. The arena of conflict will be legislative assemblies, whose very visibility could serve to highlight how these agendas, as currently framed, do not sit comfortably together. Policy practitioners need to address how to reconcile this conflict, in a way that improves both the practice of democracy and federalism in Canada, instead of enhancing one reform initiative at the expense of the other. To illustrate what may happen if they do not, for I want to explore the recent round of constitutional politics surrounding the process of Supreme Court of Canada appointments.

III. SUPREME COURT APPOINTMENTS: A CASE STUDY

Appointments to the Supreme Court of Canada have long been on the agenda of constitutional reform. Although the *Constitution Act, 1867* did not create the Supreme Court, s. 101 authorized Parliament to create a “General Court of Appeal for Canada”. Parliament exercised this power in 1875 to create the Supreme Court. Since the Court’s inception, the power to appoint the justices of the Court has rested with the federal executive. The current version of the *Supreme Court Act*, for example, vests the appointing power in the Governor in Council – in effect, the Prime Minister. As Justice Minister Irwin Cotler recently explained, the process has evolved to involve informal consultations with the Chief Justice of Canada, the Chief Justice(s) of the court(s) of the province(s) in which there is a vacancy, the relevant provincial Attorneys-General, and senior members of the legal profession.

Until 1949, the Judicial Committee of the Privy Council was Canada’s final court of appeal, and as a consequence, the process of Supreme Court appointments was not a major issue in the politics of constitutional reform. However, with the abolition of appeals to the Privy Council, the Supreme Court became Canada’s court of last resort. Although the Supreme Court is a court of general jurisdiction and not a specialist constitutional court, and therefore hears appeals on a broad range of civil, criminal and commercial matters, a disproportionate share of its docket has been occupied by constitutional cases. Prior to the enactment of the *Charter of Rights and Freedoms* in 1982, the Court’s constitutional jurisprudence was largely confined to the enforcement of the federal division of powers. And indeed, over the years, many federal-provincial disputes ended up before the Supreme Court on a broad variety of issues, ranging from natural resource policy, broadcasting, agricultural marketing, to the environment. Indeed, even fundamental questions going to the heart of the Canadian constitutional order, such as the process surrounding constitutional amendment, came before the Court in a trilogy of cases – the *Senate Reference*, the *Patriation Reference*, and the *Quebec Veto Reference*.

Because of its role in settling federal-provincial disputes over jurisdiction, the Supreme Court became known as the “umpire of federalism”. But as this formulation makes clear, the principal criticism of the process of Supreme Court appointments was that one party in federal-provincial disputes had the unfettered power to choose the judges of the Court. Not surprisingly, since 1949, Supreme Court appointments have been a perennial topic of constitutional reform. Proposed constitutional amendments regarding the Court can be found in the *Victoria Charter*, and the *Meech Lake* and *Charlottetown Accords*. Although the proposals vary in important respects, the overall goal of provincial governments has been to constitutionally entrench provincial involvement in appointments to Court.

A representative set of proposals can be found in section 6 of the *Meech Lake Accord*. Had the proposals been adopted, if a vacancy occurred on the Court, each province would have been allowed to submit a list of nominees to the federal Minister of Justice. The power of appointment would have remained with the federal cabinet, but appointments would have had to be made from provincial lists. The amendment also made special provisions for Quebec. At present, the Court consists of nine members – three from each of Ontario and Quebec, one from the Maritimes, one from British Columbia, and one from the Prairie provinces. Only Quebec’s representation on the Court is entrenched in statute, whereas the distribution of the remaining sets is a matter of political convention. The proposed amendment would have entrenched Quebec’s representation, and would have required the appointment of judges from Quebec to be made from a list of nominees provided by that province. With respect to appointments to non-Quebec positions, the provision would have required appointments to be made from names provided by provinces other than Quebec.

Many political and legal commentators at the time characterized section 6 as shifting power away from Ottawa to the provinces. However, what was not commented on was which provincial and federal institutions the provision would have conferred power on. The only institutions mentioned in the provision are “the government of each province”, “the Minister of Justice of Canada” and “the Governor-General in Council” – that is, the executive branches of the federal and provincial governments. Parliament and the provincial legislatures would have been constitutional non-entities for the purpose of Supreme Court appointments. To be sure, the federal and provincial executives could have crafted mechanisms for legislative input in both generating and vetting nominees, but nothing in the provision would have required it. In designating the federal and provincial executives as the sole constitutional actors, and failing to even mention legislatures, the provision clearly conceptualized the appointment of Supreme Court justices as a matter to be governed by

executive federalism. Moreover, by proposing to institutionalize a model of joint provincial-federal decision-making centred on executives, the provision anticipates much of the current IGR agenda, which is also aimed at institutionalizing and improving the processes of executive federalism.

But the constitutional politics of Supreme Court of Canada appointments have changed dramatically. They now fall squarely within the democratic renewal agenda. Prime Minister Paul Martin, for example, in a major speech setting out his agenda for addressing the “democratic deficit” at Osgoode Hall Law School in 2002 declared that “a process of mandatory review must apply to prospective justices to the Supreme Court of Canada”. The Liberal Party election platform in 2003 reiterated this commitment. The Conservative Party of Canada also made the reform of the Supreme Court appointments process, and took the strongest position on Parliamentary input, stating in its campaign materials that a Conservative government would “ensure that all appointments to the Supreme of Canada are ratified by Parliament”.

The renewal of democracy, in this context, appears to have a double meaning. The first is the assertion of Parliamentary control over the Supreme Court, through the vetting of nominees before a Parliamentary process that has yet to be defined. The source of concern is here the counter-majoritarian nature of the Court’s function. Although the Court has always served as a check on legislative jurisdiction, the *Charter* transformed the character of those constitutional restraints in a manner that has permitted the Court to assess and find unconstitutional government policies across a wide spectrum of policy areas, especially in the criminal justice field. Concerns about “judicial activism” have led the Court’s critics to turn to the appointments process to adjust the balance of power between the Court and Parliament. The goal is the appointment of judges whose interpretations of the *Charter* would show deference to Parliament’s policy choices.

The second meaning, more closely anchored to the central concerns of the democratic renewal agenda, is to enhance the accountability of the executive to Parliament. The concern is that when executive appointments occur without public scrutiny, patronage and party connections may trump merit and ability. Over a decade ago, Peter Russell and Jacob Ziegel raised this concern with respect to federal judicial appointments in general. Minister Cotler has recently signalled that the entire process of federal judicial appointments needs reform to reduce any role that political lobbying might play. The goal of Parliamentary oversight, on this view, is not to assert Parliamentary control over the Supreme Court, but to safeguard against executive abuse.

However one frames the link between the democratic renewal agenda and the reform of the Supreme Court appointments process, the means proposed remain the same – the vetting of candidates by some Parliamentary process. And so the democratic renewal agenda, applied to Supreme Court appointments, entails the redistribution of power away from executives to legislatures – a move that pulls in exactly the opposite direction from the proposals in the *Victoria Charter*, and the *Meech Lake* and *Charlottetown Accords* to enhance and entrench executive federalism in this context.

The rise of the language of democratic renewal, and the decline of the language of intergovernmental relations in this context, is vividly exemplified by a report of the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, “Improving the Supreme Court of Canada Appointments Process”. The report was released in May 2003. The majority report, supported by the Liberal Party MPs on the Committee, proposed that the current process of unfettered executive appointment be replaced with an *ad hoc* advisory committee, which would generate a short list of three to five candidates from which the appointment would be made by the Governor in Council. Provincial involvement in the process would occur at two stages. First, provinces could forward names to the advisory committee. Second, there would be

provincial representation on the committee. But at neither stage would the federal and provincial executives be the exclusive participants in the process. Thus, the report suggests that names could come from “varied” sources, and that the advisory committee would also include representation from parties with official standing in the House of Commons, the judiciary, the legal profession, and lay members.

The report’s proposed reforms are a dramatic shift from the system of provincial lists that would have been constitutionally entrenched by the *Meech Lake Accord*, which would have given provinces the exclusive power to screen and generate a short list for the federal government. Indeed, given the past history of the constitutional politics of Supreme Court appointments, the glaring absence of any discussion of this history in the report is illustrative of how the framework within which the majority approached the issue has moved on.

The three dissenting reports, filed by the three opposition parties, vary in the manner in which they treat the question of provincial input. As expected, the Bloc Québécois came out in favour of a Meech-style system, where appointments would be made from provincial lists. The goal would be “to avoid unilateral appointments by the federal government”. In contrast, the New Democratic Party sought to ensure that provincial representatives not dominate the advisory committee, suggesting that it would be sufficient if there were representatives from the region from which the appointment was to be made, as opposed to every province.

Perhaps most revealing is the position of the Conservative Party of Canada. In its dissent, it called for “substantive input into the compilation of a list of suitable Supreme Court of Canada nominees”, which should be understood as a greater role for provinces than that envisioned by the report. However, later in 2003, its position shifted to drop any reference to the need for enhanced provincial input. The occasion for the Conservative Party to voice its position was the nomination of Justice Louise Charron and Rosalie Abella to fill two vacancies from

Ontario in August 2003. For the purposes of this appointment, Minister Cotler convened an ad hoc committee to review these two nominees. Cotler testified before the Committee, explaining the process whereby he arrived at the two nominees, and their qualifications. The nominees did not appear.

The membership of the committee consisted of three Liberal MPs, two Conservative MPs, one MP from each of the BQ and NDP, a representative of the Law Society of Upper Canada, and the Chief Justice of Federal Court of Appeal (representing the Canadian Judicial Council). Notably absent was a representative of the province of Ontario. Now to be sure, Ontario did not publicly object to its lack of membership on the Committee, and Attorney-General Michael Bryant appears to have been very involved in the generation and vetting of the short list from which Abella and Charron were picked. But one would have expected both the BQ and the Conservative Party to raise concerns regarding the lack of provincial representation. The BQ did raise this point during the public phase of the committee's proceedings. But it nevertheless signed the majority report endorsing both nominees, which criticized other aspects of the process but was conspicuously silent on the issue of provincial representation. The Conservative Party, by contrast, did dissent on the issue of process. However, it framed its criticisms entirely in the language of democratic renewal. The process was flawed, it argued, because nominees could not question nominees, and because of the inadequate time given to the committee for its deliberations. The dissent was absolutely silent on the issue of provincial representation on the advisory committee.

In sum, the democratic renewal agenda appears to have eclipsed the IGR agenda in the area of Supreme Court appointments. Further evidence of this fundamental shift was the non-involvement of the Council of the Federation in this episode. Following its February 2004 meeting, the Council of the Federation released a communiqué in which it announced that it would "appoint a special committee of ministers to ... [d]evelop new models for selecting individuals to serve in ... the ... Supreme Court

of Canada, to ensure that provincial and territorial interests are adequately reflected and accommodated". Although Premiers Charest and Klein referred to the need for provincial input into Supreme Court appointments over the summer of 2004, those public statements were not translated into a formal position. And the Council of the Federation did not issue a public reaction either to the Justice Committee report of May 2004 or the *ad hoc* committee process of August 2004. The Council of the Federation's last statement came on July 30, 2004, when it stated in a communiqué released at the end of its summer meeting that a committee of ministers would "continue their work on appointments to National Institutions", including the Supreme Court.

IV. LESSONS LEARNED

So what lessons can we learn from the relationship between the democratic renewal and IGR agendas from the issue of Supreme Court appointments?

First, the reform of the Supreme Court appointments process illustrates how the institutional implications of the IGR and democratic renewal agendas pull in opposite directions. Enhanced provincial (and now territorial) input means more executive federalism, in the form of provincial lists from which Supreme Court appointments are made. Democratic renewal means more legislative oversight of the power of executive appointment through committees on which federal MPs are a significant presence. Thus framed, it is impossible to pursue the two agendas at the same time. More provincial power to generate short lists means less power for legislatures to generate the names of potential candidates, and vice versa.

Second, in this particular policy area, the IGR agenda has given way to the democratic renewal agenda. This shift is all the more dramatic given long-standing provincial interest in the reform of the Supreme Court appointments process, and the existence of concrete proposals that provinces and the Council of Federation could have championed.

The shift is all the more striking when one considers that the *Charlottetown Accord*, drafted in 1992, contained detailed provisions on Supreme Court appointments almost identical to those in the *Meech Lake Accord*. In slightly over a decade, the constitutional lens through which political actors approached the reform of one of the most powerful institutions of the federal government for several decades has largely been discarded, in favour of another that furthers a dramatically different set of objectives.

Why has this shift happened? I think that two factors help to account for what has occurred. The first is that the *Charter* has expanded the constitutional functions of the Supreme Court. No longer is the Court only the arbiter of federal-provincial disputes. It is now also the protector of individual rights to which provincial, territorial and federal governments must adhere. The enlarged constitutional role of the Court has understandably shifted the constitutional politics of Supreme Court appointments. I am firmly of the view that the appointments process is a dangerous way to assert legislative control over the Court, and indeed, is unnecessary because of the override. But I have little doubt that it is the Court's *Charter* jurisprudence which has placed appointments on the agenda of democratic renewal.

The alteration in the function of the Supreme Court is a factor which may not apply to other policy files where the IGR and democratic renewal agendas may collide. But the second factor -- the inefficiency of joint decision-making under the Council of the Federation -- is of much wider significance. The decision-rule for the Council is unanimity, instead of qualified majority voting. This choice will increase the probability that the Council of the Federation will not be able to react quickly to unexpected developments, such as the opening up of two vacancies on the Supreme Court through the sudden retirements of Justices Arbour and Iacobucci in the spring of 2004. If the Council of the Federation is the primary vehicle through which provinces will drive the improvement of IGR, then in those policy files

where the IGR agenda and the democratic renewal agendas conflict, the latter will prevail.

So what is the way forward? At the outset, I set out a pair of premises -- that our federation is a democratic federation, and our democracy a federal democracy. The challenge for political actors is to think creatively, outside of traditional categories, to design new institutions which advance both the democratic renewal and IGR agendas simultaneously. Proposals for reform should focus on blended institutions, which allow for input by legislatures and provinces. Although not defended in these terms, the appointments advisory committee suggested by the Justice Committee, incorporating representation from the provinces and Parliament, point to the way for how this might be done.