REFORMING CANADIAN INSTITUTIONS: PROGRESS AND PROSPECTS

By Russell Ducasse

A real crisis in Canada's federal system has been apparent since a few years ago. For a long time this crisis was attributed to a cultural conflict between the nation's two founding peoples: Quebec, the chief guardian of French language and culture, throughout its history has demanded very extensive autonomy, for fear the preponderance of Anglophone provinces would upset the constitutional balance at its expense. Nevertheless, in the last two decades English Canada has felt a strong current of regionalism, largely as a result of greater inequalities between the provinces making up the federation and feelings of economic discrimination. This paper examines some of the proposed solutions, in particular those having to do with central institutions, and discusses the future prospects for Canadian institutions.

THE SUPREME COURT

Should the Supreme Court remain a general court of appeal, or is there a need to create a specialized constitutional tribunal? How should such a body be composed? How many civil law judges, as opposed to common law judges, should sit on the court? What method would be used to appoint the judges? How would the scope and jurisdiction of this institution be defined?

Quebec is the province that reacts most strongly to these questions, pointing out that the Supreme Court, which is entirely appointed by the federal executive, does not adequately reflect the differences between the civil law and British common law systems, and that the decisions of this higher court are bound to be unfair to Quebecers. Since the 1950 federal-provincial conference delegates from Quebec have demanded that the Supreme Court of Canada, in all matters pertaining to the constitution and inter-governmental relations, should possess all the qualities required of a third-party umpire.

In 1956 the Royal Commission of Inquiry on Constitutional Problems (the Tremblay Commission) made recommendations designed to confer the character of an impartial and independent arbiter on the Supreme Court.

> The Province of Quebec, which possesses its own Civil Law, would have very good reasons for demanding and obtaining that the cases concerning provincial and civil matters be judged in last resort by a Quebec Supreme Court. This would be only just and reasonable, and at the same time a guarantee that this tribunal would render judgment according to the letter and spirit of our Civil Code, and not according to the British common law.

The Commission felt that, failing the possibility of keeping from the Supreme Court the cases arising from the Civil Code, the Quebec government should demand that such cases be judged by a tribunal composed of five judges of the Supreme Court of whom three would

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Russell Ducasse works for the Research and Documentation Service of the Library of the Quebec National Assembly.

necessarily have received their legal training in Quebec. These latter would have to render a unanimous decision in any question involving a reversal of a decision of the highest Quebec court.

Finally, the Commission recommended that the manner of appointing judges be entrenched in the Constitution, even expressing approval for the formation of a special constitutional court and for provincial participation in the naming of its members. Various formulas for this participation were suggested: the constitutional court could be made up of nine judges of the Supreme Court and the chief justices of the ten provinces; it could be composed of five judges from the Supreme Court and four others chosen by the four main regions of the country; or the constitutional court could be modelled on various international tribunals.

At the federal-provincial conference in 1960, Jean Lesage echoed the view expressed by the Tremblay Commission:

> "Consideration should at the same time be given to the creation of a constitutional tribunal in conformity with fundamental federative principles. It is an essential requirement of this system of government that the constitutional division of authority be placed beyond reach of either government. Therefore, the arbiter of conflicts should not be under the exclusive control of one of them".

This position, with a few slight modifications, was the one adopted by the governments of Johnson, Bertrand and Bourassa at the constitutional meetings which took place between 1966 and 1971.

Although not surrounded with as continuous and heated debate as in Quebec, the reform of the highest court in the land is no less a concern for the Anglophone provinces. Since the 1971 Victoria Conference, English Canada also has made known its desire for major changes in the structure and composition of the Supreme Court. English Canadian leaders have been made permanently aware of the role of this institution by the many judicial decisions that the Court has had to render with regard to basic federal-provincial issues, such as the Saskatchewan system of mining royalties, jurisdiction over the coastal waters of Newfoundland, the constitutionality of the entire federal anti-inflation program, provincial authority to initiate proceedings under the *Narcotic Control Act* and other federal laws. At the hearings of the Joint Committee of the Senate and of the House of Commons on the Constitution, on September 27, 1978, the Government of British Columbia put forward the following recommendations:

> ". . . The existence, composition and jurisdiction of the Supreme Court of Canada should be provided for in the Constitution so that these matters cannot be subject to unilateral change by either level of government.
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> . . . There should be a three-stage procedure for appointment to the Supreme Court of Canada: a) consultation between the federal government and the government of the province of the proposed nominee, b) nomination by the federal government, c) confirmation by the restructured Senate.
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> . . . The Supreme Court of Canada should be composed of eleven members. Membership should be based, of course, on merit, but judges must be drawn from all five regions of Canada.
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> . . . The Supreme Court of Canada should continue to exercise final appellate jurisdiction in constitutional law and non-constitutional cases.
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> . . . The Supreme Court of Canada should continue to exercise final appellate jurisdiction in relation to both federal statutes and provincial statutes."

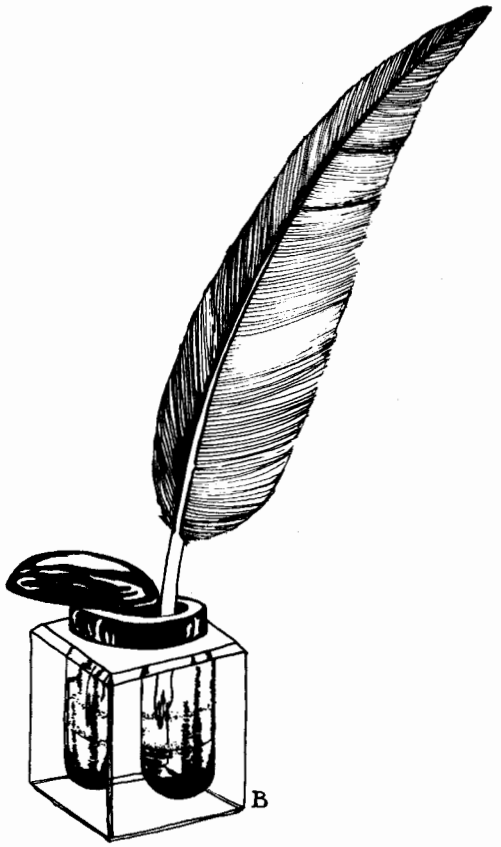
The Constitutional Amendment Bill (June 1978) contained several federal proposals for reforming the Supreme Court. The number of judges would be increased from nine to eleven. There would be four rather than three members from the Quebec bar and the remaining seven appointments would be made so as to ensure at least one judge in the Court from each of the four other regions (Atlantic provinces, Ontario, Prairie provinces and British Columbia). The provinces would be consulted in the appointment of judges. Failing agreement, a council would be convened to recommend a person for appointment. The House of the Federation (the renewed Senate) would be asked to approve the nominations. Only the judges from Quebec would decide on questions of law relating to Quebec civil law.

The report of the Task Force on Canadian Unity also recommends the entrenchment of the existence and jurisdiction of an eleven-member Supreme Court in the Constitution, but proposes a different structure for the Court. Five judges would be chosen from among judges and lawyers trained in civil law, and six from among judges and lawyers trained in common law.

The Supreme Court would be divided into three benches. The first would be the bench of provincial jurisdiction and would be subdivided into a civil law section, to hear cases concerning Quebec laws, and a common law section, to hear cases concerning the laws of the other provinces. The second, the federal bench, would hear cases concerning federal laws and its quorum would consist of seven or nine judges. The third or constitutional bench would be made up of all eleven members of the Court.

Finally, there is the most recent proposal which comes from the Constitutional Committee of the Quebec Liberal Party (January 1980) and rejects the manner of functioning described above for the Supreme Court:

> "The Pépin-Robarts Report proposed a division of the Court into three benches, namely, Civil, Common and Constitutional law. In the majority of cases, classification of legal issues into clearly defined categories is a difficult task. We believe that it would be better to leave such classification to the Court itself, except for interpretations of the constitution."



The Quebec Liberal Party document recommends retaining the present composition of the Court, that is, nine judges, three of whom would be from the Quebec bar or judiciary. In cases raising constitutional issues, the central government, a provincial government or one of the parties would be permitted to request that a dualist bench be constituted. This bench would consist of an equal number of judges from Quebec and from the other provinces, presided over by the Chief Justice of the Supreme Court. The Chief Justice, whose appointment would be made by the central government and ratified by the Federal Council, would be chosen alternately from among Quebec jurists and jurists from the other provinces.

THE SENATE

Reform of the Senate has been sought since the earliest years of the Canadian federation. It was an item on the agenda of the federal-provincial conferences of 1887. In 1926, in a study entitled *The Unreformed Senate of Canada*, Professor R. A. MacKay was the first to explain to the general public the weaknesses of the Upper House. This study also suggested ways of correcting these weaknesses; for example, appointment of members for a limited term, extending the search for senators to include ethnic groups and professional, management and union associations, and adoption of a maximum age limit. In 1951 a group of federal members of Parliament and senators recommended that provincial governments be given responsibility for appointing one-quarter or one-third of the members of the Senate.

It was not until the introduction of Bill C-60 in June of 1978 that the federal executive's intentions to form an entirely restructured Upper House were revealed. The Bill proposed replacing the present Senate by a House of the Federation designed to take regional and group interests into account. This House would consist of 118 members, fifty-eight of whom would be selected by the House of Commons, fifty-eight by the provinces and one by each of the territories. All the major political parties would be represented in the new House and the number of representatives of each party would be proportional to its share of the popular vote obtained in the elections in each province. The House would have the power to delay the enactment of laws passed by the House of Commons and to propose laws itself, excluding bills having financial implications. It would be requested to approve appointments to the Supreme Court and to certain Crown agencies. In addition, under a provision of the Bill intended to protect language rights, any measure of "special linguistic significance" would have to be adopted by a majority of the English-speaking members and a majority of the French-speaking members of the new House.

Some people, however, feel that this formula is hardly the final word. In the opinion of the Pépin-Robarts Task Force (February 1979), a body of this type would involve two major disadvantages. First, party interests rather than regional interests would likely predominate, since members would be accountable only to the

central or provincial political party which had appointed them. Second, this chamber would be unable to play an active role in intergovernmental relations, since its members could not speak for provincial governments. According to the co-chairmen, the most appropriate instrument for improving the conduct of federal-provincial relations would be a chamber made up of members appointed solely by the provincial governments. This new institution would be called the Council of the Federation.

The Council would be composed of no more than sixty voting members. Provinces would be represented roughly in accordance with their respective populations to a maximum of one-fifth of the total seats in the Council, but the distribution would be weighted to favour provinces with less than 25 per cent of the total Canadian population. A province which has at any time had 25 per cent of the population (such as Quebec and Ontario) would be guaranteed one-fifth of the seats in perpetuity. Federal government cabinet ministers would be non-voting members of the Council, but would have the right to present and defend the proposals of the central government before the Council and its committees. The Council would not have the initiating power for legislation, except for bills containing constitutional amendments; its decisions could not be considered expressions of confidence or non-confidence. Laws or treaties falling exclusively under federal jurisdiction would not be subject to the approval of the Council.

A committee of the Council would be responsible for approving appointments to the Supreme Court, major regulatory bodies and central institutions such as the Bank of Canada and the Canadian Broadcasting Corporation.

The Federal Council proposed by the Constitutional Committee of the Quebec Liberal Party closely resembles the new intergovernmental institution in the Pépin-Robarts report. It would consist of delegations from the provinces acting on the instructions of their respective governments. The provincial delegates would convey the political policies of their governments to the Council and the length of their term would depend on that of the government they represented. There would be no delegates of the central government with a right to vote on the Federal Council; federal representatives would only put forward the central government's point of view to the Council. The Council's functions would include the exercise of certain extraordinary powers of the federal government; the ratification of a certain number of laws and appointments; and the examination from a regional perspective of certain bills and decisions made by the central executive.

In addition many other proposals have been put forward by provincial governments and public and private organizations. The Government of British Columbia, the Advisory Committee on Confederation in Ontario, the Canadian Bar Association, the Canada West Foundation and others have come out in favour of a second chamber which would directly reflect the will of provincial governments and enjoy specific powers in fields shared by both orders of government and in federal-provincial relations. This is believed to be the best way of respecting regional interests and solving the complex economic and social issues that are of current concern.

There are very few supporters of an elected Senate like the one in the United States. Although it is true that it would be well in keeping with a democratic society, such a body might not be able to smooth over the difficulties in relations between the central executive and the provincial decision-making levels. The Pépin-Robarts report in particular explains the drawbacks in the following terms:

> ... an elected Senate can create serious problems in a parliamentary system like our own when there is a conflict between the popular mandate of that body and of the House of Commons to which the cabinet is responsible. Furthermore, party discipline rather than regional concerns are likely to be the dominant factor in deliberations.

THE HOUSE OF COMMONS

The House of Commons is rarely called into question in the constitutional debate. Recommendations are usually limited to suggesting that members of Parliament be provided with better technical assistance and greater access to government information and that increased powers be given to parliamentary committees to ensure closer control of the executive and Crown corporations.

Reform in connection with the House of Commons above all focusses on the electoral system. Everyone is aware that the method used in Canada — simple-majority, uninominal, single-round voting — leads to very substantial discrepancies between the percentage of the popular vote received and the number of seats obtained by the different political parties. A few examples will illustrate this flaw in the system. In 1972 and 1974 elections, all of Alberta's seats went to the Progressive Conservative Party, even though two out of five voters cast ballots for other parties. In 1974 the Liberal Party obtained 91 per cent of the seats in Quebec with only 54 per cent of the popular vote. In the May 1979 elections,

the Liberals were not elected to any of the four seats in Prince Edward Island, although they received 40.3 per cent of the votes. In Ontario, with 38.4 per cent of the popular vote, the Liberals were given 25 seats fewer than the Progressive Conservatives, who nevertheless obtained merely 0.5 per cent more of the popular vote.

In the 1980 elections, even though the Liberal Party obtained 24.3 per cent of the popular vote in Saskatchewan, 21.3 per cent in Alberta and 22 per cent in British Columbia, no Liberal members of Parliament were elected in these provinces.

As a means of correcting such situations, the possibility of combining the present election method with a proportional system has been raised. The Pépin-Robarts Task Force, for example, recommends changing the composition of the House of Commons by increasing the number of elected members by sixty. These members would be selected from provincial lists drawn up by the federal parties before a general election, with the seats being distributed between parties on the basis of percentages of the popular vote. The very similar proposal put forward by the New Democratic Party is to add fifty seats to the House, ten for each of the five regions. Each party would receive a number of seats proportional to the percentage of votes obtained in the region.

All the federal political parties profess support for electoral reform, although the NDP is most determined. For the Conservatives, the West is a private preserve that they do not wish to share with the Liberals, while the latter in principle support proportional representation but are in no hurry to change the rules of the game. The present political situation, however, allows us to hope that "national" interests will work in favour of the early adoption of the required changes to the single-ballot uninominal election system.

CONCLUSION

The opinion voiced by Professor Gérald Beaudoin, that Canada's weakness lies much more in its institutions than in its men, best explains the present crisis. Clearly the omissions or silences of the Canadian Constitution with regard to institutions are the chief reasons behind the current malaise. In the Supreme Court, the Senate, the House of Commons and various other federal bodies, matters of capital importance to the provinces are debated, and the latter are not always able to influence decisions in their favour. A more efficient system must therefore be found. The Task Force on Canadian Unity believes that the achievement of this objective will require major changes in the central institutions in keeping with the two principles of duality and regionalism.

To recognize Canada's duality, Quebec must be considered a national entity distinct from the Anglophone community and be guaranteed structures which will allow the province to assert and develop itself according to its particular aspirations and needs. Regionalism calls for the creation of organic institutions that are more responsive to the vitality of the provinces and the regions, a vitality which is reflected in demands for increased autonomy and greater influence on the formulation of federal policies.

Of course, Canada's constitutional challenge is not limited strictly to central institutions. The provinces attach a great deal of importance to the division of powers in fields where their jurisdiction is presently limited, such as communications, natural resources, offshore resources and fisheries.

The revision of the division of powers is without a doubt the thorniest task that the central and provincial governments have to face. A satisfactory understanding can be reached only if both orders of government come to an agreement, at the outset, on the essential principles of a functional federal system that accommodates the interests and aspirations of each province and the interests of a Canadian nation capable of maintaining a federation which is viable in the eyes of all citizens across the country.

The Pépin-Robarts report contains guiding principles for the new distribution of legislative powers. The major roles and essential responsibilities of the central government are to strengthen the Canadian identity; to preserve and enhance the integrity of the country; to assume the overriding responsibility for the conduct of international relations; to manage Canada-wide economic policy and participate in the stimulation of regional economic activity; to establish Canada-wide standards; and to assume responsibility for the redistribution of income. As for the provinces, their principal roles and responsibilities are to provide for the social and cultural well-being and development of their communities; to protect property and civil rights; to manage their territory; and to ensure economic development and the exploitation of natural resources in the province.

Finally, the distinctiveness of Quebec must be kept in mind. This distinctiveness would be reflected by granting Quebec either exclusive or concurrent jurisdiction over language, culture, civil law, marriage, divorce,

research and communications as well as corresponding powers with respect to taxation and foreign policy.

In the interest of the democratic tradition, the broad underlying principles of our system of government should be outlined in the Constitution. Prime Minister Trudeau has already made some very interesting proposals in this regard. The conditions and procedures governing the way the Governor General, Prime Minister, and ministers assume and leave office would be prescribed for the first time. The Constitution would also contain the principle of ministerial responsibility (in particular, the requirement that every minister be or become a member of one of the Houses, and the government's obligation to maintain the confidence of the House of Commons) and provisions guaranteeing the representative nature of government (parliamentary sessions, election of the members of the House of Commons by universal suffrage and the holding of general elections at least once every five years).

The future Constitutional Charter of Canada could also, like the Swedish fundamental law, recognize the principle of the free access of citizens to information. Parliament has to date approached this issue timidly — which in our minds is wrong, since there does not seem to be any incompatibility between a system of responsible government and the public's right to information.

In the drafting of a constitution there is always room for new ideas.

(translated from French)