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

Sujit Choudhry
Faculty of Law
University of Toronto

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'

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*

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.

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

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