Reference re *Supreme Court Act*: Defining Appointments to Canada's Highest Court

Introduction

On March 21, 2014, the Supreme Court of Canada (SCC) released *Reference Re Supreme Court* (*Supreme Court Reference*),[1] a decision about who is eligible to be appointed to the three Supreme Court seats reserved for Quebec judges or lawyers. The question arose when the federal government's appointment of Justice Marc Nadon to a vacant seat at the Supreme Court was constitutionally challenged. At the time of his appointment, Justice Nadon was not practicing law in Quebec as a lawyer or judge. Rather, he was a justice of the Federal Court of Appeal which is a Federal court and therefore, he was not considered a member of the Quebec bar. To determine if his appointment was constitutional, the Supreme Court examined the wording of sections 5 and 6 of the *Supreme Court Act* that sets out the qualifications for Supreme Court judges.

But the *Supreme Court Reference* accomplished more than providing an answer to the constitutionality of a particular appointment of one judicial candidate. It helped define how changes to the composition of the Supreme Court can be made. The answers provided by the Supreme Court to the questions posed clarified its constitutional status and reaffirmed that its composition, including the eligibility of justices for appointment, can only be achieved through the amending formula.

Facts

Justice Marc Nadon served as a justice in the Federal Courts for over twenty years. Admitted to the Barreau de Quebec (Quebec Bar) in 1974, he practiced law in both Quebec and England until his appointment to the Canadian Federal Court Trial Division in 1993. When Justice Morris Fish retired from the Supreme Court in August 2013, the Conservative government chose Justice Nadon to replace him, and he assumed his new position on October 7, 2013.[2]

That day, constitutional lawyer Rocco Galati officially challenged Justice Nadon's appointment at the Federal Court.[3] He argued that Nadon was neither a member of one of the superior courts of Quebec nor a current member of the Bar of Quebec as required by the *Supreme Court Act* and that his appointment was therefore unconstitutional. The Government of Quebec took a similar position.[4] In response to the controversy, Justice Nadon stated that he would not hear cases until the Supreme Court decided on the constitutionality of his appointment.[5]

To remedy the situation, Parliament amended the *Supreme Court Act* in the *Economic Action Plan 2013 Act No. 2* so that the requirement that those eligible for appointment be existing members of the Bar was expanded to include former members of the Bar as well as current ones.[6] Justice Nadon's appointment could then be considered constitutional. The government argued that this was the "most expeditious and most efficient way … to guarantee that federal court judges can be considered in the process of filling upcoming Supreme Court vacancies."[7] Challengers Galati and the Quebec government, however, opposed the amendments, stating that the Supreme Court is part of Canada's constitutional framework and eligibility requirements cannot be amended by the government acting alone.[8]The federal government then referred the case to the Supreme Court as a reference question for clarification of both the Nadon appointment and Supreme Court appointments in general.

Issues

The issues examined by the Supreme Court were as follows:

1. Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act*?

2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2*?[9]

The Decision in Brief

Six of the seven members of the Supreme Court responded in the negative to question 1: The *Supreme Court Act* requires that the three Quebec judges chosen must either be currently sitting on the Court of Appeal or Superior Court of Quebec, or have been members of the Barreau du Québec (Quebec Bar) for at least 10 years. The seventh member, Justice Moldaver, dissented.

The Court answered Question 2 in the affirmative, but only in part. It ruled that the government can make changes pertaining to the maintenance of the Courts, but it cannot enact legislation that would fundamentally change the Supreme Court or its structure, as it did in clause 472 of the *Economic Action Plan 2013 Act*.

Overall, the majority of the Court ruled that to be eligible for appointment to the Supreme Court, an individual *must* be a current member of the Quebec bar. The only way this eligibility criterion can be changed is through constitutional amendment.

Analysis

Who from Quebec is Eligible for Supreme Court Appointment?

Six of the seven members of the Supreme Court agreed that Nadon, a justice of the Federal Court, was not eligible for appointment to the Supreme Court even though he had been a past member of the Quebec bar. Section 6 of the *Supreme Court Act* states that "[a]t least three of the judges [of the Supreme Court of Canada] shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province."[10]

The Court examined the plain, textual meaning of section 6, that judges be selected "from among" members of the Quebec bar (implying "current" members). They believed this interpretation was consistent with the intention of the drafters of section 6 which was to preserve and protect Quebec's civil law code.[11]Having civil law experts on the Supreme Court ensures that Quebec's legal traditions will be preserved and, in turn, enhances Quebecers' confidence in the Supreme Court.[12]

The Court also examined the wording of section 5 of the *Supreme Court Act*. It explains who among all of Canada's judges may be appointed to the Supreme Court: "Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province."[13] Section 6 discusses the qualification of appointees from Quebec. "At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province if, at any time, they were an advocate of at least 10 years standing at the bar of that Province."[14] The Court concluded that while sections 5 and 6 are linked and should be read together, the wording of section 6, limiting the appointments of Quebec judges, is more important to consider than the wording in section 5. Those eligible for appointment therefore must be current members of the Bar.[15]

Justice Moldaver, however, disagreed, ruling that judges are eligible for appointment if they were a member of the Quebec bar for 10 years at *any* time in their legal career. He also argued that sections 5 and 6 are inextricably linked, which affects the way in which they are read. He stated that reading section 6 without section 5 –which is the general appointment process - is absurd.[16] Choosing to consider section 6 (the Quebec qualifications) over section 5 could result in a "newly-minted member of one day's standing at the Quebec bar [being] eligible for a Quebec seat on this Court," an undesirable result.[17] In Justice Moldaver's opinion, Justice Nadon's appointment could stand because both current *and former* members of the Quebec bar of at least 10 years standing, and current *and former* judges of the Quebec superior courts, are eligible for appointment to a Supreme Court seat reserved for Quebec.[18]

Can Parliament Enact Legislation that Modifies the Supreme Court of Canada?

The majority of the Supreme Court ruled that Parliament cannot unilaterally change the

Court's composition or essential features. By legislating changes to the Supreme Court Act via clauses 471 and 472 in the *Economic Action Plan 2013 Act, No. 2*, the Court ruled that Parliament had indeed changed the Court's composition or essential features:

1. Clause 471 stated that a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province;[19] and

2. Clause 472 modified the *Supreme Court Act* so that a candidate does not need to be an active 10-year member of the Quebec bar to be considered for a SCC appointment.[20]

Clause 472 was problematic for the Court. At issue was whether the *Supreme Court Act* was constitutionally protected. The government argued that the Act is not part of section 52 of the *Constitution Act, 1982*, a clause outlining which documents are constitutionally protected. Therefore, the Act is not "entrenched," or protected, by the Constitution and Parliament can make changes to the Court outside of the amending formula unless or until the Act becomes entrenched.[21]

The Court disagreed with the government's interpretation stating that any substantive change to the Supreme Court's eligibility requirements as stated in the *Supreme Court Act* amends the Constitution and therefore triggers the Constitution's amending formula. In other words, any changes to be made to the eligibility requirements to the Supreme Court require use of the amending formula because eligibility is constitutional. Therefore, the new substantive addition to the *Supreme Court Act*, section 6.1 (originally clause 472 of the *Economic Action Plan 2013 Act, No. 2*) is unconstitutional – it was a change made unilaterally by Parliament and did not include consent of the provinces as is required for constitutional change. In this decision, the Court declared for the first time that, at a minimum, sections 5 and 6 of the *Supreme Court Act* are part of the Constitution.[22]

Notably, Justice Moldaver did not answer question 2 because he ruled that no change to the *Supreme Court Act* was necessary to appoint Nadon, and so the question was moot: in his opinion, the second question did nothing more than restate the law as it exists.[23]

Significance of the Ruling

The Court's opinion in the *Supreme Court Reference* denied Justice Marc Nadon's candidacy for the vacant Supreme Court seat. He returned to his former position atthe Federal Court of Appeal. But what does the ruling mean in the broader constitutional context? The *Supreme Court Reference* clarifies the constitutionally-protected interests of two entities, the Supreme Court of Canada and the provinces and territories.

First, it confirmed that substantial changes to the structure of the Supreme Court are constitutionally protected and can only be changed using the Constitution's amending formula. This means the independence of the Supreme Court is protected from a federal government that may try to change the Court to suit its political interests, and that the majority of Canada's provinces must consent to any substantive changes.

Second, the decision upholds an important component of federalism by protecting the fundamental role of the provinces and territories in changing aspects of the Constitution such as eligibility for appointment to the Supreme Court. Legal scholar Ian Peach suggests that the *Supreme Court Reference* will come to be known as "much more than a simple decision about the validity of a particular judicial appointment… [It is an] important milestone in the evolution of our constitutional jurisprudence."[24]

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[1] *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] SCJ No 21 (CanLII) . <https://www.canlii.org/en/ca/scc/doc/2014/2014scc21/2014scc21.html?searchUrlHash=AAAAAQAXc3VwcmVtZSBjb3VydCByZWZlcmVuY2UAAAAAAQ>.

[2] Aaron Wherry, "The Hot Mess of the Nadon Appointment" *Macleans* (21 March 2014), online: Rogers Digital Media.

[3] *Ibid*.

[4] *Ibid*.

[5] *Ibid*.

[6] *Supreme Court Reference*, *supra* note 1 at para 11.

[7] *House of Commons Debates (Hansard)*, 41st Parl, 2nd Sess, No 6 (21 November 2013) at 0850 (Peter McKay).

[8] "The Nadon Reference: 16 Possible Outcomes," Administrative Law Matters (17 March 2014), online: < http://administrativelawmatters.blogspot.ca/2014/03/the-nadon-reference-16-possible-outcomes.html.>.

[9] *Supreme Court Reference*, *supra* note 1 at para 7.

[10] *Supreme Court Act*, RSC 1985, c S-26, ss 5-6 (CanLII) . <https://www.canlii.org/en/ca/scc/doc/2014/2014scc21/2014scc21.html?searchUrlHash=AAAAAQAXc3VwcmVtZSBjb3VydCByZWZlcmVuY2UAAAAAAQ>.

[11]Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Scarborough: Thomson, 2007) at 2.3. Quebec's civil law is different from the common law practiced in the other provinces and territories in that it is mainly written down, or "codified," whereas the common law uses past rulings to determine the direction the law will take.

[12] *Supreme Court Reference*, *supra* note 1 at para 18.

[13] *SCA*, *supra* note 10, s 5.

[14] *Ibid*, s 6.

[15] *Supreme Court Reference*, *supra* note 1 at para 56.

[16] *Ibid* at para 123.

[17] *Ibid*.

[18] Ian Peach, "*Reference re Supreme Court Act, ss 5 and 6* - Expanding the Constitution of Canada,"Const Forum Const, vol 23.3 (12 July 2014), online: *Centre for Constitutional Studies*.

[19] *SCA*, *supra* note 10, s 5.1

[20] *Ibid*, s 6.1

[21] Peach, *supra* note 18.

[22] *Ibid*.

[23] *Supreme Court Reference*, *supra* note 1 at para 111.

[24] *Ibid*.