Reference Question

A reference question is a submission by either the federal or provincial government that asks the courts for advice on a major legal issue. A court does not rule on a reference question. Rather, the question results in an “advisory

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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*.

Constitutional Challenges: Public Interest Standing

Introduction

Canada's Constitution is a document that both exists for and has relevance to all Canadians. This article will explain public interest standing and how it allows concerned Canadians to have constitutional challenges heard in court even if the contested government law or action does not affect them personally. But because the issues are of broad public interest,

such challenges are important to others, particularly the economically and socially marginalized. Public interest standing is one way to ensure governments abide by the Constitution.

Constitutional issues can be raised in court through reference questions submitted by governments, through private litigation and criminal prosecution, or by private interest standing when a law or government action has or will have an impact on the litigant(s). Issues can also be raised by public interest standing.

In public interest standing, courts have the discretion to hear constitutional challenges of government action brought forward by interested individuals, groups or corporations who may not have a personal stake in the issue. Generally, courts will grant standing when the challenged government action has broad social effect.[1]

Examples of Public Interest Standing Cases

There have been several high profile Supreme Court of Canada cases where the Court granted public interest standing. One was *Nova Scotia Board of Censors v McNeil*,[2] where a film buff was granted public interest standing to challenge the province's ban on a particular racy film. He argued that the ban, based on public morality, was a federal jurisdiction and was unconstitutional. He lost because the majority of the court found it constitutional that a province reject a film based on its own local standards of morality.

In *Chaoulli v Quebec (Attorney General)*[3] a doctor and patient of Quebec's public healthcare system were given public interest standing to challenge provincial legislation that forbid access to private healthcare and insurance. Since there was no alternative to waiting lists in the public healthcare system, they argued the legislation violated their constitutional rights to security of the person. The Supreme Court of Canada agreed, ruling that Quebec's monopoly on healthcare was unconstitutional.

More recently, Rocco Galati, a Toronto lawyer, used public interest standing to launch a challenge in the Federal Court to Hon. Marc Nadon's appointment to the Supreme Court of Canada. The challenge prompted the federal government to ask advice about the appointment of justices from Quebec to the Supreme Court in the Supreme Court Reference. The Supreme Court found that the appointment was unconstitutional. Vindication in the approach has led Galati to file for public interest standing in two more cases to be heard.[4] When asked about his successful challenge, he said it was his duty as a citizen to do it since no one else did; "As Canadians we prefer not to engage, and pretend that everything is OK, and it's not."[5]

Origins of Public Interest Standing

Traditionally, only those individuals who had a direct investment in the effects of legislation could get what was known as private interest standing in court outside of a regular civil or criminal case.

This changed with a series of Supreme Court rulings in the 1970s and 1980s. In *Thorson v Canada*[6] the Suprme Court decided to grant standing to Joseph Thorson to bring a constitutional challenge to the *Official Languages Act*.[7] The government argued he did not have standing as the law did not personally affect him, but the Court found Thorson's case sound enough to be granted a hearing. It reasoned that the result would be "alarming, if there was no way in which a question of alleged excess of executive power"[8] could be heard. Since there was no other way for the case to be heard, and since he argued as a taxpayer he had a genuine interest, the Supreme Court had the discretion to allow it to be heard. In two cases that followed, *Minister of Justice Canada v Borowski*[9] and C*anadian Council of Churches v Canada*,[10] the Supreme Court set out a test as to who is entitled to public interest standing and in what circumstances. It became known as the *Borowski* test:

(1) Is the issue raised a serious one?;

(2) Does the party bringing the case have a personal stake in the matter, or have a genuine interest in the validity of the legislation?; and

(3) Is there no other reasonable or effective way to bring the issue before the court?

This three-step test ensures that the case deserves a hearing, that it weeds out frivolous challenges by requiring a genuine interest, and it ensures that the busy and expensive judicial system is not overburdened with such cases.[11]

A Development in Public Interest Standing: *SWUAV* and Access to Justice

In *Thorson v Canada* and the cases that followed, the Supreme Court was concerned with the rule of law. Granting individuals, groups or corporations public interest standing allowed courts to scrutinize government action or law when no one else could, or would, challenge it. This rationale lay behind the three-part Borowski test and the court's discretion to hear public interest standing cases.

In 2012, in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society (SWUAV)*,[12] the Supreme Court recognized another important reason for providing public interest standing: access to justice.

SWUAV, a society of Downtown Eastside sex worker advocates in Vancouver, felt Canada's prostitution laws endangered sex workers and thus violated their constitutionally guaranteed rights. When SWUAV applied to have its case heard based on public interest standing, the government argued they did not have that standing. The chambers judge agreed with the government. Justice Ehrcke determined that the first two requirements of the test to grant public interest standing were met, but SWUAV's application failed on the third requirement that there is no other reasonable or effective way to have the issue brought before the court. He determined there was another way the issue could be brought to trial since the Bedford case, a private interest standing case about the same matter, was about to be heard in Ontario. Also a sex worker charged with a prostitution offense could

challenge the law's constitutionality in the course of a criminal case.[13]

For the third part of the test, SWUAV had argued that the current sex workers in its society were too vulnerable to mount a private interest standing challenge. If they did so, they would face reprisal from clients, the police, family members and acquaintances. SWUAV also argued that sex workers who could raise a constitutional challenge during criminal prosecution would be prevented from doing so because of the prohibitive costs associated with it.[14] Without the Society receiving public interest standing, their clients would not have access to justice.

SWUAV appealed the decision to the British Columbia Court of Appeal. There, the Court overturned the previous decision. The majority opinion reviewed previous rulings on public interest standing where the Supreme Court of Canada said that discretion to grant it "must not be exercised mechanistically." Rather, public interest standing should be exercised "in a broad and liberal manner."[15] In considering the whole case, the Court determined it was deserving of standing. On the third step of the test, the Court ruled that waiting for a criminal case or private interest standing was not a more effective way to bring the broad and multi-faceted issue before the Court, and unless Bedford was appealed to the Supreme Court it would not be binding in British Columbia.[16]

When the government appealed SWUAV, the Supreme Court stood by the Court of Appeal's ruling and clarified the interpretation of the test for public interest standing. The Supreme Court stated that the test is not considered a "checklist."[17] Rather, the three factors are to be weighed together "in light of their purposes."[18]

Therefore, the Supreme Court recast the third part of the test to be more flexible:

> (3) Whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court?[19]

In considering this question, several factors related to access to justice must be canvassed. A court must ask if the applicant for public interest standing has sufficient resources and expertise to bring the suit. The court must also be practical when a number of litigants may bring the issue to court. One party may have a particularly useful perspective. A court must also ask if the case transcends the interests of those most directly affected by the challenged legislation. In assessing this, "courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected."[20]

The Supreme Court found that SWUAV met the requirements of the third part of the test when this flexible approach was applied. It found the Society to be well organized with the legal resources and expertise about sex workers necessary to challenge the laws. Granting them standing would "prevent a multiplicity of individual challenges in the context of criminal prosecutions."[21] And since its vulnerable clients would not apply for private interest standing for fear of losing privacy and security, SWUAV's challenge would allow them access to justice.[22]

Conclusion

Public interest standing is a tool that reminds us that the Constitution exists for all Canadians. It is an excellent example of democracy in action since it allows concerned individuals, groups or corporations to have courts review government laws and actions for their constitutionality. As SWUAV has shown, it can also be an effective way of reviewing laws that affect the marginalized for their constitutionality. Since those in a vulnerable financial, health or social position may be unable or unwilling to mount a challenge based on private interest standing, public interest standing is vital to access to justice.

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[1] Dana Phillips, "Public Interest Standing, Access to Justice and Democracy under the *Charter*: Canada (AG) v Downtown Eastside Sex Workers United Against Violence." (2013) 22 Const Forum Const 21 at 22.

[2]*Nova Scotia Board of Censors v McNeil*, 1978 CanLII 6 (SCC).

[3]*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35.

[4] One challenges a federal appointment of a Quebec Court of Appeal Justice from the Federal Court of Appeal. The Justice was not a current member of the Quebec Bar when section 98 of the *Constitution Acts* indicates they are to be current. The other challenges the recently passed changes to the *Citizenship Act*, arguing that section 91 of the *Constitution Acts* only gives jurisdiction to the federal government over "aliens and naturalization" but does not give jurisdiction to the federal government to strip citizens of citizenship. Alison Crawford, "Rocco Galati challenge to Mainville appointment seen as unlikely to proceed," *CBC News* (19 June 2014) online: CBC News < http://www.cbc.ca/news/politics/rocco-galati-challenge-to-mainville-appointment-seen-as-unlikely-to-succeed-1.2679944> and Susana Mas, "Rocco Galati launches lawsuit over Citizenship Act changes," *CBC News* (25 June 2014) online: CBC News.

[5] Alyshah Hasham, "Rocco Galati: the lawyer who lives to take on government," *The Star* (19 October 2013) online:

[6] *Thorson v Attorney General of Canada*, 1974 CanLII 6 (SCC).

[7] *Official Languages Act*, RSC 1985, c 31.

[8] *Supra* note 6 at page 145.

[9] *Minister of Justice Canada v Borowski*, 1981 CanLII 34 (SCC).

[10] *Canadian Council of Churches v Canada*, 1992 CanLII 116 (SCC).

[11] Phillips, *supra* note 1 at 22.

[12] *Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society*,

2012 SCC 45. <http://www.canlii.org/en/ca/scc/doc/2012/2012scc45/2012scc45.html?searchUrlHash=AAAAAAAAAAEAFzIwMDggQkNTQyAxNzI2IChDYW5MSUkpAAAAAQAzL2VuL2JjL2Jjc2MvZG9jLzIwMDgvMjAwOGJjc2MxNzI2LzIwMDhiY3NjMTcyNi5odG1sAQ>

[13] *Downtown Eastside Sex Workers United Against Violence Society v Attorney General (Canada)*, 2008 BCSC 1726 at paras 74-78.

[14] *Ibid*.

[15] *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2010 BCCA 439 at para 41. <http://www.canlii.org/en/bc/bcca/doc/2010/2010bcca439/2010bcca439.html?searchUrlHash=AAAAAAAAAAEAFzIwMDggQkNTQyAxNzI2IChDYW5MSUkpAAAAAQAzL2VuL2JjL2Jjc2MvZG9jLzIwMDgvMjAwOGJjc2MxNzI2LzIwMDhiY3NjMTcyNi5odG1sAQ.

[16] *Ibid* at paras 66 - 68.

[17] *Supra* note 12 at para 36.

[18] *Ibid* at para 36.

[19] *Ibid* at para 52. Emphasis added.

[20] *Ibid* at para 51.

[21] *Ibid* at para 73.

[22] *Ibid* at para 71.