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Book Review - The Tenth Justice: Judicial Appointments, Marc Nadon, and the Supreme Court Act Reference by Carissima Mathen & Michael Plaxton

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The Tenth Justice: Judicial Appointments, Marc Nadon, and the Supreme Court Act Reference by Carissima Mathen & Michael Plaxton

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THE "TENTH" JUSTICE[1]

Appointments to the Supreme Court of Canada are a prerogative of the prime minister, constrained only by minimal, threshold criteria of eligibility found in the *Supreme Court Act* (*SCA*).[2] When Prime Minister Harper appointed a journeyperson, supernumerary member of the Federal Court of Appeal to one of Quebec's three positions on the Court, those criteria provided collateral grounds to attack an appointment that was perceived as lacking in merit. At the time, there was abundant speculation that Prime Minister Harper named Justice Nadon in the hope that he would support the government's positions and perhaps weaken the Court's authority.

The spectacle began after Marc Nadon was appointed to the Supreme Court on October 2, 2013 and sworn in a few days later on October 7. While his modest reputation as a jurist led to complaints that Nadon was not well qualified, the appointment proved vulnerable on legal grounds. The question under the *SCA* was whether Quebec's appointments to the Court were open only to *current* judges (*i.e.* of the Superior Court or Court of Appeal) and members of the Barreau du Québec. That was salient because Justice Nadon was a *former* member of the Quebec bar, having left in 1993 to serve on the Federal Court, Trial Division before being appointed to the Federal Court of Appeal in 2001.

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1 Carissima Mathen & Michael Plaxton, *The Tenth Justice: Judicial Appointments, Marc Nadon, and the Supreme Court Act Reference* (Vancouver, BC: UBC Press, 2020) [*Tenth Justice*].

2 RSC 1985, c S-26 [*SCA*].

Amid a rising crisis, the Harper government inserted a corrective amendment to the *SCA* in an omnibus bill and referred two questions to the Supreme Court.[3] While Justice Rothstein's recusal left seven members of the Court deciding the legality of a colleague's appointment, Justice Nadon was excused from duties, prohibited from having contact with the other judges, and banished from the Supreme Court building.[4] On March 21, 2014, with Justice Moldaver dissenting, the Court held that former members of the Quebec judiciary and bar are not eligible for appointment to the Supreme Court.[5] In addition, the Court held that the rules for Supreme Court appointment are subject to Part V of the *Constitution Act, 1982* and subsection 41(d)'s requirement of unanimity between the federal government and provinces.[6]

The *Reference re Supreme Court Act* (*Reference*) meant that Justice Nadon's appointment was void *ab initio*—or non-existent—and to this day the Supreme Court's website neither acknowledges nor recognizes that Marc Nadon was ever a member of the Court.[7] After a fashion, he is the "tenth justice" of the Court because the order-in-council appointing him was never revoked, and, as he has joked, he may still be a Supreme Court judge "in law."[8] Meanwhile, in May 2014 the prime minister and minister of justice's accusations against then-Chief Justice McLachlin—accusing her of interfering with the appointment process—placed an ugly asterisk on the process.[9]

Scholarship spotlighting landmark Supreme Court decisions and pivotal moments of institutional history is invaluable. *The Tenth Justice* is an outgrowth of the authors' earlier work and Professor Mathen's appearance at the House Standing Committee on Justice and Human Rights. It focuses on the tussle over statutory construction and exposes testy relations

3 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 at para 7 [*SCA Reference*]. The questions were: (1) whether a former member of the Quebec bar was eligible for appointment under sections 5 and 6 of the *SCA*; and (2) whether Parliament could enact legislation specifying that former members of the bar are eligible for appointment.

4 "Supreme Court Nominee Nadon Sequestered During Challenge to Appointment", *CBC News* (4 November 2013), online: <www.cbc.ca/news/canada/supreme-court-nominee-nadon-sequestered-during-challenge-to-appointment-1.2355381>.

5 *Ibid*.

6 See Part V, Procedure for Amending the Constitution, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

7 Justice Nadon returned to the Federal Court of Appeal and remained a member of the Court when *The Tenth Justice* was published.

8 *Tenth Justice*, *supra* note 1 at 183.

9 *Ibid*, ch 7, "The Aftermath."

between the judicial and executive branches of government.[10] Mathen and Plaxton provide a rich analytical narrative of the debacle—from Nadon's appointment and its fallout, to issues of statutory interpretation, the *Reference* hearing, and the decision's political, legal, and institutional aftermath. If matters of statutory construction can be dry, *The Tenth Justice* is not, offering a riveting read and valuable perspective on an unprecedented and anomalous event in Supreme Court history.

The *Reference* is a vexing decision because the prime minister's seeming disrespect for the Court makes it more difficult to criticize a majority opinion defending the institution. Though their sympathies are evident, Mathen and Plaxton refrain from staking a point of view, leaving readers to wrestle, as did the Court, with a dilemma. In a larger frame, the *Reference* posed the question of whether it was more principled for the judges to assert control over appointments to the Court and constitutionalize that issue, or to accept an interpretation of the *SCA* that left an appointment in place—one that was widely perceived as an unfriendly strike on the Court's vitality and resilience.

THE *SCA*: ABSURDITIES AND PURPOSES

Appointment to one of Quebec's seats on the Court depended on the relationship between sections 5 and 6 of the *SCA*—the general and special provisions—and whether the *SCA* treats eligibility the same way in Quebec and the rest of Canada.[11] The majority opinion's interpretation of section 6 excluded Quebec members of the Federal Court from appointment to the Supreme Court, but not others—such as Justice Rothstein—from elsewhere in Canada. More generally, the *Reference* excluded all former members of the Quebec judiciary and bar from eligibility for appointment to the Court. That exclusion created a double standard between the four categories of general eligibility under section 5—inclusive of current *and* former members of the judiciary and bar—and section 6's two

10 See Michael Plaxton & Carissima Mathen, "Purposive Interpretation, Quebec, and the *Supreme Court Act*" (2013) 22:3 Const Forum Const 15.

11 While section 5's general provision specifies that a person who is or has been a judge of the Superior Court and barrister or advocate of at least ten years' standing is eligible for appointment, section 6's special provision provides that at least three of the Court's members must be appointed from the provincial Court of Appeal or Superior Court, or from among the advocates of Quebec. *SCA*, *supra* note 2, ss 5, 6.

categories—exclusive to those with current membership on the bench or bar of Quebec.

The grammatical construction of the provision was to some extent an exercise in absurdity, that of an "ecstasy of intellectualism."[12] One absurdity under the *SCA* was that reading the provisions disjunctively meant that Quebec lawyers not subject to section 5's requirement of ten years' standing would be eligible for appointment to the Court immediately upon attaining membership in the Barreau du Québec. The majority opinion averted this absurdity by reading section 5's ten-year requirement into section 6, and then refused at the same time to incorporate section 5's inclusive definition of eligibility. This discontinuity between the provisions generated another absurdity under section 6 because nothing prevented a former Quebec judge or lawyer from instantly becoming "current"—and eligible for appointment—by re-joining the bar. Justice Moldaver described this approach, of reading some aspects of section 5 into section 6 but not others, as a form of "cherry-picking."[13]

The language of section 6 does not expressly require currency or exclude former members of the Quebec judiciary and bar, nor was the *SCA*'s legislative history definitive one way or the other. In the circumstances, a supplementary rationale bolstered the majority's conclusion that section 6 required current membership in the judiciary or bar. The well-established purpose of Quebec's statutory allocation on the Court is to ensure the presence of civil law training, expertise, and traditions at the Court, and a majority of Quebec judges on five-member panels deciding civil law issues. To that, the majority opinion added a second purpose—related to values of legitimacy and representation—of "enhancing the confidence of Quebec in the Court."[14] Under that reasoning, a requirement of currency was connected to confidence in the Court because Quebecers would not accept that those who are not "current members of civil law institutions" are qualified to represent their interests on the Supreme Court of Canada.[15]

Yet currency, without more, was a questionable proxy for values of representativeness and confidence. Justice Moldaver complained that importing Quebec's "social values" into eligibility criteria 140 years after

12 See Criss Jami Salomé, *In Every Inch In Every Mile* (USA: Createspace Independent Publishing Platform, 2011) at no 14.

13 *SCA Reference*, *supra* note 3 at para 124.

14 *Ibid* at para 56.

15 *Ibid.*

the fact was "unsupported by the text and history of the Act."[16] Noting, as well, that residence in the province is not required, he observed that membership in the bar could rest on "the most tenuous link to the practice of civil law in Quebec."[17] Moreover, confidence in the Court would hardly be served if a former member could become eligible for appointment under section 6 by re-joining the Barreau for a single day.[18] Justice Moldaver found it difficult to believe that Quebecers would have confidence in an appointee who re-joined the bar for a day just to satisfy the currency requirement.[19]

Those troubled by the prime minister's exercise of the prerogative to appoint Supreme Court justices might also be uncomfortable with a majority opinion that failed to answer or displace the reasoning of the dissent, and quite frankly appeared more outcome-oriented than principled. In this, *The Tenth Justice* stopped short, and though co-authorship might have been a complicating factor, Mathen and Plaxton do not express a clear point of view.[20] What is most intriguing about the *Reference* is the decision-making dynamic of a difficult and unprecedented situation that challenged the Court to decide whether to push back against the executive power of appointment and how far to go in doing so. Much more could be said on how the argument from principle could have gone in either direction and what, ultimately, should have been determinative in the *Reference*.

THE CONSTITUTIONALIZATION OF APPOINTMENTS

Not only did the majority opinion create a double standard on eligibility, but it constitutionalized Supreme Court appointments and set unanimity between the federal government and provinces as the threshold for amending the rules of Supreme Court appointment.[21] Mathen and Plaxton describe this as "downright jaw-dropping"[22] and "the most stunning aspect of the reference."[23] As they explain, constitutionalizing the *SCA*'s eligibility criteria may have the effect of making "perfectly legitimate

16 *Ibid* at para 145.

17 *Ibid* at para 150.

18 *Ibid* at para 149.

19 *Ibid* at paras 153–54.

20 The authors did note the majority opinion's failure to engage these concerns. *Tenth Justice*, *supra* note 1 at 104–05.

21 *SCA Reference*, *supra* note 3 at paras 104–05.

22 *Tenth Justice*, *supra* note 1 at 111.

23 *Ibid* at 156.

reforms" impossible, absent constitutional amendment.[24] To the extent the Court looked "dangerously vulnerable" and was "right to worry" that this, or another prime minister, might alter the institution in fundamental ways—even abolishing it—the *Reference* removed some of that fragility.[25] But it did so at the expense of flexibility, with the "perhaps unintended side effect of choking off reforms" that could heighten the Court's legitimacy and effectiveness.[26]

Still, it was the prime minister's appointment of Nadon and the federal government's corrective amendment to the *SCA* that created the opportunity for the majority opinion to maximize its authority and constitutionalize Supreme Court appointments.

REASONABLE PEOPLE CAN DISAGREE

The authors accept that "reasonable people can disagree" about the key issues at stake in the *Reference*.[27] Quite apart from the *SCA*'s low-threshold eligibility criteria, the executive power of appointment can undermine confidence in the Supreme Court in a variety of ways, such as making ill-considered appointments and disregarding the conventions around appointment. It is the existence of that power, not the opportunity to appoint a former judge or member of the provincial bar, that poses a more serious threat to public confidence in the Court. The risk that the power to appoint might be improperly and even subversively exercised is a function of the prerogative and a longstanding lack of transparency and accountability in appointments to the Court. Though appointments are now subject to a process, the prerogative remains in place.[28]

In hindsight, it is not so obvious that appointing Justice Nadon or other former members of the Quebec judiciary or bar would undermine confidence in the Court in a legally or constitutionally significant way. By contrast, the *Reference* presents a strong counteroffensive that changed the status of appointments and did so in a legally and constitutionally significant way. That is why reasonable people can certainly disagree about

24 *Ibid* at 161.

25 *Ibid* at 181.

26 *Ibid*.

27 *Ibid* at 121, 123.

28 See Office of the Commissioner for Federal Judicial Affairs Canada, "Supreme Court of Canada Appointment Process - 2021" (19 February 2021), online: *Government of Canada* <www.fja-cmf.gc.ca/scc-csc/2021/index-eng.html>.

whether the Court overreached its authority in this instance or acted, as expected and required, to protect the institution from the executive and legislative branches of government.