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The Shadow of Absurdity and the Challenge of Easy Cases: Looking Back on the *Supreme Court Act Reference*

Carissima Mathen*

I. INTRODUCTION

The 2013-2014 term for the Supreme Court of Canada began in the normal course. It included the appointment of a new judge: Marc Nadon. Six months later, in the *Supreme Court Act Reference*,¹ the Court ruled both that the appointment was void *ab initio*; and that the Court is an entrenched constitutional actor beyond the scope of statutory changes. By any measure, the *Reference* was an exceptional moment. In this article, I explain why.²

The *Reference* was influenced by complex and interlocking factors. It concerned judicial appointments, over which the Prime Minister enjoys tremendous discretionary power. It also was a case of first impression. The *Constitution Act, 1867*³ has nothing to say about the Supreme Court, and sections 5 and 6 of the *Supreme Court Act*⁴ had never before been interpreted. The relationship between the Stephen Harper government

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¹ *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, [2014] 1 S.C.R. 433, 2014 SCC 21 (S.C.C.) [hereinafter “*Reference*” or “*Supreme Court Act Reference*”].

² My view of the substantive legal question was first articulated in a 2013 article: Michael Plaxton & Carissima Mathen, “Purposive Interpretation, Quebec, and the *Supreme Court Act*” (2013) 22:3 *Constitutional Forum* 15 [hereinafter “Plaxton & Mathen”]. I also appeared before committees of the Canadian House of Commons and Senate: Appearances on November 19 and 21, 2013 on *Economic Action Plan 2013 Act, No. 2* (Bill C-4), S.C. 2013, c. 40 [hereinafter “*Economic Action Plan 2013 Act*”], ss. 471, 472.

³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 96, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter “*Constitution Act, 1867*”].

⁴ *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 4(1) [hereinafter “*Supreme Court Act*”].

and the Court had long been tense. Perhaps as a result, the government decided to initiate a reference and pass declaratory legislation at the same time. As discussed in Part II, all of these elements created a perfect storm of law and politics.

In considering the *Reference*, the Court met several dilemmas. One of the sitting judges faced concerns about bias.⁵ The Court confronted the awkward task of considering the eligibility of a sitting member. And, it was required to interrogate its own status under the Constitution.⁶ These dilemmas are discussed in Part III.

The Court's interpretation of section 6, delivered in a 6-1 ruling wherein the majority found Nadon J. ineligible, was met with a great deal of skepticism. In Part IV, I evaluate, and ultimately reject, two of the most common criticisms of the majority's reasoning: that it is absurd, and that it produces unintended, and highly undesirable, consequences.⁷

Finally, in Part V, I consider the reaction to the *Reference*. Even for a Court that routinely issues controversial decisions, the *Reference* provoked an unusually intense response. I discuss how the *Reference* engaged the expectation that the Court will provide a "right answer" and, flowing from that, I offer three reasons that the *Reference* provoked the reaction that it did.

II. A PERFECT STORM

In order to understand any constitutional issue, one must appreciate its broader context. The *Reference* is an excellent illustration. First, the *Reference* concerned a Supreme Court appointment, a matter that since

⁵ In this article, I deal with the recusal by Marshall Rothstein J. After the *Reference*, it was suggested that the Chief Justice herself should not have participated because (a) she had sworn in Nadon J. and (b) she was alleged to have improperly interfered in the process. *Infra*, note 23. The first claim is interesting but for space reasons cannot be examined here. Briefly, though, it seems to me that the Chief Justice's administrative and adjudicative roles are legitimately separate, and her ability to preside over the matter was no more vulnerable than those of her sitting colleagues, in that all welcomed Nadon J. as their newest member. I consider the second allegation to be baseless, and I address it in Part V. I note that the government, which would have been in possession of all of the facts available to support the second allegation, made no mention of it during the hearing and was content to proceed with the hearing (in a reference it initiated) before the Chief Justice.

⁶ The Court ruled that its composition and essential features (set forth in ss. 5 and 6 of the *Supreme Court Act*) are now protected against most kinds of change except by formal amendment under Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "*Constitution Act, 1982*"].

⁷ Both of these arguments relate to the s. 6 issue. I do not address in detail the Court's analysis of Part V of the *Constitution Act, 1982*. Further discussion may be found in my chapter "The Federal Principle: Constitutional Amendment and Intergovernmental Relations", in Emmett MacFarlane, ed., *Constitutional Amendment in Canada* (UTP, forthcoming).

1875 has been in the exclusive purview of the Prime Minister (aided by the Minister of Justice).⁸ The process for all federal judicial appointments, including to the Court, has long been criticized.⁹ In the mid-2000s, the process underwent some changes, but none touched the executive discretion at its core. The most dramatic development was in 2005, when a Supreme Court candidate appeared before members of Parliament to answer questions. For 10 years, such hearings became regular occurrences.¹⁰ Though the process continued to attract criticism, the prospects of forcing change were remote. And no court had ever been asked to pronounce on either the process or a particular appointment.

In 2013, Morris Fish J. announced his retirement. As Fish J. was from Quebec, his replacement would also have to hail from that province. The Prime Minister selected a supernumerary judge, Marc Nadon, from the Federal Court of Appeal. Justice Nadon had a particular expertise in maritime law, a field that rarely occupies the Supreme Court's docket.¹¹ His record included such things as a dissent in a Federal Court decision ordering the Canadian government to seek the

⁸ While s. 101 of the *Constitution Act, 1867* authorizes Parliament to provide for a "General Court of Appeal for Canada" the appointment process is vested in the Executive through s. 4 of the *Supreme Court Act*.

⁹ The *Constitution Act, 1867* contains very little on the subject. Section 96 states merely: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province." The appointment power for those courts is followed by very brief criteria for selection, and some basic guarantees of tenure. Section 92(14) grants the provinces jurisdiction over, "[t]he Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." *Constitution Act, 1867, supra*, note 3, ss. 96-100.

¹⁰ The first to undergo the process was Justice Marshall Rothstein. It was repeated with Moldaver J. and Karakatsanis J. in 2011 and Wagner J. in 2012. Justice Thomas Cromwell, appointed in February 2009, did not appear before a committee largely because of the December 2008 prorogation of Parliament. After the *Reference* was issued in April 2014, the candidate short list was leaked to a national newspaper. Declaring the process compromised, the federal government returned to the older model of simply making the appointment with no hearing. Two justices have since been appointed in this way: Clement Gascon and Suzanne Côté.

¹¹ In repeating these characterizations of Nadon J., I do not mean to denigrate his expertise or experience. During his two decades on the bench, Nadon J. presided over numerous legal matters. The federal government itself highlighted Nadon's maritime law expertise, online: <<http://pm.gc.ca/eng/news/2013/10/03/pm-announces-appointment-justice-marc-nadon-supreme-court-canada>>, and it has become a standard descriptor of him. The status of being supernumerary is perhaps of greater concern in that it is a step just prior to taking retirement. Both Nadon J. and the government said that the status permitted him to sit on more complex cases, but critics did raise a concern about the shift in workload that a move to the Supreme Court of Canada would entail. Jeffrey Simpson, "The Supreme Court deserves better", *The Globe and Mail*, October 26, 2013, online: <<http://www.theglobeandmail.com/globe-debate/the-supreme-court-deserves-better/article15027360/>>.

repatriation of Omar Khadr, indicating, to some, a conservative mindset.¹² It was also suggested that the choice reflected a decided preference for federal courts jurists over those from the Quebec Court of Appeal.¹³

There is no question that Nadon J., a jurist of some two decades with extensive private practice experience, was qualified to sit on the Supreme Court.¹⁴ True, he was not the most obvious choice. But, narrow conceptions of “the best” candidate should be avoided.¹⁵ There are many paths to judicial excellence, and predictions of greatness are notoriously unreliable.

Almost immediately, Nadon’s selection provoked great speculation and, even, concern. First, the Harper government has engaged in unprecedented and emphatic criticism of the judiciary.¹⁶ Through various decisions, including changing the vetting process for federally-appointed judges, the government has fostered the idea that it values ideology above other qualities.¹⁷ To some, the unusual choice of Nadon J. could be explained only in ideological terms.

¹² *Khadr v. Canada (Prime Minister)*, [2009] F.C.J. No. 462, 2009 FC 405, [2010] 1 F.C.R. 34 (F.C.). On appeal, the Supreme Court ruled unanimously that Khadr’s *Canadian Charter of Rights and Freedoms*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”] rights had been infringed by Canadian state agents. It declined to issue an order of *mandamus*, limiting itself instead to a declaration concerning the government’s conduct. *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3, [2010] 1 S.C.R. 44, 2010 SCC 3 (S.C.C.).

¹³ Interview of John Gomery (May 10, 2014) on *The House*, CBC Radio, online: <<http://www.cbc.ca/player/News/Politics/Audio/ID/2455409481/>>. The Prime Minister appointed Richard Wagner from the Quebec Court of Appeal in 2012. Wagner had only sat on that Court for eight months. “The Honourable Mr. Justice Richard Wagner”, *Supreme Court of Canada*, October 5, 2012, online: <<http://www.scc-csc.gc.ca/court-cour/judges-juges/bio-eng.aspx?id=richard-wagner>>. After Nadon J. was declared ineligible, the Prime Minister did turn to the Court of Appeal, appointing Clement Gascon. But, for the final Quebec replacement for outgoing Louis LeBel J., the Prime Minister appointed Suzanne Côté, a lawyer in private practice. The most recent appointee, Russell Brown, sat on the Court of Appeal for Alberta for one year.

¹⁴ It also followed a pattern of appointing mostly men. Prior to Marc Nadon, the Harper government had appointed Marshall Rothstein (from a short list crafted by the previous Liberal government), Thomas Cromwell, Michael Moldaver, Andromache Karakatsanis and Richard Wagner. The complement of women on the Court dropped from four to three. After Nadon J. was declared ineligible, the government appointed Quebec Court of Appeal jurist Clement Gascon and, in 2014, lawyer Suzanne Côté. In July 2015, it announced the appointment of Russell Brown from Alberta. For a breakdown of the current government’s pattern of appointments with specific reference to gender as well as race, see Rosemary Cairns Way, “Deliberate Disregard: Judicial Appointments Under the Harper Government” in J. Cameron, B.L. Berger & S. Lawrence, eds. (2014) 67 S.C.L.R. (2d) 43.

¹⁵ Carissima Mathen, “SCC Appointments” October 19, 2011, *Blogging for Equality*, online: <<http://www.bloggingforequality.ca/2011/10/scc-appointments.html>>.

¹⁶ See my “Choices and Controversy: Judicial Appointments in Canada” (2007) 58 U.N.B.L.J. 52, at 60 [hereinafter “Mathen, ‘Judicial Appointments’”], noting how as, Leader of the Official Opposition, Stephen Harper accused the former Liberal Government of stacking the Court with judges sympathetic to the push for same-sex marriage.

¹⁷ In 2006, the government changed the way that judicial candidates are ranked from “highly recommend”, “recommend” and “unable to recommend”, to simply “qualified” and “not qualified”.

Second, it became apparent that there might be a statutory barrier to the appointment. The problem concerned section 5 and, especially, section 6 of the *Supreme Court Act* which read as follows:

5. 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.

.....

6. 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.

And in French:

5. *Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.*

.....

6. *Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.*¹⁸

As Justice Fish was a section 6 appointee, his replacement would be under its criteria. Federal court judges had only ever been appointed to the Supreme Court under section 5. This included one judge, Gerald Le Dain, who was originally a Quebecker and had received his formative legal training there.¹⁹

This gave the government much more leeway in terms of selection. The government also added a fourth government representative — a member of law enforcement — and gave itself a working majority by denying a vote to the Judicial Appointments Committee chairperson except in the event of a tie. Mathen, 'Judicial Appointments', *id.*, at 61. And in 2007, the Prime Minister said:

We want to make sure we're bringing forward the laws to make sure we crack down on crime, that we make our streets and communities safer ... We want to make sure our selection of judges is in correspondence with those objectives.

House of Commons Debates, No. 110 (February 14, 2007), at 1400.

¹⁸ *Supra*, note 4. Note that s. 4 specifies that the Court shall consist of nine judges.

¹⁹ Justice Le Dain was appointed to a seat normally reserved to the province of Ontario. (By tradition, three of the Court's nine seats are allotted to Ontario appointees, and one each to the Maritimes, the Prairies and the province of British Columbia.) Another Ontario appointment, Louise Arbour, was also trained in Quebec. It should be noted, though, that at the time of their appointments both judges were well-settled in Ontario.

It should be noted that the government was aware of the issue.²⁰ Months before the appointment, the Minister of Justice expressed concern that the *Supreme Court Act* might be read to exclude *all* Federal Court judges.²¹ And, at the time that candidates were being vetted, the Chief Justice of Canada tried to alert the government to a “potential problem” with section 6.²²

The situation was so unusual that it inspired the government to solicit outside opinions.²³ On the day of Nadon J.’s “nomination”,²⁴ the Minister of Justice released a supportive memorandum written by retired Supreme Court Justice Ian Binnie. The government consulted another retired judge, Louise Charron, as well as a noted constitutional scholar, Peter Hogg, who reportedly reached the same conclusion.²⁵

²⁰ In his testimony before the Standing Senate Committee in Legal and Constitutional Affairs, the Minister of Justice described the government’s thought process:

Mr. MacKay: To be clear, we anticipated that there could be difficulty, and, hence, we sought the legal opinion of Mr. Justice Binnie, Peter Hogg and Madame Charron, which you are familiar with. But, in terms of the point in time in which this became a problem, it was not until the lawyer in Toronto launched his objection that we realized. We anticipated it could be a problem. We sought to get a legal opinion to address any suggestion around the eligibility of Mr. Justice Nadon, but, until the time that there was an objection filed, it was clear sailing. Mr. Justice Nadon could have taken his place on the court. In fact, to be correct, he could take his position on the court, but he has chosen voluntarily to recuse himself. That was his decision. That was not at the request of the federal government or of me, as Justice Minister.

House of Commons, The Standing Senate Committee on Legal and Constitutional Affairs, “Evidence” (November 27, 2013), online: <<http://www.parl.gc.ca/content/sen/committee/412/LCJC/51062-e.HTM>> [hereinafter “House of Commons, ‘Evidence’”].

²¹ Tobi Cohen, “Peter MacKay insists Conservatives are not moving Canada toward U.S.-style justice”, *National Post*, August 17, 2013, online: <<http://news.nationalpost.com/2013/08/17/peter-mackay-insists-conservatives-are-not-moving-canada-toward-u-s-style-justice/>>.

²² The Chief Justice became concerned when she saw that of six candidates initially proposed by the government, four sat on the Federal Court. Leslie MacKinnon, “Beverley McLachlin, PMO give duelling statements on Nadon appointment fight”, *CBC News*, May 1, 2014, online: <<http://www.cbc.ca/news/politics/beverley-mclachlin-pmo-give-duelling-statements-on-nadon-appointment-fight-1.2628563>>.

²³ Citing privilege, the government has refused to confirm or release any internal memoranda it received from lawyers in the Department of Justice. As my colleague Adam Dodek has noted, it strains credulity to think that the government would not have sought such advice. While impossible to prove, it is plausible that outside opinions were resorted to because the government received initial advice from its own lawyers that a Federal Court judge would be ineligible.

²⁴ I place scare quotes around the word “nomination” because in no meaningful sense did this describe the situation. The terminology of a “candidate” who has been “nominated” by the Prime Minister came into vogue during the preceding decade when Supreme Court candidates started to appear before Parliamentarians to answer questions. But, as acknowledged by a previous Liberal Minister of Justice, MPs did not “approve” the selection. Mathen, ‘Judicial Appointments’, *supra*, note 16, at 62.

²⁵ Only Mr. Justice Ian Binnie’s advice has been publicly disclosed. Access to information requests by Members of Parliament shed some but not much light on these external opinions. Results of such inquiries are on file with author.

The statutory basis for Nadon J.'s appointment was barely mentioned in his Parliamentary hearing.²⁶ He was sworn in as a puisne justice on October 7, 2013. The next day, a Toronto lawyer filed an application in Federal Court challenging the appointment. The government of Quebec publicly supported the challenge. Justice Nadon immediately announced that he would delay taking up his new duties.²⁷ The Court followed with a statement that, until the matter was resolved, it would have no contact with him.²⁸

The final factor contributing to the perfect storm was procedural. On October 22, 2013, the government introduced two new clauses to a pending budget bill:

471. The *Supreme Court Act* is amended by adding the following after section 5:

5.1 For greater certainty, for the purpose of section 5, 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.

472. The Act is amended by adding the following after section 6:

6.1 For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province.²⁹

²⁶ Government of Canada, Department of Justice, Ad Hoc Committee on the Appointment of Supreme Court of Canada Justices, *Minutes* October 2, 2013, online: <http://www.justice.gc.ca/eng/news-nouv/ja-nj/2013/doc_32972.html>.

²⁷ See online: <http://www.thestar.com/news/canada/2013/11/03/supreme_court_quarantines_marc_nadon_until_challenge_heard.html#>.

²⁸ A few weeks later, the Supreme Court announced that it would have no contact with Nadon J. until the legal proceedings were concluded. In a letter issued on November 1, 2013, the Deputy Registrar of the Court stated:

As questions concerning the legality of Justice Nadon's appointment are pending before the Court, it has adopted the following measures to ensure that justice is both done and is seen to be done in an independent and impartial manner:

1. Justice Nadon will not have contact with the members of the Court.
2. Justice Nadon will continue not to participate in the work of the Court.
3. Justice Nadon will not occupy his office or attend at the Court.

The Court confirms that none of its members has discussed the merits of the challenge or the *Reference* with Justice Nadon.

See online: <<http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35586>>. See also <http://www.thestar.com/news/canada/2013/11/03/supreme_court_quarantines_marc_nadon_until_challenge_heard.html>.

²⁹ *Economic Action Plan 2013 Act*, *supra*, note 2.

Clauses 471 and 472 were meant to be declaratory. Rather than amending sections 5 and 6 outright, the clauses would function as a guide to their interpretation. Because declaratory legislation is retroactive,³⁰ sections 5 and 6 would be read as having *always* permitted the appointment of any person who had been a member of the relevant provincial bar for 10 years. The federal government could thus deny that it was changing the rules to *retroactively* facilitate Nadon J.'s appointment. As well, by focusing on the criterion of bar membership the federal government could avoid a potentially thornier question about the eligibility of federal court judges *per se*. Clauses 471 and 472 received Royal Assent on December 12, 2013.³¹

The declaratory legislation would seem to have resolved the issue. Yet, on the very day that it introduced clauses 471 and 472, the government put to the Supreme Court the following questions:

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*?

Never before had the government sought to pass declaratory legislation and pursue a reference on the same issue.³²

³⁰ *Régie des rentes du Québec v. Canada Bread Company Ltd.*, [2013] S.C.J. No. 46, [2013] 3 S.C.R. 125, 2013 SCC 46, at para. 48 (S.C.C.).

³¹ *Economic Action Plan 2013 Act*, *supra*, note 2.

³² Adam Dodek has noted that the last time any government had introduced legislation at the same time as it sought an opinion about its validity was the *Reference re: Anti-Inflation Act (Canada)*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 (S.C.C.). That example, though, did not involve declaratory legislation. Appearing before the House of Commons Standing Committee on Justice and Human Rights, Dodek testified that the dual-track strategy was untenable. He expressed concern over the fact that the Attorney General, by permitting clauses 471 and 472 to be inserted into the budget bill, had implicitly vouched for its validity at the same time as asking the Supreme Court for an opinion on that validity. House of Commons, Standing Committee on Justice and Human Rights (November 19, 2013), at 0850. In my own testimony before the same Committee, I suggested that the unusual circumstances might well persuade the Court to refuse to answer one or both of the questions. *Id.*, at 0845.

Why would the Executive do that? The matter was raised with the Minister of Justice:

Mr. Sean Casey: My question for you is whether you would be amenable to delaying the impact of [clauses 471 and 472] to allow the Supreme Court to speak unimpeded.

Hon. Peter MacKay: Not at all. Absolutely not. Our intention is to clarify what we believe is the case and what we believe the Supreme Court will affirm.

Mr. Sean Casey: So as I understand what you just said to me, you are not in favour of delaying the implementation until the Supreme Court has spoken. You want to have Parliament amend the legislation to say that this is the state of the law, and then ask the Supreme Court what the state of the law is. Do I have that right?

Hon. Peter MacKay: Well, Mr. Casey, you've been here a little while now, and you recognize that there is something called the supremacy of Parliament when it comes to the passing of laws. So yes, that's exactly what I'm saying. We are telling the Supreme Court this is what the legislation means. We're putting in place a declaratory provision to bring about a greater understanding of the eligibility rules, and at the same time we have sought an opinion from the Supreme Court. That's how it works, sir.

Mr. Sean Casey: So we're going to ask them and tell them at the same time.

Hon. Peter MacKay: You got it.³³

The Minister's reply — that the dual-track strategy was pursued for “clarity” — is puzzling. Declaratory legislation, which is directed at courts, provides all the clarity that could be required. Asking a court for its opinion on legislation that has already been subject to the declaratory power is, at the very least, redundant. Perhaps the government was caught off guard by the speed at which events unfolded. Declaratory legislation would be attractive to a government eager to constrain a court's interpretative powers. Yet, the government no doubt appreciated the symbolic and political importance of getting the Supreme Court's imprimatur. I suspect, too, that the government did not seriously consider that the Court would rule that the appointment was barred by section 6 in any event. It likely assumed the *Reference* would be a *pro forma* affair. If so, it badly miscalculated.

³³ House of Commons, Standing Committee on Justice and Human Rights (November 21, 2013), at 0920. See also House of Commons, “Evidence”, *supra*, note 20.

III. THREE DILEMMAS

The *Reference* was heard on January 15, 2014. In addition to the federal government, the Court heard submissions from the Attorneys General of Ontario and Quebec; three former Federal Court judges intervening in their own names;³⁴ the Association of Provincial Court Judges; the Toronto lawyer (Rocco Galati) who had first challenged the appointment; and the non-profit Constitutional Rights Centre. A rather dry affair, the hearing belied the high drama lurking just underneath. Part of that drama has been explained in Part II. Once the focus shifted to the hearing, the Court confronted three additional dilemmas.

The first involved the panel. One of the sitting judges, Marshall Rothstein, had himself been appointed to the Court from the Federal Court of Appeal (in his case, under section 5). When seeking leave to intervene, Rocco Galati asked that Rothstein J. not determine the motion. Justice Rothstein instead announced his recusal from the entire proceeding. As is the usual practice, he provided no reasons.

Without reasons, it is impossible to know what motivated Rothstein J.'s decision. But, most likely, it rested on the fact that both the questions and the declaratory legislation referred to section 5 and section 6.³⁵ It was theoretically possible for the Court to conclude that neither section 5 nor section 6 permitted the appointment of a Federal Court judge, as Rothstein J. had once been.³⁶ Given the uncertainty,³⁷ Rothstein J.'s recusal was appropriate.

To the extent that there was a possibility (albeit a remote one) that the proceeding could throw his own appointment into doubt, Rothstein J. was wise to remove himself. But it is important to distinguish that fairly narrow issue from a quite different conflict: the fact that Rothstein J. hailed from the same court as Nadon J. The argument for recusal in that case would rest on the allegation that, having previously served on the same court, Rothstein J. would reasonably be perceived as having a natural sympathy with it and, by inference, Nadon J. himself. In other

³⁴ The former justices were Robert Décary, Alice Desjardins and Gilles Létourneau.

³⁵ Most likely, this was intentional, as it is more difficult to argue that Federal Court judges are ineligible to sit on the Supreme Court *per se*.

³⁶ Plaxton & Mathen, *supra*, note 2. Note, though, that we did not strongly press this interpretation.

³⁷ Doubt could arise despite the fact that the reference opinion would be advisory only: *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698, 2007 SCC 79, at para. 70 (S.C.C.) [hereinafter "*Reference re Same-Sex Marriage*"].

words, *regardless of whether the section 5 issue was in play*, it would be inappropriate for Rothstein J. to participate.

The notion of bias reflected in the above argument is deeply problematic. If sustained, it would support challenges based on all kinds of past associations such as educational affiliation, or professional memberships.³⁸ It would be only a few steps away from a demand for recusal based on racial, religious or ethnic identity or sympathy.

The Supreme Court considered the broader issue in a 2015 decision, *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*.³⁹ Writing for the Court, Abella J. noted:

While I fully acknowledge the importance of judges avoiding affiliations with certain organizations, such as advocacy or political groups, judges should not be required to immunize themselves from participation in community service where there is little likelihood of potential conflicts of interest....

.....

Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind.⁴⁰

Justice Abella's remarks strike the correct balance. Judges are not, nor should they be expected to be, blank slates. Past experience and connections deepen their humanity; and can justify recusal only in the rarest cases. While Rothstein J.'s recusal was proper, it is unfortunate that it was unaccompanied by any reasons that could have articulated the basis for it and, ideally, limited its future applicability.

Another dilemma posed by the *Reference* is that it forced the Court to sit in judgment of one of its own. Justice Nadon's peers had to advise

³⁸ *St. Lewis v. Rancourt*, [2012] O.J. No. 5698, 2012 ONSC 6768 (S.C.J.).

³⁹ [2015] S.C.J. No. 25, 2015 SCC 25 (S.C.C.) [hereinafter "*Yukon*"].

⁴⁰ *Id.*, at paras. 59, 61. Note that in the *Yukon* case, the Court concluded that the high bar for demonstrating bias *had* been made out, but on the basis of the judge's conduct and demeanour during the proceedings. The fact that he had been involved in a philanthropic organization dedicated to the general issue — minority language rights — before him did *not* suffice.

whether he could remain one of them.⁴¹ Unquestionably, this made for a very difficult dynamic. Some have suggested that the Court did not go far enough to emphasize that it was considering only the appointment and not the jurist.⁴² The majority opinion has even been criticized for repeatedly describing Nadon J. as “supernumerary” — to some, this was a slight against him.⁴³

The above criticisms illustrate the depth of the controversy, but are unfounded. The Court’s sparing references to Nadon J.’s supernumerary status were for the purpose of setting out the facts for the record, and clarifying the result of its opinion.⁴⁴ In the past, the Court has occasionally taken pains to declare itself neutral with respect to an underlying controversy.⁴⁵ But the *Reference* was not a case where this kind of manoeuvre would have been effective. The *Reference* was not just controversial. It had the potential to shake the very foundations of the Court.⁴⁶ The Court was in a “lose-lose” situation, with little it could do or say to mitigate the tension.

⁴¹ As the issue concerned eligibility, it is perhaps more accurate to speak of whether he was entitled to have been appointed. But the *Reference* dealt with his privilege to continue to sit on the Court.

⁴² See the panel entitled “The Political and Constitutional Place of the Supreme Court of Canada” at the May 2014 conference at the University of Ottawa on CPAC *Public Record*, online: <<http://www.cpac.ca/en/digital-archives/?search=appointing+supreme+court+judges>>. The closest that the majority comes is in this statement:

These questions arise in the context of the appointment under s. 6 of the Honourable Marc Nadon, a supernumerary judge of the Federal Court of Appeal and formerly, but not at the time of this appointment, a member of the Quebec bar of more than 10 years standing. Justice Nadon was not a judge of the Court of Appeal or the Superior Court of the Province of Quebec and therefore was not eligible for appointment on that basis. The narrow question is thus whether he was eligible for appointment because he had previously been a member of the Quebec bar.

In my view, which I offered during the above panel discussion, the term “the narrow question” operated as a (very muted) signal for a more blunt statement such as “We of course take no issue on the suitability of Justice Nadon.” *Supreme Court Act Reference*, *supra*, note 1, at para. 3.

⁴³ See discussion at the panel, *id.* The majority opinion uses the term three times, all in the first nine paragraphs.

⁴⁴ The three references are found in para. 3, a purely introductory passage; para. 6 where the Court gives notice of its declaration and presumably wishes to clarify that Nadon J.’s status as a supernumerary justice of the Federal Court of Appeal is restored; and para. 9 which falls under the heading called “Background”.

⁴⁵ See, e.g., *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331, 2015 SCC 5, at para. 79 (S.C.C.) [hereinafter “*Carter*”]; *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, [2013] 3 S.C.R. 1101, 2013 SCC 72, at paras. 81-88 (S.C.C.) [hereinafter “*Bedford*”].

⁴⁶ There was a simmering suspicion in some quarters that the Court was already set against Nadon J. Following the opinion’s release, members of the Conservative Party of Canada caucus accused the Chief Justice of “lobbying” against Nadon J. and the Prime Minister’s Office intimated that she had tried to meddle in the appointment. John Ivison, “Tories incensed with Supreme Court as some allege Chief Justice lobbied against Marc Nadon appointment”, *National Post*, May 1, 2014, online:

The final dilemma is that the *Reference* held profound implications for the Court as an institution. In this respect, it was not unique. In many cases, the Court may be perceived as having a special interest. For example, its constitutional status may be invoked; or the issue may affect the judges personally (e.g., compensation).⁴⁷ The *Reference* is one such matter. Once the Court determined that Nadon J. was not eligible, it had to consider the effect of the declaratory legislation purporting to state that he was. Ultimately, the Court had to rule on whether its own composition and essential features are protected against ordinary legislative change.

As with the interpretative question regarding section 6, the issue had never been addressed. The *Supreme Court Act* was enacted, and amended numerous times, as ordinary federal law.⁴⁸ While the amending formula in Part V of the *Constitution Act, 1982* does mention the Supreme Court, the rest of the Constitution does not. That ambiguity had led some scholars to suggest that Part V's mention of the Court was aspirational and would take effect only in the event of a subsequent decision to entrench the Court in the written text of the Constitution.⁴⁹

The Supreme Court rejected that argument.⁵⁰ It found that Part V was but one signal that the Court had already become an entrenched, constitutionally protected actor. Therefore, to the extent that the *Supreme Court Act* defines aspects of the Court's composition or essential features, it may now be changed only through formal constitutional amendment.

In our system, the Supreme Court has a duty to interpret and apply constitutional norms. As a constitutional actor, its own status and powers may well arise for determination. Decisions of this kind are open to criticism,⁵¹ which tends to be more pointed. But as the primary

<<http://news.nationalpost.com/news/canada/canadian-politics/tories-incensed-with-supreme-court-as-some-allege-chief-justice-lobbied-against-marc-nadon-appointment>>.

⁴⁷ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577 (S.C.C.).

⁴⁸ *Supreme and Exchequer Court Act*, S.C. 1875, c. 11, s. 4; and subsequent legislation.

⁴⁹ This has been referred to as the "empty vessels" theory and one of its proponents includes Peter Hogg in his *Constitutional Law of Canada*, 5th ed. Supp. (Toronto: Thomson Carswell, 2007), at 4-21 cited in *Supreme Court Act Reference*, *supra*, note 1, at para. 97.

⁵⁰ Justice Moldaver did not take express issue with this part of the majority's decision, though he disagreed somewhat on the relevant formula that would apply to specific changes. *Supra*, note 1, at paras. 113-114. I think therefore that the analysis is fairly attributed to "the Court".

⁵¹ Examples include: the recognition of constitutional conventions *Re Resolution to amend the Constitution*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753 (S.C.C.); the judicial role in identifying principles of fundamental justice *Reference re Motor Vehicle Act (British Columbia)*, [1985] S.C.J. No. 73,

interpreter of the Constitution, the Court is afforded no escape hatch. Indeed, to the extent that the system depends on the Court's independence and authority, it would be inappropriate for the Court to weigh, as a factor, whether its decision in a particular case could be perceived as self-aggrandizing. The declaratory legislation raised clear constitutional questions that required resolution. They required the Court to delve into a self-referential exercise that was awkward, but unavoidable. The fact that the decision was necessarily self-regarding does not count as a mark against it, or against the Court.

IV. ABSURDITY? UNINTENDED CONSEQUENCES? A REJOINDER

1. Section 6: The Restrictive Reading

The core of the Nadon controversy was whether, under section 6 of the *Supreme Court Act*, a person who is neither a judge on a superior court in Quebec nor a current member of its bar is eligible for appointment. Though the statute mentions both judges and advocates, the dispute focussed on the second term which is defined by bar membership.

In his memorandum, Binnie J. stressed that section 6 must be read in conjunction with section 5. He concluded that since section 5 cannot be read as requiring current bar membership, neither can section 6.⁵² At first blush, that conclusion may appear reasonable. To the casual observer, it is probably not evident why a Federal Court jurist would be ineligible for appointment under either section.

In a 2013 article, Professor Michael Plaxton and I agreed with Binnie J.'s analysis of section 5 but parted company with him on section 6.⁵³ Section 5 exists to guarantee minimum legal expertise for the Court as a whole.

[1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 (S.C.C.); and the reliance upon what are essentially separation of powers concerns to refuse to answer reference questions *Reference re Same-Sex Marriage*, *supra*, note 37.

⁵² Memorandum from the Honourable Ian Binnie September 9, 2013, online: <http://pm.gc.ca/grfx/docs/20130930_Binnie_cp.pdf>, at 5 [hereinafter "Binnie Memorandum"]. The French version of s. 5 reads: "Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province." The word "inscrits", Binnie acknowledged, "could be interpreted to mean current membership". He found, though, that the English version "clear[ly] and unambiguous[ly]" allows someone to be nominated so long as he or she "has been ... a barrister or advocate of at least ten years standing". He further remarked that "[i]f Parliament had intended to specify *current* membership it could easily have said so in both official languages."

⁵³ Plaxton & Mathen, *supra*, note 2.

But section 6, we argued, has different functions. One is to guarantee expertise with respect to *Quebec's* legal traditions. Another is to assure the province in a deeper sense of the legitimacy of such appointees.⁵⁴ This renders section 6 more restrictive than section 5.

It should be noted that the word “restrictive” here merely notes the comparative size of the candidate pools produced by different readings of section 6. I mention this because, in various settings, it has been put to me that the “restrictive” reading pulls against the maxim that statutory interpretation must be “large and liberal”.⁵⁵ On such an account, “restrictive” is not merely adjectival but normatively deficient: a reading of section 6 that creates a smaller pool of candidates eligible for appointment is *per se* undesirable. But, as this section hopefully makes clear, in matters of statutory interpretation desirability itself depends on the relevant interpretative factors.

The first interpretative factor⁵⁶ is textual. As the majority noted, section 5 creates four groups eligible to be appointed: current and former members of a superior court, and current and former barrister/advocates of at least 10 years standing. On its face, section 6 includes only two of those groups: current judges and current advocates.⁵⁷ Accepting the maxim that “the mention of one or more things of a particular class excludes, by implication, all other members of the class”, the specification that three judges shall be appointed “from among” the advocates of the bar “impliedly excludes former members”.⁵⁸

⁵⁴ Our conclusions in this regard were buttressed by the relevant debates in Hansard; by commentary by legal historians; and by consistent and distinctive wording in s. 6 that is not found in s. 5. For the full analysis, see Plaxton & Mathen, *supra*, note 2.

⁵⁵ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27 (S.C.C.), citing *Interpretation Act*, R.S.O. 1990, c. I.11.

⁵⁶ The majority opinion mentions three factors (which it called “premises”), two of which are canvassed here. The third premise was the broader scheme of the *Supreme Court Act*, in particular, the fact the Federal Court judges are excluded from those provisions enabling the appointment of *ad hoc* judges to fulfil the quorum demands for s. 6 jurists. *Supreme Court Act Reference*, *supra*, note 1, at paras. 63-68.

⁵⁷ Section 5 refers to both present and former membership in the listed institutions by using the words “is or has been” in the English version and “*actuels ou anciens*” in the French version. By contrast, s. 6 refers only to the pool of individuals who are presently members of the bar (“shall be appointed from among” and “*sont choisis parmi*”). The significance of this change is made clear by the plain meaning of the words used: the words “from among the judges” and “*parmi les juges*” do not mean “from among the former judges” and “*parmi les anciens juges*”, and the words “from among the advocates” and “*parmi les avocats*” do not mean “from among the former advocates” and “*parmi les anciens avocats*”. *Id.*, at para. 41.

⁵⁸ *Id.*, at para. 42.

The second factor was legislative purpose. As I have argued, the purpose of section 6 is not confined to ensuring competence in Quebec's civil law tradition. It also reflects "the historical compromise that led to the creation of the Supreme Court".⁵⁹ Section 6 "protects both the *functioning* and the *legitimacy* of the Supreme Court as a general court of appeal for Canada".⁶⁰ The majority found that this additional purpose, amply demonstrated by the historical record, required candidates who were not only "qualified to represent Quebec on the Court, but ... *were perceived by Quebecers as being so qualified*".⁶¹ While "excluding former advocates of at least 10 years standing [might not] perfectly advance this two-fold objective",⁶² it did advance the provision's purpose sufficiently so as to explain the textual differences between sections 5 and 6. The majority took pains to emphasize that, read in this way, the statute implied nothing about the *actual* expertise in civil law of Quebec lawyers who are appointed to the Federal Court. It simply meant that such jurists are ineligible under section 6.⁶³

In our article, Michael Plaxton and I did not consider any constitutional arguments. We stated that, if the government found section 6 to be too narrow, it should amend it. The *Reference* foreclosed that option, because the majority concluded that the declaratory legislation⁶⁴ indirectly amended section 6 in a manner contrary to the *Constitution Act, 1982*.

As a result, the majority declared Nadon J.'s appointment void *ab initio*.⁶⁵ This was a dramatic result, unprecedented and unexpected by almost everyone (including me). Describing itself as "genuinely surprised", the federal government strongly criticized the opinion.⁶⁶ It

⁵⁹ *Id.*, at para. 48.

⁶⁰ *Id.*, at para. 49 (emphasis in original).

⁶¹ *Id.*, at para. 56 (emphasis added).

⁶² *Id.*, at para. 57.

⁶³ The third reason given by the majority for its restrictive interpretation was the broader scheme of the *Supreme Court Act*, in particular, the fact the Federal Court judges are excluded from those provisions enabling the appointment of *ad hoc* judges to fulfil the quorum demands for s. 6 jurists. *Id.*, at paras. 63-68.

⁶⁴ The Court was obliged to consider the issue because the government had passed declaratory legislation affecting the interpretation of ss. 5 and 6. The legislation could have that effect only if it was *intra vires* Parliament. While Moldaver J.'s answer to Question 1 made it unnecessary for him to consider the declaratory legislation, he agreed that changes to the Court's composition would require formal amendment, though he disagreed somewhat on the relevant formula. *Supra*, note 1, at paras. 114-115.

⁶⁵ Note that by making this kind of declaration, the Court appeared to issue an actual remedy, which would exceed the ordinary restrictions of the advisory function.

⁶⁶ Jordan Press, "Harper government 'genuinely surprised' by Supreme Court's decision to reject Marc Nadon", *National Post*, March 21, 2014, online: <<http://news.nationalpost.com/news/canada/canadian-politics/marc-nadon-not-allowed-to-sit-on-supreme-court-of-canada-top-court-rules>>.

was not alone. Some of the criticism devolved into outright attacks on the Chief Justice.⁶⁷ Other claims were more substantive. With respect to the section 6 issue, those claims tended to fall into two camps, which I call the argument from absurdity and the argument from unintended and undesirable consequences.⁶⁸ Both will now be considered.⁶⁹

2. Argument(s) from Absurdity

The basis of the argument from absurdity is that the majority's interpretation leads to such wildly counter-intuitive results that Parliament could not possibly have intended it as the correct reading. What those results are, vary. One is found in the Binnie Memorandum:

Parliament's obvious concern in ss. 5 and 6 was to exclude from consideration men and women who lack the appropriate skills and experience. Exclusion from possible appointment of the talent pool of Federal Court judges conflicts with this purpose. Take for example a lawyer who practices for 15 years in Montreal from 1970 to 1985, then sits as a Judge on the Federal Court of Appeal from 1986 to 2000. Such an individual is clearly better qualified in 2000 after 14 years on the bench than he was in 1985 prior to the initial appointment. Yet the objection to the appointment of Federal Court judges attributes to Parliament the view that Federal Court experience is a detriment not an asset. ... Any interpretation of ss. 5 and 6 of the *Supreme Court of Canada Act* that leads to such an absurd result should be rejected.

In the above variation, the purported absurdity arises from the exclusion of people who are clearly competent to perform the task of a "Quebec judge" on the Supreme Court. The point is: a Quebec-trained jurist who happens to sit on a court outside of that province is not thereby less competent to represent Quebec. That is a reasonable proposition. But, in order for it to render the restrictive reading *absurd*, one must *also* accept that section 6 was crafted to ensure that *all* competent persons would be considered. In fact, that does not properly describe section 5 *or* section 6. Quite the contrary: the provisions set out predictable criteria to *limit* the pool of candidates beyond mere competence.

Think of it this way. Were "excellence in civil law" the true threshold for section 6, there would be no reason to confine its candidates to those

⁶⁷ Discussed, *infra*, at note 92 and surrounding text.

⁶⁸ This second critique might also be described as "the sky is falling" argument.

⁶⁹ As stated earlier, I will not address substantive criticism of the Part V analysis.

who are or have ever been advocates in Quebec. Being a Quebec advocate does not exhaust the universe of those who possess relevant expertise in civil law. Bar admission provides, at most, a proxy for competence. Similarly, were “excellence in the law generally” the true threshold for section 5, there would be no reason to limit its candidates to those with 10 years bar membership. Again, length of time functions as a proxy for rather than sole indicator of excellence.

So, many persons who could fulfil the functional role of a Supreme Court judge are excluded by a plain reading of *both* sections. Without evidence that the legislature intended to create the broadest possible pool, the mere fact of such exclusion cannot show that the restrictive reading of section 6 (or, for that matter, section 5) is absurd.

Another argument from absurdity rests on the so-called “one-day” rule. Under this version, the restrictive reading would require simply that a candidate join the Quebec bar for one day. In its most extreme form, the one-day argument treats section 6 as a stand-alone provision. Since section 6 mentions no *minimum* period of bar membership, any Quebec advocate may be appointed to the Supreme Court *on the first day that she is called to the bar*. In my opinion, the majority correctly concluded that sections 5 and 6 function together, but section 6 operates more restrictively with respect to the criteria *that it enumerates*.⁷⁰ There is no *plausible* reason to read section 6 as permitting a markedly *reduced* bar membership period for Quebec judges than section 5 does for all other judges — except, perhaps, to bootstrap a conclusion that section 6 should *not* be read on its face. But, once it is accepted that sections 5 and 6 work together, it is plain that section 6 does not exhaust the eligibility criteria for Quebec judges.

A less extreme version of the one-day argument is that, in light of *why* currency is important, it is absurd that a person with 10 years past membership could be considered qualified merely by *rejoining* the bar for a single day.⁷¹ In his dissent, Moldaver J. emphasized this point:

My colleagues have chosen not to address ... whether one day’s renewed membership at the Quebec bar is sufficient to qualify as an advocate or whether something more is needed - six months, two years, five years, or perhaps even a continuous 10-year period immediately preceding the appointment.

⁷⁰ *Id.*, at para. 42.

⁷¹ I will leave aside whether such an “administrative” act would be as simple as its advocates suggest.

In my view, *currency means exactly that*. A former Quebec superior court judge or advocate of 10 years standing at the Quebec bar could rejoin that bar for a day and thereby regain his or her eligibility for appointment to this Court. In my view, this exposes the hollowness of the currency requirement. Surely nothing is accomplished by what is essentially an administrative act. Any interpretation of s. 6 that requires a *former* advocate of at least 10 years standing at the Quebec bar, or a *former* judge of the Quebec Court of Appeal or Superior Court, to rejoin the Quebec bar for a day in order to be eligible for appointment to this Court makes no practical sense. Respectfully, I find it difficult to believe that the people of Quebec would somehow have more confidence in this candidate on Friday than they had on Thursday.⁷²

The majority declined to address the question, noting somewhat acidly that it had not been posed.⁷³

Professor Plaxton and I have conceded that such a person would indeed be eligible.⁷⁴ If section 6 exists to provide predictable rules for Quebec candidates, we have said, then so long as the 10-year membership has been achieved, it matters only that the membership is current *at the time of appointment to the Court*.⁷⁵

It has always puzzled me that the above interpretation of section 6 could be labelled “absurd”. Rules, after all, function in different ways. At their margins, rules may permit applications that do not fully match their underlying reason — that permit, in effect, a kind of sharp practice. A familiar example is tax law, where a person takes advantage of a loophole. It may nevertheless be consistent with purposive interpretation to err on the side of a more mechanical application, and tolerate the sharp practice.

The premise behind the second version of the one-day argument is that, to the extent the restrictive reading of section 6 permits a Prime Minister to evade it by use of an “administrative act” (as Moldaver J. called it), the reading is fatally deficient. But the argument blurs an important distinction between a rule, and the actors charged with respecting it. Most assuredly, it would be odd, perhaps even improper,

⁷² *Supreme Court Act Reference*, *supra*, note 1, at paras. 152-153.

⁷³ *Id.*, at para. 71.

⁷⁴ Plaxton & Mathen, *supra*, note 2, at 21.

⁷⁵ Now, I do not agree that a single day’s bar membership is enough for a former *judge* of a Quebec superior court. The reality is that such a person is likely to have 10 years bar membership anyway, because that is the minimum qualification for superior court judges in Canada. But, for a hypothetical candidate who did not, I would *not* read s. 6 as permitting the appointment of such a person after joining the Quebec bar for one day.

for a Prime Minister to encourage a past advocate to join a law society for a single day in order to ascend to the Supreme Court. But the potential for a rule to be manipulated by a devious or indifferent actor shows, at most, that the rule may be ineffective or under-inclusive. It does not render that rule absurd.

The final argument that I group under the “absurdity” umbrella (although it could also qualify as one about unintended consequences) is that the restrictive reading of section 6 imputes to Parliament a negative, even derogatory, attitude towards the Federal Court. Recall what Binnie J. wrote: “the objection to the appointment of Federal Court judges attributes to Parliament the view that Federal Court experience is a detriment not an asset.”⁷⁶

Now, such a view might well be uninformed.⁷⁷ But, this hardly establishes that Parliament is thereby *foreclosed from holding it*. To be clear, I take no position on the issue other than to note that one may not legitimately disregard statutory language or history to avoid an uncomfortable conclusion. The same argument was made with respect to provincial court judges. Both sections 5 and 6 enumerate “superior” courts, leaving judges of inferior ones without a direct route to the Court (under section 5, they could be appointed as past advocates). Yet there were vanishingly few supporters pressing for the express inclusion of provincial court judges. And, there appears to be far less concern at the fact that they remain ineligible.⁷⁸

If the above response seems harsh, there is a much softer one: the restrictive reading of section 6 does not imply a negative assessment of those whom it excludes.⁷⁹ Professor Plaxton and I noted that rules occasionally function as heuristic devices, achieving an underlying goal indirectly rather than directly.⁸⁰ Here, the rule limits a candidate pool to those thought to possess the required competence *and* legitimacy. Like a voting age rule that bypasses the need to individually assess citizens for

⁷⁶ Binnie Memorandum, *supra*, note 52.

⁷⁷ During a Q and A session following a presentation I made at the Canadian Constitution Foundation Conference in January 2015, an audience member offered a spirited argument that, by nature of its limited jurisdiction, the Federal Court is in fact *not* the equivalent of superior courts. In the volatile atmosphere following the *Reference*, people have been extremely reluctant to articulate this view. My point is that it is, plainly, not absurd.

⁷⁸ Provincial court judges did intervene in the *Reference* to make a similar eligibility argument, but there was very little discussion of, or concern raised about, their position.

⁷⁹ The majority opinion echoes this argument, *supra*, note 1, at para. 60.

⁸⁰ Plaxton & Mathen, *supra*, note 2, at 22.

sufficient maturity, the currency rule avoids having to individually assess particular candidates for their link to Quebec society.

So the arguments from absurdity ignore one legislative reading in favour of another that supports what some clearly see as a better outcome. Certainly, requiring section 6 appointees to be current members of the bar is not the only way to ensure that the Court's Quebec judges are sufficiently connected to that province. It may not even be a particularly good or comprehensive way. The argument is, simply, that it is the method most plausibly suggested by all of the relevant interpretative factors.

3. Consequences

The second broad criticism is that the Court's interpretation of section 6 has led to unintended, and highly undesirable, consequences. Some have charged that Quebec is being cheated of the fullest complement of potential judges.⁸¹ The argument has been even more impassioned regarding the Federal Court, which is described as denigrated and its judges rendered second-class citizens.⁸² The Minister of Justice went so far as to suggest that the restrictive interpretation might be "discriminatory".⁸³ Concern also has been expressed that Quebec lawyers will be dissuaded from sitting on the Federal Court, leading to a precipitous decline in that bench's quality.⁸⁴

The argument that Quebec is not getting the benefit of the fullest complement of candidates may be valid. But similar concerns are present for *all* of the limiting rules. And, unlike the 10-year rule, the currency requirement applies only to appointments under section 6. An outstanding Quebecker who meets the relevant criteria could be appointed under section 5. She or he could follow the path of a Arbour J. or Le Dain J.⁸⁵ I do not suggest that either of those judges was appointed under section 5 in order to evade the strictures of section 6. Nor do

⁸¹ Laura Payton, "Peter MacKay won't rule out renaming Marc Nadon to Supreme Court", *CBC News*, March 24, 2014, online: <<http://www.cbc.ca/news/politics/peter-mackay-won-t-rule-out-renaming-marc-nadon-to-supreme-court-1.2584517>>.

⁸² See the extraordinary speech made by the Chief Justice of the Federal Court: Cristin Schmitz, "Chief Justice Noel's remarks spark debate over how far to go", *The Lawyers Weekly*, December 26, 2014, online: <<http://www.lawyersweekly-digital.com/lawyersweekly/3432?pg=3#pg3>> [hereinafter "Schmitz"].

⁸³ House of Commons, 'Evidence', *supra*, note 20, at 0935.

⁸⁴ A Conservative Member of Parliament put that argument to me during my testimony before the House of Commons Standing Committee on November 21, 2013. *Supra*, note 33, at 0945.

⁸⁵ *Supra*, note 19 and surrounding text.

I deny the likely political consequences of appointing a judge from Quebec under section 5 when the province already enjoys three of the Court's nine seats. I merely note that an alternate route exists.

Finally, it has been suggested that people will refuse appointments to the Federal Court in order to maintain their eligibility for the Supreme Court, harming the former's quality.⁸⁶ The argument is utterly speculative. Appointments to the Supreme Court are generational, featuring innumerable considerations. The chances that a single individual will receive a Supreme Court nod are akin to winning the lottery. It must also be said that there is something disconcerting in the idea that potential jurists would be seriously affected by such considerations. Self-interest is a powerful motivator. But the suggestion that an unidentified, indeed unidentifiable, group might be dissuaded from joining the Federal Court is not a sensible argument for reading section 6 of the *Supreme Court Act* to include them. In fact, very little is known about who actually applies to the Federal Courts. The government has not made such statistics available.⁸⁷ But it seems plausible that a variety of factors would weigh on the decision to apply; and that the position's independence, security of tenure and generous compensation would hold plenty of attraction for entirely competent candidates even if accepting that position now forecloses a *direct* promotion to the Supreme Court.

Reasonable people can disagree about whether section 6 included or excluded someone like Nadon J. Reasonable people can also disagree on the underlying policy of ensuring legitimacy, and not just technical competence, when filling the three Quebec seats. Some, though, have insisted that the only reasonable interpretation is that Nadon J. was always eligible. This resistance to alternative arguments, and the accompanying characterization of them as "absurd", suggests that we are no longer really dealing in interpretation but in passionate advocacy in favour of what the law should say. But the focus needs to be foremost on what the law does say. (Perhaps ironically, Nadon J. endorsed this approach at his Parliamentary hearing.⁸⁸)

⁸⁶ *Supra*, note 84. See also comments by the Chief Justice of the Federal Court, *supra*, note 82.

⁸⁷ Kirk Makin, "Of 100 new federally appointed judges, 98 are white, Globe finds", *The Globe and Mail*, April 17, 2012, online: <<http://www.theglobeandmail.com/news/politics/of-100-new-federally-appointed-judges-98-are-white-globe-finds/article4101504/>>.

⁸⁸ *Supra*, note 26.

V. EASY CASES AND THEIR ANSWERS

The *Reference* was an exceptional moment for the Court. The foregoing sections reveal its exceptional character in respect of history, procedure and substance. Here, I focus on another element: the *Reference*'s reception.

Reaction to any Supreme Court decision is apt to occupy a spectrum. For a given case, some will think the Court got it mostly right, and some mostly wrong. Some will think the Court completely mistaken and others will not care. It is impossible to place the reaction to the *Reference* along a continuum of outrage. So, the discussion that follows is admittedly impressionistic. I acknowledge, too, that my own small role in the *Reference* may have coloured my perceptions.

The Supreme Court routinely considers highly controversial issues.⁸⁹ And those decisions provoke spirited reaction.⁹⁰ Even so, the reaction to the *Reference* struck me as unusual. Though it obeyed the letter of the ruling, the government clearly considered its spirit to be utterly misguided. Ministers continued to defend their interpretation of section 6, relying on the dissenting opinion as well as prior endorsements by former justices and eminent scholars.⁹¹ Some government members went so far as to impugn the Chief Justice herself, sparking concern both in Canada and abroad.⁹² In over

⁸⁹ See, in the past two terms alone: *Carter and Bedford*, *supra*, note 45; *Reference re Senate Reform*, [2014] S.C.J. No. 32, [2014] 1 S.C.R. 704, 2014 SCC 32 (S.C.C.); *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, [2014] 2 S.C.R. 256, 2014 SCC 44 (S.C.C.); *R. v. Nur*, [2015] S.C.J. No. 15, 2015 SCC 15 (S.C.C.).

⁹⁰ Grant Huscroft, "The Supreme Court should leave assisted suicide to Parliament", *The Toronto Star*, October 10, 2014, online: <http://www.thestar.com/opinion/commentary/2014/10/10/supreme_court_should_leave_assisted_suicide_to_parliament.html>; Tristan Hopper, "Peter MacKay slams Supreme Court for quashing mandatory minimum gun sentences", *National Post*, April 22, 2015.

⁹¹ The Prime Minister's office made the following comment:
This legal advice was reviewed and supported by another former Supreme Court justice as well as a leading constitutional scholar, and was made public. None of these legal experts saw any merit in the position eventually taken by the Court.

Mark Kennedy, "Harper refused 'inappropriate' call from chief justice of Supreme Court on Nadon appointment, PMO says", *National Post*, May 1, 2014, online: <<http://news.nationalpost.com/news/canada/canadian-politics/harper-refused-inappropriate-call-from-chief-justice-of-supreme-court-on-nadon-appointment-pmo-says>> [hereinafter "Kennedy"]. Additionally, former Justice Michel Bastarache testified, with me, before the Senate Committee on Legal and Constitutional Affairs on November 21, 2013. Justice Bastarache opined that both ss. 5 and 6 included past advocates.

⁹² John Ivison, "Tories incensed with Supreme Court as some allege Chief Justice lobbied against Marc Nadon appointment", *National Post*, May 1, 2014, online: <<http://news.nationalpost.com/news/canada/canadian-politics/tories-incensed-with-supreme-court-as-some-allege-chief-justice-lobbied-against-marc-nadon-appointment>>. It was eventually revealed that, while the Chief Justice *did* raise concerns about how s. 6 would bear on the appointment of a federal court judge (after the

two decades of involvement in Supreme Court advocacy, I have rarely seen such levels of executive hostility towards a decision.

Public commentary on the ruling was more mixed.⁹³ But criticism emerged from unusual sources including former Supreme Court justices⁹⁴ and the Chief Justice of the Federal Court of Appeal.⁹⁵ At a conference that I co-organized in May 2014, most of the participants (scholars and jurists) expressed concern about at least one aspect of the *Reference*.⁹⁶ In short, the *Reference* left many persons unconvinced that it was the “right answer”.⁹⁷ And, the quality of that disagreement appeared unusually sharp. Why? In this final section, I discuss three possible reasons: internal division; finality; and expectations in an “easy” case.

1. Internal Division

In previous work, I have strongly defended the utility of dissent.⁹⁸ Dissent can function, *inter alia*, as a pressure valve, and a necessary

government’s short list revealed that four of six candidates were from that bench) she did so when the selection process was still formative, and long before Nadon was selected: Kennedy, *id.*; Julius Melnitzer, “ACTL weighs in on Harper-McLachlin spat”, *Financial Post*, May 8, 2014, online: <<http://business.financialpost.com/legal-post/actl-weighs-in-on-harper-mclachlin-spat>>.

⁹³ Grant Huscroft, “The Supreme Court’s faulty logic on Nadon”, *National Post*, March 25, 2014, online: <<http://news.nationalpost.com/full-comment/grant-huscroft-the-supreme-courts-faulty-logic-on-nadon>>; Andrew Coyne, “Flaky Supreme Court ruling meets dubious appointment”, *National Post*, March 24, 2014, online: <<http://news.nationalpost.com/full-comment/andrew-coyne-on-marc-nadon-flaky-supreme-court-ruling-meets-dubious-appointment>> [hereinafter “Coyne”]; Leonid Sirota, “What You Wish For”, March 22, 2014, online: <<https://doubleaspectblog.wordpress.com/2014/03/22/what-you-wish-for/>>. More positive commentary included Paul Daly quoted in Sean Fine, “Supreme Court’s rejection of Nadon is a legal marker and a political blow”, *The Globe and Mail*, March 21, 2014, online: <<http://www.theglobeandmail.com/news/politics/supreme-courts-rejection-of-nadon-is-a-legal-marker-and-a-political-blow/article17625541/>>; Adam Dodek quoted in John Geddes, <<http://www.macleans.ca/politics/ottawa/q-a-supreme-court-of-canadas-rejects-a-harper-appointment/>>; Carissima Mathen, “Nadon ruling hits like an earthquake”, *Ottawa Citizen*, March 21, 2014, A8.

⁹⁴ See the comments by former Justice John Major in Sean Fine, “Harper says he will ‘respect’ Supreme Court’s blocking of Nadon”, *The Globe and Mail*, March 25, 2014.

⁹⁵ Schmitz, *supra*, note 82.

⁹⁶ “Appointing Supreme Court Judges in the 21st Century: Reflections on the Nadon Reference”, University of Ottawa, May 28, 2014.

⁹⁷ I borrow this term from legal theory, but this section is not intended to enter into that debate. For a very brief survey, see: H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997); Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985); Joseph Raz, “Authority and Justification” (1985) 14 *Philosophy and Public Affairs* 3; John Mackie, “The Third Theory of Law” reprinted in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984); Brian Bix, *Law, Language and Legal Determinacy* (Oxford: Clarendon Press, 1995).

⁹⁸ See my “The Upside of Dissent in Equality Jurisprudence” in B.L. Berger, J. Cameron & S. Lawrence, eds., *Constitutional Cases 2012* (2013) 63 S.C.L.R. (2d) 111; see also my “Dissent and Judicial Authority in *Charter Cases*” (2003) 52 U.N.B.L.J. 321.

condition for a vibrant jurisprudence. A healthy legal order requires the freedom to disagree. So, I am reluctant to criticize any dissent as such. But dissent does not come without cost. And in this case, the cost was high.

A 6-1 split would not normally be considered significant. But in the exceptional context of the *Reference*, the dissent carried disproportionate weight. For one, it lent credence to the view that the majority had evaded such issues as the “one-day” argument.⁹⁹ I doubt that Moldaver J. meant to suggest that the majority had acted in bad faith. But some of his comments could lend support to that view.¹⁰⁰ Additionally, the dissent did not really stand alone. It vindicated previous opinions by persons who might be considered of equivalent stature to the Court: former justices, and the most prominent constitutional scholar in the country.¹⁰¹

So, notwithstanding the general value of dissenting opinions, a unanimous opinion likely would have garnered a different reception. A unanimous opinion would have conveyed the deepest possible authority, and permitted the Court to speak as an institution rather than as individual judges. The Court could have issued it *per curiam*, or as a joint opinion signed by every judge. A joint opinion is a very blunt message, only delivered in the context of a serious power struggle or challenge to a court’s authority. (The paradigmatic example is the United States Supreme Court’s joint opinion in the de-segregation case of *Cooper v. Aaron*.¹⁰²)

So the Court likely would have issued a unanimous opinion *per curiam*.¹⁰³ Because of the dissent, in order to signal a truly joint endeavour the six participating judges were required to sign it in turn. The image of the *seriatim* names may well have contributed to a sense that they were kicking Nadon J. off the Court in the face of a lonely, principled objector. In such a politicized case, every detail matters.

⁹⁹ *Supra*, note 72 and surrounding text.

¹⁰⁰ *Supreme Court Act Reference*, *supra*, note 1, at paras. 123-124 where Moldaver J. implies that the majority engages in “cherry-picking” and resorts to statutory interpretation principles “heretofore unknown”; Coyne, *supra*, note 93.

¹⁰¹ *Supra*, notes 25 and 92 and surrounding text.

¹⁰² 358 U.S. 1 (1958). In its even more famous predecessor, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the unanimous opinion was delivered by Chief Justice Earl Warren.

¹⁰³ See, e.g., *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) or *Reference re Same-Sex Marriage*, *supra*, note 37.

2. Finality

The next possible reason is finality. Of course, all Supreme Court rulings are “final”. Most obviously, they conclude the concrete dispute between the parties and may not be further appealed.¹⁰⁴ A ruling also becomes a powerful precedent. In these respects, the *Reference* resembles other cases. But in at least two ways, the finality attending the *Reference* was subtly different.

First, the *Reference* imposed a degree of finality that was probably unexpected. The original interpretative question concerned ordinary legislation. Even if the existing framework presented an obstacle to Nadon J.’s appointment, the government appeared to have a relatively straightforward option: amend the statute.¹⁰⁵

The declaratory legislation changed that. The Court was asked not only to interpret sections 5 and 6, but about the scope of Parliament’s authority to set the terms for that interpretation. Once the Court determined that Nadon J. was ineligible, Question 2 forced the Court into the morass of Part V of the *Constitution Act, 1982*.¹⁰⁶

As discussed earlier, the Court concluded that it has evolved from a creature of statute to a constitutionally entrenched actor; and that its composition may not be changed through ordinary means. In one fell swoop, the Quebec Rule changed from a mere curiosity to a constitutional dictate. This could be perceived as a move by the Court to insulate section 6 from subsequent meddling. And, if one were to find the majority’s answer to Question 2 overbroad that could foster suspicion of the answer to Question 1.

The *Reference* also concerned an issue (constitutional amendment) that may well be subject to a more powerful *degree* of finality. Any

¹⁰⁴ There are always exceptions. First, in a non-constitutional case, declaratory legislation permits the government to change the outcome, and is presumptively retroactive. Second, in the case of an existing statute, the government may resort to amendment, or even repeal, and may do so retroactively. Third, if the subject matter is subject to the Charter’s notwithstanding clause, the law may be preserved despite an adverse ruling (note, though, that it may not be applied retroactively: *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.)). And, in the most extreme cases, a constitutional ruling may be changed by formal amendment (with prospective effect only).

¹⁰⁵ Of course, there would still be the question of what to do with Nadon J. himself, as in the normal course such changes would not have retroactive effect.

¹⁰⁶ Prior to the Court’s release of the opinion, I mused that one way out of the thicket would be if the Court decided Question 1 in the government’s favour, and declined to answer Question 2. Conversely, I acknowledge that even in a reference dealing solely with the *Supreme Court Act*, it is possible that broader constitutional questions would have arisen. But, without a reference question clearly requiring such analysis it is quite possible that the Court would decline to answer such questions on the basis it would be premature to do so.

constitutional pronouncement is treated as final. Yet, the Court retains the power to depart from it. And, over the years, the Court has articulated numerous reasons that can justify that sort of departure.¹⁰⁷

While it is theoretically possible that the Court will articulate reasons to justify eventually departing from rulings about the amending formula, the prospect is unlikely. In terms of constitutional design, amendment rules represent the most direct expression of a society's *political* will. Arguably, they are also the most tied to expectations of predictability. In other words, if anything in the constitutional firmament is entitled to a powerful presumption of stability, and against change, amendment rules would seem to be it. If so, then the Court's decision regarding Part V has, for all practical purposes, rendered the *Reference* "untouchable". To the extent that one might have misgivings about the substance of the decision, those misgivings would no doubt be heightened by the attendant degree of finality.

3. Expectations in 'Easy' Cases

A court of final appeal performs at least two functions. It provides illumination when the legal path is unclear. And it provides authoritative settlement for disputes. Illumination may be considered particularly important when a case is "hard", for example, when it presents roughly balanced arguments, high stakes and an inchoate legal framework.¹⁰⁸ A hard case may provide just as much pressure for authoritative settlement. But in hard cases especially, we look to courts for the right answer. Conversely, if a case is considered to be easy with an obvious resolution, the court's involvement is more likely to be sought for its settlement function.¹⁰⁹

It is clear that many perceived the *Reference* to be an easy case. On policy grounds, there seemed no good reason to exclude Federal Court judges. The reference was initiated *after* Nadon J. (who was clearly *competent*) had been sworn in. And the Court was reviewing the exercise

¹⁰⁷ *Carter, supra*, note 45; *Bedford, supra*, note 45; *R. v. Bernard*, [1988] S.C.J. No. 96, [1988] 2 S.C.R. 833 (S.C.C.).

¹⁰⁸ John Gardner, "Concerning Permissive Sources and Gaps" (1988) 8(3) *Oxford J. of Legal Studies* 457.

¹⁰⁹ See, for example, legal process theory: Henry M. Hart Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, William N. Eskridge & Philip P. Frickey, eds. (Westbury, NY: Foundation Press, 1994). Note that Hart and Sacks do qualify the principle of "institutional settlement" with the term "duly established procedures", suggesting that a bare outcome is insufficient. *Op. cit.*, at 4.

of a highly discretionary executive power. That the Court would actually *reject* Nadon J. was unthinkable.

To find that Nadon J. was eligible under section 6 would have been the path of least resistance. It would leave the Court whole; it was consistent with the tradition of maximum executive discretion; and it removed the need to deal with the declaratory legislation. That the Court did not opt for that path, in a case that many people *also* saw (for whatever reason) as presenting an easy interpretive *issue*, seemed to provoke a suspicion among commentators that the Court had approached the case with the wrong attitude. Adding to this sense was the fact that the Court decided that its own status and accompanying composition rules are entrenched in the Constitution, taking the matter out of the government's hands.

I dispute the notion that the *Reference* was, even initially, an easy case. Section 6 of the *Supreme Court Act* presented an issue of first impression in a highly volatile and uncertain context. It was dependent upon interpretative factors that were not obvious. Once those factors are accepted, the answer to the question became easier, but unquestionably hard to mete out.¹¹⁰

If one perceived the *Reference* as an easy issue with an obvious (and easy) answer, the fact that the majority opted for the harder answer could be seen as proof of (a) misguided reasoning or (b) bad faith. In this article, I have tried to show why the first characterization is unfounded. The second, I contend, is unfair. Answers are not owed respect merely because they are hard. But, sometimes, choosing the hard answer will signal a level of engagement and commitment that *is* entitled to respect (which, I hasten to add, does not require substantive agreement). To put it another way, it is entirely possible that, like many others, the judges who comprised the majority opinion initially thought that the *Reference* was an easy case with an obvious answer. But the deliberative space provided by the reference procedure (clear questions; submissions by interested parties; opportunity to test premises in an oral hearing; requirement of collective discussion) persuaded them of the soundness of the more difficult answer.

¹¹⁰ That the answer was hard, though, could not justify judicial avoidance. Naturally, there are exceptions, for example, if the answer will lead to a breakdown of the rule of law: *Reference re: Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.). But these are very rare.

VI. CONCLUSION

Over the last three decades, the Supreme Court has emerged as the most significant actor in Canada's constitutional order. Its path has often been a fraught one. The Court wields immense powers. Robust debate over the limits of judicial review is likely to continue for as long as the Court occupies its current role. All the more striking, then, that one of its most politicized moments should occur in a dispute, initially, over a minor issue of statutory interpretation.

For what it revealed about core institutional relationships, what it decided in terms of the Court's constitutional status and what it required of the eight justices on the bench in 2013-2014, the *Supreme Court Act Reference* was an exceptional moment. At its core was the answer provided about the Court's absent ninth justice. It was a hard answer: difficult, perhaps unwelcome and, in some ways, brutal. It would not have been cause for celebration to anyone on the Court. But that very difficulty should count for, and not against, the judges who felt compelled to render it.

