

Supreme Court Rejects Prime Minister's Appointee to the SCC

by Carlo Di Carlo¹

On March 21, 2014, the Supreme Court of Canada finally resolved the uncertainty that was caused by challenges made to the Prime Minister's most recent appointment to the bench, Justice Nadon. The immediate challenge to this nomination led to the unprecedented situation where Justice Nadon was effectively "suspended" while the Supreme Court determined if his appointment was valid. In what has been described as a "stunning blow" to the Prime Minister, ultimately, the Court decided that it was not.² Thus, the Prime Minister has been sent back to the drawing board to select a new Justice for one of the three spots on the bench for Quebec.

Background

On September 30, 2013, the Prime Minister announced the nomination of Justice Nadon of the Federal Court of Appeal to the Supreme Court of Canada to replace Justice Fish as one of the three judges appointed from Quebec, as provided by the *Supreme Court Act* (the "Act"). Justice Nadon was appointed to the court on October 3, 2013.

Shortly afterwards, Justice Nadon's appointment was challenged in the Federal Court. The National Assembly of Quebec followed this challenge with a unanimous resolution opposing the appointment. These parties challenged the appointment on the basis that as a semi-retired Justice of the Federal Court, Justice Nadon did not meet the eligibility requirements to be appointed as one of the three Justices representing Quebec. Specifically, they argued that the *Act* required that only *current* members of the Quebec judiciary or Barreau du Quebec (the "Barreau") could be appointed. As a Federal Court judge, Justice Nadon did not satisfy this criterion.

The Prime Minister responded to these challenges by referring the issue to the Supreme Court for determination. The Prime Minister also amended the *Act* by adding provisions to make it clear that former members of the Quebec judiciary and/or bar are eligible for appointment. In light of the reference, the Supreme Court publicly banned Justice Nadon from the premises of the Supreme Court until these issues were determined.

The Supreme Court had two issues to determine at the reference:

1. Can former members of the Quebec judiciary or the Barreau qualify for appointment to the Supreme Court? If no, then
2. Can Parliament enact legislation to make such former members eligible for appointment?

¹ Associate, Stockwoods LLP

² Sean Fine, "Supreme Court Rejects Harper Appointee Marc Nadon", March 21, 2014, online: <http://www.theglobeandmail.com/news/politics/marc-nadon-supreme-court-ruling-stephen-harper/article17607585/>.



Supreme Court's Decision

A majority of the Supreme Court answered no to both of the above questions. The decision rejects Justice Nadon as a valid appointment and forces the Prime Minister to nominate another Justice to represent Quebec.

Details of the Supreme Court's answers to each of these questions are as follows:

Question 1 – Nominees from Quebec Must Be Current Members of the Quebec Judiciary or of the Barreau du Quebec

This question required the Court to interpret the provisions of the *Act* dealing with appointees to the Supreme Court from Quebec. There were two sections of the *Act* in question:

- section 5, which states that any person may be appointed to the Supreme Court who is or has been a judge or lawyer of at least 10 years standing of a province; and
- section 6, which states that at least 3 of the judges “shall be among” the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or “from among” the lawyers of that province.

The Court held that the effect of reading these two sections together was that nominees to the Supreme Court from Quebec had to be current members of the Barreau, the Court of Appeal or the Superior Court. By specifying that the judges be appointed “from among” the judges and lawyers of these institutions, the *Act* excluded former members, such as Justice Nadon.

The Court noted that its analysis of these sections was consistent with the historical compromise that led to the creation of the Supreme Court. Specifically, it (i) ensures the protection of civil law expertise and representation of Quebec's traditions and values on the bench, and (ii) enhances the confidence of Quebec in the Court.

Question 2 – Parliament Cannot Amend the Act to Nominate Former Lawyers/Judges

In response to the challenges to the appointment of Justice Nadon, Parliament passed amendments to the *Act* that clarified that former Judges or lawyers from Quebec could be appointed to the Supreme Court. The Supreme Court held that Parliament lacked the authority to make this amendment.

In responding to this question, the Supreme Court reviewed its own evolution, from its historical origins to the confirmation of its constitutional status. The Supreme Court held that as a result of the *Constitution Act, 1982*, the Government can only make changes to the composition of the Supreme Court by obtaining the unanimous support of Parliament and the provincial legislatures. Eligibility requirements, such as those in sections 5 and 6 of the *Act*, are included as part of the composition of the Court. Therefore, in attempting to change these eligibility requirements



Stockwoods.
Smart Litigation.

STOCKWOODS LLP
TD NORTH TOWER
77 KING STREET WEST, SUITE 4130
P.O. BOX 140
TORONTO, ONTARIO, CANADA
M5K 1H1
PH: 416-593-7200
FAX: 416-593-9345

www.stockwoods.ca

without seeking the support of the provincial legislatures, the Court held that the Parliament had acted without proper authority.

Sole Dissent of Justice Moldaver

Justice Moldaver provided the sole dissent to the judgment and would have upheld Justice Nadon's appointment. Justice Moldaver disagreed with the majority's interpretation of the *Act*. Specifically, Justice Moldaver found that the words "from among" in section 6 conveyed no temporal meaning and instead referred to the group described in section 5. According to Justice Moldaver's interpretation of these provisions, section 5 of the *Act* establishes the eligibility requirements (*i.e.*, current and former members of the bar with at least 10 years of standing and current and former judges), whereas section 6 establishes that of the candidates who meet the criteria in section 5, three must be chosen from Quebec. Because Justice Moldaver's interpretation of the *Act* would permit nominees from Quebec to be former members of the judiciary or the Barreau, he did not need to answer Question 2.

Conclusion

From a legal perspective, the decision is interesting because it is the first to affirm the constitutional status of the composition of the Supreme Court. The timing of the decision is politically interesting as well, given that it was issued in the midst of a provincial election in Quebec. A decision re-affirming the Prime Minister's appointment would likely have been seized upon by Sovereignists.

Because of the political difficulties inherent to constitutional amendments (which, in this instance would require the unanimous consent of all of the provincial legislatures and parliaments), it is very unlikely that the Government will seek to amend the *Act* so as to re-appoint Justice Nadon. Although the Government could fulfill the requirements of the *Act* by appointing Justice Nadon to the Superior Court of Quebec and then shortly afterwards re-nominating him to the Supreme Court, such a course of conduct would be controversial. In all likelihood, the Government will nominate a new appointee.



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STOCKWOODS LLP
TD NORTH TOWER
77 KING STREET WEST, SUITE 4130
P.O. BOX 140
TORONTO, ONTARIO, CANADA
M5K 1H1
PH: 416-593-7200
FAX: 416-593-9345

www.stockwoods.ca