THE TENTH JUSTICE

Judicial Appointments, Marc Nadon, and the Supreme Court Act Reference

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INTRODUCTION

On 21 March 2014, the Supreme Court of Canada released its opinion in *Reference re Supreme Court Act, ss 5 and 6.*¹ Most of the public knew the case by another name: the Nadon Reference.² For six months, the man at the heart of the case – Marc Nadon – had quietly waited offstage while politicians, journalists, lawyers, academics and, ultimately, the Supreme Court debated whether, as a Federal Court judge, he was eligible for a seat on the bench of Canada’s highest court.

Now it was over. By a six-one majority, the court concluded that section 6 of the *Supreme Court Act* precluded the appointment of Federal Court judges to one of the three seats reserved for Quebec jurists.³ More shockingly, the majority advised that the Act could not be unilaterally amended by the federal government. There might yet have been ways for Marc Nadon to be appointed – in particular, by retiring as a Federal Court judge and reapplying to the bar of Quebec. But he didn’t seem interested in pursuing that course. If anything, he sounded relieved that the episode was over. In an interview with Global News, Nadon said: “I’ve been living in limbo … since October … [A]t least this has … ended the uncertainty.”⁴ It didn’t, however, end the controversy.

It is not always easy to tell which cases will be regarded as landmarks. The Supreme Court may issue a sweeping statement of principle that makes headlines across the nation and then proceed to water it down over a period of years. What seems like an important precedent may be distinguished by later decisions into virtual irrelevance or overruled altogether.⁵ Today’s dissent may be tomorrow’s majority opinion.⁶
Some decisions, though, are instant classics. In a stroke of the pen, they change the way we make sense of whole bodies of law, and even entire institutions. Indeed, they may affect how those institutions understand themselves and how others in the political sphere relate to them.

Not surprisingly, some of the most canonical decisions involve assertions of power by the judiciary vis-à-vis other branches of government. Think of the US Supreme Court’s decision in *Marbury v Madison*, in which it articulated its own authority to issue binding rulings on the meaning of the Constitution. Or *Fuller’s Case*, in which Lord Coke emphatically denied that the King had authority to “adjudge any case,” holding that the common law was supreme. *Roncarelli v Duplessis*, an indisputably canonical case in Canada, concerned the authority of the courts to review exercises of discretionary power by executive actors. These cases are bigger than the disputes that gave rise to them. They provide a lens through which to see our entire constitutional order differently or with new clarity.

There is a reasonable argument that the Nadon Reference sits alongside those other landmarks in terms of its legal significance and wider cultural importance. This book makes that argument.

The Supreme Court of Canada is the highest appellate court in the country. First created in 1875, it has come to occupy an increasingly important position in Canadian society. The court’s power over its first sixty years was limited because of Canada’s strong ties to the United Kingdom. Those ties meant that cases could be appealed to the Judicial Committee of the Privy Council. It was only in 1949 that the Supreme Court came to occupy the apex position in the judicial system.

The court, though, did not immediately assume more importance in the eyes of Canadians. The pivotal moment came in 1982, when Canada made important changes to its Constitution. Through the *Constitution Act, 1982*, Canada guaranteed that individual and group rights would be protected, primarily in the *Charter of Rights and Freedoms*. As a result, Canadian courts were called upon to scrutinize the validity of legislation and government decisions more frequently
than before. The Supreme Court led the way, ushering in a distinctive approach to constitutional interpretation and issuing landmark decisions in every area, from equality rights and freedom of expression to privacy and Indigenous Title cases.

Over the last four decades, the Supreme Court has become more familiar to Canadians. Its role in holding governments and legislatures to account has been identified as one of the features of the Canadian legal and political system that gives Canadians confidence. To be sure, the court issues controversial decisions, and its increased power has spurred criticism from those who think that courts should not intervene in policy matters. Nonetheless, it is impossible to deny that the Supreme Court has assumed a function in Canadian society that would have been unimaginable, say, fifty years ago.14

Given the role and function of the Supreme Court, the process by which persons are appointed to it matters a great deal. Yet the appointments process has traditionally been a quiet affair. The fierce confirmation battles that characterize appointments to the US Supreme Court are not part of Canada’s political or constitutional culture. Supreme Court of Canada appointments are generally in the hands of the prime minister. And though, in the years just prior to the Nadon appointment, there had been greater scrutiny of judicial appointments, the idea that they might give rise to a court challenge – or, in fact, that they could run up against any sort of legal barrier at all – was virtually unthinkable. Until 2014, when the unthinkable happened.

As a matter of constitutional law, the Nadon Reference established that the Supreme Court of Canada is an essential part of Canada’s “constitutional architecture” and that its core features cannot be changed through an ordinary Act of Parliament. It is because of the Nadon Reference that there is now controversy and uncertainty about whether eligibility to the Supreme Court of Canada can be formally restricted to those who are functionally bilingual in Canada’s official languages, or whether a seat can be reserved for an Indigenous jurist. That alone makes the decision noteworthy. But the idea of constitutional architecture was also important in itself; shortly after the Nadon Reference,
it was deployed in the Senate Reference as a basis for finding that most kinds of Senate reform require the consent (either substantial or unanimous) of the provinces.15

The Nadon controversy began as a dispute over statutory interpretation, and much of the reference is an exercise in just that. But even in this notoriously technical – some might call it dull – area of the law, the reference is striking. In holding that Parliament may use overinclusive rules to achieve a particular goal, the Nadon Reference rejected a widely held view about what it means to engage in purposive interpretation, namely, that it requires lawyers and judges to give relatively little weight to the text of a statute when it is in tension with Parliament’s aim in enacting the statute in the first place. This aspect of the decision continues to generate a great deal of skepticism, and even hostility.

Apart from its significance for the law, the reference was a noteworthy moment in the history of the relationship between the judicial and the executive branches of government. When Prime Minister Stephen Harper first announced Marc Nadon as his choice, many onlookers saw it as an attempt to make the Supreme Court more deferential to the executive and legislative branches. At the time, there was a perception that the Harper government had suffered a number of high-profile losses in the high court. The Nadon Reference itself was followed by a remarkable attack on Chief Justice Beverley McLachlin. Furthermore, in the wake of the reference, there was an almost unprecedented leak of the appointments short list from which Nadon’s name had been selected.

The entire episode focused the public’s attention on the judicial appointments process to an extent we had not seen before, and it arguably gave rise to a new legal field: judicial appointments law. Following the Nadon controversy, there was increased discussion about challenging certain judicial appointments on constitutional grounds – for example, Justice Robert Mainville’s appointment, in 2014, from the Federal Court of Appeal to the Quebec Court of Appeal (which some thought was a precursor to further elevation to the Supreme Court of Canada) and Justice Russell Brown’s appointment to the Supreme Court of Canada. Most recently, the Canadian Bar Association
was prepared to challenge, on constitutional grounds, any attempt to replace Justice Thomas Cromwell (who came to the Supreme Court from the Nova Scotia Court of Appeal) with someone who was not drawn from the Atlantic provinces. It may have been because of this, at least in part, that Justice Malcolm Rowe, a Newfoundlander, was ultimately appointed to replace him.

Though relatively new, the Nadon Reference is indeed a landmark. The Tenth Justice explains how it came to be a case, how it was argued, and why it matters. We look to media coverage, legal scholarship, and political commentary to capture the public mood and debate surrounding the case as it developed and as arguments emerged and to contextualize the decision within a broader public conversation about the Supreme Court appointments process. In Chapters 1 and 2, we consider the controversy surrounding Marc Nadon’s appointment to the Supreme Court of Canada. Chapter 1 looks at some of the things that were cited about Nadon as a basis for objecting to his appointment. Most, if not all, of these bases were, at best, overstated and, at worst, unfair. The reasons for taking issue with his appointment were grounded, by and large, in political and legal forces quite outside Nadon’s control – in particular, they had to do with Quebec politics, with the fact that Supreme Court appointments were made under conditions of great secrecy, and with the perception that the prime minister, Stephen Harper, had a somewhat antagonistic relationship with the courts, which is examined in Chapter 2.

Chapter 3 explores the early legal questions that swirled around Nadon’s appointment – that is, those concerning the interpretation of section 6 of the Supreme Court Act. It is reasonably clear that the prime minister and minister of justice were broadly aware that Federal Court judges might be ineligible for appointment under that provision. From the moment Marc Nadon was introduced to the Canadian public, the minister of justice sought to foreclose attacks on the legality of his appointment by wielding a memorandum written by former Supreme Court justice Ian Binnie. We discuss that memorandum in Chapter 3 and the many criticisms levied against it.
Chapter 4 discusses the next phase in the Nadon controversy, when the federal government introduced declaratory legislation purporting to resolve the interpretive dispute over section 6. At the same time, the government referred two questions to the Supreme Court of Canada – one concerning the proper interpretation of section 6, and one concerning the constitutionality of the new declaratory provisions. We explore the issues arising out of this two-tiered approach.

Chapters 5 and 6 focus on the written and oral submissions made by the attorney general of Canada and the interveners in the reference, as well as the court’s decision. We discuss the arguments that had the greatest (and least) amount of traction and the criticisms directed at the majority decision after its release. Chapters 7 and 8 examine events that took place after the reference. Chapter 7 looks at the remarkable public dispute between Prime Minister Harper and then Chief Justice Beverley McLachlin, the leak of the short list from which Nadon’s name was selected, and the government’s subsequent dismantling of its own judicial appointments process and the Trudeau government’s new, more transparent one. Chapter 8 considers the reference’s impact on how politicians, lawyers, the media, and the public at large view Supreme Court appointments – through a legal and political lens.

Finally, Chapter 9 looks at the reference’s potential effect on future attempts to reform the appointments process. In holding that matters concerning the composition of the Supreme Court can be changed only with a constitutional amendment, the majority protected the court as an institution. It cannot be unilaterally abolished or stacked through an ordinary Act of Parliament. But the opinion also presents formidable hurdles to those wishing to make the court more reflective of the diversity of Canada. Henceforth, efforts to statutorily enshrine gender, race, or regional diversity on the court, or to make bilingualism an express criterion of eligibility, may well meet with the objection that they are unconstitutional. To this extent, the reference has cast the Supreme Court in amber.
ON 2 OCTOBER 2013, the Canadian public was introduced to Marc Nadon, Prime Minister Stephen Harper’s nomination for the Supreme Court of Canada. Appearing before an ad hoc committee of parliamentarians in a suit and bow tie, Nadon was an unassuming figure. He spoke about his humble roots in Saint-Jérôme, Quebec – “a tiny village north of Montreal, in the Laurentian Mountains” – and about his family: his grandparents, father, mother, wife, and son. He discussed his path to legal studies, his initial hopes to practise criminal law, and his ultimate diversion into transportation and maritime law. Nadon spoke about his work on the Federal Court and the Federal Court of Appeal. He reflected on the life of a judge as a “life of intellectual pursuits.” And he discussed the role of the Supreme Court of Canada in Canadian society, the importance of the rule of law, and the significance of lawyers in the administration of justice. Nadon closed his introductory remarks with an anecdote about a speech given by Lord Chancellor Elwyn-Jones to a group of civil lawyers in Paris, in which they mistranslated “common lawyers” as “ordinary lawyers.”

It was by all accounts a perfectly charming, if suitably dry, appearance by a man who, most assumed, was set to become Canada’s next Supreme Court justice. Nadon inadvertently invited controversy by seeming to
have suggested that he had been drafted by the Detroit Red Wings. Otherwise, though, Marc Nadon came across as pleasant and good-natured.

Yet in the weeks and months that followed, Nadon would be at the centre of one of the great legal and political controversies in modern Canadian history. National columnist Jeffrey Simpson wrote a scathing op-ed in the Globe and Mail in which he concluded: “Justice Nadon is undoubtedly a nice man and perhaps a competent judge, but he is not qualified enough to sit on the Supreme Court of Canada ... [H]is is at best an ordinary appointment, and at worst sub-par.” In a longer piece by Sean Fine, reflecting on what Nadon’s appointment “says about the Supreme Court’s future,” a number of distinguished legal academics were remarkably candid about their lack of regard for him as a jurist. Professor Jamie Cameron, who made a point of noting that she was breaking “a rule not to comment publicly on the attributes of appointees,” observed that “the appointment shows ... the Prime Minister’s lack of respect for the Supreme Court as an institution.” She stated: “[T]his appointment unquestionably weakens the court.” Professor Robert Leckey quipped that Nadon was on no one’s short or long list.

One cannot overstate just how unusual it is for any appointment to the Supreme Court of Canada to be subjected to the sort of withering criticism that Marc Nadon received in fall 2013. Traditionally, the bar, legal academics, and the media have been strenuously careful not to call into question the merits of appointees. That was not the case with Justice Nadon.

So what happened? How could such an apparently mild-mannered judge of twenty years’ standing, the coauthor of a book on maritime law, provoke such a cascade of criticism?

To understand the political and legal firestorm that greeted Marc Nadon’s appointment, one needs to situate the appointment in a wider context. In fact, the controversy was rarely about Nadon himself, though ungenerous insinuations were sometimes made about his character as a judge. The controversy, rather, was about the person who appointed him, the legal framework surrounding judicial appointments in Canada,
and an array of other political debates about, among other things, diversity, criminal justice, francophone-anglophone relations, and the long-term direction of the Supreme Court. It may help to begin by taking a brief moment to consider the man Justice Nadon was appointed to replace: Justice Morris Fish.

SO LONG, JUSTICE FISH, AND THANKS

On 22 April 2013, almost six months before Marc Nadon nostalgically reflected on his erstwhile hockey ambitions, Justice Morris Fish announced that he would be retiring from the Supreme Court of Canada.7 In making sense of the controversy that would swirl around Marc Nadon, it helps to appreciate the stature of the man he was supposed to replace on the Supreme Court and the important role that his predecessor played.

Justice Fish had been appointed to the Supreme Court after spending fourteen years on the Quebec Court of Appeal. An expert in criminal law, committed to civil liberties, his elevation in August 2003 was widely celebrated.8 When Justice Fish was named to the court (replacing Charles Gonthier), Michel Robert, chief justice of the Quebec Court of Appeal, described him as a person with “a passion for defending the rights of the accused, though he’s not always in favour of the accused’s rights. I think he’s got some equilibrium and balance.”9 Justice Fish had a strong reputation as a criminal law expert even before his appointment to the bench in the late-1980s. Prior to sitting on the Court of Appeal, he had periodically taught criminal law at the law faculties of the University of Montreal (1969–71), the University of Ottawa (1971–74), and McGill (1973–80, 1986–89). Justice Fish had been active in law reform initiatives and received a number of honours for his contributions to criminal justice.10 In a Supreme Court news release issued upon news of his retirement, Chief Justice Beverley McLachlin stated: “Justice Fish has served on the court with wisdom, and made enormous contributions to the court and to Canada. He is a wonderful colleague and friend who will be greatly missed.”11
Those are the sorts of comments one might expect from a chief justice whenever any member of the court departs. But well before Justice Fish officially announced his retirement, the wider legal community had quietly reflected on what his departure might mean for the court and for civil and legal rights in Canada. After all, the court’s docket is dominated by criminal cases – many of which are heard as a matter of right – and so the loss of a judge with expertise in the area would be felt especially keenly. In a 2012 article for the *Globe and Mail*, Kirk Makin reported the concerns of many lawyers – particularly those working in criminal defence. They worried about the tough-on-crime agenda of Prime Minister Stephen Harper and the effect that a more “conservative” or “hawkish” appointment might have on the Supreme Court’s effectiveness as a guardian of the Charter rights of criminal defendants. Justice Fish was arguably the last link to an era when the court was regarded as the stalwart defender of those rights. As Makin wrote: “Judge Fish has carried on the legacy of the Gang of Five – a faction of Supreme Court of Canada judges whose orientation toward the rights of the accused in criminal cases dominated the court in the 1990s.” Since Beverley McLachlin had become chief justice, it was generally acknowledged, the court had adopted a far more deferential posture, leading to a perceived softening in rights protection. Justice Fish was a vocal critic of the court’s direction, frequently dissenting on matters concerning the scope of Charter protections in criminal investigations.

Indeed, a month after he announced his impending retirement, Justice Fish chastised future chief justice Richard Wagner for failing to appreciate that a defendant should have been permitted to leave the partial defence of provocation with the jury in a murder case – describing Justice Wagner’s analysis as “incomplete and flawed.” Makin, reporting the jab for the *Globe and Mail*, observed: “As its ranking expert in the field [of criminal law], Justice Fish’s imminent departure from the court is a major concern to the defence bar, which perceives him as the only judge on the court who consistently advocates for the rights of the accused.” Makin further reported public remarks by Justice Fish that were taken as a thinly veiled rebuke of the views...
of Justice Michael Moldaver, who had suggested that defence lawyers were using the Charter to make specious arguments and to string out the trial process. Justice Fish took issue with that claim and urged lawyers to make Charter arguments whenever doing so would advance the interests of clients.17

Justice Fish’s departure left the court short of expertise in criminal law, and Marc Nadon’s appointment did not compensate for that loss. Moreover, his own areas of expertise – maritime law and transportation law – were of less obvious use on Canada’s highest court. As Jeffrey Simpson wrote: “[M]aritime law cases might make it to the Supreme Court once in a quarter-century.”18

There were also suggestions that Nadon, by then a supernumerary judge on the Federal Court, lacked the necessary vigour for a position on the Supreme Court.19 Sean Fine wrote at length that Nadon had been effectively pulled out of semiretirement. Whether intentional or not, he conjured an image of Nadon practically leaping at the chance to “work about half his usual hours and still receive his full pay.” Fine quoted Frederick Vaughan, coauthor of a history of the Supreme Court, who stated: “It’s a strange, strange appointment, frankly.” He continued, “Why would you go with a supernumerary when he’s indicated that he’s halfway to retirement?”20 The impression cast was of a judge who would be no more than a marginal figure in the life of the court.

Those comments were somewhat unfair. For his part, Nadon denied that his supernumerary status was akin to semiretirement. Under questioning by Françoise Boivin, Nadon argued that he had taken supernumerary status so that he could devote more time to complex cases, rather than thinly spreading his time across a wider number of simpler but less interesting cases. He stated: “The supernumerary status allows us to hear fewer cases and work fewer weeks as a result ... It can also help us dedicate much more time to our cases, should we choose to. So we are not talking about an early retirement.”21 To illustrate his point, he observed that, shortly after taking supernumerary status, he had spent two months working full-time on “a complicated Charter case” concerning equality rights.22 Under light pressure, he continued: “I knew those weeks or days of rest would disappear when I accepted
this appointment to the Supreme Court. I did not accept the Prime Minister’s offer lightly. If this goes well, I am ready to do the work and devote all my time to it.”

Again, all these questions about energy and vigour may have been unfair. It is not so difficult to believe that a person might find the work at the Supreme Court of Canada more interesting and attractive than work at many lower courts. But there were other questions surrounding Nadon as a jurist. It was widely suggested that he had been selected principally because he would be inclined to defer to the government and legislature in Charter cases. His dissenting opinion in Canada v Khadr, in particular, was frequently referenced.

THE KHADR CONTROVERSY

Omar Khadr is a Canadian citizen who, at the age of fifteen, was taken prisoner by US forces in Afghanistan and subsequently held at Guantanamo Bay. He was subjected to a sleep deprivation program to make him more pliable while under interrogation. Knowing this, Canadian officials nonetheless questioned Khadr and shared the information they obtained with the Americans. On that basis, the Supreme Court of Canada in 2008 held that the Canadian government had violated Khadr’s rights under section 7 of the Charter. At the time, this finding was reached only by way of concluding that the government had a duty to disclose the information to Khadr and his lawyers. On the strength of the finding, however, Khadr argued that the government also had a Charter obligation to seek his repatriation to Canada. Prime Minister Harper had emphatically stated in a press conference that he had no intention to do so.

And so Khadr sought an order from the Federal Court to force the prime minister’s hand. At the trial level, Justice James O’Reilly found that the government had infringed Khadr’s section 7 rights and ordered it to request his return to Canada. A majority of the Court of Appeal upheld the order. But Justice Nadon dissented. He found that the Canadian government had “taken all necessary means at its disposal to protect Mr. Khadr during the whole period of his detention at
Guantanamo Bay.”26 In a lengthy passage that surely would have appealed to the prime minister, Nadon noted that the Canadian government had advocated for Khadr’s fair treatment on numerous occasions and that it “continued to monitor Mr. Khadr’s situation and kept in contact with US officials in that regard.”27

Justice Nadon noted that Canadian authorities had requested that Khadr be provided with medical assistance and had paid him frequent “welfare visits.” He concluded: “Other than the fact that Canada ... should not have proceeded with interviews in 2003 and 2004 and should not have provided the information obtained therefrom to US authorities, I cannot see how Canada’s conduct can be criticized.”28 Even if there had been a Charter violation, Nadon continued, it would be inappropriate to remedy the violation by ordering the government to request repatriation. Observing that matters pertaining to foreign affairs lie at the core of the Crown’s traditional prerogative powers, Justice Nadon stated that O’Reilly’s order was contrary to the separation of powers. It is worth noting that, although the Supreme Court of Canada ultimately agreed with O’Reilly’s finding that there had indeed been an infringement of Khadr’s Charter rights, the court somewhat endorsed Nadon’s analysis of the remedy. Rather than order the government to seek repatriation, which was regarded as too intrusive a remedy, the court issued a declaration that the government had violated Khadr’s rights.29

Nadon’s dissenting opinion in Khadr was often trotted out as an example of the deferential stance he could be expected to adopt when appointed to the high court.30 At the very least, it was suggested, Prime Minister Harper had selected Nadon in the expectation that he would issue decisions and cast votes “friendly” to the government. Sean Fine, discussing the inferences that might be drawn from Nadon’s decision in Khadr, stated:

Thirteen Canadian judges ultimately heard the case ... On interrogating a teenager without counsel present, and turning information over to his jailers, the court said: “[This behaviour] offends the most basic Canadian standards about the treatment of detained youth suspects.”
Only one judge called Canada nearly blameless: Justice Nadon. Foreign policy, he wrote in a stylish and confident defence, is one of “the forbidden areas” in which judges have no right to question government.

Clearly he was no bleeding heart. He had nerve. And he was on the government’s side.31

When assessing a judge’s entire career, one shouldn’t make too much of a single case. It is not clear whether Nadon himself considered his opinion in \textit{Khadr} representative. He did submit it to the judicial selection committee as an example of his work, but some of his comments on the separation of powers before the ad hoc committee on his appointment are at least broadly consistent with his reasoning on the remedy.32

The other cases Nadon submitted to the committee do not reflect any particular or obvious skepticism of Charter review or an especially deferential attitude to the government. One possible exception is \textit{Canada v Jodhon}.33 There, the claimant, who was legally blind, alleged that websites operated by the Treasury Board, Statistics Canada, and the Public Service Commission of Canada were not accessible to persons with visual impairments, and to that extent infringed section 15 of the Charter. The trial judge agreed that there was a section 15 violation, which was not saved under section 1, and ordered a supervisory order – or structural injunction – whereby the court remained seized of the case until the violation was effectively fixed.

Justice Nadon, writing for the court, found no error in the trial judge’s conclusion that there had been a violation of section 15. He did, however, conclude that under the circumstances the supervisory order had been unjustified and needlessly intrusive. The order was based on evidence that was dated, and this was the first case of its kind, meaning that there was no reason to think that the government would fail to take necessary and timely steps to make the websites accessible to the visually impaired.34 More interesting, Nadon again appealed to separation-of-powers considerations: “[T]he judge’s remedy ventures
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into the realm of the executive ... [A] contempt proceeding would have been available to the Attorney Generals and would have constituted a more appropriate way to deal with government disobedience or further inaction rather than a supervisory order because it would intrude less on executive jurisdiction.” Under the circumstances, Nadon concluded, a declaration of unconstitutionality was an appropriate remedy.

It is, of course, possible to draw broad parallels between *Jodhon* and *Khadr*, especially in Nadon’s consideration of the remedy. But structural remedies are rightly rare, and it is hard to see Nadon’s rejection of one here as particularly noteworthy.

*Martin v Canada* likewise involved a section 15 claim. The main thrust of the litigation was that the *Employment Insurance Act*, by limiting parental leave to thirty-five weeks per pregnancy, as opposed to per child, discriminated against the parents of, for example, twins. Nadon, writing for the court, found that the parents of multiple children did not represent a historically disadvantaged group and that the restriction was not based on stereotyping. Moreover, the restriction did not deny “access to fundamental institutions or a basic aspect of [their] full membership in Canadian society.” On this basis, the Federal Court of Appeal rejected the Charter challenge. Section 15 is a tricky area of law, but it is difficult to see the opinion as especially problematic or even controversial. A similar conclusion could have been reached by judges embodying a variety of philosophical perspectives. It is hard, therefore, to know what, if anything, one should read into it.

Finally, there is Nadon’s ruling in *Mugesera v Canada*. A deportation order was issued against the applicant broadly on the basis that he had incited hatred, murder, and genocide of the Tutsi ethnic group and had misrepresented his involvement in a crime against humanity to obtain status in Canada. The order was upheld by the Appeal Division of the Immigration and Refugee Board. The applicant sought judicial review of that decision in the Federal Court. Nadon was the trial judge. He found that a number of factual conclusions by the adjudicator and Appeal Division were unreasonable and sent the matter back to the Appeal Division for reconsideration. Furthermore, he certified two
questions of law for consideration by the Federal Court of Appeal. The case itself is interesting – concerning, among other things, the definition of various serious criminal offences – and it ultimately found its way to the Supreme Court of Canada. It is, however, difficult to see any particular judicial philosophy at work in Nadon’s ruling.

One other case, which to our knowledge was not presented by Nadon to the selection panel, is also of interest. In 2011, Elizabeth May, leader of the federal Green Party, had sought judicial review of a policy by the Canadian Radio-Television and Telecommunications Commission (CRTC) that not every leader of a political party needed to be included in election debates. To expedite the review process, May sought an order requiring the CRTC to amend its guidelines for election debates and an order requiring the television networks covering the debates to allow her to participate. Nadon rejected the application, for the most part on what might be regarded as technical grounds – for example, May’s failure to challenge the policy in a more timely fashion and her failure to name the attorney general of Canada as respondent. But Nadon also took the view that the underlying merits of May’s case were relatively weak, and he found her Charter claim – that the CRTC’s policy interfered with her right to effective participation in the electoral process – particularly unpromising. This case was mentioned in the media on at least one occasion. Again, though, the case hardly suggests that Marc Nadon had especially strong political convictions. At most, it suggests a concern for legal process and, in the absence of a compelling justification, a disinclination to throw the election debates into chaos only twelve days before they were scheduled to take place.

For all the fuss over Justice Nadon’s opinion in Khadr, then, the rulings that were made available to the judicial selection committee do not reveal anything especially problematic about his judicial philosophy or his attitude to constitutional rights or civil liberties. Indeed, there were several occasions during the hearing when it seemed as if his questioners were confused about why he had included some of the cases. Moreover, academics and commentators did not produce other cases by way of demonstrating Nadon’s infirmities as a judge. On the
contrary, few onlookers had ever thought to ask themselves about his judicial merits prior to his appointment. He was on nobody’s radar. Jeffrey Simpson remarked: “The country’s law associations and professors knew so little about such an unknown judge that they fell silent.” That is not exactly high praise, but it underscores that Nadon was hardly a notorious figure before the national spotlight was turned upon him.

DIVERSITY AND QUEBEC REPRESENTATION

Some of the criticism heaped upon Justice Nadon during the weeks and months following the prime minister’s announcement was no doubt driven by the fact that his appointment would do nothing to improve either gender or racial diversity on the court. Concerns had been expressed, well before Nadon’s nomination, that the Harper government had a tendency to appoint men to the high court, leading to a decrease in gender parity. Since 2006, when Harper took office, there had been four vacancies on the court, and all but one of the replacements had been men. As a result, the complement of women on the court had dropped from four to three. At the same time, commentators had noted a wider trend in judicial appointments across the country – one suggesting, at worst, deliberate disregard for the value of diversity among judges. To those onlookers, Nadon’s appointment could be justified only if he had an especially distinguished record on the bench. The heightened scrutiny he received can be understood in this light as well – even if this was somewhat unfair to Nadon, who had hardly appointed himself to the Supreme Court.

There was an additional, very different diversity issue in play. Quebec is entitled to have three judges representing it on the Supreme Court of Canada. Nadon was to be one of those judges. As a Federal Court judge, however, he was not a current member of the Quebec judiciary or bar. This created a legal problem. It also created a political problem. The whole point of the legal requirement of Quebec representation was arguably to ensure that there would be voices on the
Supreme Court prepared to speak on behalf of Quebec’s unique culture and traditions. For Quebec’s political establishment, section 6 was symbolically important. Nadon’s appointment therefore embroiled him in, of all things, the political dynamic between the federal government and Quebec. He arguably became the unwitting symbol of the federal government’s willingness to stampede over Québécois rights, values, and culture.

What, then, was so bad about Marc Nadon? In an important sense, the answer is clear – nothing. Certainly, there was nothing to suggest a lack of competence. Nadon had written a few opinions that were arguably on the conservative side but none that could be described as radical. He had reduced his workload on the Federal Court of Appeal by assuming supernumerary status but was still active on the bench. His name may not have been on the lips of the profession and professoriate before his appointment was announced, but there was nothing in his record to justify the abuse he endured in the popular press. After all, the merits of one judicial candidate relative to another are not always easy to assess. Nadon had served as a judge for more than twenty years; he was familiar with the demands of the job. He was sometimes caricatured as a mere “maritime lawyer.” As he pointed out in a conversation with us, however, his work on the bench was hardly limited to maritime law issues – he had dealt with cases pertaining to tax, patents, and constitutional questions. And, he was far from the first Federal Court judge to be so elevated.

There was, of course, a further reason to subject Marc Nadon’s qualifications to special scrutiny. From the outset, it appeared, there might be a legal barrier to his appointment. To some commentators, that raised the question: Why appoint someone who raised issues of legal eligibility unless he was not just superior but obviously superior to everyone else? A competent judge, Nadon had not been a particularly prominent or distinguished voice. He had not developed an especially strong identity, authored noteworthy opinions, produced influential
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... scholarship, or in other ways demonstrated the particular combination of skills and qualities that many people hope to see reflected on the Supreme Court. To his critics, he was ordinary and workmanlike. And that was taken to reflect a decision, by the prime minister who appointed him, that the court itself should be more ordinary and workmanlike too.