THE TENTH JUSTICE

Contents

	Acknowledgments	vii
	Introduction	3
1	What's So Bad about Marc Nadon?	9
2	The Prime Minister's Prerogative	22
3	Memos	38
4	Asking and Telling	69
5	The Legal Showdown	84
6	The Opinion and Its Critics	106
7	The Aftermath	124
8	Judicial Appointments Law	140
9	A Court Frozen in Amber	156
	Conclusion	179
	Appendix	185
	Notes	193
	Selected Bibliography	242
	Index of Cases	251
	Index	254

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,[7] and even entire institutions.[8] Indeed, they may affect how those institutions understand themselves and how others in the political sphere relate to them.[9]

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.[10] 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.[11] *Roncarelli v Duplessis,* an indisputably canonical case in Canada, concerned the authority of the courts to review exercises of discretionary power by executive actors.[12] 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.*[13] 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.

1

What's So Bad about Marc Nadon?

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.[1] 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.[2] (He hadn't.) 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."[3] 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."[4] Professor Robert Leckey quipped that Nadon was on no one's short *or* long list.[5]

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?[6]

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."[12] 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.[13] Justice Fish was a vocal critic of the court's direction, frequently dissenting on matters concerning the scope of Charter protections in criminal investigations.[14]

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."[15] 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."[16] 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."[23]

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.[24]

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.[25]

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 *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 *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

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."[35] 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,[36] and it is hard to see Nadon's rejection of one here as particularly noteworthy.

Martin v Canada likewise involved a section 15 claim.[37] 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.[38] 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.[39] 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.[40] 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."[41] 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.[42] 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.[43] 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.[44] 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

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.

2

The Prime Minister's Prerogative

Justified or not, people had concerns about Justice Nadon as a replacement for the retired Justice Fish. Those concerns were amplified by the fact that it did not seem that there was anything that could be done about it. Since the creation of the Supreme Court of Canada, the appointments process has been largely marked by secrecy and all-but-untrammelled discretion.

It may come as a surprise, but the *British North America Act, 1867* – the document that created the Dominion of Canada – does not say anything at all about a Supreme Court of Canada. On the contrary, at the time of Confederation, it was anticipated that the final court of appeal would remain the Judicial Committee of the Privy Council, in the United Kingdom. Section 101 of the *BNA Act* conferred upon Parliament the power to create a "general court of appeal for Canada."[1] But there was no legal requirement on Parliament to do so, and any court created pursuant to section 101 would still be subject to the oversight of the Privy Council. Parliament created the Supreme Court not by a constitutional process but by an ordinary statute: the 1875 *Supreme and Exchequer Courts Act*.[2] For much of the court's history, it was open to Parliament to radically change, or even abolish, the Supreme Court; there was nothing in the Constitution to prevent it.

Section 4(2) of the *Supreme Court Act* states that judges are to be appointed by the governor general, acting on the advice of the governor-in-council – that is, the federal Cabinet. In practice, it has generally been understood that the matter is entirely in the hands of the prime minister.[3] At least three ministers of justice, including the minister who shepherded Marc Nadon's appointment, have articulated this understanding.[4] There are few legal limits on the prime minister's exercise of this prerogative power. Section 4(1) stipulates that there must be one chief justice and eight puisne judges. And sections 5 and 6 of the *Supreme Court Act* state:

> 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.

Thus, the Act mandates that there be nine judges on the court, three of whom must come from Quebec and all of whom must satisfy the qualifications set out in section 5. These provisions represent – or, anyway, were thought to represent – the extent of the statutory limits on the prime minister's appointment power. In addition, there were and are conventions of regional representation – though the precise parameters of those conventions have always been a matter of some dispute. For example, it is often thought that the province of Ontario must also be represented by two or three judges on the court, the Atlantic provinces must be represented by one judge, and the western provinces must be represented by at least two.[5] Furthermore, there has arguably developed over the last thirty years a convention of rough gender parity on the court, though it may be too early to say how far such a convention has solidified.[6] There is certainly no convention of racial or ethnic diversity, though there has been increasing dismay and frustration about the court's homogeneity.[7]

So there are few legal constraints on the prime minister's prerogative over judicial appointments to the Supreme Court. But even more striking has been the traditional absence of political constraints. Until relatively recently, the process was conducted in strict secrecy, with all the suspicion that engenders. Adam Dodek has observed that "[m]ore was known about the process for electing a new Pope than about the process for selecting a new Supreme Court justice."[8] Similarly, Jacob Ziegel described the process as one "shrouded in vagueness, and unsubstantiated rumour and gossip."[9]

THE POLITICS OF JUDICIAL APPOINTMENTS

Given the lack of transparency, and the limitless discretion accorded the prime minister, there has always been a risk that appointments to the court would be awarded on a patronage basis.[10] Indeed, for the first seventy-five years of the Supreme Court's history, more than a few appointments were nakedly political.[11] Consider the appointment of Louis-Philippe Brodeur in 1911. Ian Bushnell, discussing Brodeur's appointment, remarked: "[Brodeur] had been speaker of the House of Commons from 1901–04, following which he had been a member of the government until his appointment to the court. The appointment was an obvious and dramatic return to one in which the political background dominated."[12]

Robert Taschereau's appointment in 1940 also smacked of patronage. Taschereau was a prominent member of the Liberal Party. His father was Louis-Alexandre Taschereau, the former premier of Quebec. According to Bushnell, Robert Taschereau "had a high political and social profile, and had been heir-apparent to his father's political power until Duplessis' victory of 1936."[13] He had no judicial experience before his appointment. An even more controversial appointment, Douglas Abbott, was a federal Cabinet minister when he was appointed to the Supreme Court in 1954.[14]

Perhaps the most blatant example was in 1963, when Chief Justice Patrick Kerwin died just as the Diefenbaker Conservatives were in

the middle of a collapse. The prime minister himself was offered the vacant position on the court in exchange for stepping down as leader of the Conservatives. He refused, and ultimately Justice Wishart Spence was appointed – after Parliament was reconstituted with a new government.[15]

Beyond such notorious episodes, politics has long played a role in the appointment of Supreme Court judges. How extensive a role it plays is unclear, largely because of the lack of transparency.[16] Empirical research published in 1967 showed that, among federal judicial appointments generally, the vast majority were politically affiliated with the governing party.[17] From 1984 to 1988, when Mulroney was prime minister, 47.4 percent of federal judicial appointments "had a known association with the Conservative Party."[18] A further study of federal appointments from 1989 to 2003 indicated that 30.6 percent had "probably" donated money to the party of the prime minister who appointed them.[19] As David Schneiderman notes in *Red, White, and Kind of Blue?*, "The numbers across both Conservative and Liberal federal administrations were nearly constant."[20]

At the Supreme Court level, outright lobbying on behalf of certain candidates has been rare. There have, however, been exceptions. Following the sudden death of Justice John Sopinka in November 1997, there was blatant jockeying in favour of two Ontario Court of Appeal justices: John Laskin and Rosalie Abella.[21] The struggle was engineered by their supporters rather than the judges themselves, but it had a political character that some onlookers regarded as unseemly. Prime Minister Jean Chrétien eventually appointed Ian Binnie, a renowned lawyer and senior partner at a national firm. Like Sopinka, Binnie had not previously been a judge before his ascension to the Supreme Court.

None of this is to suggest that brute partisan political considerations drive judicial decision making in a straightforward or predictable fashion.[22] Nor have there been indications that the public's respect for the judiciary has been significantly undermined by the secrecy surrounding the process.[23] A Focus Canada survey in 1989 found that 76 percent of respondents had at least some confidence in the Supreme

Court as an institution.[24] A Gallup poll conducted in 2001 showed that "Canadians had greater respect for and confidence in the Supreme Court than they did in almost all other Canadian institutions, including ... the federal government, the House of Commons, and provincial governments."[25] In *The Last Word: Media Coverage of the Supreme Court of Canada,* Florian Sauvageau, David Schneiderman, and David Taras reported: "When asked whether courts or legislatures should have the final say on key questions in public life, Canadians supported the courts by a margin of two to one."[26] This was the case in spite of allegations of judicial activism, often from conservative commentators.[27] A 2010 poll found that 69 percent of Canadians had confidence in the Supreme Court, compared with 42 percent who felt that way about Parliament.[28]

Yet one cannot assume that Canadians are entirely satisfied with how Supreme Court justices are appointed. Sauvageau, Schneiderman, and Taras observed: "Despite efforts to appear independent and non-partisan, the public views the Supreme Court as being deeply enmeshed in politics."[29] They cited a 2001 Ipsos-Reid poll that suggested that "seven out of ten of those surveyed believed that the court was influenced by partisan politics" as well as a 2003 poll showing that an "astonishing" two-thirds of respondents "believed that party politics either always or sometimes played a role."[30] Canadians, it appears, do have concerns about the process by which high court judges are selected, if not about the judges themselves.[31]

THE TURN TOWARDS TRANSPARENCY AND ACCOUNTABILITY

In 1949, Canada abolished appeals to the Judicial Committee of the Privy Council. The Supreme Court became the country's court of last resort. As a result, it was thought important to dispel any hint of partisanship in the court's appointments.[32] In 1969, Prime Minister Trudeau wrote: "Judges should not be regarded as representatives of several different governments which could conceivably be allowed to

appoint them."[33] And in the Charter era, it became still more difficult to justify a Supreme Court appointments process that appeared in any way to rely on partisan considerations.[34] In 2004, following a request by the minister of democratic reform in Paul Martin's Liberal government, the process was scrutinized by the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.[35] It concluded that there should be an appointments advisory committee with representatives from each of the official parties, the provinces, the judiciary, the bar, and the lay public. That committee would provide a short list of candidates for the minister of justice, who would later appear before the committee to explain the process and the qualifications of the individual ultimately selected from the list.[36] There were dissenting voices from the other parties, but few disputed the need for more transparency and accountability.

The new process was unveiled in 2005, and it empowered an arms-length advisory group to produce a short list of three candidates. Except in extraordinary circumstances, the minister of justice and prime minister would choose someone from the list. Candidates, however, would not be subject to questioning, and the advisory group would sign confidentiality agreements regarding the list.[37] Finally, the minister of justice would appear before a committee to explain the process and selection.[38]

The new procedure took effect when Justice John Major retired. After the short list for his replacement was assembled, however, Stephen Harper's Conservatives were voted into government. Justice Marshall Rothstein was selected from the list and – in a departure from the prescribed process – the nominee himself was asked to answer questions before a parliamentary committee.[39] The hearing was televised. Justice Rothstein entertained questions on a wide variety of subjects, including Indigenous Rights and their relationship to the Charter, the appropriate treatment of lower courts by appellate ones, the importance of precedent, the increasing role played by nonlegal experts in complex litigation, the wisdom of relying on foreign judgments and international law, and the role of personal experience and biases in judging.[40] He emphasized

the need for judicial restraint and deference to Parliament's judgment, stating:

> [T]he important thing is that judges, when applying the [Charter], have to have recognition that the statute they're dealing with was passed by a democratically elected legislature, that it's unlikely the legislature intended to violate the charter. Sometimes it happens. But they have to be aware of that, and therefore they have to approach the matter with some restraint. But the most important thing is that they apply a rigorous and thorough analysis, and if they do that, then I would say they are doing their job. If they depart from that, it might be a different matter.[41]

There is room to wonder just how much Canadians learned about Justice Rothstein as a result of this process.[42] Professor Peter Hogg chaired the proceedings and (for reasons we will see) was clearly intent on ensuring that they would not degenerate into anything like an American-style confirmation hearing. The chair cut off questioners and the respondent numerous times, no doubt in the interest of fairness but sometimes at the expense of a substantive dialogue.[43] Nonetheless, insofar as the hearing introduced Canadians to their newest Supreme Court justice and humanized him, the innovation could be regarded as a modest success.

Two years later, in 2008, a broadly similar process was undertaken when Justice Michel Bastarache announced his retirement. But the advisory committee, when presented with the minister of justice's long list, was "beset by partisan bickering."[44] Frustrated, Prime Minister Harper opted simply to nominate Justice Thomas Cromwell (then of the Nova Scotia Court of Appeal). At first, the intention was that Cromwell would not be formally appointed until he participated in a Rothstein-esque hearing before a parliamentary committee. Shortly after announcing the nomination, however, Harper asked the governor general to dissolve Parliament. Following an election campaign, which the Harper Conservatives won, the governor general prorogued Parliament.

More than three and a half months after nominating Cromwell, Harper gave up on the hearing, and officially appointed him.[45]

A process broadly similar to that used in the appointment of Rothstein was used again in 2011, when Justices Ian Binnie and Louise Charron both decided to retire. There were minor changes. For example, in addition to consulting with the Ontario attorney general and leading members of the Ontario bar, the minister of justice invited members of the public to suggest possible candidates through a government website.[46] But the nominated candidate, chosen from a short list settled upon by an advisory committee of five members of Parliament, would still be required to answer questions at a public hearing. The chosen replacements, Justices Michael Moldaver and Andromache Karakatsanis, did just that – as did Justice Wagner when he was selected to replace Justice Deschamps in 2013.

Thus, by the time Justice Fish retired, in 2013, there was a broadly settled process in place for appointing Supreme Court justices. The main innovation of the Harper government was, of course, the public hearing. Plainly, the point of this was to mimic the Senate confirmation hearings used in the United States for the appointment of federal judges. In the United States, nominations for federal courts, including the Supreme Court, must receive the "advice and consent" of the Senate. Since the 1950s, nominees have appeared before senators.[47] In principle, one can see why, in an era when the Supreme Court of Canada sometimes issues decisions that have a political hue, nominees should be required to publicly answer questions addressed to them by elected representatives from all the major political parties. The fear, however, is that those very representatives will treat the nomination as simply another zero-sum political debate – in which one party's success, by definition, requires another party's failure – and conduct the questioning in such a way that the public will come to regard judicial decision making as driven by partisan political considerations rather than legal ones. Indeed, Canadian jurists and legal commentators are often horrified by US confirmation hearings, which, at least since the failed nomination of Judge Robert Bork in 1987, have been viciously fought

by both Republicans and Democrats.[48] For this reason, the Canadian Bar Association, in 2004, flatly opposed any sort of parliamentary review of Supreme Court nominations.[49] Retired Justice Claire L'Heureux-Dubé, providing evidence to the Standing Committee on Justice, Human Rights, Emergency Preparedness, and Public Safety, did the same.[50]

The appointments process devised by the Harper government was intended to provide a degree of transparency and accountability without undermining public respect for the judiciary. At bottom, though, the process in 2013 was hardly more transparent than that which had existed before Paul Martin's government initiated reform in 2004. Canadians were none the wiser as to the criteria for selecting candidates, the nature of the consultation process (i.e., who would be consulted and the extent to which the input from consulted bodies could be disregarded by the minister of justice), the role to be played by the public, the number of names on the long list assembled by the minister of justice, and whether and to what extent the prime minister's final decision would be guided by the opinions of the minister of justice.[51]

Perhaps more to the point, none of the changes made to the process really constrained the prime minister's discretion. The advisory committee could not consider anyone not included on the minister of justice's long list – which, it seemed, did not need to be terribly long.[52] Moreover, the government controlled who was on the advisory committee; since 2011, a majority of MPs on the committee were Conservatives, and the proceedings of committee hearings were entirely secret.[53] They were given only two to three days' notice to scrutinize the candidates on the long list.[54] What is more, the parliamentary hearings themselves did not exert much of a pull on the prime minister's appointment power. Prime Minister Harper announced the appointments of Justices Moldaver, Karakatsanis, and Wagner, within a day of their respective hearings, giving no indication that the opinions of the parliamentarians who attended them had made any difference.[55] Indeed, legal scholar Adam Dodek pointed out that, "[i]n one case, the Chief Justice announced the swearing-in dates for the new justice before the

Prime Minister had formally appointed the 'nominee,' thus demonstrating the *pro forma* nature of the hearings."[56] In an editorial for the *Globe and Mail,* it was suggested that the prime minister regarded the hearings as a mere formality.[57] And why wouldn't he? After all, the MPs who asked questions during the hearing were typically those who served on the advisory committee that created the short list. It is unlikely that they would take serious issue with a candidate they themselves had notionally approved.[58]

Insofar as anyone was made accountable by the process, it was the judges who were nominated, not the prime minister who appointed them. In 2006 and 2011, respectively, Justices Rothstein and Moldaver were challenged about their lack of facility in French. Justices Karakatsanis and Wagner faced questions regarding their relative lack of judicial experience.[59] To a degree, this is precisely what critics of public hearings feared: turning Supreme Court judges into political punching bags. (As we have already seen, Justice Marc Nadon hardly got off lightly during his own hearing.) There will always be some metric by which someone other than the person ultimately chosen could be regarded as "better." To a degree, weighing one prospective judge against another is a matter of subjective taste rather than objective fact.[60]

For now, we would simply note that the appointments process, whatever else it may have achieved, did not make the prime minister more accountable. If anything, it turned the nominee into a kind of proxy target for critics of the prime minister, encouraging frustrated committee members from opposing parties to direct their criticisms at the appointee, not the appointer. It may have had a similar effect on media commentators who, lacking much insight into the process by which the nominee was selected, were reduced to reporting any issues of substance that happened to float to the surface.

THE PRIME MINISTER

The appointments process in 2013 did nothing to dispel the notion that the prime minister was under no legal constraints, and few political ones, in selecting new Supreme Court of Canada judges. This only

magnified concerns that Prime Minister Harper would use his power to appoint someone who would thwart judicial review of his conservative agenda. Harper had a track record for pushing up against the legal limits of his authority. In 2008, he asked the governor general to prorogue Parliament, apparently to avoid an inevitable vote of non-confidence that would bring down his (newly re-elected) minority government.[61] In the waning days of 2009, he again asked the governor general to prorogue Parliament during February's Olympic Winter Games, ostensibly to allow Canadians to focus on the event, but possibly to hinder a parliamentary investigation of Canada's treatment of detainees in Afghanistan.[62] On both occasions, the prime minister would have known that, by and large, the governor general does not refuse such requests, irrespective of the reasons for making them. Without diminishing the complexity of the issues raised in these episodes,[63] or suggesting that one or both of these prorogation requests were illegitimate,[64] they nonetheless suggested a willingness to push against the limits of the law.

These are far from the only examples. Legislation concerning criminal justice was often introduced through private members' bills, rather than government bills, in order to circumvent requirements that the Department of Justice vet them for Charter compliance.[65] Relatedly, in 2013, Edgar Schmidt, former general counsel in the Legislative Services Branch of the Department of Justice, sued the Office of the Attorney General for failing to apply a proper test for Charter compliance.[66] So long as there was a credible argument that legislation was constitutionally valid, Schmidt alleged, it would be waived through. Ultimately, in 2016, Justice Noel of the Federal Court found that the governing legislation did not require a more searching standard.[67] But the allegations fit within a broader public narrative that Harper was someone who did not feel obligated to respect the spirit of the government's legal duties, rather than its letter. Likewise, the Mike Duffy expenses scandal, which had been slowly burning since 2012, suggested that the prime minister had exploited a loophole in the residency requirement for Senate appointments.

This track record suggested that Harper would be prepared to push his prerogative authority to appoint Supreme Court judges to its limits, without regard for legal or political niceties. Moreover, there was some reason to think that Harper might at least try to make radical changes to the court. Since taking office in 2006 – and, indeed, before – Harper's Conservatives had had a contentious relationship with the judiciary. He was, after all, the man behind the now defunct Reform Party's *Blue Books* of the early 1990s. The 1991 *Blue Book* stated: "The Reform Party supports more stringent and more public ratification procedures for Supreme Court judges in light of the powers our legislators are handing to the courts. Our Draft Constitutional Amendment calls for Senate ratification of Supreme Court appointments."[68] Other figures close to Harper and the Reform movement – such as Preston Manning and Ted Morton – frequently assailed the Supreme Court as too political.[69]

As president of the National Citizens Coalition, Stephen Harper had written an op-ed in 2000 explaining his decision to challenge election advertising laws on Charter grounds. He stated: "I share many of the concerns of my colleagues and allies about biased 'judicial activism' and its extremes. I agree that serious flaws exist in the Charter of Rights and Freedoms, and that there is no meaningful review or accountability mechanisms for Supreme Court justices."[70] (Harper ultimately fought the case up to the Supreme Court of Canada – and lost.)[71]

His outlook did not seem to change once he became leader of the Opposition. In 2004, Conservative Party members of a committee considering possible reforms to the judicial appointments process insisted, in a dissent, that Supreme Court appointments should be subject to parliamentary ratification.[72] As David Schneiderman has observed, one can draw a direct line from the early Reform Party *Blue Books,* driven by a suspicion of decisions such as *Morgentaler,*[73] to the Conservative position in 2004.[74] Moreover, at around this time, Justices Rosalie Abella and Louise Charron were appointed to the court. Their appointments were seen by some, including people in the Harper government, to be part of a "Liberal conspiracy" to ensure that the court remained committed to a particular political agenda.[75]

The conspiracy claim was directly tied to the Same-Sex Marriage Reference. By March 2004, three provincial courts of appeal had found the opposite-sex definition of marriage to be unconstitutional.[76] The federal government decided not to appeal any of these decisions and directed the Supreme Court to hear a reference concerning draft legislation entrenching a new definition of marriage.[77] This decision rendered moot the work of a parliamentary committee conducting hearings on the issue. The executive, working in cahoots with the judiciary, seemed to have taken the issue out of Parliament's hands.[78] Critics speculated that the appointments of Abella and Charron were intended to ensure that the court would approve the Liberal government's draft legislation.[79] Stephen Harper adopted a particularly aggressive tone, as illustrated in the following excerpt from an interview:

> I think it's a typical hidden agenda of the Liberal party ... They had the courts do it for them [change the definition of marriage], they put the judges in they wanted, then they failed to appeal – failed to fight the case in court ... I think the federal government deliberately lost this case in court and got the change to the law done through the back door.[80]

Since taking office, Harper had undertaken significant reforms of the judicial appointments process. In 2006, the government changed the way that judicial candidates were ranked from "highly recommend," "recommend," and "unable to recommend" to simply "qualified" and "not qualified." This gave the government much more leeway in terms of selection.[81] 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 committee chairperson except in the event of a tie. These changes were made over the objections of the Canadian Bar Association, the Canadian Judicial Council, and the Federation of Law Societies of Canada. Chief Justice McLachlin, writing in her capacity as chairperson of the Canadian Judicial Council, called for "an immediate process of consultation on the proposed changes

with the judiciary, Canadian Bar Association, the law societies and other interested parties ... to protect the interests of all Canadians in an independent advisory process for judicial appointments."[82] Nonetheless, the reforms were made. In 2007, Harper stated: "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."[83]

There were also what might be described as collateral attacks on the role of the Charter and the courts. In 2006, the Harper government largely abolished the Court Challenges Program of Canada.[84] This was a program that funded litigation that challenged the constitutionality of legislation. It is reasonable to think that this policy change was driven by suggestions made by well-known "Charter skeptics" Ted Morton, Rainer Knopff, and Ian Brodie (who would become Harper's assistant chief of staff) that the program benefitted a particular group of equality-rights advocacy groups.[85] Similarly, many have construed the Harper government's decision to abolish the Law Reform Commission – "a body whose task was to propose possible legislative changes, which was seen as duplicating the work of government in a generally unconservative way" – as a way of narrowing the ability of unelected judges to influence policy.[86]

Finally, much of the legislation enacted as part of the Harper government's tough-on-crime agenda worked to constrain the role of judges in the criminal justice system – particularly at the sentencing stage of proceedings. Mandatory sentences of imprisonment precluded judges from issuing sentences that might be perceived as too soft. Likewise, judges were obligated to impose victim surcharge fees without considering extenuating circumstances, the offender's ability to pay, or even whether there was a clear-cut victim.[87] The point, to a large extent, was to tie a judge's hands. Moreover, much of the legislation was introduced through private members' bills rather than government bills. In a recent paper, James Kelly and Kate Puddister have suggested that Harper – a leader notorious for centralizing governmental power in the Prime

Minister's Office – supported such private members' bills precisely because they were not scrutinized for Charter compliance by the Department of Justice.[88]

There were reasons for thinking, then, that Harper would want to appoint judges to the Supreme Court who would favour – or at least not interfere with – a conservative agenda. It is important to note, though, that these fears had been expressed virtually every time there was a vacancy on the court and, as far as anyone could tell, they had not been borne out.[89] In 2006, the prime minister appointed Justice Rothstein from a list of candidates assembled before Harper took office. Thomas Cromwell, appointed in 2008, did not appear to be particularly conservative. In 2011, after Justices Binnie and Charron announced that they were retiring from the court, Kirk Makin wrote in an article titled "The Coming Conservative Court":

> Legal experts now believe Mr. Harper will use his choices to usher in a decades-long course of conservative Charter of Rights rulings and low-key deference to Parliament. That prospect is sure to delight those who view activist judges as anathema and the Charter with suspicion. At the same time, it conjures up a potential nightmare for the political left and civil libertarians who look to the Supreme Court to strike down laws that offend the Charter and to safeguard the rights of the accused.[90]

Makin suggested that Justice Rosalie Abella, as the only "liberal" voice on the court, might become isolated – or simply leave out of frustration or disillusionment. Law professors Allan Hutchinson and Jamie Cameron both echoed these concerns. And yet there was an unmistakeable tension in Makin's article. The concern was not simply that Harper would mould the court into his political image but that it had already become too conservative in outlook and, indeed, had been that way since Beverley McLachlin was made chief justice (by Jean Chrétien) in 1999. Makin noted that the McLachlin court had a well-deserved reputation for deference – at least in choosing remedies

for Charter violations. The problem, in other words, was not just that Harper's appointments would make the court more conservative but that they would squelch hopes of making it more liberal. Ultimately, however, Harper appointed Justices Moldaver and Karakatsanis, both justices on the Ontario Court of Appeal, to replace Justices Binnie and Charron. Neither appointment could be construed as strikingly ideological.[91]

The following year, when Justice Richard Wagner of the Quebec Court of Appeal was nominated to replace the retiring Justice Marie Deschamps, there would again be suggestions that Harper was attempting to pull the Supreme Court to the right. Wagner had been an appellate court judge for only one year, though he had been a superior court judge for roughly seven years before that, and had a strong reputation in Quebec's legal community. There was also some controversy surrounding the decision not to appoint a woman to replace Deschamps. But Wagner was hardly seen as a radical conservative. Sean Fine reported: "Based on Judge Wagner's relatively short judicial record and impressions from friends and acquaintances, he is likely to be a court centrist who is neither staunchly conservative nor a strong believer in advancing the law through creative judgments."[92]

Tom Flanagan has recently said that Harper "didn't do the job well of changing the complexion of the judiciary. The only [Harper appointee] with a reputation as a conservative was Russ Brown [appointed in 2015]."[93] At the time, Justice Nadon's nomination was not obviously the latest in a string of transformative conservative appointments. But there was a perception that Harper was attempting to shift the court in a more conservative direction, however tentatively. This aggravated concerns that he would exploit the lack of legal and political checks on his appointment power and arguably heightened suspicion of Justice Nadon himself.

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