Purposive Interpretation, Quebec, and the Supreme Court Act

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On 30 September 2013, the Prime Minister announced the nomination of Marc Nadon,[1] a Federal Court of Appeal judge, to fill the seat vacated by Supreme Court Justice Morris Fish.[2] The announcement was accompanied by an unusual supporting document — an opinion by a former Supreme Court Justice, The Honourable Ian Binnie.[3] Asked whether the *Supreme Court Act*[4] permits the appointment of Federal Court judges, Binnie wrote a brief memorandum arguing that it does — a conclusion endorsed by another former Supreme Court Justice, Louise Charron, and Professor Peter Hogg.[5] After Nadon was sworn in, a Toronto lawyer launched proceedings in Federal Court to contest the appointment. This prompted Nadon to decline to participate in court hearings until the issue is resolved.[6] On October 22, in apparent response to these events, the federal government announced that it would introduce a "declaratory" change to the *Supreme Court Act*. It has also sought an advisory opinion from the Supreme Court of Canada as to whether someone in Nadon's position is qualified for appointment.[7]

In this brief paper, we examine the interpretive problem raised by Justice Nadon's appointment. Because Binnie's interpretation of sections 5 and 6 is one of the only discussions of this issue, and is likely to influence any subsequent legal analysis, we take his opinion as a starting point.

I. Binnie's memorandum

Section 5 of the *Supreme Court Act* states: "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." Section 6 provides: "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." Mr Justice Nadon was, at the time of his nomination, neither a judge of a Quebec superior court nor a *current* member of the practicing bar.[8] It is not clear that he is "among the advocates" of Quebec within the meaning of section 6.

Binnie observed, correctly, that section 6 cannot be read in isolation. Reading it in conjunction with section 5, he concluded that it does not restrict the class of potential nominees to current advocates of the Quebec bar.[9] The French version of section 5 reads: "Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provincial et parmi les avocats inscits pendant au moins dix ans au barreau d'une province." The word "inscrits", Binnie acknowledged, "*could* be interpreted to mean current membership."[10] He found, though, that the English version "clear[ly] and unambiguous[ly]" allows someone to be nominated so long as he or she "*has been*… a barrister or advocate of at least

ten years standing".[11] He further remarked that "[i]f Parliament had intended to specify *current* membership it could easily have said so in both official languages."[12] This suggests that, in reading section 6, we should not interpret "among the advocates" as requiring nominees to be current advocates.

Binnie also drew upon the legislative history of sections 5 and 6. The "'inscrits' issue", as he put it, only emerged in the 1952 version of section 5.[13] The 1927 French version stated: "Peut être nommé juge quiconque est ou a été juge d'une cour supérieure de l'une des provinces du Canada, ou un avocat qui a exercé pendant au moins dix ans au barreau de l'une des provinces." It could not plausibly be said that, by replacing "a exercé" with "inscrits", Parliament intended to narrow the range of nominees to exclude former advocates. This is especially so given that the English versions of the 1927 and 1952 provisions were identical.[14]

Ultimately, Binnie rested his conclusion on the idea that sections 5 and 6 of the Act were not designed to restrict candidates for the Supreme Court to *practicing* advocates in Quebec. Rather, they were designed to ensure that candidates had a minimum level of *experience*.[15] Since one could have the requisite experience without being a current member of the bar, Binnie concluded, there was no basis for reading section 5 more restrictively than the English version of the text permits. He wrote:

> The *Supreme Court of Canada Act* established a final appellate body for Canada. Parliament's obvious concern in ss. 5 and 6 was to exclude from consideration men and women who lack the appropriate skills and experience. Exclusion from possible appointment of the talent pool of Federal Court judges conflicts with this purpose. Take for example a lawyer who practices for 15 years in Montreal from 1970 to 1985, then sits as a Judge on the Federal Court of Appeal from 1986 to 2000. Such an individual is clearly better qualified in 2000 after 14 years on the bench than he was in 1985 prior to the initial appointment. Yet the objection to the appointment of Federal Court judges attributes to Parliament the view that Federal Court experience is a detriment not an asset. Equally, on the contrary view, an appointment to the International Court of Justice at the Hague would present an insurmountable barrier to appointment, despite decades of earlier practice at a provincial bar. Any interpretation of ss. 5 and 6 of the Supreme Court of Canada Act that leads to such an absurd result should be rejected.[16]

One possible question raised by Binnie's analysis is whether, on his interpretation of the Act, it would be open to the Prime Minister to appoint someone who had, to modify his example, practiced from 1970 to 1985 and then pursued an altogether different line of work. If section 5 only imposes a "10 years of practice" requirement, then it would not exclude such a person. That might seem an uncharitable reading — a 25-year absence from the legal profession, after all, *would* surely be a "detriment" and not an "asset". But to avoid that result, one would need to read section 5 so that it allows a person with 10 years of practice, but who is not a current member of the bar, to nonetheless be appointed if he or she has also served as a judge on *a court*. (Presumably, Binnie's interpretation would also permit a prior member of the bar with 10 years of experience to be appointed to the Supreme Court where he or she had been a legal academic in the interim, but we will set that point aside.)

Section 5, of course, does not say anything about the appointment of judges from just *any* court. It refers only to judges from "a superior court of a province." The Federal Court, the Federal Court of Appeal, and (since Binnie brings it up) the International Court of Justice are not "superior courts" in the sense in which the Judicature provisions of the *Constitution Act 1867* use that term.[17] Presumably, then, Binnie must be interpreting "superior courts" purposively — namely in light of the legislative intent underpinning section 5. On this view, the courts enumerated in section 5 are "simply illustrative of the type of court from which one might be appointed" and are "not exhaustive."[18]

This line of reasoning does indeed seem to inform Binnie's opinion. He downplayed the significance of the fact that there is no mention of the Federal Court and Federal Court of Appeal

in section 5: he noted that, prior to the 1952 consolidation, those courts simply did not exist.[19] He further observed: "Membership in the predecessor court, the Exchequer Court of Canada was never considered a bar to appointment to the Supreme Court of Canada."[20]

There is a strong case to be made for Binnie's reading of section 5. There is little reason to suppose that the provision was intended to restrict the class of eligible candidates for the Supreme Court except to ensure that they had the necessary experience and expertise for the job. A narrow reading of the class of persons *excluded* by that section would seem appropriate. As he observed in his opinion, several Justices of the Supreme Court were appointed directly from the Federal Court of Appeal, and Madam Justice Arbour had been appointed after serving as Chief Prosecutor of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia.[21] Binnie's reading of section 5, then, squares well with long-standing practice.

II. The missing section 6 analysis

Binnie focuses on section 5 far more than on section 6. Section 6, though, is a very different provision. It is of course true that we must read section 6 in light of section 5, but we must also pay attention to its plain language. The section on its face imposes a restriction over and above that imposed by section 5: three judges must be from Quebec. In addition, it suggests that appointees who do not sit on one of the eligible courts must be a current member of the Quebec bar. In interpreting the section 6 requirement that nominees be drawn from the Court of Appeal or Superior Court of Quebec, or from "among its advocates", it seems strange, if one is to adopt a purposive reading of the section, not to ask *why* the Quebec requirement was imposed in the first place. Yet Binnie does not ask that question. He reads section 6 as though all it does is reproduce section 5, swapping "of a province" with "of Quebec."

A purposive reading may well suggest that section 6 of the Act was intended to exclude judges on the Federal Court or the Federal Court of Appeal, insofar as they are not current members of the bar of Quebec. Daly has noted:

> The most obvious inference is that the object of s. 6 is to ensure that the Quebec judges on the Supreme Court have current knowledge of Quebec's Civil Code. The Supreme Court can hear cases from Quebec. When it does so, it needs judges who are familiar with civil law. Judges from the common-law provinces usually will not be. Accordingly, it makes perfect sense to have additional requirements for judges from Quebec: that they either be sitting judges or active practitioners (who, even if they are not specialists in private law, have nonetheless a professional obligation to keep abreast of civil-law developments).[22]

Since the Federal Court and Federal Court of Appeal hear few civil law cases, Daly continues, it would not be surprising if Parliament wished to exclude judges sitting on those courts.[23] It would also explain why section 6 is written in the present tense, whereas section 5 is written in both the past and present tense: the aim was to ensure that nominees for the Supreme Court would have a grasp of *current* civil law.[24]

Section 30 of the *Supreme Court Act* provides further support for this reading. It permits, where necessary, the appointment of an *ad hoc* judge. Before 2002, section 30(1)(a) made specific allowance for *ad hoc* judges to be drawn from the Federal Court, which then included a trial and appellate division.[25] In 2002, that provision was amended to reflect the newly separate Federal Court of Appeal. But section 30(2), which governs the appointment of ad hoc judges where the appeal is from a judgment rendered in Quebec, looks very different. It states:

> Unless two of the judges available fulfill the requirements of section 6, the *ad hoc* judge for the hearing… shall be a judge of the Court of Appeal or a judge of the Superior Court of [Quebec]…

Strikingly, there is again no mention of the Federal Court or Federal Court of Appeal. If Parliament wanted to include these courts under section 30(2), it could easily have done so. The fact that it chose not to do so suggests that it regarded judges of the Federal Court and Federal Court

of Appeal to be inappropriate as representatives of Quebec on the Supreme Court. (Indeed, the reference could support a restrictive interpretation of both sections 5 *and* 6, since Federal Court judges are mentioned as appropriate candidates for *ad hoc* appointments, but not *permanent* ones).

Yet one further point could be made. The Supreme Court was created through the *Supreme and Exchequer Courts Act*. The Exchequer Court, of course, was the precursor to the Federal Court and Federal Court of Appeal.[26] That Court was, therefore, front and center in Parliament's 'mind.' If the legislature had meant to include judges from the Exchequer Court in what would become section 6, it could (again) have easily done so. Legislative history suggests that it had good reasons — or, at least, what it would have regarded as good reasons — for wanting only Quebec superior court judges (in the section 96 sense) and current members of the Quebec bar to be 'appointable' to the Supreme Court.

III. Legislative history and intent

Legislative history supports the view that section 6 was designed to guarantee that at least some members of the Supreme Court would have a working familiarity with civil law. Its original progenitor was section 4 of the *Supreme and Exchequer Courts Act*.[27] The relevant part of that provision read as follows:

> two of whom [the judges] at least shall be taken from among the Judges of the Superior Court or Court of Queen's Bench, or the Barristers or Advocates of the Province of Quebec…

This language found its way into the Act after The Honourable Mr Laflamme, Member of Parliament for Jacques Cartier, Quebec, introduced it during the third reading of the Bill in the House of Commons. Hansard reports his comments as follows:

> Mr Laflamme moved that this Bill… be amended by adding the following words after the word "court" on the 18th line of the fourth section…: - "Two of whom at least shall be taken from the Judges of the Superior Court or Court of Queen's Bench, or from among the Barristers or Advocates of the Province of Quebec." He said this motion was merely to carry out the idea which he had expressed the other night — that he believed under the peculiar circumstances in which the Province of Quebec was situated, and its special system of laws, of which the Judges from the other Provinces who might be selected for the composition of this court would be entirely ignorant — it was essential in order to arrive at a good and sound interpretation of the laws of that Province, that two of these Judges, at least, should be selected from the bar of Lower Canada. He believed there was no Province in the Dominion which stood in this peculiar position. If their laws had been the same as those of the other Provinces, certainly no one in Quebec would have pretended to demand this representation….[28]

Mr. Laflamme's reasoning was explicitly endorsed by several Members of Parliament, including The Honourable Sir John A. MacDonald.[29] Others resisted.[30] The Honourable Mr. Masson observed that, carried to its logical conclusion, Mr. Laflamme's argument suggested that *only* judges drawn from the Quebec bar should hear Quebec appeals.[31] The Honourable Mr. Palmer "was quite willing to admit that two of the Judges of the Supreme Court should be taken from Quebec, but he would be sorry to see that made a part of the Act."[32] The Honourable Mr McKay Wright "admitted the peculiarities in the laws of the Province of Quebec" but nonetheless took the view that the Bill should not have any "sectionalism."[33] Ultimately, though, Mr. Laflamme's amendment was adopted. Tellingly, no one is recorded as suggesting that Mr. Laflamme's reasoning was flawed — they disagreed only that his reasoning carried the implications he suggested for the Act. Moreover, a subsequent proposal to amend the Act by requiring at least one judge from British Columbia was rejected.[34] Frank Mackinnon observed that this amendment "was lost because of the feeling on both sides of the House that the representative principle was not of the same importance to the other provinces as it was to Quebec."[35]

Even before the amendment was introduced, the House of Commons debates concerning the

creation of the Supreme Court indicate that Parliament was preoccupied with the question of whether the Court would be able to effectively deal with appeals turning on points of Quebec civil law. Peter Russell has observed: "Hostility to the Supreme Court's review of provincial court decisions, especially the decisions of the Quebec courts dealing with Quebec's Civil Code, ran throughout the debate and was the central theme of most French Canadian criticism of the Act."[36] The Honourable Mr. Baby, five days before Mr. Laflamme introduced his amendment, stated:

> Amongst the rights reserved to the Province of Quebec [by the British North America Act] was that of dealing with property, civil rights and civil procedure in the courts. The constitution of the proposed Supreme Court would take away those rights. … [A] disappointed suitor, whose case had been adjudicated upon by the different courts of the Province, would appeal to the Supreme Court and the decision of the different tribunals would be reviewed by that court and possibly set aside. The decisions of Judges fully acquainted with the French law would be set aside by six Judges, four of whom would be unlearned in the laws of Quebec. … Not only would the rights of Quebec be jeopardized by the fact that four of the six Supreme Court judges would be ignorant of French laws, but the rights of the other Provinces would be endangered by the Judges being unacquainted with the laws, customs and habits of the parties pleading before the court.[37]

Before proposing what would become section 6, Laflamme suggested an amendment that would have "forb[ade] appeals in all private law cases from Quebec (excluding commercial law cases) in which two Quebec courts had been unanimous."[38] Other amendments, likewise intended to make it impossible for four common law judges to overturn decisions on Quebec civil law reached by jurists more familiar with it, were proposed but rejected.[39] Russell states:

> This kind of concern about the Supreme Court's appellate jurisdiction was almost entirely confined to French Canadian representatives of Quebec. … The French Canadians showed no inclination to couch their criticism of the Supreme Court in federalist terms. On the whole, the rationale of their case turned much more on an interest in preserving their own culture than on the logic of federalism.[40]

While this kind of legislative history does not definitely answer the question of what was the intent behind section 6, it is very suggestive of a purpose to ensure that at least some members of the Supreme Court had familiarity with Quebec's civil law. That does not mean that section 6 requires judges with an *up-to-date* grasp of civil law. But in the context of a new confederation, in which the people of Quebec were suspicious of a high court with jurisdiction over civil law appeals, it is entirely plausible that Parliament would have wanted Supreme Court appointments from Quebec to have a *current* understanding of Quebec civil law, and that they would have wanted this understanding demonstrated with *ongoing* membership in the Quebec bar or by being a judge in one of its 'domestic' superior courts. Given Russell's point that the objection of French Canadians was grounded in cultural rather than federalist concerns, the symbolic importance of drawing Quebec appointments only from its *currently* practicing bar or from *its* superior courts, should not be lightly dismissed.

In 1949, when the Supreme Court of Canada was made the "court of last resort," it was expanded from seven judges to its current complement of nine. Section 6 was likewise modified to require three judges from Quebec rather than two. The debates in both the House of Commons and the Senate suggest, again, that Parliament's intention was to guarantee a measure of expertise in Quebec civil law. The Minister of Justice, replying to objections that Quebec was receiving special treatment that would be "resented" by the other provinces, stated:

> So far as the reference in the clause to there being three appointees from Quebec is concerned, the necessity for that arises, as my honourable friend knows, from the fact that in that province they have a system of civil law which is altogether different in character from the common law that we inherited from England, and which prevails in the other provinces. While the clause says that the third judge shall be appointed from Quebec, the real purpose is to get upon the supreme court, when it becomes the court of last resort for Canadian

> lawsuits, three lawyers trained in the civil code rather than in the common law.[41]

He continued:

> We knew that when we created the supreme court as the court of last resort for Canada we would have to have appointed to the membership of that court enough civilians or judges trained in the civil law so that, in the event of there coming from Quebec a case involving any matters other than criminal law, it would be decided without a stalemate, having one civilian judge on one side and one civilian judge on the other. That necessitated the appointment of three judges trained in the civil law on that court of last resort.[42]

The character of Quebec's legal order has also been raised in other contexts. When the Canadian Bar Association, for example, passed a Resolution "that the rule of *stare decisis* ought to continue to be applied with respect to past decisions of the Court, as well as with respect to past decisions of the Judicial Committee,"[43] some Parliamentarians argued that such a rule, if incorporated into the *Supreme Court Act*, would be incompatible with Quebec's civil law tradition.[44] All things considered, it is clear that the impact of the Court on Quebec was in the forefront of legislators' minds.

The legislative history helps bring out the difference between section 5 and section 6 as regards bar membership. Where a criterion for appointment is based primarily on the need to ensure a minimum level of legal expertise, as is clearly the case with section 5, it does not necessarily matter whether one acquired that expertise recently or in the past. Thus, it is not surprising that section 5's reference to 10 years' bar membership is not restricted to current members. But, as we have seen, section 6 arguably reflects more than a concern for technical expertise in civil law. It also reflects the need to *assure Quebeckers* that members of the Supreme Court have that expertise. With that in mind, it may indeed be perceived as important to draw candidates for appointment to the Supreme Court not only from civil law experts, but from the community of lawyers and judges *practicing in Quebec*. On Binnie's reading of the *Supreme Court Act*, it would be possible to appoint a person who practiced law in Quebec for 15 years, but for the past 10 years has lived and practiced in Vancouver, ensconced in the common law system. To the extent section 6 is designed only to ensure civil law expertise, that result is entirely unobjectionable. But if the point is to *assure* Quebeckers that the Supreme Court can draw on judges who are familiar with and sensitive to French Canadian legal traditions, that result looks more problematic. And the present tense language of section 6, read in conjunction with section 30(2), and viewed in light of legislative history, suggests that great care should be taken before we assume that "among the advocates" includes past advocates.

IV. Purposive interpretation: Uses and abuses

It is worth taking a moment to consider what we have not argued. First, we have not claimed that judges from the Federal Court or Federal Court of Appeal can never be appointed to the Supreme Court of Canada. As we noted above, Binnie's reading of section 5 of the Supreme Court Act is entirely reasonable. Indeed, when we read that provision in light of section 30(1) of the Act, his argument appears even stronger. This means that there is no question of the legality of the appointments of, for example, Mr. Justice Iacobucci, Mr. Justice Rothstein, or Madam Justice Arbour. The difficulty with appointing judges directly from the Federal Court or Federal Court of Appeal arises only when they are being appointed to fulfill the requirements of section 6. This gives rise to a second qualification of our argument: where the government sets out to appoint *more* than three judges from Quebec, the reasonable conclusion to draw is that the "extra Quebec judge" need only satisfy the requirements of section 5. Section 6, on *any* reading, was designed only to ensure a minimum degree of competence on the Court in Quebec civil law.[45] Once that minimum threshold is satisfied, other appointments need only satisfy the requirements of section 5.

Third, in claiming that the intention of the legislature, in enacting section 6 of the *Supreme Court Act*, was to guarantee a minimum degree

of competence in Quebec civil law, we are not claiming that this was — still less is — a "pressing and substantial objective."[46] Only a small fraction of the cases ultimately heard by the Supreme Court of Canada involve Quebec civil law.[47] Moreover, though Supreme Court judges may once have had little facility with the French language, making it difficult for Quebec lawyers to effectively argue their cases,[48] that problem has long since been ameliorated. All of that, though, is beside the point. In interpreting section 6, one must still look to the intention of the legislature in 1875, keeping in mind the priorities and concerns that exercised and preoccupied it *then*. It is important to focus on what the statute means, and not whether it was or is 'good' law.

Finally, even on the more restrictive reading of section 6, it would not be impossible to appoint someone in the position of Mr. Justice Nadon. After the controversy erupted, some argued that the section 6 problem would immediately disappear if Nadon resigned from his position on the Federal Court of Appeal and proceeded to re-enter the Quebec bar.[49] That, again, strikes us as correct: as a current "advocate" of the Quebec bar, with ten years standing, the text of neither section 5 nor section 6 would present an obstacle to his appointment.[50] And let there be no doubt: the barrier to Mr. Justice Nadon's appointment is primarily *textual*. Section 6 presents a problem because its plain language narrows the sphere of eligible nominees to current members of the bar and judges of Quebec's "superior courts." Change the language of the section — so that, for example, it explicitly allows for the appointment of people who were "once among the advocates of Quebec" — and, even on the sort of purposive reading advanced above, the problem vanishes.

The text matters. It has independent force of its own. It is important to keep that in mind, because one might otherwise try to use the purposive approach in ways that are rather too ambitious, even silly. One could, for example, try to argue that section 6 imposes a substantive requirement that nominees have an *actual* working grasp of Quebec civil law. On that reading, it would arguably not be enough for nominees to be drawn from the Quebec bar; even though the plain language of section 6 demands nothing more, they would also need to have the sort of practical background from which one could infer expertise in civil law. Using that sort of reasoning, one might argue that full-time criminal defense lawyers are ineligible. After all, a criminal lawyer does not obviously have more familiarity with Quebec civil law than a Federal Court judge. If the latter is excluded by section 6, why not the former? Alternatively, but along broadly similar lines, one could argue that it would not be enough for a Federal Court judge with prior membership in the Quebec bar to re-enter it for a day, since that gives us no greater confidence in his or her knowledge of civil law. If we have doubts about a person's grasp of civil law while he or she is on the Federal Court, so the argument would go, a day of membership in the Quebec bar would not remove them. This, of course, is the mirror image of the reasoning that Binnie appears to have used. He seems to proceed on the basis that it would be "absurd" if section 6 prevented judges on the Federal Court from being appointed to the Supreme Court, and on that basis concludes that it must not do so. In getting to that conclusion, he is forced to focus on the language and purposes of section 5 — since, once our attention is trained on section 6, the waters become considerably murkier.

But these arguments from absurdity miss the point. No one claims that, merely because one is a member of the Quebec bar for 10 years, he or she has expertise in civil law — or that one cannot have such expertise unless one practiced law in Quebec. (One could, for example, be a law professor in Vancouver with a strong research interest in Quebec's civil law tradition, but no formal accreditation in that province.) No one claims, either, that Federal Court judges are *necessarily (or even probably)* ignorant of civil law. The claim is nothing more or less than that *the language Parliament actually used* in sections 5 and 6 currently restricts who can be appointed to the Supreme Court of Canada.

Why does that matter? One could argue that, if the point of the section is to guarantee expertise in civil law, we should just apply the section so that it achieves that goal. That, after all, seems

to be just what it means to engage in purposive interpretation.

It is certainly true that purposive interpretation requires us to look behind the text and consider the object it was intended to achieve. But it also requires us to ask why the legislature opted to use the language it did. After all, it would have been open to Parliament, when it crafted section 6 of the *Supreme Court Act*, to simply say: "At least three judges on the Supreme Court must have expertise in Quebec's civil law." Under the 'brute purposive approach' described above, there is no difference between section 6 as it was actually written and section 6 written in such a way that it makes civil law expertise on the Court an explicit requirement.

That reasoning, however, is unsatisfactory. It proceeds on the basis that the legislature can only choose to pursue an object, as it were, 'directly' and not 'indirectly.' But sometimes, the legislature may find it advantageous to pursue a state of affairs through legislation without explicitly setting out that state of affairs *in* the legislation. Consider, for example, legislation that restricts the franchise to those 18 years of age or older.[51] We might say that this kind of provision is designed to ensure that only people who have achieved a certain level of maturity will be able to vote in federal elections. On the brute purposive approach, the fact that the legislation explicitly limits the franchise to those who are 18 or older is neither here nor there. Its object is to guarantee maturity among voters. That being the case, it is entirely appropriate to read the legislation in such a way that it allows intellectually precocious 16-year-olds to vote, and disallows immature 25-year-olds.

The problem with such an approach is that it ignores the fact that the legislature may have had reasons for not simply stating that citizens will be eligible to vote only if they are 'sufficiently mature.' For example, perhaps the legislature feared that such a provision would enmesh officials in deeply contentious arguments about precisely which individuals are 'worthy' enough to vote, ultimately casting a pall over the legitimacy of elections and our democratic institutions. Rather than set out the desired state of affairs in the statute, the legislature could reasonably conclude, it is better that the statute impose an age-based restriction. This rule would be, in a sense, arbitrary — why 18 and not 17? why not 18 years less a day? — and so would permit the inclusion of some immature over-18s and the exclusion of some mature under-18s.[52] But the advantage to the political process, in crafting a bright-line rule rather than a more open-ended standard, makes the selection of such a rule entirely rational.[53]

In interpreting legislative purpose, in other words, the decision to use a heuristic device[54] may itself be significant. The fact that Parliament has mandated the use of a heuristic device to achieve a desired state of affairs (familiarity with Quebec's civil law tradition) indirectly, rather than directly, may likewise serve a legislative purpose. The Supreme Court of Canada, from the moment of its birth, was a controversial institution[55] — particularly among French Canadians.[56] It is difficult to believe that Parliament would have wanted a statutory provision requiring overt scrutiny of French Canadian candidates for their grasp of civil law. Better to paper over issues of expertise, which might stir up further controversy and call into question the legitimacy of the Court, by purporting to apply a somewhat different, and to all appearances less political test. Critics who claim that it would be "absurd" if a nominee's eligibility turned on whether he or she has been a current member for a day miss this point.

Binnie's suggestion that it would be absurd not to allow judges from the Federal Court to be appointed to the Supreme Court similarly highlights certain purposes while ignoring others. He accepts that the legislative intention to ensure a degree of legal experience and expertise on the Court is legitimate. The more specific intention behind section 6 — to protect the authority and legitimacy of the Court in the eyes of Quebec citizens, advocates and jurists — is not similarly endorsed; indeed, it is not even considered. To be sure, we should be reluctant to attribute to the legislature an intention to achieve ostensibly "absurd" results. If, however, it is clear that the legislature indeed had that intention, and that it is not unconstitutional, judicial and executive actors should be reluctant to ignore it.[57]

Conclusion

The analysis in the Binnie opinion is reasonable as applied to section 5, but, we think, too inattentive to of the purpose and history behind section 6. It sidelines a plain textual reading in favour of what seems like a more reasonable policy, namely that Federal Court judges from Quebec should be able to serve on the Supreme Court.

Endnotes

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1 The announcement was made pursuant to a process whereby a 'long list' of several candidates is forwarded to an *ad hoc* committee consisting of Parliamentary representatives of three political parties, which winnows it to a short list of three candidates from which the Prime Minister makes his selection. The candidate then appears before an ad hoc committee of Parliament for a public hearing. The procedure does mark a change from the first 150 or years of Supreme Court appointments. But successive Justice Ministers have been clear that the slightly more open process does not permit the legislature to block a particular selection. It is understood by all that once he or she is announced, the candidate is not truly a 'nominee'. For discussion, see Carissima Mathen, "Choices and Controversy: Judicial Appointments in Canada" (2008) 58 UNBLJ 52.

2 Fish, a criminal law specialist who formerly sat on the Quebec Court of Appeal, joined the Supreme Court on August 5, 2003. In April 2013, Fish announced that his retirement would be effective August 31.

3 For convenience, we will refer to him simply as "Binnie" for the remainder of this paper.

4 *Supreme Court Act*, RSC 1985, c S-26.

5 See Office of the Prime Minister, "Qualification of a member of the Federal Court with 10 years of experience as a member of the Québec Bar to be appointed to the Supreme Court of Canada" *Canada News Centre* (30 September 2013) online: <http://news.gc.ca/web/article-eng.do?nid=776789>. The issue of qualifications had not previously been a topic of wide discussion. It is not mentioned at all in Brian A Crane & Henry S Brown, *Supreme Court of Canada Practice*, (Scarborough: Carswell, 2005) Yet, when the current Minister of Justice took on his duties, he mentioned the need to "reform" the Act in the following terms:

> "There are provisions right now that could be interpreted as excluding federal judges from Supreme Court appointments," he said, noting that's not the intention. "This act literally goes back to Confederation. Suffice to say, there's a need to update some of the provisions."

To many, this was the first mention of the issue. Tobi Cohen, "Peter MacKay insists Conservatives are not moving Canada toward U.S.-style justice", *National Post* (17 August, 2013) online: <http://news.nationalpost.com/2013/08/17/peter-mackay-insists-conservatives-are-not-moving-canada-toward-u-s-style-justice/>.

6 Tobi Cohen, "Marc Nadon's appointment to Supreme Court of Canada faces legal challenge by Toronto lawyer", *National Post*, (8 October 2013) online: <http://news.nationalpost.com/2013/10/08/marc-nadons-appointment-to-supreme-court-of-canada-faces-legal-challenge-by-toronto-lawyer/>.

7 CBC News, "Budget bill amends Supreme Court Act for Nadon appointment" (22 October 2013) online: Canadian Broadcast Corporation <http://www.cbc.ca/news/politics/budget-bill-amends-supreme-court-act-for-nadon-appointment-1.2159083>.

8 It has been suggested that another former Supreme Court Justice, Douglas Abbott, was in an analogous position, as he was appointed directly to the Supreme Court from the federal Cabinet in 1954. Abbott J, who practiced law in Montreal for many years, did not surrender or suspend his license upon his entry into politics. He was therefore a member of the bar at the time of his appointment. In any event, our argument does not depend on Nadon J's nomination being the first of its kind.

9 Memorandum from the Honourable Ian Binnie, (9 September 2013), online: <http://pm.gc.ca/grfx/docs/20130930_Binnie_cp.pdf>, at 5 [Binnie Memorandum].

10 *Ibid* at 4 [emphasis in original].

11 *Ibid* at 4-5 [emphasis in original].

12 *Ibid* at 5 [emphasis in original].

13 *Ibid,* citing *Supreme Court Act,* RSC 1952, c 35, s 5.

14 *Ibid* at 6, *Supreme Court Act*, RSC 1927, c 35, s 5.

15 *Ibid* at 5.

16 *Ibid* at 7.

17 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss96-101.

18 Paul Daly, "More on section 6 of the Supreme Court Act: Legislative History and Purpose", *Administrative Law Matters* (16 Ocotber 2013) online: <http://administrativelawmatters.blogspot.ca/2013/10/more-on-section-6-of-supreme-court-act.html> [emphasis in original] [Daly, "More on section 6"]. Daly was referring to section 6, but the reasoning applies as well to section 5.

19 Binnie Memorandom, *supra* note 8 at 7.

20 *Ibid.*

21 *Ibid* at 2.

22 Paul Daly, "Eligibility to sit on the Supreme Court of Canada" *Administrative Law Matters* (9 October 2013) online: <http://administrativelawmatters.blogspot.ca/2013/10/eligibility-to-sit-on-supreme-court-of.html> [Daly, "Eligibility"]. See also Paul Weiler, *In the Last Resort: A Critical Study of The Supreme Court of Canada* (Carswell, 1974) at 17.

23 Daly, *supra* note 22.

24 *Ibid.*

25 We thank Mathew Englander for pointing this out.

26 See Daly, "More on section 6", *supra* note 18.

27 SC 1875, c.11, s 4.

28 *House of Commons Debates*, 3rd Parl, 2nd Sess, No XX (30 March 1875), 970-1.

29 *Ibid* at 971 (Hon Mr Fournier), 972 (Hon Mr Mills, Hon Sir John MacDonald).

30 *Ibid* at 971.

31 *Ibid* at 972.

32 *Ibid* at 971.

33 *Ibid.*

34 *Ibid* at 974 (Mr Bunster).

35 Frank Mackinnon, "The Establishment of the Supreme Court of Canada" in WR Lederman, ed, *The Courts and the Canadian Constitution* (McLelland and Stewart, 1964)106 at 112. See also James G Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 1985) at 8.

36 Peter H Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* , Volume 1 of *Documents of the Royal Commission of Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1969) at 13 [Russell].

37 *House of Commons Debates*, 3rd Parl, 2nd Sess, No XX (25 March 1875) at 921-2.

38 *Bilingual and Bicultural Institution supra* note 36 at 14, citing *House of Commons Debates, ibid.* at 937.

39 Russell, *ibid.*

40 *Ibid.*

41 *House of Commons Debates*, 21st Parl, 1st Sess, No XX (4 October 1949), at 662.

42 *Ibid* at 662-3.

43 See 1949 *Yearbook of the Canadian Bar Association and the Minutes of Proceedings of the Thirty-First Annual Meeting* (Ottawa, National Printers Ltd.: 1949) at 54-5.

44 See, *e.g.*, *House of Commons Debates*, 21st Parl, 1st Sess, No XX (4 October 1949)at 509; *Debates of the Senate*, 21st Parl, 1st Sess, No XX (19 October 1949) at 132.

45 Indeed, during the 1949 House of Commons debates, the Minister of Justice made it clear that the phrase "at least" was intended to ensure that it would have access to legal "talent" from anywhere in the country. See *House of Commons Debates*, 21st Parl, 1st Sess, No XX (4 October 1949) at 664-5.

46 See *R v Oakes*, [1986] 1 SCR 103 at para 69.

47 But see the Canadian Bar Association Committee Report, *The Supreme Court of Canada* (Ottawa, 1987) at 28 (noting that, in fact, the number of Quebec appeals as a percentage of total private law appeals was disproportionately high in spite of the relative lack of civil law expertise on the Supreme Court).

48 See *Bilingual and Bicultural Institution*, *supra* note 34 at 21. Russell observes that, among French Canadians, there was often an expressed preference for appeals to the Privy Council, where there was believed to be more familiarity with civil law and with the French language.

49 See Sean Fine, "Justice Nadon steps aside from Supreme Court until legal challenge resolved" *The Globe and Mail* (8 October 2013), online: <http://www.theglobeandmail.com/news/politics/supreme-court-justices-appointment-challenged-in-court/article14743436/>.

50 It is, of course, a different issue whether a particular law society would choose to re-admit such a person without her having to re-qualify.

51 *Canada Elections Act*, SC 2000, c 9, s 3.

52 On the over- and under-inclusiveness of legal rules, see Frederick F Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon, 1991) at 31-44.

53 See *ibid* at ch. 5. Sometimes, of course, the legislature will want to encourage people to reflect on the background reasons for doing or not doing something. Under those circumstances, it may be sensible to incorporate open-ended standards into the text of a statute. For discussion, See Jeremy Waldron, "Vagueness and the Guidance of

Action" in Andrei Marmor & Scott Soames, eds, *Philosophical Foundations of Language in the Law* (Oxford: Oxford University Press, 2011) 58.

54 See Daniel Kahneman, *Thinking Fast and Slow* (New York: Doubleday, 2011) at 98: "The technical definition of heuristic is a simple procedure that helps find adequate, though often imperfect, answers to difficult questions."

55 See Snell & Vaughan, *supra* note 35 at chs 1 and 2.

56 See Russell, *supra* note 36.

57 The irony is that Justice Nadon espoused this very judicial philosophy during his nomination hearing.