Dalhousie Law Journal

Volume 44 | Issue 2 Article 2

8-2021

But Why Him? A Review of The Tenth Justice: Judicial Appointments, Marc Nadon, and the Supreme Court Act Reference, by Carissima Mathen and Michael Plaxton

Andrew Flavelle Martin
Schulich School of Law, Dalhousie University

Book Review

But Why Him? A Review of *The Tenth Justice: Judicial Appointments, Marc Nadon, and the* Supreme Court Act *Reference*, by Carissima Mathen and Michael Plaxton.

How and why did a narrow question of statutory interpretation explode into a gripping public spectacle? This question, among others, is answered in *The Tenth Justice: Judicial Appointments, Marc Nadon, and the* Supreme Court Act *Reference* by Carissima Mathen and Michael Plaxton.[1]

To the great benefit of the Canadian legal community and the Canadian public, the authors have created an extensive, concise, and highly readable account of the Nadon saga. Anyone unfamiliar with the purported appointment of Justice Nadon to the Supreme Court of Canada, the *Reference re Supreme Court Act, ss 5 and 6* (also known as the *Nadon Reference*),[2] and the aftermath will find this book invaluable. I expect this work will become the definitive and authoritative account of this saga and that it will be indispensable to future scholars.[3]

I begin this review with a brief overview of the content and organization of the book. Within that context, I then focus on the debates the book raises and provokes and on the mysteries that remain for future work.

At the outset, I highlight some fascinating nuggets nestled in the book. These include the "real" reason why Justice Rothstein recused himself from the *Reference*;[4] the continuing (and unsuccessful) adventures of Rocco Galati around challenging judicial appointments;[5] and the questionable validity of the Supreme Court's declaration in the *Reference* that Nadon's appointment was void, given that the matter was a reference and Nadon was not a party to the proceeding.[6] (It is this last discussion in which Nadon jokingly implies he "'may still be a Supreme Court judge in law'… [as the] order-in-council appointing him was never revoked" that appears to prompt the book's title, *The Tenth Justice*, the meaning of which was

1. Carissima Mathen & Michael Plaxton, *The Tenth Justice: Judicial Appointments, Marc Nadon, and the* Supreme Court Act *Reference* (Vancouver and Toronto: UBC Press, 2020) [Mathen & Plaxton].
2. *Reference re Supreme Court Act*, *ss 5 and 6*, 2014 SCC 21 [*Reference*].
3. Eric M Adams describes the book as "deft, compelling, and illuminating" and "a definitive account": Mathen & Plaxton, *supra* note 1 at rear cover.
4. *Ibid* at 85-87.
5. *Ibid* at 99, 140-141.
6. *Ibid* at 183-184.

unclear until that point.[7]) The book also helpfully includes as an appendix the full text of the legal memorandum by the Honourable Ian Binnie that was commissioned and relied upon by the government.[8]

Content and organization

The book is organized in nine chapters. The authors begin with an Introduction previewing why the *Reference* is a "landmark."[9] They anchor this characterization in the growing importance and profile of the Supreme Court of Canada and the long-term impact of the *Reference* on that Court.

In Chapter 1, "What's So Bad About Marc Nadon?," the authors outline the major criticisms of Nadon's selection: that he lacked the criminal law expertise of the judge whom he replaced,[10] that his maritime law expertise was of marginal utility for the Supreme Court of Canada,[11] that he was a supernumerary judge,[12] that he was suspected to have been chosen largely for his deferential dissent in *Canada (Prime Minister) v Khadr*,[13] that he would detract from the Court's diversity,[14] and of course that he was potentially ineligible for one of the three "Quebec" seats on the Court.[15] The authors push back primarily against the *Khadr* criticism, by examining some of Justice Nadon's other decisions and cautioning that "[w]hen assessing a judge's entire career, one shouldn't make too much of a single case."[16]

In Chapter 2, "The Prime Minister's Prerogative," the authors briefly explain the statutory and constitutional basis for the appointment power,[17] but their focus is on how the appointments process has changed over time, with an emphasis on the role of political considerations.[18] Particularly helpful is a concise description of how the appointments process—or rather, the process built around the bare appointments themselves—had rapidly mutated since 2004.[19] The authors conclude that the various versions of

7. *Ibid* at 183.
8. *Ibid* at 185-192.
9. *Ibid* at 7.
10. *Ibid* at 12-13.
11. *Ibid* at 13.
12. *Ibid* at 13-14
13. *Ibid* at 14-16; *Canada (Prime Minister) v Khadr*, 2009 FCA 246 [*Khadr*], rev'd in part 2010 SCC 3. The authors dismiss this criticism as "fuss" (Mathen & Plaxton, *supra* note 1 at 18). The authors later at 133 note that "[w]hether warranted or not, Federal Court judges had a reputation in some legal circles for being too deferential to government."
14. *Ibid* at 19.
15. *Ibid* at 19-20.
16. *Ibid* at 16-18 (quotation is from 16).
17. *Ibid* at 22-24.
18. *Ibid* at 24-37.
19. *Ibid* at 27-37.

the process "turned the nominee into a kind of proxy target for critics of the prime minister"; "Insofar as anyone was made accountable by the process, it was the judges who were nominated, not the prime minister who appointed them."[20]

Chapters 3 ("Memos") and 4 ("Asking and Telling") focus on the steps taken by the Stephen Harper government before and up to the point that the Governor in Council initiated the *Reference*. Chapter 3 explains the eligibility issue and the government's legal opinions, focusing on the memorandum it commissioned from the Honourable Ian Binnie, the government's public use of that memorandum, and criticisms of it.[21] Most surprising is the authors' discovery and discussion of a predecessor judicial eligibility affair within the federal government in 1940.[22] Chapter 4 outlines the relevant declaratory amendments to the *Supreme Court Act* and the questions referred to the Supreme Court of Canada, and considers to some extent the controversy over doing both at once.[23] The authors themselves describe the declaratory amendments as "eyebrow-raising" and "provocative."[24]

Chapters 5 ("The Legal Showdown") and 6 ("The Opinion and Its Critics") provide a detailed account of the hearing, the reasons, and the criticisms of those reasons. Chapter 5 is particularly important and useful because, with some exceptions and for understandable reasons, legal analysis tends to turn little if at all on the questions and answers during the hearing. This focus provides excellent context for the deeper meaning and impact of the *Reference* for future cases.

Chapter 7 ("The Aftermath") considers three fairly disparate but important issues: the apparent conflict between the government and Chief Justice McLachlin after the release of the *Reference*,[25] the leak of the longlist and shortlist and Prime Minister Harper's subsequent abandoning of any appointments process,[26] and the process adopted by the next Prime Minister, Justin Trudeau (and criticism of that approach).[27]

---

20. *Ibid* at 31.
21. *Ibid* at 39-43 (see for eligibility issues and the government's legal options), 43-50 (see for the Binnie Memorandum), 50-64 (see for criticisms).
22. *Ibid* at 64-68.
23. *Ibid* at 79-82; *Supreme Court Act*, RSC 1985, c S-26, ss 5.1 and 6.1, as added by *Economic Action Plan Act 2013, No 2*, SC 2013, c 40, ss 471, 472.
24. Mathen & Plaxton, *supra* note 1 at 69, 81.
25. *Ibid* at 125-131. As I will explain below, I would have appreciated more analysis here: see the text accompanying notes 42 to 44 below.
26. *Ibid* at 131-134.
27. *Ibid* at 134-139.

Chapter 8 ("Judicial Appointments Law") considers several remaining issues. It starts with an account of the post-*Nadon* "*Mainville Reference*."[28] This subsequent reference was initiated not by Canada but by Quebec, prompted again by a challenge by Galati to a judicial appointment, but this time of an appointment of a justice of the Federal Court of Appeal to the Quebec Court of Appeal.[29] The authors then turn to the convention of regional representation and the ultimately unfulfilled possibility that the subsequent government of Prime Minister Justin Trudeau might breach it.[30] The chapter concludes with a brief consideration of the Harper government's final Supreme Court of Canada appointee, Justice Russell Brown.[31] The authors express compelling dismay that this appointment attracted little public attention or media coverage, particularly because the appointment would appear to constitute a breach of the caretaker convention.[32]

The final Chapter ("A Court Frozen in Amber") focuses on the *Reference*'s constitutionalization of the *Supreme Court Act*—which the authors view as "shockin[g]"[33]—the controversy over that aspect of the reasons,[34] and the implications, particularly for aspirations of bilingualism, Indigeneity and other diversity, and regional representation,[35] but also for the appointments process itself.[36] Particularly important in this chapter is an endnote, worthy of inclusion in the body of the text, explaining that references are formally non-binding but typically treated as if they were binding.[37]

The book's conclusion to some extent bemoans the politicization of judicial appointments that resulted from the Nadon saga: "If it could ever have been said that Supreme Court appointments were above politics, it cannot be said now."[38] In more haunting language, the authors argue that "[e]xposing the place of politics and power at the heart of judicial appointments means confronting the unnerving fragility of our

28. *Quebec (Attorney General) v Canada (Attorney General)*, 2014 QCCA 2365.
29. Mathen & Plaxton, *supra* note 1 at 140-145.
30. *Ibid* at 145-153.
31. *Ibid* at 153-154.
32. *Ibid* (as the authors put it, "once the election writ is drawn up, the government…can (and must) govern, but it must do so with restraint, generally restricting itself to activities that are routine, noncontroversial, reversible, or urgent" at 154).
33. *Ibid* at 3.
34. *Ibid* at 157-164.
35. *Ibid* at 164-174.
36. *Ibid* at 174-177.
37. *Ibid* at 160/235, n 22.
38. *Ibid* at 180.

constitutional order, one in which the guardians of the Constitution are selected by the very people whose decisions will come under review."[39]

The authors describe the purpose of the book in two ways: "*The Tenth Justice* explains how [the Nadon *Reference*] came to be a case, how it was argued, and why it matters."[40] "There is a reasonable argument that the Nadon Reference sits alongside…other landmarks in terms of its legal significance and wider cultural importance. This book makes that argument."[41]

The authors achieved that purpose. Indeed, the particular strength of the book is the balance struck among the *Reference* itself, its genesis, and its aftermath. The authors weave the three parts into a coherent story that would be unavoidably incomplete otherwise. The book is thus much more than an extended case comment.

Food for Thought

Overall, Mathen and Plaxton seem to have made a deliberate choice to mostly refrain from normative analysis and instead leave it to readers to judge the Nadon saga and the key players within it. While this is certainly a legitimate editorial choice and has its benefits, I remain curious as to what the authors really think. To provide so much context for a position, and then not take a position, leaves the reader wanting more—which is not necessarily a bad thing. Here I take the opportunity to demonstrate how the book prompts and provokes important further discussions.

In my respectful view, the authors are not critical enough around the role and misdeeds of the Minister of Justice and Attorney General for Canada at the time, Peter MacKay. In their analysis of "The Aftermath" (Chapter 7),[42] the authors allocate less than ten pages to the immediate aftermath, which they subtitle "The Harper Government Versus McLachlin"[43] and later refer to as the "the Harper-McLachlin contretemps."[44] (In the Introduction they describe the incident as "a remarkable attack on Chief Justice Beverley McLachlin" and a "remarkable public dispute."[45]) While they do mention MacKay's reinforcement of Harper's statements,[46] as well as unnamed "senior Conservatives,"[47] their focus is on the propriety of

39. *Ibid* at 180.
40. *Ibid* at 7.
41. *Ibid* at 4.
42. *Ibid* at 124-139.
43. *Ibid* at 125-131.
44. *Ibid* at 130.
45. *Ibid* at 6, 8.
46. *Ibid* at 129.
47. *Ibid* at 125.

the Prime Minister's actions. Harper surely bears an ultimate leadership responsibility as the Prime Minister. However, in my view MacKay as a lawyer and indeed Chief Law Officer of the Crown bears an equal, if not greater, responsibility, stemming from his professional duty to encourage respect for the administration of justice.[48]

On the other hand, the authors do acknowledge criticism of MacKay for "permitting" the declaratory amendments to be introduced while the interpretative matter was simultaneously referred to the Supreme Court of Canada in the *Reference*.[49] To my knowledge, such criticism has been overlooked in the legal literature.

One of the few shortcomings of the book is its failure to robustly explain that Chief Justice McLachlin's decision to raise the eligibility concern with the Minister of Justice, and her attempt to raise it with the Prime Minister, was completely reasonable and appropriate. While the authors note that Chief Justice McLachlin garnered praise,[50] they provide readers little context with which to evaluate whether that praise was warranted.

It is entirely appropriate for chief justices to be consulted on the needs of their courts when appointments are being considered, and to initiate such consultations when the executive fails to do so. An appointment open to a credible court challenge could—as indeed happened—leave the court shorthanded for some time. While Chief Justice McLachlin was unavoidably the chief justice of the apex court that might ultimately decide such a challenge, she was also unavoidably the chief justice of the court to which that appointment was being made. Nothing in this paragraph is original—indeed, I imagine many if not most lawyers and judges would give a similar account—but its absence from the book is striking and leaves readers with inadequate context to draw their own conclusions. Indeed, the Canadian Judicial Council's recently updated *Ethical Principles for Judges* might appear to be a response to this criticism of Chief Justice McLachlin.[51]

---

48. See e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, as amended 19 October 2019), r 5.6-1, online (pdf): <flsc.ca/resources/> [perma.cc/692F-JTMH] [*FLSC Model Code*]: "A lawyer must encourage public respect for and try to improve the administration of justice." I am far from alone in this view. See e.g. Brent Cotter, "The Prime Minister v the Chief Justice of Canada: The Attorney General's Failure of Responsibility" (2015) 18:1 Leg Ethics 73.

49. Mathen & Plaxton, *supra* note 1 at 81-82 (quotation is from 81).

50. *Ibid* at 130, 131.

51. Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: The Council, 2021), online: <cjc-ccm.ca> [perma.cc/T9NE-S8SL] ("Chief Justices and other judges with administrative responsibilities will necessarily have contact and interaction with the executive branch of government […]" at 44, 5.B.4).

While reasonable people can disagree, I would ascribe more responsibility than do the authors to Justice Nadon himself. With respect, Justice Nadon knew and should have known there could be a controversy around his elevation,[52] and he nonetheless made the deliberate decision to accept it. While I am not suggesting any mere mortal, including Justice Nadon, would have the fortitude to decline an appointment to the Supreme Court of Canada, responsibility comes with choices. The authors' sentiment is clearest in the first chapter, where they write that "[t]he heightened scrutiny [Nadon] received…was somewhat unfair to Nadon, who had hardly appointed himself to the Supreme Court."[53] The authors emphasize in their Conclusion that "Nadon was subjected to intense (*and arguably unfair*) scrutiny."[54] Moreover, they suggest responsibility lies with the Court and the government, not Nadon himself: "[t]o many commentators, Marc Nadon—who was neither a party nor an intervener in the case that would decide his fate—has been done a great disservice, *if not by the court than by the government that appointed him*."[55]

On the other hand, the book provides helpful factual context to the controversial debate—which has only grown since the *Reference*—over governments' (and other parties') eagerness to commission and release publicly legal opinions from retired judges of the Supreme Court of Canada.[56] The authors' treatment and discussion of the Binnie memorandum is markedly improved over Mathen's previous work, which reads as non-committal about the fact that Binnie was clearly acting solely as a lawyer and in no way acting as a judge: "In the case of the Nadon memorandum, Justice Binnie could be viewed as acting more as a lawyer than as a judge."[57] The authors explain that, according to an interview with Howard Anglin (then "senior adviser on legal affairs and policy"), the Binnie memorandum was commissioned because the government was "reluctant" to release its own internal advice: "The government could, of course, release the opinions provided by the Department of Justice and

52. See also Mathen & Plaxton, *supra* note 1 ("In an interview with us, Marc Nadon stated that he had been advised of the eligibility issue when the government first informed him that he was to be appointed." at 43).
53. *Ibid* at 19.
54. *Ibid* at 179 [emphasis added].
55. *Ibid* at 182 [emphasis added].
56. See e.g. Amy Salyzyn, "Against Supreme Lawyering," *Slaw* (29 March 2019), online: <www.slaw.ca/2019/03/29/against-supreme-lawyering/> [perma.cc/VY8F-YASC].
57. Carissima Mathen, *Courts without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019) at 213; characterized as "perturbing" in Andrew Flavelle Martin, "Review of: Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019) and Kate Puddister, *Seeking the Court's Advice: The Politics of the Canadian Reference Power* (Vancouver: UBC Press, 2019)" (2020) 13:3 JPPL 633 at 641.

the Privy Council Office, but it was reluctant to set a "precedent" by which internal legal opinions would be expected to be made public in the future."[58]

While this is a plausible reason for commissioning the Binnie memorandum, I am concerned that the government may have inadvertently benefitted from a public and media impression that the opinion must be correct not because of its reasoning but because it was signed by a retired justice of the Supreme Court of Canada, and perhaps even that it should have undue predictive value or weight. Salyzyn describes the issue of practice by retired Supreme Court of Canada judges as follows:

> The worry…is the perception that part of what clients are buying when they ask retired SCC judges to do such work is that (ex)judicial imprimatur. It's common sense that when a client retains a retired SCC judge to do legal work, part of the reason the client does so is because the status of "former SCC judge" has gravitas.[59]

I share Salyzyn's concerns, particularly as they apply to governments as clients. Moreover, while any such lawyer may indeed have "impeachable credentials" (and Ian Binnie undoubtedly does),[60] a retired judge is just a lawyer and his memorandum is just a lawyer's opinion. While Binnie was the second retired judge consulted, and the first (the Honourable Louise Charron) had independently come to the same view, the concern abides.[61] In contrast, no such issue would arise from retaining a high-profile expert lawyer who has never been a judge, as the government then did with Peter Hogg.[62]

Enduring Mysteries

Mathen and Plaxton solve several mysteries—in Gillian Calder's words, the book is "[a]n intriguing detective story,"[63] though it is much more than that—and they also provide an excellent foundation for further work. In my view, two enduring mysteries remain unsolved and primed for future research, one factual and one legal.

The enduring factual mystery remains painfully striking: Why was Justice Nadon selected? With no disrespect to Justice Nadon, it is fair to ask what made him the appropriate candidate in the view of the Prime Minister. Indeed, an eminently fair criticism of MacKay is his conclusory

58. Mathen & Plaxton, *supra* note 1 at 41.
59. Here see also Salyzyn, *supra* note 56.
60. Mathen & Plaxton, *supra* note 1 at 41.
61. *Ibid* at 41-42.
62. *Ibid* at 41-43.
63. *Ibid* at rear cover.

assurance that "we believe that Justice Nadon is eminently qualified."[64] Why? MacKay was never willing and able to answer that further question. Indeed, his inability to articulate a convincing account—or even an unconvincing account—as opposed to conclusory statements is another glaring failure during this saga. (That is why I favour the processes proposed in 2004 and adopted by the Trudeau government in 2016, in which the Minister of Justice answered legislators' questions.[65]) Moreover, in lieu of such an answer to this burning question, MacKay and his office instead made some legally empty and thus potentially misleading public statements that Quebec judges on the Federal Court of Appeal had a "right" to be appointed to the Supreme Court of Canada.[66]

While this is an impossible question to answer definitively without candour from Harper or MacKay, I would have appreciated some theories here. The authors do acknowledge, and provide excellent context to question, the widespread assumption that Nadon was chosen primarily for his deferential dissent in *Khadr*.[67] They also suggest that, at least to critics of Nadon's appointment, his selection "reflect[ed] a decision, by the prime minister… that the court itself should be more ordinary and workmanlike too."[68]

Mathen and Plaxton title Chapter 1 "What's So Bad About Marc Nadon?," concluding that "[t]he answer is clear—nothing."[69] But after reading the book, I am left with the opposite question: "What's so great about Marc Nadon?" Admittedly, this is an awkward question to ask. I write this cognizant of, and indeed I believe in furtherance of, my duty as a lawyer to encourage respect for the administration of justice.[70] I certainly

64. *Ibid* at 47, quoting *Hansard* (*House of Commons Debates*, 41-2, No 2 (18 October 2013) (Hon Peter MacKay).

65. Mathen & Plaxton, *supra* note 1 at 27, 136.

66. See e.g. Andrea Hill & Bruce Cheadle, "Don't exclude Quebec federal judges: MacKay; Home province shouldn't be a factor: minister" *The National Post* (16 January 2014) A6, quoting MacKay: "Federal court judges who come from the province of Quebec should enjoy the same rights and privileges for consideration for Supreme Court appointment as every other province". See also Sean Fine, "Justice Nadon steps aside while legal challenge heard" *The Globe and Mail* (9 October 2013) A3: "Paloma Aguilar, press secretary to Justice Minister Peter MacKay, said the government will 'defend the rights of Quebeckers who are appointed to the Federal Court to also sit on the highest court in Canada.'"

67. Mathen & Plaxton, *supra* note 1 at 14-19; *Khadr*, *supra* note 12.

68. Mathen & Plaxton, *supra* note 1 at 21.

69. *Ibid* at 20.

70. *FLSC Model Code*, *supra* note 48, r 5.6-1. See also commentary 3: "a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism."

do not mean to add to what the authors characterize as "withering criticism" and "ungenerous insinuations…made about his character as a judge."[71]

One would idealistically hope, if not assume, that the Supreme Court of Canada is composed of the best judges in the country, albeit with lots of room for disagreement over the meaning of "best" in such a context, or at least "great" judges. With abundant respect to Justice Nadon, I have no reason to doubt that he is a good judge but I need some context for why he is a *great* judge. I appreciate the sentiment of the authors—"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." [72] However, that sentiment only goes so far. Some judges are historically great, and some are "competent" journeymen like Nadon.[73] There is an indisputable and recognizable difference between competence and greatness. Why not aspire to the latter? If the Prime Minister was indeed deliberately reducing the gravitas of the Court,[74] which is possible but seems unlikely in my view, that would make a public explanation of the rationale even more necessary.

I remain perplexed, though perhaps naively, that Justice Nadon has apparently become a folk hero for elements of the conservative legal establishment, such as the Runnymede Society.[75]

The enduring legal mystery is this: can a supernumerary judge be elevated? This question, though beyond the scope of the *Reference* and properly not addressed in the reasons, is intricately interwoven into the context of the Nadon appointment. It is worthy of future study and perhaps even litigation. As I mentioned above, Mathen and Plaxton note briefly in their first chapter the public controversy over Nadon's supernumerary status. However, they characterize the issue as one of "vigour" as opposed to one of law and conclude that "[t]hose comments

71. Mathen & Plaxton, *supra* note 1 at 10.
72. *Ibid* at 10: "Traditionally, the bar, legal academics, and the media have been strenuously careful not to call into question the merits of appointees."
73. *Ibid* at 20: "[a] competent judge….To his critics, he was ordinary and workmanlike."
74. Recall the text accompanying note 68 above.
75. See e.g. Sean Fine, "Libertarian student group Runnymede Society seeks to shake up Canada's legal culture" *The Globe and Mail* (10 September 2019), online: <www.theglobeandmail.com/canada/article-libertarian-student-group-runnymede-society-seeks-to-shake-up-legal/> [perma.cc/RQ8N-7W4U]: "A particular Runnymede favourite is Federal Court of Appeal Justice Marc Nadon"; Sean Fine, "Doctrine is 'everything' for Marc Nadon, the outspoken conservative justice rejected by Canada's Supreme Court" *The Globe and Mail* (2 October 2019), online: <www.theglobeandmail.com/canada/article-marc-nadon-supreme-court-canada-runnymede-society/> [perma.cc/VNA6-67LY].

were somewhat unfair."[76] Indeed, the authors uncritically accept at face value Justice Nadon's dubious "deni[al] that his supernumerary status was akin to semiretirement."[77] In my respectful view, this denial is much more troubling than the question of whether Nadon had indeed been drafted into the National Hockey League,[78] which received inordinate media attention and demonstrates the relative triviality with which the media, the public, and many politicians approached the hearings.

It is clear that under the *Supreme Court Act* there is no such office of supernumerary judge of the Supreme Court of Canada,[79] and that under the *Judges Act* there is no mechanism for a judge of the Supreme Court to elect supernumerary status.[80] Moreover, for the other federally-appointed judges for whom an election is available, there is no provision for revocation of the election. Furthermore, the *Federal Courts Act* provides that in the absence or incapacity of the Chief Justice of the Federal Court of Appeal, or of the Chief Justice and Associate Chief Justice of the Federal Court, and where the corresponding Chief Justice has not designated a substitute, those duties flow to the most senior judge who has not elected supernumerary status.[81] These provisions suggest that there is something lesser about the office of supernumerary justice.

While there is nothing in the *Supreme Court Act* explicitly rendering supernumerary judges ineligible for appointment, that does not necessarily answer the question. I would argue there is a convention – or at least an implicit assumption—that supernumerary judges have foregone further elevation and should not be appointed to the Supreme Court of Canada. Indeed, my guess would be that prior to the Nadon saga, it might never have seriously occurred to judges, or the Minister of Justice for Canada, that a supernumerary judge should be considered for elevation.

While columnist Christie Blatchford asserted that the majority reasons in the *Reference* "take every opportunity to refer to Judge Nadon as

76. Mathen & Plaxton, *supra* note 1 at 13-14.
77. *Ibid* at 13.
78. *Ibid* at 9-10.
79. *Supreme Court Act*, *supra* note 22.
80. *Judges Act*, RSC 1985, c J-1, ss 28-29, 33.
81. *Federal Courts Act*, RSC 1985, c F-7, ss 6(2), 6(2.1). See similarly *Tax Court of Canada Act*, RSC 1985, c T-2 s 5(3)(c). *Contra*: *National Defence Act*, RSC 1985, c N-5, s 234(4), concerning the Court Martial Appeal Court (though the *National Defence Act* has no provision for a supernumerary election by a judge of that Court). I leave for another day the question of whether a judge cross-appointed to the Court Martial Appeal Court can continue in that role once she has elected supernumerary status on her "home" court.

"supernumerary,""[82] the majority only does so three times.[83] Blatchford considers this "language…insulting" and asserts that "[t]he suggestion is meant to convey something—age perhaps?"[84] In contrast, my view is that even if the language was intended to convey a meaning, it was not derogatory but reflects perhaps mere surprise and confusion that a supernumerary judge would be elevated to the Supreme Court of Canada —and perhaps even a subtle warning that this legal issue may arise in the future.

Energizing Future Work

At the end of the day, *The Tenth Justice* is an impressive achievement that lays a solid and well-researched foundation for future research and analysis. Indeed, until now the *Nadon Reference* has attracted less in-depth analysis in the legal literature than one might expect.[85] Mathen and Plaxton have thus filled a gap that was not only large but also potentially weakening to Canadian public law research. I expect the book will provoke renewed attention to the *Reference* and its implications and trigger renewed excitement around its potential to inform important scholarship.

Andrew Flavelle Martin
Assistant Professor
Schulich School of Law

82. Christie Blatchford, "By spurning Marc Nadon, the Supreme Court is also rejecting the executive's fundamental role in governance" *The National Post* (22 March 2014) (WL) [Blatchford].
83. *Nadon Reference*, *supra* note 2 at paras 3, 6, and 9. There is also one mention in the SCR headnote.
84. Blatchford, *supra* note 82.
85. See primarily Carissima Mathen, "The Shadow of Absurdity and the Challenge of Easy Cases: Looking Back on the *Supreme Court Act Reference*" (2015) 71 SCLR (2d) 161; J Gareth Morley, "Dead Hands, Living Trees, Historic Compromises: the Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada" (2016) 53:3 Osgoode Hall LJ 745; Kate Glover, "The Supreme Court in Canada's Constitutional Order" (2016) 21:1 Rev Const Stud 143; Frank AV Falzon, "Statutory Interpretation, Deference and the Ambiguous Concept of "Ambiguity" on Judicial Review" (2016) 29:2 Can J Admin L & Prac 135; Paul Daly, "A Supreme Court's Place in the Constitutional Order: Contrasting Recent Experiences in Canada and the United Kingdom" (2015) 41:1 Queen's LJ 1. See also e.g. John Schudlo, "Respectfully Submit: Deference to the Supreme Court in Canada" (2017) 11 JPPL 487 at 496-497 (on media coverage); Richard Albert, "Constitutional Amendment by Stealth" 60:4 McGill LJ 673 at 689-690; Christopher Manfredi, "Conservatives, the Supreme Court of Canada, and the Constitution: Judicial-Government Relations, 2006-2015" (2015) 52:3 Osgoode Hall LJ 951 at 971-974; Erin Crandall, "Defeat and Ambiguity: The Pursuit of Judicial Selection Reform for the Supreme Court of Canada" (2015) 41:1 Queen's LJ 73 at 99-103; Léonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50:2 UBC L Rev 505 at 526-528.