Controversial Supreme Court Appointments – A Blockbuster in the Foreign Films Category?

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Hugo Cyr, The Bungling of Justice Nadon's Appointment to the Supreme Court of Canada, 67 Sup. Ct. L. Rev. 73 (2014).

Often we like scholarship lots because it reflects new or interesting perspectives on familiar subjects. Sometimes, though, the story itself is so thought-provoking that a good telling is all that is needed to make the article worth commending to Courts Law readers.

Such is the case with Hugo Cyr's article, which chronicles the highly charged engagement between the Supreme Court of Canada and the Canadian Government (the Executive, comprised of members of the ruling political party) over the fundamental requirements for their respective legitimacy. Everyone seems to agree that the incidents recounted were "unfortunate" in that they provoked strong expressions of differences in what has historically been regarded as a relationship to be managed tactfully. Yet the events exposed many intriguing issues about how best to conduct this critical relationship to promote the continuity and flexibility needed to serve well the interests of the public.

It is hoped that this brief summary will, like the fast-paced trailers that preview a movie's highlights, whet the appetites of JOTWELL readers to press "watch" in the link above and follow the entire story. But, first, a word or two of background – much like the lines that appear by way of explanation in the first scene of the movie:

Like the Supreme Court of the United States, the Supreme Court of Canada serves a range of important constitutional roles, including as arbiter of federal relations. Indeed, so trusted has it become in that role that its unusual jurisdiction to render advisory opinions on the constitutionality of proposed legislation has been invoked on a number of occasions in recent years to provide perspective on potentially controversial political initiatives.

The implications of the Court's many sensitive roles for judicial appointments – both for who is selected and for the appointment process – will be obvious to U.S. readers. The academic discussion and political commentary on the judicial appointment process in Canada has developed more slowly than in the U.S.; it has become more prevalent with the advent and interpretation of the Charter of Rights and Freedoms, although there is not yet any formal approval process.

Still, there has long been acknowledgement of the need for judges to be representative of Canada's juridical diversity. The Supreme Court Act makes provision for three of its nine judges to be appointed from Québec. Customarily (*i.e.,* not by law), the remaining six judges include three from Ontario, two from the provinces to the west and one from the provinces to the east. Since the Court is a court of general appellate jurisdiction, the inclusion of three members from Québec ensures that the Court, which may sit in panels of five, seven or nine, could arrange its sittings so that a majority of the panel deciding an appeal from Québec or having important implications for Québec-federal relations would be from that province.

As a practical matter, the Court operates in a much more collegial way than this would suggest. Many of the judges are functionally bilingual; they typically include young lawyers trained in Québec among their law clerks; and from time to time it even happens that Québec judges take the lead in writing majority or unanimous judgments on issues of the common law.

With the scene set, the drama begins with the need to appoint a successor for one of the retiring Québec judges. The incumbent Government, known for emphasizing expedience over politesse, conducted a process that did not ease these concerns by selecting a member, who was from Québec, of the Federal Court of Canada (a lower federal court).

Unfortunately, it is not clear that Supreme Court Act permits this. The provision for appointing judges from Québec sits within the larger context of the provision establishing the basic requirements for eligibility for appointment. To be eligible, a person must be either a current or former member of a superior court of a province, or a lawyer who has been a member of the profession for at least ten years. The language of the provision for appointing judges from Québec appears to add an additional requirement–that the appointee must be a current member of the Québec judiciary or the profession. Federal Court judges are neither. (Judges from Québec have been appointed without this qualification in the past, but not as one of the three Québec judges.)

Aware of the problem, the Government obtained advance opinions from well-respected past members of the Supreme Court and announced Marc Nadon's appointment. In the course of the following week, he was interviewed by an *ad hoc* committee of parliamentarians to answer general questions about himself and his career and he was sworn in. His appointment was challenged immediately in the Federal Court, and the Supreme Court announced that he would not participate in matters for the time being. Later that month, the Québec National Assembly adopted a unanimous motion rejecting the appointment as deplorable unilateralism depriving Québec of its guaranteed "répresentation" on the Court.

These events are just the fast-paced opening scene of a fascinating story. The plot thickens as the Government attempts to sideline this opposition by introducing legislative amendments to correct the problem after the fact and by seeking an advisory opinion from the Supreme Court to bless its actions. There is considerable character development as the majority of the Supreme Court interprets its legislation as invalidating the Government's appointment and goes on to pronounce the proposed legislation also constitutionally invalid. The drama continues as the Court offers the view that its composition and "essential features" are, or have become, entrenched and would require formal constitutional amendment to be modified. (In Canada, a constitutional amendment would be virtually impossible.)

The story's ending necessarily remains open. But Professor Cyr astutely identifies the uneasy sense in which the Government's bold action provoked a strong response from the Supreme Court that may have jeopardized the flexibility required to maintain good working relations between the Judiciary and the Executive. Such "cooperative federalism" has served Canada well in the past and may be much in demand to meet the challenges ahead in a changing world. Though the progress of this relationship is inevitably shaped by the specifics of Canadian law and politics, stories like this can be of larger comparative interest to those whose passion is Courts law.

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