Defeat and Ambiguity: The Pursuit of Judicial Selection Reform for the Supreme Court of Canada

Erin Crandall[*]

The more important a court, the more controversial its judicial selection system tends to be. This is especially true for Canada's Supreme Court. The prime minister's nearly unchecked power over judicial selection has been the focus of longstanding complaint. Yet, despite a general acceptance that change is needed, formal reform—either constitutional or statutory—has proven elusive. This article discusses the question of why Canada has been unsuccessful at reforming the Supreme Court's system of judicial selection. It analyzes the unsuccessful efforts at constitutional change undertaken from the 1970s to 1990s and compares these attempts at reform to the judicial selection system of the High Court of Australia over the same time period. This article also considers how the longstanding ambiguity concerning the Supreme Court's constitutional status has affected more recent efforts at reform, and the consequences for future reform after the Court's affirmation of its constitutional entrenchment in Reference re Supreme Court Act, ss 5 and 6.

[*] Assistant Professor, Department of Politics, Acadia University. Thanks to Christopher P Manfredi, Jacob T Levy, Matthew Hennigar, Jeffrey A Sachs and the anonymous reviewers of this journal who all offered helpful feedback on earlier versions of this project. A special thanks goes to Richard Albert who provided the opportunity to be part of this issue. Part of this research was supported by the Fonds de recherche du Québec: Société et culture (FRQSC) in the form of a post-doctoral fellowship.

Introduction

The Supreme Court of Canada is one of the most respected peak courts in the world. Its system of judicial selection is not. In the words of constitutional scholar Peter Russell, "Canada is the only constitutional democracy in the world in which the leader of government has an unfettered discretion to decide who will sit on the country's highest courts and interpret its binding constitution."[1] Given the SCC's transformation from being a second-string player to the United Kingdom's Judicial Committee of the Privy Council (JCPC) into one of the most powerful courts in the world, criticism of the prime minister's nearly unchecked power is hardly surprising. More surprising is that since its creation some 140 years ago, the SCC's appointment process remains formally unaltered.

This article examines why the SCC's system of judicial selection has proven so difficult to formally reform. I argue that part of this answer lies in Canada's struggles with constitutional amendment. Equipped with an amending formula so demanding that it has been referred to as constructively unamendable,[2] efforts to reform the Court's appointment process are part of Canada's larger story of struggle with its Constitution. Uniquely, however, it is also a story of

1. House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada* (March 2004) (Chair: Derek Lee).

2. See Richard Albert, "Constructive Unamendability in Canada and the United States" (2014) 67:1 SCLR (2d) 181.

unusual constitutional ambiguity: Until 2014, it was unclear whether or not the SCC was actually entrenched in the constitution at all.

To further unpack how the particular conditions of Canada's constitutional rules have affected efforts to modify the SCC's appointment process, reform of the judicial selection system of the High Court of Australia will also be considered. Canada and Australia make desirable comparative case studies for several reasons. While both countries are vested with identical appointment systems inherited from the UK, these countries' attempts at formal reform have produced notably different outcomes: Whereas Canada has been unsuccessful in its reform efforts, Australia successfully amended the appointment system of its High Court in 1979 so that its subnational governments must now be consulted as part of the process.

When final courts of appeal were established in Canada (1875) and Australia (1903), both adopted the British model of judicial appointment, vesting the formal power to select judges in the governor in council. The two countries also share considerable institutional and political similarities—both are stable, advanced federal democracies that follow Westminster Parliamentary systems and practice common law.[3]

They also, however, have important differences in their rules for constitutional reform and their courts' constitutional statuses. For major constitutional reforms, the consent of both Canada's federal and provincial governments is required, whereas Australia's state governments hold no equivalent veto power. Furthermore, while Australia's High Court was set out in the constitution at its inception, Canada's Supreme Court has historically had an ambiguous relationship with the constitution.

Being able to hold many of the above-mentioned institutional and political factors relatively constant means that we are better positioned to explore how these differences in the amending rules and the courts' constitutional statuses have affected efforts to reform their judicial appointment processes. Comparing these two cases and identifying the factors that both facilitated and inhibited reform will permit us to further consider how Canada's constitutional rules and the SCC's constitutional

3. In Quebec, private law not involving matters of federal jurisdiction is governed by the civil law system; in Canada's other nine provinces and three territories, the common law system is used for both private and public law. Consequently, the Supreme Court of Canada decides a small number of civil law cases each year.

ambiguity have affected efforts to reform the Court's judicial selection system.

This article is divided into four sections. In Part I, past efforts to reform the SCC's judicial appointment system by constitutional amendment are analyzed. This historical review gives particular attention to the Meech Lake Accord and how Canada's constitutional amendment formula provided the provinces with a strategic advantage that allowed SCC reform to be placed on the constitutional agenda. Part II addresses the High Court of Australia and explores how, by contrast, the design of Australia's amendment formula limited the opportunities for the states to successfully pursue constitutional reform and encouraged policy-makers to take a pragmatic approach to reforming the High Court's appointment system. Part III offers a comparative analysis of each country's approach to judicial appointment reform. Finally, in Part IV, the article returns to the SCC. This part considers how the Court's ambiguous constitutional status following the entrenchment of the *Constitution Act, 1982*[4] affected recent reform efforts, and speculates as to how reforms are likely to be approached moving forward given the SCC's recent ruling in *Reference re Supreme Court Act, ss 5 and 6* (*Nadon Reference*).[5]

I. The Supreme Court of Canada

A. Constitutional Status and Rules of Constitutional Reform

Discussing and analyzing constitutional change to the SCC—its selection process included—is not a straightforward endeavor. In fact, until 2014, arguably one of the most interesting questions a student of the SCC could ask was whether the Court was entrenched in Canada's constitution at all. As will be discussed later on in this article, the SCC recently helped to clarify its own constitutional status in the *Nadon Reference*. However, up until this ruling, questions concerning reform of the SCC, by necessity, stemmed from a rather abstract starting point of asking whether constitutional change was necessary for SCC reform at all.

4. Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].
5. 2014 SCC 21, [2014] 1 SCR 433 [*Nadon Reference*].

This confusion can be traced to the Court's rather modest beginnings. Unlike the Parliament of Canada, the SCC was not established by the *Constitution Act, 1867*.[6] Instead, its creation was merely contemplated, granting Parliament the power to provide for the "Constitution, Maintenance, and Organization of a General Court of Appeal for Canada and for the Establishment of any additional Courts for the better Administration of the Laws in Canada" under section 101.[7] This power, in fact, was not actually exercised by Parliament until 1875, when the SCC was established via the *Supreme and Exchequer Courts of Canada Act*.[8]

The *Supreme Court Act* sets out how appointments to the SCC are made. Formally, it is the governor in council who makes SCC appointments, though in practice the prime minister, in consultation with the attorney general and cabinet, exercises this power. The qualifications required to sit on the bench are relatively few. Section 5 of the *Supreme Court Act* states that any person may be appointed as a judge if they have 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.[9] Section 6 guarantees that at least three of the Court's nine judges must be appointed from among the judges of the Quebec Court of Appeal, the Superior Court of Quebec or from among the province's advocates.[10]

In 1927, the *Supreme Court Act* was modified so that no one beyond the age of seventy-five is allowed to serve on the bench. Although only Quebec's seats are guaranteed by the Act, by convention, each region of the country has been allocated seats, which places an additional, though informal, geographic-based constraint on the government's choice.[11] Aside from these relatively modest qualifications that an appointee must meet, the discretion of the prime minister in selecting a SCC judge is nearly unlimited.

Another notable absence from the *Constitution Act, 1867* was a domestic procedure for constitutional amendment. Instead, any proposed

6. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
7. *Ibid*.
8. RS 1900, c 154.
9. RSC 1985, c S-19, s 5.
10. *Ibid*.
11. This regional breakdown is generally as follows: three judges from Quebec, three judges from Ontario, one from the four Atlantic provinces and two from the four western provinces.

constitutional reform required the assent of the Parliament in the UK. This gap, in fact, became the main stimulus for Canada's decades-long efforts to patriate its constitution. With the entrenchment of an amending formula in Part V of the *Constitution Act, 1982*, Canada was finally able to amend its own constitution;[12] however, a by-product of this was increased uncertainty concerning the constitutional status of the SCC and the measures required for its reform.

It is the nature of constitutions to be broad in their measures, and as a consequence, sometimes unclear. However, it is another thing when changes to a constitution have made an institution's status less clear, as was the case in Canada. Notably, while the SCC was not expressly entrenched in the *Constitution Act, 1982*, it was not the case that no mention of the Court was made at all. Had that been the case, the SCC's position would be clear: As a product of simple federal statute (the *Supreme Court Act*), Parliament would continue to have the authority to modify all aspects of the SCC under section 101 of the *Constitution Act, 1867*.[13] Instead, the SCC was referenced in the *Constitution Act, 1982*, but only in the context of Part V's amending formula.[14] Section 41(d) of the *Constitution Act, 1982* provides that constitutional amendments relating to the "composition of the Supreme Court of Canada" require the unanimous consent of the Senate, the House of Commons, and all ten provincial legislatures.[15] Section 42(1)(d) provides that other constitutional amendments relating to the SCC require the consent of the Senate, the House of Commons, and the legislatures of seven provinces that together have at least fifty percent of the country's population (known as the 7/50 formula).[16] Thus, while the *Constitution Act, 1982* does not explicitly entrench the SCC, it *does* clearly set out an amending procedure for the Court's future reform. What remained unclear, however, was whether this reference to the SCC in Part V meant that the SCC had itself become constitutionally entrenched.

This ambiguity persisted until the *Nadon Reference* of 2014. By stating unequivocally in this case that the SCC is constitutionalized, the Court helped to clarify its own constitutional status. Consequently, when

12. *Supra* note 4.
13. *Supra* note 6.
14. *Supra* note 4.
15. *Ibid.*
16. *Ibid.*

discussing the rules of SCC reform, we are dealing with three distinct time periods: first, the period from 1875 to 1981, during which the federal government had exclusive authority to reform all aspects of the SCC; second, the period from 1982 to 2014, when the entrenchment of Part V of the *Constitution Act, 1982* provided constitutional rules for amending the SCC, while simultaneously making it unclear whether the SCC was itself constitutionalized; finally, from 2014 to the present, when the SCC confirmed that it is constitutionally entrenched and that at least some changes to the Court's judicial selection system require constitutional amendment.

B. Formal Reform: Opportunities and Failure

While it can now be expected that every SCC appointment is accompanied by a series of op-eds criticizing the selection process,[17] this has not always been the case. In fact, the low status of the SCC in its early years meant that little attention was paid to its appointments at all.[18] This low status can largely be attributed to the fact that the UK's JCPC was Canada's final court of appeal until 1949. However, even after the SCC became Canada's peak court, it did not immediately emerge as an important political actor. Due to the relatively strong intergovernmental cooperation that followed the Great Depression and World War II, the Court initially heard relatively few high-profile division of power cases.[19]

17. A small selection of these include: Irwin Cotler, "Conservatives Are Turning Back the Clock on Appointments to Supreme Court", *The Toronto Star* (9 June 2014), online: <www.thestar.com>; Adam Dodek, "Supreme Court Appointments: Fix the Process or Scrap It", *The Globe and Mail* (22 January 2014), online: <www.theglobeandmail.com>; Carissima Mathen, "Supreme Court Appointments: Still More Questions Than Answers", *The Globe and Mail* (4 June 2014), online: <www.theglobeandmail.com>; Christopher P Manfredi, "The Case for Vetting the Supremes", *The National Post* (3 July 2003) A17; Patrick J Monahan and Peter W Hogg, "We Need an Open Parliamentary Review of Court Appointments", *The National Post* (24 April 2004) A19; Jacob Ziegel, "Supreme Court Selection Process Needs More Thought", *The Globe and Mail* (13 April 2005), online: <www.theglobeandmail.com>.

18. See James G Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985) at 23.

19. See Richard Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972); FR Scott, "Our Changing Constitution" in William R Lederman, ed, *The Courts and the Canadian Constitution: A Selection of Essays* (Toronto: McClelland & Stewart, 1964) 19 at 19.

Nevertheless, op-eds complaining about its system of judicial selection would hardly have been out of place even in these early years. After all, it is difficult to reconcile the federal government's exclusive jurisdiction over the structure and appointments of the country's final court of appeal with the basic principles of federalism. This very point was made in the 1956 report by Quebec's Royal Commission of Inquiry on Constitutional Problems (known as the Tremblay Commission), which noted that it is "fundamentally repugnant to the federative principle that the destinies of the highest tribunal of a country be surrendered to the discretion of a single order of government".[20]

Similar to the SCC selection process, developments concerning Canada's constitution also carried a low profile during this period. In 1931, the *Statute of Westminster, 1931* formally dissolved Canada and Australia's legal subordination to the British Parliament.[21] However, unlike Australia, Canada did not have a domestic amending formula, which meant that its constitution formally remained in British hands. Without major pressure to reach an agreement, federal and provincial first ministers held occasional meetings over the next few decades in the pursuit of a domestic amending formula, but with no success. This pattern seemed to change with an apparent breakthrough in October 1964.

Announced by the Federal Minister of Justice, Guy Favreau, and his ten provincial counterparts, an agreement, known as the Fulton-Favreau Formula, would have provided Canada with the domestic amending formula it had long sought. Criticism of the agreement within Quebec, however, eventually became strong enough that Premier Jean Lesage withdrew the province's support in January 1966. The failure of this first major effort to patriate the constitution made clear that Quebec's nationalist interests would exert a profound influence on the patriation process. Moving forward, the constitutional agenda was opened up and a domestic amending formula became one item on a long list of constitutional demands of both the provinces and federal government.[22]

20. Canadian Royal Commission on Bilingualism and Biculturalism, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, translated by Peter H Russell (Ottawa: Queen's Printer, 1969) at 38.

21. (UK), 22 & 23 Geo V, c 5, s 2.

22. See Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004).

In the new round of constitutional politics that followed the failure of the Fulton-Favreau Formula, the rules of reform remained the same. Formally, constitutional amendments only required the assent of the British Parliament, but in practice, Canada's negotiations were approached with an understanding that both the federal and provincial governments' approval was needed. Notably, this approach was challenged only once. At constitutional loggerheads with eight of the ten provinces, Liberal Prime Minister Pierre Trudeau announced the federal government's intention to proceed unilaterally with a constitutional package in 1980. Quebec, Newfoundland and Manitoba challenged the validity of this unilateral approach and in one of its most well-known and politically consequential rulings, a divided SCC held that while no legal barrier prevented the federal government from proceeding alone with constitutional reforms, a substantial degree of provincial consent was required by constitutional convention.[23] This meant that while there were no formal rules during this first period (1875 to 1981) to guide how domestic constitutional negotiations should proceed, in practice, first ministers at both levels of government were well positioned to exert influence in the negotiations of any constitutional deal.

This executive-driven approach to constitutional reform was upheld and cemented in the *Constitution Act, 1982*. By stipulating that major reforms require either the approval of all (section 41) or seven of the ten provinces constituting fifty percent of the population (section 42), the amending process set out in Part V formally guaranteed both the federal government and the provinces *veto* player positions in comprehensive constitutional negotiations.

(i) Meech Lake Accord

How did these rules of constitutional amendment affect efforts to reform the SCC appointment system? With the exception of the

23. *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1.

Constitution Act, 1982,[24] all major constitutional packages from the Victoria Charter (1971) to the Charlottetown Accord (1992) included measures that would have limited the discretion of the prime minister in their selection of SCC judges by devolving nominating powers to the provinces. The failed Meech Lake Accord (1987 to 1990) illustrates how the provinces' strong position at the negotiating table helps to explain the design of these proposed reforms.

When the *Constitution Act, 1982* was passed without the consent of the Quebec government, many continued to view the constitution as unfinished, including the federal Progressive Conservative Party, which formed government in 1984.[25] Soon after, a new round of constitutional negotiations began, with Quebec's position in these renewed debates presented in the governing Liberals' policy statement, *Mastering Our Future*.[26] The document set out five minimum conditions required for Quebec to sign on to the constitution: (1) a full Quebec veto for constitutional changes; (2) the recognition of Quebec as a distinct society; (3) a provincial role in making appointments to the SCC; (4) a shift to the provinces in power over immigration; and (5) limits on the federal spending power.[27]

As a minimum condition for Quebec's agreement, provincial participation in SCC appointments was thus a necessary concession for the federal government to make in pursuit of a larger constitutional package.[28] As a consequence of this policy statement, it is no surprise that when the Meech Lake Accord was announced in April 1987, it included reforms to the SCC's appointment process. These reforms would have

24. While reform to the SCC's system of judicial selection was part of the negotiations leading up to the final package that would become the *Constitution Act, 1982*, it, along with Senate reform, was apparently dropped in the effort to reach a final deal. For further details, see Erin Crandall "DIY 101: The Constitutional Entrenchment of the Supreme Court of Canada" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada: The Law and Politics of Part V of the Constitution Act, 1982* (Toronto: University of Toronto Press) [forthcoming in 2016].

25. See Russell, *supra* note 22 at 127–30.

26. Policy Commission, "Mastering Our Future" (1985) Quebec Liberal Party Working Paper.

27. *Ibid* at 46–55.

28. While it was Quebec's demands that formed the basis of negotiations, the other provinces had also advocated for provincial participation in the selection of Supreme Court judges.

constitutionally entrenched the SCC and its composition, including the requirement that three of its nine members come from Quebec. The power of judicial appointment would have remained with the governor in council; however, the federal government would have been required to choose its judicial appointees from a list of candidates submitted by the provinces. In the case of the three judges from Quebec, the Quebec government alone would have been charged with the selection of judicial nominees.

This provincial power to propose SCC nominees was a significant concession on the part of the federal government. First, it is worth noting that the federal government's willingness to consider judicial appointment reform after the failure of the Fulton-Favreau Formula marked a departure from its previous position where similar calls, such as those presented by Quebec's Tremblay Commission, were simply dismissed.[29] Second, the move to have the provinces select judicial nominees would have constrained the federal government's discretion in the appointment process, constituting a major change from the status quo.

While we can only speculate as to the effects such reforms would have had, it is fairly easy to imagine occasions when the provinces' proposed nominees would have overlapped with those favoured by the federal government. That is, in practice there would have likely been occasions where the provinces' participation in the process would have had little effect on who was ultimately appointed to the bench. However, an equally easy scenario to imagine is one where, for example, the preferred choice of a Parti Québécois government in Quebec would have been different from that of the federal government. In such a situation, a consensus

29. In this new environment of open-ended constitutional negotiations, Supreme Court appointment reform was one of the items that the federal government was willing to concede to early on. Indeed, in the opening constitutional position paper presented by the Liberal government of Lester B Pearson, the composition, jurisdiction and procedures of the Supreme Court were all placed on the reform agenda. In its follow-up publication, "The Constitution and the People of Canada", the federal government acknowledged that to ensure "continued confidence" in the Supreme Court, some form of provincial participation in the process was worthwhile. See Canada, *Federalism for the Future: A Statement of Policy by the Government of Canada* (Ottawa: Queen's Printer, 1968) at 26; Pierre Elliott Trudeau, "The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People, and the Institutions of Government" in Anne F Bayefsky, ed, *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) vol 1, 78 at 89.

candidate would have had to be found. Had these reforms passed, then, it seems almost certain that in some instances the judges chosen under this system of provincial nomination would have been different from those selected by the federal government alone.

This then begs the question, why was the federal government willing to concede significant discretion to the provinces over SCC appointments? Although Quebec's above-mentioned five minimum demands meant that SCC reform was virtually guaranteed to be in any successful package, it is also important to consider the nature of these constitutional negotiations and why Quebec was positioned to make demands in the first place. Christopher P. Manfredi and Michael Lusztig set out two forms of constitutional modification that are useful to this analysis.[30] The first form is incremental modification, which includes simple attempts to alter discrete aspects of the constitution that will not change the fundamental nature of the regime. The second form is comprehensive modification, which includes attempts to address the very nature of the political community and changes that are concerned with the identity and fundamental principles of the regime. Comprehensive negotiations, by their very nature, must be multilateral and include all recognized members of constitutional bargaining.

The period of intensive constitutional politics that began with the failure of the Fulton-Favreau Formula and ended with the failure of the Charlottetown Accord in 1992 falls within this definition of comprehensive negotiations. Together, these comprehensive negotiations and Canada's newly installed amendment formula had a number of important effects for the Meech Lake process. Most importantly, by giving the provinces a strong hand at the negotiating table, it forced the federal government to concede some of its powers over the appointment of SCC judges so that a larger constitutional package could be struck. This comprehensive package approach also meant that while most of the reforms proposed in the Accord only required the 7/50 formula to be met, unanimous consent was nonetheless needed in order for the package to be ratified. The all-or-nothing approach of this constitutional round meant that if any key actor made incompatible and intractable demands, the entire project was almost certain to fail, making successful ratification

30. Christopher P Manfredi & Michael Lusztig, "Why Do Formal Amendments Fail?: An Institutional Design Analysis" (1998) 50:3 World Politics 377 at 380.

exceptionally difficult; and indeed, Meech Lake's protracted ratification process ultimately ended in failure.[31]

A second question of interest is whether the SCC's ambiguous constitutional status affected the negotiations of the Meech Lake Accord. Recall that because the Accord was negotiated prior to the *Nadon Reference*, it was unclear whether the SCC was actually entrenched in the constitution. While the working assumption during the negotiations of the Meech Lake and Charlottetown Accords was that the Court was not entrenched, the focus on change via constitutional modification during the 1980s and early 1990s meant that efforts to reform the SCC's judicial selection system occurred exclusively under the umbrella of constitutional politics.[32] Consequently, even if this working assumption had been incorrect, the minimum threshold to reform the Court in all constitutional scenarios (i.e., entrenched, partially entrenched, not entrenched) was met. Moreover, the constitutional entrenchment of the SCC, proposed in both the Meech Lake and Charlottetown Accords, meant that had they been ratified, future changes to the Court's judicial selection process would have unquestionably required constitutional amendment. Thus, having judicial selection reform as part of these constitutional packages was not only inevitable given the provinces' interests and control over the agenda, it was also practical given that entrenchment of the SCC through these accords would have clarified the requirements for future reforms.

II. The High Court of Australia

A. Constitutional Status and Rules of Constitutional Reform

In comparison to Canada, the relationship between Australia's constitution and its High Court is straightforward. Unlike Canada's Supreme Court, the framework for Australia's federal judiciary,

31. For descriptions detailing the failure of the Meech Lake Accord, see Patrick Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991); Russell, *supra* note 22.

32. The Progressive Conservative government of Brian Mulroney introduced informal reforms to the appointment system of provincial superior courts in 1988. However, ongoing constitutional negotiations meant that the Supreme Court's appointment system was not part of these reforms. See Department of Justice Canada, *A New Judicial Appointments Process* (Ottawa: Communications and Public Affairs, Department of Justice, 1988) at 9.

including the High Court, was set out in the *Commonwealth of Australia Constitution Act 1900*, which took effect in 1901.[33] The power to appoint justices of the High Court and other federal courts is detailed in section 72 of the Act and gives the power to the governor in council.[34] As in Canada, it is the prime minister—in consultation with the attorney general and cabinet—that makes these appointments, though the Australian cabinet appears to have greater sway in matters of executive appointment than its Canadian counterpart.[35]

As will be discussed in greater detail later in this section, under section 6 of the *High Court of Australia Act 1979*,[36] the attorney general must consult with the state attorneys general before an appointment to the Court is made. Formalized qualifications for who can be appointed to the High Court are few. Since a constitutional amendment in 1977, High Court appointees must be less than seventy years of age,[37] and via section 7 of the *High Court of Australia Act 1979*, appointees must have been either a judge of a court created by Parliament, a state or territory, or been enrolled as a barrister, solicitor or legal practitioner of the High Court or supreme court of a state or territory for no less than five years.[38] The selection process is otherwise at the discretion of the executive.

Like Canada, the design of Australia's amendment rules has made constitutional change difficult and infrequent. The initiative to propose a constitutional amendment in Australia rests with the Commonwealth Parliament. The next step, under section 128 of the *Commonwealth of Australia Constitution Act 1979*, requires that a Constitution Alteration Bill be passed by an absolute majority of Parliament's two houses, or by one house twice, in accordance with a prescribed deadlock procedure.[39]

33. (Cth), c 3.
34. *Ibid*, s 72.
35. For example, Cabinet rejected the preferred High Court candidate of Attorney General Daryl Williams in 1998. See Helen McCabe, "Fischer Won Battle over New Judge", *The Daily Telegraph* (6 March 1998).
36. (Cth).
37. *Constitution Alteration (Retirement of Judges) Act 1977* (Cth).
38. *Supra* note 36.
39. *Supra* note 33.

Once a constitutional proposal has been passed by Parliament, it must also earn double majorities via a national referendum that requires a national majority, as well as a majority of voters in four of six states.[40] As a result of these very specific and onerous rules, only eight of forty-four proposed amendments have passed in Australia since its constitution came into force in 1901.[41]

Although both Canada and Australia have difficult amending procedures, differences in their amendment rules mean that the relative influence of political actors when pursuing reforms varies significantly. As will be made apparent, this in turn has influenced the strategies political actors in both countries have used to pursue reforms.

B. Formal Reform: Opportunities and Modest Success

From its establishment in 1903, the High Court of Australia was intended to be an important political institution. As noted by Brian Galligan, this meant that it did not "serve a long apprenticeship to the more august imperial tribunal of the Privy Council as the Canadian Supreme Court had done".[42] In its early years, the High Court actually worked to uphold many of the Australian states' powers, much to the frustration of Australia's federal government. However, by the 1920s, its approach to division of power cases had shifted, and the Court was fairly consistent in expanding the powers of the federal government.[43] While a number of important judicial rulings were decided against the Australian government into the 1940s, this period as a whole ushered in a time of "coercive federalism", where the federal government's fiscal dominance led to frequent incursions into the states' jurisdictions.[44]

40. *Ibid.*

41. See Austl, Commonwealth, Politics and Public Administration Group, *The Politics of Constitutional Amendment* by Scott Bennett (Canberra: Parliament of Australia, 2003), online: <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0203/03rp11>.

42. Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (St. Lucia, Qld: University of Queensland Press, 1987) at 80.

43. See Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (Vancouver: UBC Press, 2006).

44. Russell Mathews, "Innovations and Developments in Australian Federalism" (1997) 7:3 Publius 9.

By the end of the 1960s, disputes over federal spending had become particularly acrimonious, with states frustrated by their dependent financial status.

It was under these conditions that, in 1969, the Government of Victoria suggested a constitutional convention be held—the first major review of the constitution since the 1890s. The work of the Convention would eventually span well over a decade, meeting six times between 1973 and 1985.[45] While the High Court was not the sole or even primary concern of the states at this time, like in Canada, its important role in intergovernmental relations meant that its centralized appointment process was part of these negotiations.

(i) New South Wales: A Pragmatic Proposal

Following the Convention's first meeting in 1973, the state of New South Wales convened a select committee to consider the High Court's appointment process. The timing of the Committee's report in September 1975 was complicated by the Federal Labor government's unexpected fall in November 1975.[46] Consequently, the impact of the New South Wales select committee's report appears minimal. Nonetheless, the report provides a useful means to better understand the states' view on the High Court and their reasoning for seeking judicial appointment reform.

In considering possible reforms to the High Court's system of judicial appointment, the committee held that any proposal must meet two basic criteria: (1) practicality, and (2) an increased say for the states.[47] The criterion of practicality is an especially interesting one. The report makes clear that however attractive a proposal may be in principle, it must be avoided if unlikely to be accepted by the federal government.[48]

45. Heather McRae & Anne Mullins, *Australian Constitutional Convention 1973–1985: A Guide to the Archives* (Melbourne: Centre for Comparative Constitutional Studies, The University of Melbourne, 1998), online: <hdl.handle.net/11343/27655>.

46. The events leading up to this critical moment in Australia's political history, in which the Governor General removed the governing Labor Party and installed the opposition Liberals in its stead, are intricate and have been addressed in great detail elsewhere. See Jenny Hocking, *Gough Whitlam: A Moment in History* (Carlton, Vic: Melbourne University Press, 2008); Gough Whitlam, *The Truth of the Matter* (Melbourne: Penguin, 1979).

47. Austl, New South Wales, *Select Committee of the Legislative Assembly upon the Appointment of Judges to the High Court of Australia*, Parl Paper No 53 (1975) at 16.

48. *Ibid.*

Thus, while the judicial appointment process proposed in Canada's 1971 Victoria Charter was viewed favourably in the Committee's report, it was ultimately dismissed. A process in which the states had the dominant role in judicial appointments was assessed to be an almost certain non-starter for the federal government.[49] In his submission to the Committee, the president of the New South Wales Bar Association and former federal Attorney General, T.E.F. Hughes, presented the challenge for the states bluntly: "[n]o government in Canberra, whatever its political colour, will be disposed to surrender control or to permit any diminution of its control over federal judicial appointments."[50]

With the states limited to options likely to be considered reasonable by the federal government, the report ultimately recommended that High Court appointments continue to be made by the governor general on the advice of cabinet.[51] As a concession to the states, however, the report also recommended the formation of a High Court Appointments Commission made up of the attorneys general of all the states and the Australian government.[52] Under this proposed process, appointments would only be made if a majority of the commission's members supported the federal government's proposed nominee. With this additional step of consultation, the states would be granted some say over High Court appointments; however, because the recommendation of the attorneys general would technically only be an advisory one, a constitutional amendment would not be required for the reform to be implemented.

(ii) *High Court of Australia Act, 1979*

Meeting as a council of states not long after this report, the four non-Labor state governments of New South Wales, Victoria, Queensland and Western Australia called on the newly formed Liberal government to consult with the states on all future judicial appointments. The Liberal government accepted the request in principle,[53] and soon after, the issue was debated at the fourth plenary session of the Australian constitutional convention. Here, Western Australia proposed a similar motion that called

49. *Ibid* at 19.
50. *Ibid* at 17.
51. *Ibid* at 21.
52. *Ibid.*
53. Galligan, *supra* note 42 at 195.

for a method of consultation between the Australian government and states for High Court appointments.[54] Following the approach made in the above-mentioned 1975 report, the focus on subnational consultation, rather than nomination, meant that a constitutional amendment would not be required.

The principle of the motion was tested less than a year later with the retirement of the High Court's Kenneth Jacobs J in March 1978. The Liberal government honoured its commitment to consult with the states, and later in the year the consultation process was formally installed by legislative amendment to the *High Court of Australia Act 1979*. This new requirement, as set out in section 6, states that: "Where there is a vacancy in an office of Justice, the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorneys-General of the States in relation to the appointment."[55] Again, because this reform only required the federal government to consult with the states, it could be made by reforming the federal statute, rather than constitutional modification.

Unlike in the Canadian case, therefore, the Australian states succeeded in formally reforming the appointment system for their country's peak court. However, though this reform effort qualifies as a success, it is one that is quite modest in scope. The states' role is purely consultative in nature, and places no meaningful constraints on the discretion of the federal government. As a result, it is generally regarded as having given little to no practical control over appointments to the states.[56]

The constitutional convention held in July 1983 offers insight as to whether more substantive reform was possible or whether no federal government would have been willing to surrender control over federal judicial appointment, as suggested by T.E.F. Hughes. At the convention, the state of Queensland put forward a motion to require a majority of state governments' consent before a High Court nominee was appointed by the federal government.[57]

54. Austl, WA, Parliament House Perth, *Parliamentary Debates* (26–28 July 1978) at 167.

55. *High Court of Australia Act 1979*, *supra* note 36.

56. See Amelia Simpson, "Reform of Court" in Tony Blackshield, Michael Coper & George Williams, eds, *The Oxford Companion to the High Court of Australia* (South Melbourne: Oxford University Press, 2001) 588 at 588.

57. Austl, Qld, Judicature Sub-Committee, *Second Report to Standing Committee* (Brisbane: Government Printer, 1985) at 33.

Because the reform proposed to change the governor in council's power to make appointments to the High Court, a constitutional amendment would have been needed for its implementation.

While the proposal was ultimately defeated at the convention, the breakdown of the vote is revealing. A majority of state delegates voted in favour (twenty-nine versus twenty-six), but all twelve federal delegates, including members of both government and opposition parties, voted against the motion.[58] This stands in considerable contrast to the Canadian example of the same time period, where both governing Liberal and Progressive Conservative federal governments were willing to devolve considerable powers to the provinces over SCC appointments. The failure of Queensland's motion, then, supports the argument that substantive reform to the High Court of Australia's appointment process was indeed off the table for the Australian government.

III. Comparative Analysis

The unique constitutional amendment rules of Canada and Australia help to explain, at least in part, the differences in approach to judicial appointment reform in both countries. While both Canada and Australia have difficult amending procedures, differences between their amendment rules mean that the relative influence of political actors when pursuing reform vary significantly. This in turn influenced the strategies these actors employed in pursuing reforms. In order to successfully modify the High Court's appointments process via constitutional amendment, the Australian states require both the agreement of the federal government and a successful national referendum. The Australian government thus exercises significant control over the constitutional agenda. In comparison, major constitutional change in Canada requires the consent of at least two thirds of the provinces (7/50 formula) and in some instances all

58. See JE Richardson, "The Australian Constitutional Convention, Sydney, 1973" (1973) 45:4 Aust Quart 90 at 92. All Labor delegates—both state and federal—voted against the motion, while those voting in favour were made up almost entirely of state Liberal delegates, with the addition of a number of state National Country Party members and independents. The breakdown of this vote is provided on page xli of the Minutes of the Constitutional Convention (31 July 1985, Brisbane).

ten, providing Canada's subnational governments a stronger bargaining position than their Australian counterparts.

This disparity in bargaining positions is made readily apparent by the different approaches subnational governments in Canada and Australia took when pursuing reform of their peak courts' appointment processes. The Australian amendment formula—where items are put forward to a referendum vote at the discretion of the Commonwealth Parliament—means that the states are far less likely to push for items viewed unfavourably by the federal government. Faced with such a high hurdle, it made sense for the states to adopt a more pragmatic approach to reform, most often advocating for state consultations on judicial nominees prior to appointment. The failure of the states in 1983 to get substantive reform of the High Court on the constitutional agenda demonstrates the prudence of this pragmatic approach.

By comparison, Canada's federal government is not positioned to pursue major constitutional reforms on its own and thus must engage with its provincial counterparts when it is interested in pursuing constitutional reform. The consequences of this are well illustrated by the Meech Lake Accord, as detailed above.

By virtue of the provinces having a strong hand at the negotiating table, the federal government was willing to concede some of its powers over the appointment of SCC judges in order to reach an agreement on a larger constitutional package. The design of the constitutional amending formula meant that there was no compelling need for the provinces to pursue a pragmatic approach comparable to the Australian states. However, by incorporating their demand for a provincial say over the appointment process into the larger negotiations concerning constitutional reform, the provinces were left with nothing once those negotiations broke down. Thus, the provinces' stronger bargaining position in Canada allowed them to adopt a more ambitious strategy than their counterparts in Australia, but ultimately with less success.

These case studies also provide evidence that differences in the process of constitutional amendment affected the scope of constitutional reform. With proposed constitutional reforms voted on individually by popular referendum, and the constitutional agenda formally controlled by the Commonwealth Parliament, the Australian amendment process appears to lend itself to incremental constitutional change.

By comparison, the Canadian amendment process requires the participation of both the provinces and the federal government for many reforms. This means that comprehensive change, where multiple governments bargain back and forth on a constitutional package based on often competing interests, is far more likely.

While this article focuses on the effects of Canada's and Australia's amendment formulas on reform, this is not intended to suggest that differences in amendment rules alone can explain the differences in the reform approaches considered here. Without question, every effort of constitutional reform will have its own unique context, which makes generalization a particularly fraught exercise. In this instance, for example, while both countries faced intergovernmental tensions, the strains on the Canadian federation were especially notable, given the credible threat of Quebec secession if a constitutional deal was not struck. The perceived necessity of constitutional reform meant that the federal government was willing to concede on larger items—like SCC reform—in order to achieve the larger objective of a constitutional package. The Australian government did not face the same threat of secession and consequently had fewer incentives to concede to the demands of the Australian states. Certainly these differences in intergovernmental relations influenced how negotiations and reforms were approached.[59] As such, the objective here is not to argue that amendment rules are the only factor contributing to differences in judicial appointment reform by the Canadian and Australian governments. Rather, the analysis presented suggests that the countries' amendment formulas informed, in part, the strategies and objectives of political actors, and that this had important effects on both the form of negotiations and ultimately the outcomes in the cases considered here.

59. For further information on the historical context of these reform efforts, see Erin Crandall, *Understanding Judicial Appointments Reform: Comparing Australia, Canada, and the United States*, (PhD Thesis, McGill University Department of Political Science, 2013) [unpublished].

IV. The Constitutional Ambiguity of the Supreme Court and the *Nadon Reference*

Turning back to Canada, the federal government's deliberate dodging of constitutional reform since the failure of the Charlottetown Accord brings us squarely to the question of how the SCC's constitutional ambiguity has affected recent efforts to reform its judicial appointment process. As noted earlier, the SCC was not established by the *Constitution Act, 1867* and is only referenced in the *Constitution Act, 1982* under Part V's amending formula. With the constitutional rules for its amendment set out, yet no explicit entrenchment of the SCC, the *Constitution Act, 1982* made it unclear whether the SCC was itself constitutionalized.

Until the *Nadon Reference* clarified the Court's constitutional status in 2014, this ambiguity had important implications for judicial appointment reform. If the SCC was constitutionally entrenched, then changes to its appointment system—like those proposed in the Victoria Charter, and the Meech Lake and Charlottetown accords—could only be made under the procedure provided for in section 42(1)(d) of the *Constitution Act, 1982* (7/50 formula). However, if the Court was not entrenched, then Parliament was empowered to initiate unilateral reforms.

While the pursuit of SCC reform by constitutional modification meant that the question of the Court's constitutional ambiguity could be safely sidestepped with the Meech Lake and Charlottetown Accords, in the post-Charlottetown era, methods of non-constitutional change took on greater importance. For the SCC, while the failure of the Charlottetown Accord marked the end—at least in the short term—of efforts to reform its appointment process via constitutional amendment, it was hardly the end of interest in reform. After all, the appointment process remained centralized in the hands of the prime minister, and with the entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982,[60] the political importance of the SCC was never greater.

Despite continued calls for reform to the appointment process, a window for reform only again opened in 2003 with the retirement of Jean Chrétien and the selection of Paul Martin as Liberal leader.

60. Part 1 of the *Constitution Act, 1982*, *supra* note 4.

From 2003 to 2006, Prime Minister Paul Martin's reform interests included a "democratic deficit" agenda, which amongst a number of measures, sought to reform how senior government appointments were made, including those to the SCC.[61] In 2005, the government announced its new appointment process, which featured an advisory committee charged with evaluating and narrowing down a shortlist of possible SCC candidates. The proposed appointment process required the minister of justice to answer questions before the House of Common's Standing Committee on Justice and Human Rights on the government's appointment and the process that was followed.[62] The first opportunity to use this new process came in August 2005 when the SCC's John Major J announced his retirement. The selection process was interrupted by the 2006 federal election, which saw the Conservative Party form government. Led by Prime Minister Stephen Harper, the new government chose to adopt the work already completed by the Liberals, but made one adjustment to the selection process—a public hearing of the recommended SCC candidate, rather than the minister of justice.

Between 2006 and 2014, five SCC justices have appeared before these *ad hoc* Parliamentary committees prior to their appointments to the bench.[63] And while the first committee appearance by Marshall Rothstein J was hailed by Prime Minister Harper as "an unprecedented step towards the more open and accountable approach to nominations that Canadians deserve",[64] none of these new measures were set out formally in legislation. Additionally, the power of the governor in council to make appointments

61. See Peter Aucoin & Lori Turnbull, "The Democratic Deficit: Paul Martin and Parliamentary Reform" (2003) 46:4 Can Pub Admin J 427.

62. While the Liberal government was still studying judicial appointment reform, Rosalie Silberman Abella and Louise Charron JJ were appointed under a reformed interim process in 2004. See Irwin Cotler, "The Supreme Court Appointment Process: Chronology, Context, and Reform" (2008) 58:1 UNBLJ 131.

63. The five Supreme Court candidates who have appeared before an *ad hoc* committee are: Marshall Rothstein (2006), Andromache Karakatsanis (2011), Michael Moldaver (2011), Richard Wagner (2012) and Marc Nadon (2013). Justice Nadon was later found ineligible to serve as a Supreme Court judge and his appointment was consequently nullified. *Nadon Reference*, *supra* note 5.

64. Bill Curry, "Top-Court Pick Praised, Review Process Panned", *The Globe and Mail* (24 February 2006), online: <www.theglobeandmail.com>.

remains unchanged.[65] In fact, between 2006 and 2014, only five of eight SCC candidates actually participated in the committee process.[66] The process's informality was further illustrated with the recent appointment of Suzanne Côté in November 2014 when the government announced that it was abandoning these reforms altogether in favour of the previous status quo.[67]

The 2003 to 2014 round of efforts to modify the SCC's appointment system via informal reform also appears informative. For example, why did neither the Liberal nor Conservative governments try to formally install these new measures by amending the *Supreme Court Act*, similar to what was done in 1979 by the Australian government?

The Conservative Party's approach to reform, in opposition and then in government, is particularly revealing in terms of how the SCC's constitutional ambiguity affected reform. When the Liberal government under Paul Martin announced its interest in reforming the SCC's appointment process, it referred the issue to the House of Common's Standing Committee on Justice and Human Rights for study.[68] In the ensuing 2004 report, all political parties agreed that change to the appointment system was needed, but differed on what a reformed system should look like. Consequently, in addition to the recommendations issued by the Liberal committee members, the Conservative Party, the New Democratic Party (NDP), and the Bloc Québécois all offered dissenting opinions in the report.[69]

65. While these reforms were announced with high praise from the government, most commentators—both academic and media—have criticized the new process as window dressing for an appointment system that remains highly centralized and obscure. For detailed evaluations of the process, see Adam M Dodek, "Reforming the Supreme Court Appointment Process 2004–2014: A Ten Year Democratic Audit" (2014) University of Ottawa Faculty of Law Working Paper No 2014-07; Andrea Lawlor & Erin Crandall, "Questioning Judges with a Questionable Process: An Analysis of Committee Appearances by Canadian Supreme Court Candidates", Can J Pol Sc [forthcoming].

66. See note 63 for the list of five SCC candidates who participated in the Committee Process. The three candidates who did not appear before committee are: Thomas Cromwell (2008), Clément Gascon (2014) and Suzanne Côté (2014).

67. See Tonda MacCharles, "Quebec Lawyer Suzanne Côté Named to Supreme Court of Canada", *The Toronto Star* (27 November 2014), online: <www.thestar.com>.

68. Cotler, *supra* note 62 at 134.

69. House of Commons, Human Rights Standing Committee on Justice, Public Safety and Emergency Preparedness, *Improving the Supreme Court of Canada Appointments Process* (May 2004) (Chair: Derek Lee).

For the Conservative Party in particular, the changes proposed by the Liberals did not go far enough in making the process accountable given the SCC's importance in policy making. Rather than have the minister of justice appear before the committee as proposed by the Liberals, the Conservatives recommended that the shortlist of SCC nominees be submitted for public review before a Parliamentary committee, and that there be Parliamentary ratification of the chosen nominee. The Conservatives further advocated that these changes be made as amendments to legislation so that the appointment process would be mandated.[70] While the Conservative's minority report noted that any proposed ratification could not infringe on the constitutional right of the governor in council to make the actual appointment, it did not elaborate on how such an infringement could be avoided.

The NDP's minority opinion challenged the constitutional feasibility of the Conservative's recommendations. The NDP noted that until the constitutional status of the SCC was resolved, the "safest route" to follow was to assume that the *Supreme Court Act* could only be modified by a constitutional amendment. Suggestions like Parliamentary ratification, the NDP argued, should be presumed to be unconstitutional.[71] Given the questions surrounding the SCC's constitutional status, it is not surprising that when the Conservatives formed government less than two years after the Justice Committee's report, they appeared to take the NDP's argument to heart. This is exemplified by the selection process that would eventually place Marshall Rothstein J on the bench in 2006. With this first appointment by the new Conservative government, it became clear that Parliamentary ratification of SCC nominees and legislative amendments were no longer part of the Conservative's reform agenda.

Thus, the post-Charlottetown era provides examples of two federal governments pursuing small changes to the SCC's appointment system, but, at the end of the day, purposefully choosing to forgo formalizing them in legislation. The example of Australia's statutory reform to its appointment process in 1979 is again helpful in understanding this trend. In Australia, the High Court's explicit entrenchment in the constitution made it clear that the government could formally modify the judicial selection process via legislative statute, so long as it did not affect the

70. *Ibid* at 15–16.
71. *Ibid* at 21.

appointment power of the governor in council. Canada, by contrast, did not have this same clarity in period two (1982 to 2014), making it uncertain what amendments to the judicial appointment process could be implemented by federal statute versus constitutional amendment. Under these circumstances, the only way to minimize the risk of a constitutional challenge was to have changes remain informal and not affect the formal powers of appointment as laid out in the *Supreme Court Act*. This risk-averse approach to reform could likely have continued without incident had it not been for the series of unusual events that followed the announcement of Justice Marc Nadon as the Conservative government's SCC nominee in October 2013.

A. The Nadon Reference

To understand how the appointment of Justice Nadon could upend the government's control over SCC appointments and bring some clarity to the Court's constitutional status, it is first useful to explain some of the Court's compositional features. As already noted, three of the SCC's nine members must come from Quebec. This is a consequence of the bijural nature of Canada's legal system (i.e., civil law is practiced in Quebec, and common law is practiced in all other provinces). By mandating that a third of its members be judges from Quebec, the Court ensures that it is prepared to hear any case that comes before it, regardless of the legal system it originated in.

Justice Nadon was selected to replace the retiring Morris Fish J, who occupied one of the SCC's three Quebec seats. However, as a member of the Federal Court of Appeal, questions quickly arose as to whether Nadon met the technical qualifications of a "Quebec judge". This is because section 6 of the *Supreme Court Act* specifically states that Quebec's three members must be drawn "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".[72] Nadon was first called to the Barreau du Québec in 1974 and had practiced law in the province for almost twenty years, but as a judge of a court not referenced in section 6, and without current membership in the Barreau du Québec, his eligibility for appointment as one of the SCC's Quebec judges was ambiguous. This ambiguity did

72. *Supra* note 9.

not go unnoticed, and on October 7, 2013—the same day that Nadon was sworn in as an SCC justice—an Ontario lawyer filed a legal challenge to his appointment.[73] Less than two weeks later, the Quebec government announced its intention to also challenge the appointment.[74]

Faced with an inevitable legal showdown, the Conservative government took two actions. First, on October 22, 2013, declaratory provisions were included in a budget omnibus bill to clarify that Federal Court judges appointed from Quebec are eligible to fill Quebec vacancies.[75] Second, the government referred two questions to the SCC in order to receive final clarification on: (1) who qualifies as a Quebec judge and (2) whether Parliament has the power to unilaterally modify the *Supreme Court Act*.[76]

The SCC released its ruling on March 21, 2014. With one judge in dissent, the six-member majority concluded that the three SCC judges from Quebec must be either from the Quebec Court of Appeal, the Superior Court, or be a *current* member of the Quebec bar.[77] As a judge of the Federal Court of Appeal, Nadon did not meet these qualifications and the Court declared his appointment "void *ab initio*".[78] Although the rejection of a SCC appointment by the SCC itself is, on its own, an outstanding event, it is the second question concerning Parliament's ability to unilaterally modify sections 5 and 6 of the *Supreme Court Act* that is of particular importance.

73. The Canadian Press, "Marc Nadon's Failed Journey to the Supreme Court", *CBC News* (8 May 2014), online: <www.news.cbc.ca>.

74. *Ibid*.

75. Department of Justice Canada, News Release, "Government of Canada Takes Steps to Clarify Certain Eligibility Criteria for Supreme Court Justices" (22 October 2013), online: <news.gc.ca/web/article-en.do?nid=782979>.

76. The two questions referred to the Supreme Court were:

> 1. Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act*?
> 2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2*?

Nadon Reference, *supra* note 5 at para 7.

77. *Ibid* at para 4.

78. *Ibid* at para 6.

The federal government's position was that the SCC had never been entrenched in the constitution. Therefore, sections 5 and 6 could be altered through ordinary statute. The Court disagreed, however, finding instead that the unilateral power of Parliament to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada" under section 101 of the *Constitution Act, 1867* had been overtaken by the SCC's constitutional evolution, as recognized in Part V of the *Constitution Act, 1982*. The SCC's ruling in the *Nadon Reference* confirmed its constitutional entrenchment, putting to rest the decades-old question of the Court's constitutional status.

There still remains, however, the critical question of what features of the Supreme Court are entrenched and what features are not. Here, the Court offered some guidance, though it can hardly be considered exhaustive. First, on the specific issue of the declaratory provisions passed by the Conservative government, the majority concluded that changes to judges' eligibility requirements under sections 5 and 6 of the *Supreme Court Act* constitute modification of the SCC's composition and can therefore only be made under the procedure provided for in section 41(d) which requires unanimous consent. Consequently, the declaratory provisions passed by Parliament were ruled to be *ultra vires*. The majority also specified that the express mention of the SCC in section 42(1)(d) (7/50 formula) was intended to ensure the proper functioning of the SCC.[79] As a consequence, the "essential features" of the SCC must be protected and only subject to reform via the 7/50 formula. Such essential features, according to the majority, "include, at the very least, the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence".[80]

B. Reforming the Supreme Court Post-Nadon

Coming out of the *Nadon Reference*, then, are certain actions related to the SCC that we can be confident are outside the scope of Parliament's exclusive jurisdiction. Parliament, for example, can neither abolish nor increase the number of judges on the bench without the unanimous consent of the provinces. However, it remains unclear to what extent

79. *Ibid* at para 94.
80. *Ibid*.

reforms to the SCC's appointment system affect its essential features or composition. It seems certain, for example, that judicial elections, even if they were advisory in nature, would affect both the Court's judicial independence and the power of the governor in council to make appointments, therefore requiring constitutional amendment. Likewise, the Conservative Party's recommendation in the Justice and Human Rights Committee's 2004 report that SCC nominees face Parliamentary ratification would appear to require a constitutional amendment. The SCC's reasoning in the recent *Reference re Senate Reform* is instructive on this particular issue.[81] In addressing the question of whether a framework for consultative provincial elections for appointments to Senate requires a constitutional amendment, the Court focused on the intended effects of the proposed federal legislation. While the federal government argued that the prime minister retained the power of appointment because elections would technically only be advisory, the Court ruled that because the intended effect of the proposed legislation was to endow senators with a popular mandate, it would amend the constitution by changing the Senate's role within the constitutional structure.[82] Similarly, while the Conservative Party's recommendation in the 2004 report noted that the form of ratification must not infringe on the constitutional right of the governor in council to make the judicial appointments, if the intended effect of such a reform was to give Parliament the power to appointment SCC judges, then it too would appear to amend the constitution by changing an essential feature of the SCC.

81. 2014 SCC 32, [2014] 1 SCR 704.

82. *Ibid* at paras 61–63. For further analysis of *Reference re Senate Reform*, see Emmett Macfarlane, "Unsteady Architecture: Ambiguity, the Senate Reference and the Future of Constitutional Amendment in Canada" (2015) 60:4 McGill LJ 81.

The need for constitutional amendment for less dramatic reforms is more difficult to assess. Would a reform comparable to Australia's, for example, which mandates that the attorney general consult with the provinces prior to a SCC appointment, require a statutory amendment to the *Supreme Court Act*? In the *Nadon Reference*, the majority notes that Parliament's power to unilaterally amend features of the SCC under section 101 of the *Constitution Act, 1867* now requires Parliament to maintain and protect the essence of what enables the SCC to perform its "current role".[83] Certainly, provincial consultation presents no obvious threat to the SCC role and arguably could be seen as enhancing it given the Court's own endorsement of cooperative federalism.[84]

Moreover, while the attorney general is not required to consult with the provinces on SCC appointments, by convention it is very often done,[85] which would seem to further illustrate that the Court's role would not be altered if provincial consultations were formalized. Such an interpretation, however, remains untested and if such reforms were ever introduced and then challenged, it would ultimately be up to the SCC to again fill in the contours of its own constitutional status. Thus, while the ambiguity of the SCC's constitutional status during period two (1982 to 2014) meant that the federal government was hesitant to pursue formal reform via legislative statute, the *Nadon Reference* seems unlikely to diminish this hesitancy.

Conclusion

This article has explored how Canada's constitutional amendment rules have helped to structure the politics of judicial selection reform in Canada. These rules have endowed the provinces with significant power over whether a constitutional amendment will be adopted—a power that the provinces have in the past leveraged in their attempts to secure major formal reforms to the judicial selection process, as with the Meech Lake Accord considered here. These same rules, however, make formal reform exceptionally difficult to obtain, while the ambiguity surrounding

83. *Supra* note 5 at para 101.

84. See *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837.

85. Cotler, *supra* note 62 at 136.

the SCC's constitutional status has made the requirements for reform uncertain.

The former point, in particular, is often expressed when discussing constitutional politics in Canada. As noted by Kate Glover, such explanations tend to make one of two claims: (1) that the high threshold required for constitutional amendment is politically impossible to satisfy (the impossibility claim) or (2) that the rules of reform are so complicated, confusing and/or unclear that they are difficult to apply (the complexity claim).[86] The thrust of the argument presented here certainly falls within what Glover describes as the complexity claim, both for emphasising the high threshold required for formal reform of the SCC and for the ambiguity that has historically surrounded its constitutional status.

This does not mean that the SCC's appointment system will or should remain frozen in time. Indeed, the informal reforms introduced by the Martin and Harper governments, although apparently temporary, demonstrate how changes that respond to contemporary criticism of the appointment process, such as its lack of transparency, are possible. While the *Nadon Reference* did not provide an answer for every conceivable SCC reform that could be proposed, it does nonetheless have the potential to facilitate future reform efforts by acting as a needed, albeit incomplete, guide for what modifications do or do not require formal amendment. In other words, the path to formal reform appears no easier coming out of the *Nadon Reference*; however, the path to informal reform is somewhat clearer insofar as the constitutional status of the SCC has been affirmed. Moving forward then, an informal approach to reform, while limited, will likely continue as the preferred strategy for the federal government when dealing with the SCC's appointment process.

86. Kate Glover, "Complexity and the Amending Formula" (2015) 24:2 Const Forum Const 9.