HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 005 • 2nd SESSION • 41st PARLIAMENT

EVIDENCE

Tuesday, November 19, 2013

Chair

Mr. Mike Wallace

Standing Committee on Justice and Human Rights

Tuesday, November 19, 2013

● (0845)

[*English*]

The Chair (Mr. Mike Wallace (Burlington, CPC)): Ladies and gentlemen, I call this meeting to order. This is meeting number five of the Standing Committee on Justice and Human Rights.

We are studying the subject matter of clauses 471 and 472 of Bill C-4, A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures. Today we have witnesses to deal with the clauses that were referred to this committee.

We have Professor Carissima—is that how you say it?

Professor Carissima Mathen (Associate Professor, Faculty of Law, University of Ottawa, As an Individual): Carissima.

The Chair: Sorry. We have Professor Carissima Mathen, associate professor, faculty of law, University of Ottawa, and Adam Dodek, who is vice-dean of research, and associate professor, faculty of law. Thank you for joining us this morning.

Professor Mathen, you are first, for 10 minutes, please.

Prof. Carissima Mathen: Thank you very much.

My name is Carissima Mathen, and I am here in a purely personal capacity.

My introductory remarks will focus first, on the nature of sections 5 and 6 of the Supreme Court Act, and second, on certain issues raised by the nature of clauses 471 and 472.

The two clauses purport to clarify the qualifications for justices appointed to the Supreme Court. Questions have arisen over the interpretation of sections 5 and 6. The appointment of Marc Nadon, a Federal Court of Appeal justice who is not a current member of the Quebec bar, though he has over 10 years' membership, has created controversy. The two clauses at issue deal with bar membership. They do not address the eligibility of Federal Court judges per se to sit on the Supreme Court.

Justice Nadon's nomination was accompanied by a memorandum prepared by former Supreme Court justice Ian Binnie. Mr. Binnie concluded that there is no impediment to appointing Federal Court judges to the court. He noted as well that both sections permit candidates with 10 years' bar membership regardless of its currency.

Together with Professor Michael Plaxton of the University of Saskatchewan, I examined Mr. Binnie's analysis in an article entitled, “Purposive Interpretation, Quebec, and the Supreme Court Act”. I did submit that article to the committee.

Very briefly, Professor Plaxton and I largely agree with Mr. Binnie's analysis of section 5, but we suggest that his analysis of section 6 is incomplete. In our view, he seems to treat section 6 as effectively identical to section 5. It is not. The purpose of section 5 is to guarantee minimum legal expertise for the court as a whole. The purpose of section 6 is additionally to guarantee minimal expertise with respect to Quebec's distinctive legal tradition.

Section 6 responds to a functional concern that is not present in section 5. In addition, our research indicated that section 6 was an attempt by successive Parliaments to assure Quebeckers that at least three judges drawn from that province would have sufficient links with its legal culture.

Returning to the clauses at issue, so long as it acts in accordance with the Constitution, Parliament is always free to amend in whole or in part any law. Courts must interpret and apply the law in its current form. Indeed, the very fact of amendment will inform subsequent judicial interpretation.

When Parliament amends a law, it is assumed to be trying to change it for the future. Thus, as a general rule, statutory amendments do not operate retroactively. Of course Parliament remains free to specify that particular changes are retroactive.

Clauses 471 and 472 are declaratory. Unlike ordinary legislation, declaratory legislation purports to determine the meaning of existing law. Traditionally, such legislation follows an adverse judicial ruling. For this reason, it is assumed to operate retroactively to change the state of affairs under which that ruling was rendered. Declaratory legislation enacted in the absence of an adverse judicial ruling, which is the situation here, is rare. In the present case, it would mean that 10 years' bar membership is all that has ever been required for appointment to the court under section 5 and section 6. In determining the appropriate uses of declaratory legislation, one must consider its goals as well as the law it is purporting to affect.

To the extent that the clauses in issue purport to define the purpose that animated an earlier Parliament or Parliaments, this does not seem to be an appropriate use of declaratory legislation. Determining the purpose of section 6 as originally enacted is an interpretive issue and thus within the special purview of the courts. Parliament may imbue the law with a new or amplified purpose. It may, through declaratory legislation, determine the application of sections 5 and 6, but its ability to define the law's original purpose is more limited, and for good reason.

I noted earlier that Parliament's actions are constrained by the Constitution. Last week during the Senate reference, some counsel noted that part V of the Constitution Act, 1982, the amending formula, includes certain changes to the Supreme Court. One of these is the court's composition. Changes to the Constitution in relation to this require unanimity.

● (0850)

The question of whether and to what extent composition may include the current sections 5 and 6 of the Supreme Court Act suggests a role for examination of their original purpose. This may well constrain the potential scope of any declaratory legislation.

To conclude, a law's original purpose can be significant. Where it is, the use of declaratory legislation is not straightforward and ought to be applied with caution. I believe the current clauses, which raise important issues for the separation of powers and consistency in interpretation, represent one such situation.

That concludes my prepared remarks.

Thank you.

The Chair: Thank you, Professor.

Our next presenter is Professor Dodek.

You have 10 minutes, sir.

Professor Adam Dodek (Vice-Dean, Research, and Associate Professor, Faculty of Law, University of Ottawa, As an Individual): Good morning. My name is Adam Dodek.

[*Translation*]

I am the vice-dean of research and an associate professor in the common law section of the University of Ottawa.

[*English*]

I teach in the areas of public law and legal ethics. I also teach a seminar on the Supreme Court of Canada, which I would pause to say, as you can well imagine, has been very interesting for our students this year.

I have co-edited three books relating to the Supreme Court of Canada and judicial independence, and have written numerous articles about the Supreme Court, the role of government lawyers, and other matters. Like my colleague Professor Mathen, I am appearing today wholly in my individual capacity.

In my prepared remarks I will address two issues: first, clauses 471 and 472 are not a proper subject of a budget bill; second, by bringing a reference to the Supreme Court about these very provisions, the government is interfering with the proper work of this House.

I recognize that members of the committee may have questions about the interpretations of sections 5 and 6 of the Supreme Court Act and the impact of clauses 471 and 472, and I am very happy to address any questions on that subject.

First, on the appropriateness of inserting clauses 471 and 472 into a budget bill, Bill C-4 is entitled "A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures". As the members of this committee are well aware, clauses 471 and 472 have nothing to do with the budget that the Minister of Finance tabled in Parliament on March 21, 2013. They are instead proposed amendments to the Supreme Court Act. The government's position is that they are declaratory and are not substantive amendments. By this admission, they have no monetary impact and no connection whatsoever to the March 21, 2013 budget.

You will no doubt hear from other witnesses that they do not agree with the government's position that clauses 471 and 472 are simply declaratory. I would say that even if they are correct in that position, there is still no connection whatsoever with the March 21, 2013 budget. Thus, there is no substantive connection, and there is also no temporal connection, between clauses 471 and 472 and the March 21, 2013 budget.

Clauses 471 and 472 relate to a controversy that erupted over the appointment of Justice Marc Nadon, an appointment that began with the announcement on Monday, September 28, 2013 by the Prime Minister, fully six months after the Minister of Finance tabled the budget in the House. It is a factual impossibility to connect something that happened six months later to a budget tabled six months earlier.

Justice Fish announced his intended retirement on April 22, 2013. Again, that was after the budget was tabled.

The controversy over clauses 471 and 472 show that they are not the proper subject of a budget bill. These are not matters that are uncontroversial or mere technical amendments. The government knew the issue was uncertain, and that's the reason it commissioned and then released the opinion from the Honourable Ian Binnie. As well, the directing of the reference to the Supreme Court on these very issues demonstrates the uncertainty of the issue.

I believe that what is at stake here is no less than the democratic features of the House of Commons. Bills such as this one are a threat to democracy in Canada.

Clauses 471 and 472 should be the subject of an independent bill because they raise separate and important public policy issues. I would just pause to say that is my position, notwithstanding my agreement with the government that these provisions are simply declaratory and make no substantive changes to sections 5 and 6 of the Supreme Court Act.

We have a Constitution similar in principle to that of the United Kingdom, and we have often learned and we cherish our constitutional history. Members of this House, I believe, would be wise to heed the warnings from Parliament in Westminster.

Erskine May, in the 23rd edition of *Parliamentary Practice*, states:

> In former times, the Commons abused their right to grant Supply without interference from the Lords, by tacking to bills of aids and supplies provisions which, in a bill that the Lords had no right to amend, must either have been accepted by them unconsidered, or have caused the rejection of a measure necessary for the public service. This practice infringed the privilege of the Lords, no less than their interference in matters of finance infringes the privileges of the Commons.

● (0855)

On December 9, 1702, the House of Lords passed a resolution which stated:

> That the annexing any Clause or Clauses to a Bill of Aid or Supply, the Matter of which is foreign to, and different from, the Matter of the said Bill of Aid or Supply, is Unparliamentary, and tends to the Destruction of the Constitution of this Government.

That was then converted into a standing order that had not needed to be invoked as the basis for rejection of a Commons bill since 1807.

In the United Kingdom the rules of order of the House of Commons exclude the possibility of a foreign matter from being tacked on to such bills by way of amendment, and respect for constitutional practice prevents the inclusion of such matters among their original provisions.

Second is the impropriety of legislating and referring the question to the Supreme Court for its consideration at the same time. It is highly unusual for a government to ask Parliament to enact legislation at the same time as it directs a reference to the Supreme Court. Why is this unusual? Because the purpose of directing a reference to the Supreme Court is to obtain the court's advice on a legal question or questions before proceeding with a course of action. The Senate reference that the Supreme Court heard last week is certainly a good example of that. As well, the government's prior reference, the securities reference directed by the government, is another example.

Based on my research, the last time the government directed a reference to the Supreme Court while or after enacting legislation was in 1976 in the Anti-Inflation Act reference when the government of Pierre Trudeau directed a reference to the Supreme Court three months after Parliament had enacted the Anti-Inflation Act. That situation was different. There was a perceived national crisis of double-digit inflation. I would submit to you that the uncertainty regarding sections 5 and 6 is not a cause for a national crisis. It's also highly unusual for a government to, in effect, be challenging its own legislation.

I believe this raises the question as to how the Attorney General of Canada, as the legal adviser to the Governor in Council, can both vouch for the legality of clauses 471 and 472 at the same time as he is questioning them in his advice to the Governor in Council directing the reference on the very same subject. The two simply cannot co-exist. Either the government believes that it is within its power to enact clauses 471 and 472, or it is uncertain and requires the advice of the Supreme Court.

I believe that this odd state of affairs puts the members of this House in an untenable position. They are being asked to vote in favour of two provisions with the assurance by the government that such provisions are legal, indeed constitutional, while at the same time the government is questioning that very advice by directing a reference to the Supreme Court.

Thank you. I look forward to your questions.

● (0900)

The Chair: Thank you, Professor, for that.

We will go to questions.

Our first questioner from the New Democratic Party is Madame Boivin.

[*Translation*]

Ms. Françoise Boivin (Gatineau, NDP): Thank you both for coming here this morning.

Outside, I was telling one of the witnesses that the University of Ottawa is my alma mater, so we are here in force today…

[*English*]

A voice: Conflict of interest.

Ms. Françoise Boivin: Not necessarily. I'm a labour lawyer, so believe you me, I will defer to their great minds.

[*Translation*]

Before asking you some questions, I would like to make some observations. I was pleased to hear Professor Dodek say that there is a glaring contradiction in what is going on at the moment, even without the constitutional arguments and the ego. Our committee has received the mandate to consider two clauses in a budget bill dealing with the Supreme Court of Canada. We received that mandate from the Standing Committee on Finance, to which we in no way report.

This way of doing things is fundamentally worrisome because the very most we could do is make a few recommendations, if there is anything to recommend, to the Standing Committee on Finance. This way of doing things concerns me greatly. It is not the first time it has happened. I think that it is the second time I have been faced with this situation since I was elected in 2011. As a lawyer, I find it disturbing that people are trying to find a back-door solution to a situation for which they are responsible.

Now I will put my questions to the witnesses.

You probably know more about this matter than we do. According to section 6, at least three positions have to be occupied by judges from Quebec. To your knowledge, have any of the positions ever previously been occupied by a Federal Court judge, either from the Federal Court itself or the Federal Court of Appeal?

Either of the witnesses can answer.

Ms. Carissima Mathen: No, there have been none.

Ms. Françoise Boivin: I have heard the argument a lot that it may be very hard for Federal Court judges from Quebec. It must be said that a number of Quebec's former great legal minds currently sit on the Federal Court, and I will never have anything but good to say about that.

If I am not mistaken, judges have been appointed from the Federal Court, but that was to fill one of the other six positions on the Supreme Court of Canada.

● (0905)

Ms. Carissima Mathen: That is correct.

Ms. Françoise Boivin: Professor Dodek, I am concerned by another aspect of the road we are on, and you spoke about it. It is the fact that there is a reference to the Supreme Court at exactly the same time asking exactly the same questions as those that the committee is studying at the moment in the context of clauses 471 and 472 of Bill C-4.

The gist of the reference clearly focuses on those two clauses and on the government's right to pass a bill that would establish the interpretation of the interpretive provisions. It would explain the facts of a situation that has existed since sections 5 and 6 of the Supreme Court Act were written.

You mentioned that seeing a situation like that is a concern. Am I to understand that, while it may not be very appropriate, it is not illegal? Parliament could pas Bill C-4 including clauses 471 and 472, but it would be ill-advised to do so, because we could get our knuckles rapped. It may happen, but it may not. Perhaps the Supreme Court will decide that we have the right to do it. Is it just inappropriate, but not necessarily illegal? That is what I am trying to find out.

Prof. Adam Dodek: It is not illegal.

[*English*]

It's not unconstitutional.

[*Translation*]

It is inappropriate; the interference is the problem.

[*English*]

with the work of the House of Commons and creates a problem of separation of powers. It is asking the House of Commons to vote on an issue that is at the very same time before the Supreme Court, so there is the real possibility of each one interfering and improperly influencing the work of the other. To be very clear, I do not think that the course of action is illegal or unconstitutional.

[*Translation*]

Ms. Françoise Boivin: We are lucky to have you here, as you are both great constitutional scholars. But I am not sure I understood what you said about how section 6 is to be interpreted. In matters dealing with the composition of the Supreme Court of Canada, is the unanimous consent of the provinces required? Is the interpretation of the rules requiring three positions from Quebec under section 6 subject to the requirement in section 41 of the Constitution Act, 1982?

Prof. Adam Dodek: In my opinion, section 41 of the Constitution Act, 1982 has nothing to do with it. I don't think this amendment implies that we are amending the Constitution.

Ms. Françoise Boivin: So unanimous consent, including from Quebec, would not be required in order for those three positions to be filled.

[*English*]

Prof. Adam Dodek: I do not believe that this amendment affects the amendment in Bill C-4. Clauses 471 and 472 change the composition of the Supreme Court of Canada, and therefore I don't believe that they implicate part V of the Constitution Act, 1982.

The Chair: Professor Mathen, do you want to answer?

[*Translation*]

Ms. Carissima Mathen: That is not clear. I feel that we have to wait for the Senate reference in order to get more principles on section 5.

[*English*]

I would say that the use of the word “composition” in 41(d) has to mean something. The country does not speak in vain. Whether that extends to qualifications is the issue.

I think it is at least a possibility that because of the use of the word “composition”, because of the non-exhaustive nature of the list of the documents that are listed in section 53 of the Constitution Act, 1982, it is possible that certain aspects of the Supreme Court Act are now protected against mere legislative change. Whether that extends to qualifications is the issue.

Ms. Françoise Boivin: Thank you both.

The Chair: Thank you very much.

Our next questioner from the Conservative Party is Monsieur Goguen.

[*Translation*]

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): Good morning. My thanks to the witnesses for joining us today.

Professor Dodek, I am going to follow up on the questions that Ms. Boivin asked you.

Essentially, you are saying that the federal government is acting well within its rights, that it is not illegal to make declaratory provisions like those in clauses 471 and 472. Your opposition is rather to the form, to the fact that this is in Bill C-4. So you are not opposed to the substance, but just to the form, is that correct?

● (0910)

Prof. Adam Dodek: Exactly. In my opinion, the problem is in the form.

Mr. Robert Goguen: Given the decision in the Canada Bread Company Ltd. case, there is no doubt that the federal government clearly has the right to make these declaratory provisions. That case was about an appeal of a judgment in a Quebec case where the Government of Quebec completely eliminated what had been done, using a declaratory provision.

So the government is completely within its rights to do this, correct?

Prof. Adam Dodek: The federal government has the power to pass provisions like the ones in clauses 471 and 472.

[*English*]

They certainly have the power. Whether it is prudent to do so is the issue I raised.

[*Translation*]

Mr. Robert Goguen: Of course, Bill C-4 will be voted on in the House.

Prof. Adam Dodek: Yes, the House will vote.

Mr. Robert Goguen: The bill may be passed, or it may be defeated. Since there will be a vote, it will be democratic in some measure, will it not?

Prof. Adam Dodek: Yes, but that depends on how we want to characterize democratic.

Mr. Robert Goguen: A vote is certainly not undemocratic.

Prof. Adam Dodek: Right.

Mr. Robert Goguen: You know that the Federal Courts Act requires a certain minimum number of civil law judges?

Prof. Adam Dodek: Yes, I am aware of that.

Mr. Robert Goguen: Are you a civil lawyer, Mr. Dodek?

Prof. Adam Dodek: Yes. On the Federal Court, 10 of the 30 judges must be civil law judges from Quebec. On the Federal Court of Appeal, five civil law judges must come from Quebec.

Mr. Robert Goguen: So the Federal Court clearly works with civil law. Since there are 15 civil law judges, they clearly deal with Quebec cases, do they not?

Prof. Adam Dodek: Yes.

Mr. Robert Goguen: So all those judges are trained in civil law. Their careers have been in civil law.

The argument is about section 6 of the Supreme Court Act. How can it be that a judge with 20 years of experience in civil law follow by another 20 years of experience as a sitting judge, with 40 years of experience in total, cannot be qualified for a position as a Supreme Court judge?

I am sure you are aware of the opinion written by Justice Binnie, which Justice Charron concurred in, as did Peter Hogg, one of our great constitutional scholars. I take nothing away from you; you are in the same category. However, I have difficulty understanding how a person with so much experience as a lawyer and a judge can fail to meet the criteria in the act.

Prof. Adam Dodek: I agree.

[*English*]

I agree with the propositions you put. Like my colleague, I agree with the conclusions of the Honourable Ian Binnie in his opinion. I agree with your point about how a judge could qualify as a civilist or as a judge from Quebec for the Federal Court but not for the Supreme Court. Certainly my analysis and my conclusion and my belief are that a judge from the Federal Court who was a member of the Barreau du Québec does qualify under section 6 of the Supreme Court Act for nomination and appointment to the Supreme Court of Canada.

The Chair: Professor Mathen had her hand up. Would you like a response from Professor Mathen?

Mr. Robert Goguen: I think we are done.

The Chair: Our next questioner is Mr. Casey from the Liberal Party.

Mr. Sean Casey (Charlottetown, Lib.): Thank you, Mr. Chair.

Welcome to the witnesses.

My first question for you, Professor Mathen, is with respect to a couple of specifics regarding the language in clause 471. It calls for someone with “standing” at the bar and doesn't require “good standing”.

What are your thoughts on whether perhaps there's a word missing there?

Prof. Carissima Mathen: I would assume that “standing” refers to being qualified by whatever regulations the particular law society entails to the extent that there is in fact a difference between someone who is in standing and someone who is in good standing. That may be something for the committee to consider. That term is not used in the current sections 5 and 6.

● (0915)

Mr. Sean Casey: What about the years of experience? Do you have any comments, any perspective on whether the term called for in clause 471 should be consecutive?

Prof. Carissima Mathen: Yes, I would think that they should be, that you would want 10 years’ consecutive experience before a bar in order to qualify.

Mr. Sean Casey: The section doesn't call for that now. It just calls for 10 years.

Prof. Carissima Mathen: That's right.

Mr. Sean Casey: Professor Dodek, you heard your colleague's comments with respect to the appropriateness of the use of declaratory legislation, and we certainly heard you loud and clear with regard to the conflict between proceeding with legislative changes at the same time as proceeding with a court reference.

Could I have your comment on the suggestion that if the coming into force of these sections were delayed, the court could speak unimpeded first, before these sections were to come into force? Could I have your views on that?

Prof. Adam Dodek: As I've stated publicly before, I think the best options that respect both the work of the House of Commons as well as the work of the Supreme Court would be for the government either to proceed by legislation, as you have before you in clauses 471 and 472, or to direct a reference to the Supreme Court, not both at the same time.

I would support any cause of action that suspended or delayed one of those activities. Ultimately, that is a policy choice to be made by the government. I personally have no preference as to which choice the government should make. It's wholly within the government's power.

To be clear, it's within the government's power to do both at the same time. It is not illegal or unconstitutional, but it is imprudent and it is injurious to our democratic institutions.

Mr. Sean Casey: We could address the imprudence and the injuriousness by allowing one to proceed unimpeded, and then the coming into force of the legislative changes could, I suppose, deal with anything that may happen down the road.

Prof. Adam Dodek: Yes, you certainly could do that.

Mr. Sean Casey: I put this forward to get your advice before we propose amendments. That's the goal.

Prof. Adam Dodek: A number of possibilities would be in the hands of the members of this committee as to how they wish to proceed.

As I've said before, I don't believe that these clauses are the proper subjects for a budget bill. I would support a recommendation that they be hived off into a separate bill; or there is no need to proceed with them, to take them out of the budget bill completely, given the reference that is pending before the Supreme Court; or the committee could decide to recommend to the government to withdraw its reference to the Supreme Court in light of the recommendation by this committee to adopt these amendments.

The Chair: You have one more minute, Mr. Casey.

Mr. Sean Casey: Thank you.

Professor Mathen, I heard you loud and clear with respect to the appropriateness of declaratory legislation in an instance such as this. Could you elaborate on whether this is an appropriate situation for a constitutional amendment? In your view, is that advisable or required?

● (0920)

Prof. Carissima Mathen: I do not think that qualifications, per se, count toward the composition of the court. That said, we have just had three days of argument before the Supreme Court of Canada with respect to part V of the Constitution Act, 1982, and it is possible that the court will adopt an approach to part V that will require consideration of that issue.

I do not believe that qualifications, per se, go to composition, but we are about to get much more guidance about that. To my mind, that complicates the use of declaratory legislation at this time, because one cannot through declaratory legislation effect changes that would otherwise be governed under the Constitution.

The Chair: Thank you, Mr. Casey.

Thank you for those answers, professors.

Our next questioner is Mr. Dechert, from the Conservative Party. Following on what Mr. Casey did, indicating who your question is for is helpful to the witnesses in determining who will answer.

Thank you.

Mr. Bob Dechert (Mississauga—Erindale, CPC): Thank you, Mr. Chair. Thank you to our witnesses.

My questions are for Ms. Mathen.

Ms. Mathen, former chief justice John Richard, who was a law partner of mine for a number of years, stated that the Federal Court of Appeal is "a national, bilingual institution dispensing justice" across Canada, and that it is "also a bijuridical court, applying both the common law and the civil law." As well, as you know, the federal government, through Bill S-12 and other acts, has promoted bijuralism in the Federal Court.

Do you agree with former Federal Court chief justice John Richard in those comments that he made?

Prof. Carissima Mathen: Yes, I do.

Mr. Bob Dechert: Okay.

You mentioned in your opening statement that the purposes of section 6 in particular were to ensure that a candidate for the Supreme Court from Quebec had a minimal expertise in civil law and sufficient links with the legal culture of the bar of Quebec.

I just note that I don't believe either of you is a member of the Quebec bar. I think, Professor Dodek, that you're the dean of the common law section at the University of Ottawa.

Prof. Adam Dodek: I'm the vice-dean of research in the common law section. I don't want to—

Mr. Bob Dechert: Okay, very good.

The Chair: Give yourself a promotion.

Prof. Adam Dodek: That's very generous of you.

Voices: Oh, oh!

Mr. Bob Dechert: I'm just trying to understand your position here, and I'm always happy to give someone a promotion.

Thank you for being here, and thanks for your comments on the democracy issues, although I don't think that's probably an area of your expertise as a professor of law.

Ms. Mathen, do you agree with the federal government's position that civil law is an important part of the country's legal system and that Quebec judges of the Federal Court have a right to sit on the Supreme Court?

Prof. Carissima Mathen: I'm glad to have a chance to clarify, because in fact my colleague and I do not agree on the interpretation of the current section 6.

It is one question whether Federal Court judges bring the kind of expertise that is useful to the Supreme Court from Quebec, and I think that they do. It is another question whether section 6 as drafted, in view of its legislative history, permits Federal Court judges to be appointed under its provisions. That question, my research has indicated, would be answered no.

Mr. Bob Dechert: It's interesting that there's a difference of opinion between two professors of law from the same law school. It sounds as though there is an interesting class that you could have at law school on this. Maybe it will be an exam question this term.

Prof. Adam Dodek: Probably.

Mr. Bob Dechert: I have a third question.

Ms. Mathen, you mentioned clauses 471 and 472. Would you describe these clauses as ordinary statutory amendments, or are they declaratory amendments? Can you explain the difference between those two? Can you also tell us about the Canada Bread decision and the Supreme Court comments about the use of the declaratory provisions by the Quebec National Assembly in that case?

Prof. Carissima Mathen: Certainly. Let me start with the Canada Bread decision.

The Canada Bread decision in fact is a common use of declaratory legislation. It is legislation to respond to an adverse outcome that the legislature wished to overturn. That is within the legislator's powers. Under doctrines of parliamentary supremacy, when the legislature wishes to make that kind of change, it is retroactive.

Mr. Bob Dechert: So both you and Professor Dodek agree on that point.

Prof. Carissima Mathen: This is In the context of Canada Bread. I would note that there are other decisions dealing with the definitions and proper uses of declaratory legislation by the Supreme Court of Canada.

● (0925)

Mr. Bob Dechert: Okay.

Can you envision a situation in which a member of the Quebec bar with many years of experience at the Quebec bar was looking at potentially becoming a jurist and deciding whether or not they wanted to choose the path of the Federal Court, which deals with very important legal issues, as I'm sure you would agree with me, or take another route? Would you see that person as potentially deciding that if they went with the Federal Court they would exclude themselves from a future appointment to the Supreme Court? What kind of impact would that have on the ability of the Federal Court to attract the best and the brightest of the Quebec bar to its ranks? What kind of impact would it have on the application of civil law when it comes up in cases before the Federal Court?

Prof. Carissima Mathen: It's difficult for me to speculate. A number of factors go into lawyers', and for that matter, academics', musings about possible judicial paths. I really couldn't comment on that.

Mr. Bob Dechert: Okay. It might be interesting to hear the opinions of some of the students in the civil law section at the University of Ottawa law school. That's something that no doubt they would consider in their future legal careers.

Thank you both for your answers. I have no more questions.

The Chair: Thank you for those questions.

Thank you, professors, for those answers.

Our next questioner, from the New Democratic Party, is Madame Boivin.

Ms. Françoise Boivin: I just enjoy too much chatting with them.

[*Translation*]

Since the session began, the Conservatives have been suggesting that Federal Court judges will never be able to get to the Supreme Court of Canada. As section 6 is interpreted, a person must definitely be a judge of the Court of Appeal of Quebec or of the Superior Court of Quebec, or someone who has been a member of the Quebec Bar for 10 years, That does not preclude the other six positions on the Supreme Court of Canada coming from the Federal Court. Am I mistaken in that?

That interpretation, on which you have been very clear, could be how section 6 must be interpreted. It is recognized by the Government of Quebec and by a number of members of the legal community in Quebec. So it seems to me that we are being a little dramatic in suggesting that federal court judges will be forever excluded from the Supreme Court of Canada.

Am I missing something?

[*English*]

Prof. Carissima Mathen: Yes.

[*Translation*]

I agree with…

[*English*]

Honourable Ian Binnie in his interpretation of section 5.

Section 6 is with respect to three seats on the Supreme Court. There is no bar with respect to other judges from Quebec being appointed.

I think the issue is the difference between the two sections, and the reason section 6 is worded the way it is.... I would also point the committee to section 30 with respect to the appointment of ad hoc judges, which again treats the Federal Court differently for the purpose of the three seats reserved under section 6.

[*Translation*]

Ms. Françoise Boivin: So I am not mistaken. Some people sitting on the Supreme Court of Canada actually do come from the Federal Court. I think we are creating a problem where there is none. They are giving the impression that people from one particular court can never, ever be appointed to the Supreme Court of Canada.

That said, Professor Dodek, you mentioned various possibilities and the fact that it is legal. But, in law, “legal” and “appropriate” are sometimes two different things. We agree on that.

As you mentioned, it would have been more logical for the government to choose one or other of the options, possibly withdrawing the reference. But the problem I see here is that the application from the lawyer from Toronto, Mr. Galati, is still in effect. So the courts are going to have to render a decision about the appointment of Justice Nadon. Of all the measures that the government can take, it is probably the least acceptable, because the Supreme Court will have to make a decision on it one day.

In the circumstances, do you not find the situation that the government's actions have brought about to be a little unfortunate? Does it not somewhat politicize the Supreme Court, a great institution that must be completely separate from Parliament?

● (0930)

Prof. Adam Dodek: It is a problem for the Supreme Court of Canada. But Supreme Court justices are dealing with a good number of cases referred by other courts. The fact that only eight judges are sitting on a case is very difficult for the Supreme Court, but it is not a national crisis. The Supreme Court is a very strong institution.

[*English*]

It will be able to survive a delay in the participation of the Honourable Justice Nadon. I don't think that just because there is an uncertainty is sufficient reason to proceed with both the reference and the proposed legislation.

The Chair: Thanks for those questions and answers.

Our next questioner is from the Conservative Party. Mr. Seeback, you have five minutes.

Mr. Kyle Seeback (Brampton West, CPC): Thank you, Mr. Chair.

Professor Mathen, I want to try to understand the logic behind the interpretation you're giving to section 6. What you're doing is effectively trying to interpret the statute, and as we've heard quite clearly, the Federal Court applies and interprets civil law.

You would agree with me on that, yes?

Prof. Carissima Mathen: Yes.

Mr. Kyle Seeback: Okay.

When you look at the interpretation of a statute, it's not supposed to be read in isolation in a particular section. Of course, that's a big part of it. Also, you want to look at the scheme and the object of the act itself. So I would say you'd want a logical interpretation of the statute.

You seem to be suggesting that someone who is from Quebec and goes to the Federal Court is going to be barred or disqualified from being on the Supreme Court, or is ineligible.

That's your interpretation of section 6, correct?

Prof. Carissima Mathen: My interpretation of section 6 is that it was intended to reserve three seats on the Supreme Court to judges from Quebec courts.

Mr. Kyle Seeback: Right, so not someone from the Federal Court despite the fact that they interpret and apply civil law.

Prof. Carissima Mathen: That is my interpretation of the will of successive Parliaments.

Mr. Kyle Seeback: So somebody who has 15 years of Quebec bar experience and then goes to the Federal Court for six months, that person, under your analysis, would be disqualified from sitting on the Supreme Court. Am I correct?

Prof. Carissima Mathen: That is a closer question with respect to the currency of the bar membership.

Mr. Kyle Seeback: That's what you're basically breaking it down to: how long you've been a member, or how recently you've been to the bar. Somebody who is away from the Quebec bar, technically, because they're on the Federal Court interpreting civil law for five years, you say that person is not eligible to be on the Supreme Court of Canada for those Quebec seats.

Prof. Carissima Mathen: Under the current section 6.

Mr. Kyle Seeback: So five years is too much. What about six months?

Prof. Carissima Mathen: It's not a question of five years versus six months. It's a question of interpreting the statute.

Mr. Kyle Seeback: Right. So you interpret it such that if someone who has 30 years of Quebec bar experience, but then goes to the Federal Court for a single day, will be ineligible to go to the Supreme Court of Canada, based on your interpretation of section 6.

Prof. Carissima Mathen: My interpretation of section 6, based on the history, is that it has a specific meaning. If the current Parliament disagrees with that meaning, it should amend the statute.

Mr. Kyle Seeback: But you think that's a logical interpretation when taking the statute as a whole, that someone who sets foot in the Federal Court for 10 seconds, despite 30 years of Quebec bar experience, is ineligible. You think that was the intention of the section.

Prof. Carissima Mathen: It's not a question of logic; it is a question of the provision understood within its broader historical context.

● (0935)

Mr. Kyle Seeback: Thank you.

The Chair: Thank you for those questions.

I like to watch lawyers argue. It's great.

Our next questioner is from the NDP, and it's Monsieur Jacob.

[*Translation*]

Mr. Pierre Jacob (Brome—Missisquoi, NDP): Thank you, Mr. Chair.

As I understand it, according to your expertise, section 6 historically applies specifically to judges from Quebec. Is that not in order to preserve the specific presence of the Civil Code on the Supreme Court of Canada? Yes or no?

[*English*]

The Chair: Who did you want to answer the question, Monsieur Jacob?

[*Translation*]

Mr. Pierre Jacob: The question goes to either one of you or to both.

Prof. Adam Dodek: In my opinion, the purpose of section 6 is to have judges from Quebec with expertise in civil law. The goal of the section is not necessarily to have a judge who comes from Quebec, but to make sure that there is civil law expertise on the Supreme Court of Canada.

Mr. Pierre Jacob: Thank you.

Do you agree with that position, Ms. Mathen?

[*English*]

Prof. Carissima Mathen: My interpretation of section 6 is that it is to ensure sufficient expertise on the Supreme Court to deal with questions involving Quebec civil law.

[*Translation*]

Mr. Pierre Jacob: Thank you, Ms. Mathen.

Is it appropriate to ask the justices of the Supreme Court of Canada to take a position on the future of potential colleagues of theirs?

That question goes to either Mr. Dodek or Ms. Mathen.

[*English*]

Prof. Carissima Mathen: The Supreme Court is charged with answering questions of national interest. The Supreme Court, in fact, has taken steps to assure the public that it is considering the issue impartially. I don't envy those judges and the task that is before them, but I have confidence that they will perform that task.

Prof. Adam Dodek: I would add that in normal circumstances you have the principle of a judge should not be a judge in his or her own cause. Clearly, the reference asks the court to interpret matters that will have an effect on it.

However, the exception to that rule is the doctrine of necessity: when there is no other place to go, then there is no other place that the government could have directed this reference to. There is no substitute court in this circumstance.

There are circumstances where judges, under the doctrine of necessity, have no choice but to rule on matters that affect them, and this is certainly one of those cases.

[*Translation*]

Mr. Pierre Jacob: I have one last question. Since Bill C-4 provides the answer that the government wants to hear, are they not politicizing the Supreme Court, which should be neutral, or at least surround itself with an appearance of neutrality?

[*English*]

Prof. Adam Dodek: I've stated before that I don't think it's prudent for the government to both enact legislation and direct the reference to the court. I think it puts the court in a difficult situation because of the question that we just responded to previously. The court has no choice but to deal with this issue.

It is a difficult position for the court to be in, one that they, as I said, will eventually come out of. It won't damage the court as an institution, but it was certainly avoidable.

[*Translation*]

Mr. Pierre Jacob: Thank you.

Do you want to weigh in on that question, Ms. Mathen?

[*English*]

Prof. Carissima Mathen: It is difficult to divorce law from politics in many cases. I think the Supreme Court of Canada does an admirable job in treating legal issues as such.

I regret the current state of affairs, given that the government expressed awareness of this in the summer, that there was a potential issue with the Supreme Court Act. It is unfortunate that we find ourselves in the current position of having appointed someone, sworn them in, and then putting to the Supreme Court a question about their eligibility.

● (0940)

[*Translation*]

Mr. Pierre Jacob: Thank you, Ms. Mathen and Mr. Dodek.

Thank you, Mr. Chair.

[*English*]

The Chair: Thank you very much.

Thank you for those answers. Thank you for the questions. I have an understanding that the Conservatives have no more questions. We have one last slot, and the last questioner will be Madame Péclet for five minutes.

[*Translation*]

Ms. Ève Péclet (La Pointe-de-l'Île, NDP): Thank you very much, Mr. Chair.

My thanks to the witnesses for being here.

My goal is to become a lawyer one day. I have never set foot in the Federal Court of Canada, but I hope that, one day, I will be able to be appointed a Supreme Court judge.

I would like to deal with two quite important matters, and that will perhaps allow you to clarify some things.

In the English version of the bill, the proposed addition of section 5.1 uses the words “barrister” and “advocate”, whereas the proposed addition of section 6.1 uses the word “advocate” only. There is a distinction.

What categories of people do these two proposed additions include? Why is there a difference between proposed addition 5.1 and proposed addition 6.1?

[*English*]

Prof. Carissima Mathen: It comes from a historical division of functions between people called to the bar in the common law system, between barristers and solicitors. The term now is “barristers and advocates”, but it all refers to qualified members of the bar.

Prof. Adam Dodek: I would simply add that in Quebec the term “advocates”,

[*Translation*]

…the French word “avocat” is used as the equivalent of the word

[*English*]

“lawyer”, or in common law provinces you often see “barrister and solicitor”. I believe that is why clause 471, which would apply to all appointments to the Supreme Court, uses the term “barrister or advocate”, and clause 472, which only applies to Quebec, only uses the term “advocate”, because the term “barrister or solicitor”, in my understanding, is not generally used in Quebec.

Ms. Ève Péclet: As much as we know the courts have deference for some decisions of the administration, you touched a point on interference between the Supreme Court and the government because of the fact that right now they are asking questions about whether or not and how to proceed on modifying the legislation, yet they perceive that they do not even know if it's the right way or not. Maybe you could elaborate on your point.

Ms. Mathen, you're welcome to answer, but Mr. Dodek, you touched on the particular point that whether or not it is legal, the government has to have some deference for, or at least not to interfere with the courts' and judicial system's independence about whether or not or how they should proceed.

Prof. Adam Dodek: My point is simply this. The Attorney General of Canada and the Minister of Justice of Canada in his role as the legal adviser to the Governor in Council, when this bill would have been introduced...to vouch to the Governor in Council that the contents of it were legal, that the Parliament of Canada has the power to enact this legislation, and then, at the same time as the legal adviser to the Governor in Council directing the reference, the Attorney General of Canada signed his name to a reference question that questions the very own jurisdiction and power of Parliament to enact this legislation. That is simply inconsistent, and it is problematic.

● (0945)

Prof. Carissima Mathen: I would add that the Supreme Court has, in other cases, refused to answer reference questions in circumstances where the court felt the issue was moot, it was not ripe, it had been put forward in circumstances that might contribute to uncertainty. That led to the Supreme Court refusing to answer a question in the same-sex marriage reference. I have written about this, and written about some of the problems of uses of the reference function in a way that actually puts the court in a difficult position, and this may be one such case.

The Chair: Thank you for those questions.

Thank you to our witnesses. We appreciate your coming this morning and hope this wasn't cruel and unusual punishment that I'll be getting charged with, and back to school for you.

Thank you very much for your input.

For the committee's knowledge, for the first hour on Thursday, Minister MacKay will be here. Take note that we will meet at Queen Street on the seventh floor. The reason for that is we couldn't get the big rooms since there is a state visit and everyone is being bumped out of there. I don't know what it is, but that's what's happening. We have three witnesses after that, and then we have a half hour set aside for discussion of whatever recommendations come from this committee.

If you have recommendations, I ask they be in both official languages. If you have amendments that we can do, we will do them on the floor because we are not doing clause-by-clause study. It's recommendations back to the finance committee.

With that, thank you very much. Thank you for joining us this morning.

The meeting is adjourned.