

**Barreau du Québec
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My predecessors, on occasions such as this, felt the need to extol the virtues of the Federal Courts as important national institutions. The belief was that unless they spoke about the Federal Courts, very few would know they existed. I do not feel the need to do this today.

The Nadon reference is not the only reason that the Federal Courts are in the headlines. Whether it be in the area of immigration, national security, pharmaceutical research, access to generic drugs, government ethics, cohabitation with First Nations, environmental threats, and I could go on, the Federal Courts touch Canadians in a very direct way almost every day.

Obviously, by granting the federal government its powers under section 91 of the *Constitution Act, 1867*, the Fathers of Confederation were staking the future. Today, we cannot help but recognize that the hot judicial topics are often matters that come before our courts.

Fifty years ago, hardly anyone practiced patent law in Quebec. Tax law was the domain of one or two firms, and there was no immigration law. All that has changed. These issues now do concern

Quebec, and they are the mainstay of prosperous firms. More often than not, it is before the Federal Courts that you will plead them.

Even if it is no longer necessary to demonstrate the importance of the Federal Courts, its reason for existence bears to be recalled. Canada is a vast and diverse country. Federal Court judges are called upon to travel it widely and frequently, from sea to sea to sea.

The Federal Courts exist to ensure consistency in the judicial decisions rendered throughout Canada, while taking into account Quebec's specificity, due of course to its distinctive features: language and the civil law tradition.

This tradition is acknowledged in the *Federal Courts Act* by the requirement that at least 4 judges out of a complement of 11 in the Federal Court of Appeal, of which I am one, and 10 out of 30 in the Federal Court, are trained in the civil law. That the proportionate number of judges with a civil law background is so large, when contrasted with the number of judges from the other provinces, is not the result of a miscalculation.

Indeed, the lengthy history of the Federal Courts, and of the Exchequer Court before them, shows that the Quebec lawyers trained in civil law who were appointed to those courts have always excelled in their capacity to accomplish their judicial duties not only in

Quebec but throughout the country. This ability to carry out the mission of the Federal Courts, without linguistic or legal limitations, has won the Quebec delegation widespread admiration, and especially that of our colleagues from the common law provinces. Amongst the past standard-bearers from Quebec in the Federal Courts I recall people such as Louis Pratte, Louis Marceau, Jim Hugessen, Pierre Denault, Alice Desjardins, Robert Décary, Gilles Létourneau and more recently Robert Mainville.

It is somewhat discouraging, I must admit, that despite this success by Quebecers, some believe that knowing another legal system is not an asset, that it could be damaging, even [TRANSLATION] « a threat for the Quebec legal culture » according to the headline of an article published in *Le Devoir* in June this year (*Le Devoir, Libre pensée*, June 25, 2014). I will surprise no one by stating that there is no study of comparative law that suggests that knowing another system of law can be damaging to retaining one's initial legal training. Quite the contrary, in-depth knowledge of another legal system sheds a contrasting light on one's own legal tradition.

This brings me to the Nadon reference. Before dealing with this topic, I want to say two things. First, whatever opinion one may hold about this controversy, all agree that no one should be put through the ordeal that Justice Nadon was made to endure. I commend the

courage, the resilience and the wisdom that allowed him to come through all this still standing. Second, you may rest assured that I have no intention of criticizing the decision rendered by the Supreme Court. It is the highest court in the land, and I fully accept that the Supreme Court has the last word on all issues that come before it, including of course the one raised by the Nadon reference.

However, as the new Chief Justice of the Federal Court of Appeal, now responsible for its governance, I believe that I have the duty to speak about repercussions that were seemingly not considered by the Supreme Court. The Nadon reference raised an issue of statutory interpretation, the type of issue that can be complicated for the uninitiated, especially where constitutional considerations are added to the mix. According to the written media, the issue was generally understood as being whether Quebec judges on the Federal Courts were sufficiently familiar with civil law and connected with Quebec social values to be eligible to fill a Quebec seat on the Supreme Court. And all understood the answer to be a resounding no.

This answer creates serious problems for the Federal Courts. It should be said that the *Federal Courts Act*, just like the *Supreme Court Act*, reserves seats for jurists trained in Quebec civil law, and for the very same reason: ensuring the representation of Quebec, and of the civil law, on our Courts.

This brings me to a very concrete problem. How can one explain to a Quebec candidate, approached to fill a vacancy in our Court, that he will be appointed for his civil law training and as a representative of Quebec, but that he will be deemed to no longer have those qualities under the *Supreme Court Act* from the moment he is sworn in? How to explain, in the same vein, that having been a member of the Quebec Bar for over ten years, he qualifies as a potential appointee to the Supreme Court, but that he will lose that possibility from the moment he becomes a member of our Court?

Many have played down the concern that Quebec nominees on the Federal Courts are no longer eligible for elevation to the Supreme Court. As a practical matter, they say, every generation sees only three Quebecers reach the highest Court. Why would judges from Quebec worry about such a remote possibility?

I realize that this relates more to symbols than reality. But as you know, institutional respect for judges depends on symbols. When those symbols are undermined for a class of judges, respect may be harder to maintain.

Like many of you, I read and heard in the media how Federal Court judges are disconnected from the civil law because of the work that we do. These opinions are fed either by pure misinformation or by sheer ignorance. Let me spell out some facts.

Quebec's National Assembly recognizes in section 24 of the *Code of Civil Procedure* that the Federal Courts, as well as the Supreme Court, have jurisdiction in civil matters in Quebec, including not only traditional civil law but also modern civil law outside the boundaries of the Civil Code. Under their own enabling statute, the Federal Courts are civil law courts in Quebec in all areas where Parliament relies on the law of the provinces, whether explicitly or implicitly.

The recognition by the Quebec legislature of the civil law role of the Federal Courts in Quebec dates back over a century. It was first stated in section 40 of the *Code of Civil Procedure, 1897* (S.Q. 1897, c. 48), acknowledging the creation twenty years before of the Supreme Court and of the Exchequer Court (*An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, S.C. 1875 c. 11) This recognition is maintained in the 1965 *Code of Civil Procedure* (S.Q. c. 80, s. 24), amended later to take into account the creation of the Federal Court of Canada. In February 2014, section 8 of the new *Code of Civil Procedure* was adopted. It will come into force in the fall of 2015. This provision acknowledges the separation of the Federal Court of Canada into two distinct courts, and confirms for each its jurisdiction over civil matters in Quebec.

This historic recognition of the jurisdiction of the Federal Courts in civil matters is not merely words. It is real. Since my appointment in 1992, I have witnessed the Federal Courts applying

civil law in civil liability, tort liability, construction of contracts, limitation, easements, sales, property rights, employment and service contracts, unjust enrichment, estates, trusts, property law, rental, overpayment, immunity from seizure, agency, adoption, custody rights, consent, family law, set-off, secret contracts, simulation. I apologize for going on so long, but there's nothing like a reality check.

I am grateful to my friend and former colleague Robert Décary for producing a non-exhaustive list of decisions showing the exercise of our jurisdiction in civil law in these various matters in the last twenty years.

Among these decisions I would like to point out as an example a decision that I signed with my colleagues Justices Gauthier and Mainville, long before the Nadon reference, *Her Majesty the Queen v. 9101-2310 Québec Inc.*, 2013 FCA 241 (available on the Federal Court of Appeal's website). I would invite you to read paragraphs 42 to 61 of the decision and ask yourself whether the judges who signed it are disconnected from civil law. You will realize that not only do we deal with civil law, but we see our role as its champions when applying federal legislation in Quebec.

The Federal Courts are present in Quebec not only through our decisions but by our physical presence, the offices that we maintain

and the sittings that we hold. Motions have been heard in Montreal every single Monday, save holidays, since the inception of the Federal Court in 1971. Our Court sits in Montreal and Quebec City, and the Federal Court recently sat in Alma, Drummondville, Gaspé, Victoriaville, to name but a few.

It is true that judges of the Federal Courts, when sitting in Quebec, do not only apply the Civil Code. However, they do not lose their quality as persons versed in Quebec law by virtue of the fact that they apply federal law. We are no different in this respect from the judges of the Quebec Court of Appeal or the Quebec Superior Court who apply the *Criminal Code*, the *Bankruptcy and Insolvency Act* and the other various federal statutes that they are called upon to apply.

Claude Robinson , the now famous Quebec creator of comic characters, chose to pursue his copyright recourse against those who copied his works before the Quebec courts. He could just as well have proceeded before the Federal Courts. The Superior Court judge and the three Court of Appeal judges who heard these proceedings did not lose their civil law identity because they applied federal legislation, and neither do we.

The media in Quebec have heralded the outcome of the Nadon controversy as a great victory for Quebec. Nothing could be further

from the truth. Quebec cannot relish the thought that those who fill a place reserved for Quebec on the Federal Courts now have a diminished status when compared to that of the judges from the other provinces. Only those who wish to see Quebecers and Quebec disengage from, not to say leave, federal institutions, can rejoice at the demotion of the judges from Quebec.

I would remind you that we are Quebec judges appointed as representatives of Quebec, in order for the Quebec perspective to be applied when federal legislation operates in Quebec. Let me remind you also that 98% of the decisions of the Federal Court of Appeal are final. As long as Quebec is part of the Canadian federation, it serves no one to diminish the meaning and the impact of the Quebec delegation within the Federal Courts.

To conclude, I am convinced that the Supreme Court did not mean to put into question the existing structure of the Federal Courts, but at the same time, I do not think that it foresaw the consequences of creating two classes of judges within the same court.

If the Federal Courts are to continue in their present form, this differential treatment based on the legal training and the origin of the judges will have to be eliminated. Easier said than done, of course, especially given the constitutional aspect. If, however, I have managed to make you aware of the importance of our role in Quebec

and of our present situation as Quebec judges within our courts, it may be the beginning of a solution.

Thank you.