**File No. 35586**

# SUPREME COURT OF CANADA

**IN THE MATTER OF Section 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26;**

**AND IN THE MATTER OF a Reference by the Governor in Council concerning sections 5 and 6 of the *Supreme Court Act,* R.S.C. 1985, c. S-26, as set out in Order in Council P.C. 2013-1105, dated October 22, 2013**

**Dossier n$^{o}$ 35586**

# COUR SUPRÊME DU CANADA

**DANS L'AFFAIRE DE l'article 53 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26**

**ET DANS L'AFFAIRE D'UN renvoi par le gouverneur en conseil concernant les articles 5 et 6 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26, institué aux termes du décret C.P. 2013-1105 daté du 22 octobre 2013**

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## FACTUM OF THE / MÉMOIRE DU ATTORNEY GENERAL OF CANADA / PROCUREUR GÉNÉRAL DU CANADA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada* / Règle 42 des *Règles de la Cour suprême du Canada)*

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# PART I – STATEMENT OF FACTS

## A. OVERVIEW

1. This reference asks for the Court's opinion as to the proper interpretation of the provisions of the *Supreme Court Act* that govern the appointment of judges. The reference also seeks an opinion on whether Parliament has the legislative authority pursuant to section 101 of the *Constitution Act, 1867* to prescribe, by ordinary statute, past or present membership at the bar of a province as a condition of appointment as a judge of the Court.

2. The Supreme Court of Canada is one of the few high courts in the world with broad appellate authority in a bijural and bilingual country. Its jurisdiction is undivided: it encompasses criminal, civil and constitutional matters. It hears appeals from the Federal Court of Appeal and each of the provincial appellate courts. Through its decisions, the Court has a significant impact on the daily lives of Canadians.

3. Since 1875, Parliament alone has exercised its plenary powers to provide for a general court of appeal for Canada. Section 101 of the *Constitution Act, 1867* grants Parliament exclusive authority to establish and provide for the constitution, maintenance and organization of a general court of appeal. It is under this authority that Parliament originally enacted the predecessor section to sections 5 and 6 of the *Supreme Court Act.* Section 5 of the present *Act* sets out the professional qualifications required for appointment, while section 6 ensures that of the nine judges appointed to the Court, three have been trained in civil law.

4. Properly construed, sections 5 and 6 provide that any person who is or was, at any time, an advocate of at least ten years standing at the Barreau du Québec, is eligible to be appointed as one of Quebec's three judges on the Court. This is the only plausible interpretation if the words of the provisions are read in their entire context, and in light of the purpose of the provisions and of the Act as a whole. The relevant context in this case includes an analysis of the historical evolution of the text of each provision, the legislator's intent as expressed in parliamentary debates, consideration of the scheme and object of the *Act* and reference to similar provisions in the *Federal Courts Act,* the *Judges Act* and various proposed constitutional accords.

5. Parliament's legislative authority to require either past or present membership at the bar of a province as a condition for appointment under section 101 of the *Constitution Act, 1867* has not been limited by judicial interpretation or by constitutional amendment. The extensive constitutional discussions and proposals relating to the possible entrenchment of matters relating to the Supreme Court confirm this conclusion. Accordingly, there is no constitutional impediment to Parliament's ability to legislate with respect to this condition in the *Supreme Court Act,* as the government currently proposes be done through Bill C-4*,* now before the House of Commons.

## B. BACKGROUND TO THE REFERENCE

6. On September 30, 2013, the Prime Minister announced the nomination of the Honourable Marc Nadon, to the Supreme Court of Canada[1], which was made effective by the

[1] Three news releases were issued on September 30, 2013: http://pm.gc.ca/eng/news/2013/09/30/pm-announces-nominee-supreme-court-canada ; http://pm.gc.ca/eng/news/2013/09/30/qualification-member-federal-court-10-years-experience-member-quebec-bar-be ; and http://pm.gc.ca/eng/news/2013/09/30/honourable-mr-justice-marc-nadon

Governor in Council on October 3, 2013.[2] Justice Nadon, who was a judge of the Federal Court of Appeal, then became a puisne judge of the Supreme Court of Canada and replaced the Honourable Justice Morris Fish, who had been one of the three judges appointed from Quebec pursuant to section 6 of the *Supreme Court Act* (the "*Act*"). [3]

7. Shortly thereafter, on October 7, 2013, the appointment was challenged by way of an application (now stayed) in the Federal Court of Canada.[4]

8. On October 22, 2013, the Governor in Council referred two questions to this Court for determination pursuant to section 53 of the *Act.*[5]

9. Also on that date, the government introduced a bill entitled Bill C-4, *Economic Action Plan 2013 Act, No. 2* in the House of Commons. Clauses 471 and 472 of the bill contain declaratory provisions which clarify the meaning of sections 5 and 6 of the *Act.*[6] Bill C-4 was read a second time on October 29, 2013 and the portions relating to the *Act* have been considered by the House of Commons Standing Committee on Justice and Human Rights.[7] They were also referred to the Standing Senate Committee on Legal and Constitutional Affairs for pre-study.[8]

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[2] P.C. 2013-1050, **Record of the Attorney General of Canada [AGC Record], vol. I, tab 3, p. 7.**
[3] *Supreme Court Act*, R.S.C. 1985, c. S-26, as am., s. 6 [*Supreme Court Act*], **Authorities of the Attorney General of Canada [Auth.], vol. I, tab 11**.
[4] Notice of Application, Federal Court File No. T-1657-13, October 7, 2013, **AGC Record, vol. I, tab 4, pp. 9-18**; Order of the Honourable Mr. Justice Zinn, November 12, 2013, **AGC Record, vol. I, tab 5, pp. 19-20**
[5] P.C. 2013-1105, **AGC Record, vol. I, tab 2, pp. 3-4**; *Supreme Court Act, supra*, s. 53, **Auth., vol. I, tab 11.**
[6] Bill C-4*, Economic Action Plan Act 2013, No. 2* [*Bill C-4*], **Auth., vol. I, tab 1.**
[7] See: http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6284720&Language=E&Mode=1&Parl=41&Ses=2#T1235
[8] See: http://www.parl.gc.ca/Content/Sen/Chamber/412/Debates/012db_2013-11-05-e.htm?Language=E

## C. LEGISLATIVE AND CONSTITUTIONAL PROVISIONS CONCERNING THE SUPREME COURT OF CANADA

### i. The *Constitution Act, 1867*

10. The judicature provisions of the *Constitution Act 1867*[9] (the "*1867 Act*") are set out in Part VII. Section 101 of the *1867 Act* grants Parliament exclusive authority to provide for a general court of appeal:

| General Court of Appeal, etc. | Cour générale d'appel, etc. |
|---|---|
| 101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time 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 of Canada. | 101. Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada. |

### ii. The *Constitution Act, 1982*

11. The *Constitution Act, 1982* (the *"1982 Act"*) contains no provisions prescribing the constitution, maintenance or organization of the Supreme Court of Canada. Nor is the *Supreme Court Act* one of the statutes listed as forming part of the written constitution.[10] However, the amending formulas set out in Part V of the *1982 Act* do refer to the Court. Amendments to the Constitution concerning the Court's composition must have the unanimous consent of the provinces,[11] while other amendments that concern the Court require the consent of at least seven provinces with 50 percent of the population.[12]

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[9] *Constitution Act, 1867*, 30 & 31 Vict., c.3; R.S.C. 1985 App. II, No. 5 [*Constitution Act, 1867* or *1867 Act*], **Auth., vol. I, tab 3.**
[10] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, ss. 52(2), schedule [*Constitution Act, 1982*], **Auth., vol. I, tab 4.**
[11] *Ibid.,* ss. 41(d), **Auth., vol. I, tab 4**.
[12] *Ibid.*, ss. 38, para. 42(1)(d), **Auth., vol. I, tab 4**.

### iii. The *Supreme Court Act*

12. Pursuant to section 101 of the *1867 Act,* Parliament established the Supreme Court of Canada by statute in 1875.[13] The *Act* provides that the judges of the Supreme Court are appointed by the Governor in Council by letters patent under the Great Seal.[14]

13. Section 5 of the *Supreme Court Act* prescribes the minimum professional qualifications for the appointment of a judge:

| Who may be appointed judges | Conditions de nomination |
|---|---|
| 5. Any person may be appointed a judge who is or has 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. | 5. Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province. |
| R.S., c. S-19, s. 5. | S.R., ch. S-19, art. 5. |

14. Section 6 of the *Act* requires that, of the nine judges appointed to the Court, no less than three must be from among the bench or bar of Quebec:

| Three judges from Quebec | Représentation du Québec |
|---|---|
| 6. At least three of the judges shall be appointed 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. | 6. Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci. |
| R.S., c. S-19, s. 6; 1974-75-76, c. 19, s. 2. | S.R., ch. S-19, art. 6; 1974-75-76, ch. 19, art. 2. |

### iv. *Bill C-4 – Economic Action Plan 2013 Act, No. 2*

15. The government has proposed clauses 471 and 472 of *Bill C-4 – Economic Action Plan Act 2013, No. 2*[15] be added to the *Supreme Court Act:*

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[13] *An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, SC 1875, c. 11 [*Supreme Court Act, 1875*], **Auth., vol. I, tab 12.**
[14] *Supreme Court Act, supra,* s. 4, **Auth., vol. I, tab 11.**

**471. The *Supreme Court Act* is amended by adding the following after section 5:**

5.1 For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province.

**471. La *Loi sur la Cour suprême* est modifiée par adjonction, après l'article 5, de ce qui suit :**

5.1 Pour l'application de l'article 5, il demeure entendu que les juges peuvent être choisis parmi les personnes qui ont autrefois été inscrites comme avocat pendant au moins dix ans au barreau d'une province.

**472. The Act is amended by adding the following after section 6:**

6.1 For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province.

**472. La même loi est modifiée par adjonction, après l'article 6, de ce qui suit** :

6.1 Pour l'application de l'article 6, il demeure entendu que les juges peuvent être choisis parmi les personnes qui ont autrefois été inscrites comme avocat pendant au moins dix ans au barreau de la province de Québec.

[15] *Bill C-4, supra,* First Reading, October 22, 2013, **Auth., vol. I, tab 1**.

## PART II – POINTS IN ISSUE

16. The Attorney General's answers to the questions set out in the Order in Council dated October 22, 2013 are as follows:

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*?

   **Answer:** Yes, when read in context, and in light of the purpose of the provisions and of the Act as a whole, sections 5 and 6 provide that a person who is or has been, at any time, an advocate of the Barreau du Québec of at least 10 years standing is eligible to be appointed as one of the three members of the Court from Quebec.

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*?

   **Answer:** Yes, pursuant to section 101 of the *Constitution Act, 1867,* Parliament can enact legislation that requires past or present membership at the bar of a province as a condition of appointment as a judge of the Court, as set out in clauses 471 and 472 of Bill C-4.

# PART III – ARGUMENT

## QUESTION 1

### A. SECTION 6 OF THE *SUPREME COURT ACT* DOES NOT REQUIRE CURRENT MEMBERSHIP AT THE BAR OF QUEBEC

#### i. When read together, sections 5 and 6 do not require current membership

#### (a) Section 6 cannot be read in isolation

17. A court charged with interpreting a statutory provision is required to undertake a contextual and purposive analysis. The modern approach to statutory interpretation requires that the words of a statutory provision be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament."[16] The "relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole."[17]

18. The cardinal rule is that a statutory provision should never be read in isolation.[18] When sections 5 and 6 are read together and in light of their context and purpose, they provide that a person with at least ten years standing at the Barreau du Québec may be appointed a judge of the Court, regardless of whether he or she is a current member of the bar of that province.

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[16] *Bell ExpressVu Limited Partnership* v. *Rex,* 2002 SCC 42, [2002] S.C.R. 559, at para. 26 [*Bell ExpressVu*], **Auth., vol. II, tab 36.** See also: *Interpretation Act*, R.S.C. 1985, c. I-21, as am., s. 12, **Auth., vol. I, tab 7.**
[17] *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10, **Auth., vol. II, tab 40.**
[18] *A.G.* v. *Prince Ernest Augustus of Hanover,* [1957] A.C. 436 (H.L.) at 461, **Auth., vol. II, tab 34.**

19. Sections 5 and 6 of the *Act* were originally enacted as a single provision.[19] Their component parts were then separated into subsections in 1886.[20] The continuing relationship between the two provisions is apparent when one examines the text in the current statute. The more general language contained in section 5 ("*[a]ny person may be appointed a judge*", or « *[l]es juges sont choisis parmi* ») can be contrasted with the use of the definite articles in section 6 ("*three of the judges*" and « *trois des juges* »).

20. Although s. 6 is concerned with the number of nominees to be appointed from Quebec, the function of section 5 is to prescribe the professional qualifications that all nominees must have before they may be considered for appointment. This construction of the two provisions is supported by the text of section 6. Neither the phrase *"from among*" nor the word « *parmi* » convey any temporal meaning.

**(b) The text of section 5 does not require current membership in the bar**

21. The plain meaning of both the English and French versions of section 5 of the *Act* is that a person who is or has been a judge of a Superior Court, or who is or has been a member of a provincial bar of at least ten years standing, is eligible for appointment.

22. Given the grammatical structure of the English version, the phrase *"[a]ny person may be appointed a judge who is or has been*" applies to both categories of eligible candidates: "*a judge of the superior court of a province"* or *"a barrister or advocate of at least ten years standing*

[19] *Supreme Court Act, 1875*, *supra*, s. 4, **Auth., vol. I, tab 12**.
[20] *An Act respecting the Supreme and Exchequer Courts*, R.S.C. 1886, c.135, ss. 4(2), 4(3) [*Supreme Court Act, 1886*], **Auth., vol. I, tab 13.**

*at the bar of a province*". The disjunctive "or" separating the two categories is not preceded by a change in verb tense, confirming that "is or has been" applies to both judges and lawyers.

23. In the French version, though the phrase « *actuels ou anciens* » is parenthetically used solely in relation to judges, the ordinary sense of the expression « *parmi les avocats inscrits pendant au moins dix ans au barreau d'une province* » can refer to both current and past members with at least ten years standing. The use of the present indicative verb tense in the phrase « *[l]es juges sont choisis* » creates imperative language and does not preclude this interpretation.[21]

24. Nor does use of the word « *parmi* » before « *les avocats* » necessarily imply any temporal tense, as evidenced by the use of « *parmi* » before « *les juges* », who may clearly be « *actuels ou anciens* ». A plain reading of « *parmi les avocats inscrits pendant au moins dix ans au barreau d'une province* », allows for both past and current membership to meet the provision's requirements. Similarly, while the word « *inscrit* » can have a present and a past sense, the better view is that it simply refers to a person who has at one time been registered with or admitted to the Barreau du Québec.

25. Even if this Court were to conclude that there is ambiguity in the French version arising from the use of « *actuels ou anciens* » in relation to judges, or lack of temporal clarity in the phrase « *parmi les avocats inscrits pendant au moins dix ans au barreau d'une province* », the English version reflects the shared meaning.

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[21] *Interpretation Act, supra,* s. 11 (French), **Auth., vol. I, tab 7**; see also *Canada (Minister of Citizenship and Immigration) v. Khosa,* 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 38 [*Khosa*], **Auth., vol. II, tab 39.**

26. Because the English and French versions are equally authoritative,[22] a court's task is to find the meaning common to both that is consistent with legislative intent.[23] The search for shared meaning occurs within the larger framework of the modern rule.[24] In *R v. Daoust*, this Court set out a two-step approach to determine the shared meaning of English and French legislative provisions. The first step is to determine whether they have a shared meaning.[25] The second step is to determine whether the shared meaning is consistent with Parliament's intent, and ordinary rules of statutory interpretation apply.[26]

27. An ambiguity exists where one or both versions of a statute are "reasonably capable of more than one meaning."[27] While the English version is clear that the expression "is or has been" applies to both qualifying judges and advocates, it may be argued that the expression « *parmi les avocats inscrits pendant au moins dix ans au barreau d'une province* » is reasonably capable of meaning both advocates who are currently, or were at some point, members of the bar of a province for at least ten years.

28. Given that any possible ambiguity in section 5 arises only in the French version, the common meaning is the version that is plain and unambiguous, which is the English.[28] To

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[22] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, s. 18(1), **Auth., vol. I, tab 2**; *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.), ss. 6, 7, 13, **Auth., vol. I, tab 9.**; *R. v. Daoust,* 2004 SCC 6, [2004] 1 S.C.R. 217 at para. 26 [*Daoust*], **Auth., vol. II, tab 50.**

[23] *Daoust*, *supra* at paras. 24-30, **Auth., vol. II, tab 50**; *R. v. Mac,* 2002 SCC 24, [2002] 1 S.C.R. 856 at para. 5 [*Mac*], **Auth., vol. II, tab 52**; *R v. S.A.C.*, 2008 SCC 47, [2008] 2 S.C.R. 675 at paras. 14-33, **Auth., vol. II, tab 54**; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R 269 at paras. 54-80, **Auth., vol. III, tab 63**. See also: Hon. Michel Bastarache et al., *The Law of Bilingual Interpretation* (Markham: LexisNexis Canada, 2008) at 32-94 [*The Law of Bilingual Interpretation*], **Auth., vol. III, tab 66.**

[24] *Khosa*, *supra* at paras. 38-39, **Auth., vol. II, tab 39**; *Schreiber*, *supra* at para. 54, **Auth., vol. III, tab 63**.

[25] *Daoust*, *supra* at paras. 27-29, **Auth., vol. II, tab 50**.

[26] *Ibid.* at para. 30.

[27] *Ibid.* at para. 28, quoting *Bell ExpressVu, supra* at para. 29, **Auth., vol. II, tab 36**.

[28] *Ibid.* at para. 28.

interpret section 5 to exclude persons who had in the past been members of a provincial bar for at least ten years would ignore the plain words of the English version.[29]

29. The shared meaning found in the English version also comports with Parliament's intent as evidenced by the legislative evolution of the provisions and the parliamentary debates.

**ii. The legislative evolution and history of the provisions indicate that current membership in the Barreau du Québec is not required**

**(a) Evolution of the texts of sections 5 and 6**

30. The evolution of legislation is a part of Driedger's "entire context" and can assist the interpretive exercise by shedding light on the intention of Parliament in amending a statute.[30] Here, the evolution of section 4, later sections 5 and 6, demonstrates that the present provisions should not be interpreted to require current membership at the bar of a province. Comparison of the English and French versions over time shows that while the English version of section 5 has remained almost identical and unambiguous since 1886, a series of statute revision exercises have introduced anomalies into the French text.

31. As compared to later versions, the original text of the English version of section 4 as enacted in 1875, *could* be read to require current membership at the bar of a province. The section provided for appointments of persons "who are, or have been, respectively, Judges of one

[29] As Bastarache et al. underlines, it is the plain meaning of each version that must be compared to the other: *supra The Law of Bilingual Interpretation*, *supra* at 51, **Auth., vol. III, tab 66**. See also: *Mac, supra,* paras. 5-6, **Auth., vol. II, tab 52**.

[30] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53, [2011] 3 S.C.R. 471 [*Mowat*] at paras. 43-44, **Auth., vol. II, tab 38**; *R. v. Ulybel,* 2001 SCC 56, [2001] 2 S.C.R. 867 at para. 33 [*Ulybel*], **Auth., vol. II, tab 55.**; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers*, *Local 771,* 2005 SCC 70, [2005] 3 S.C.R. 425 at para. 28, **Auth., vol. II, tab 45**; Ruth Sullivan, *Sullivan on the Construction of Statutes*, Fifth Edition, (Toronto: LexisNexis, 2008) at 577-578 [*Sullivan on the Construction of Statutes*], **Auth., vol. III, tab 76.**

of the said Superior Courts … or who are Barristers or Advocates of at least ten years' standing at the Bar of one of the said Provinces."[31]

| | |
|---|---|
| 4. Her Majesty may appoint, by letters patent, under the Great Seal of Canada, one person, who is, or has been, a Judge of one of the Superior Courts in any of the Provinces forming part of the Dominion of Canada, or who is a Barrister or Advocate of at least ten years' standing at the Bar of any one of the said Provinces, to be Chief Justice of the said Court, and five persons who are, or have been, respectively, Judges of one of the said Superior Courts, or who are Barristers or Advocates of at least ten years' standing at the Bar of one of the said Provinces, to be Puisne Judges of the said Court, two of whom at least shall be taken from among the Judges of the Superior Court or Court of Queen's Bench, or the Barristers or Advocates of the Province of Quebec; and vacancies in any of the said offices shall, from time to time, be filled in like manner. The Chief Justice and Judges of the Supreme Court shall be respectively the Chief Justice and Judges of the Exchequer Court: they shall reside at the City of Ottawa, or within five miles thereof. | 4. Sa Majesté pourra nommer, par lettres patentes sous le grand sceau du Canada, - comme juge en chef de cette cour, - une personne étant ou ayant été juge de l'une des cours supérieures dans quelqu'une des provinces formant la Puissance du Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelqu'une de ces provinces et, - comme juges puînés de cette cour , -cinq personnes étant ou ayant été respectivement juges de l'une de ces cours supérieures, ou étant avocats de pas moins de dix ans de pratique au barreau de quelqu'une de ces provinces, dont deux au moins seront pris parmi les juges de la Cour Supérieure ou de la Cour du Banc de la Reine, ou parmi les procureurs ou avocats de la province de Québec ; et les vacances survenant dans ces charges seront, au besoin, remplies de la même manière. Le juge en chef et les juges de la Cour Suprême seront respectivement le juge en chef et les juges de la Cour de l'Echiquier. Ils résideront en la cité d'Ottawa, ou dans un rayon de cinq milles de cette cité. |

32. However, the English text was revised in 1886 to remove that requirement. The new section 4(2) read: *"[a]ny person may be appointed a judge of the court who is or has been a judge of a superior court of any of the Provinces of Canada, or a barrister or advocate of at least ten years' standing ..."*[32] At this point, the meaning of the two versions was consistent:

| | |
|---|---|
| 4(2). Any person may be appointed a judge of the court who is or has been a judge of a superior court of any of the Provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said Provinces. | 4(2). Pourra être nommé juge de la cour quiconque sera ou aura été juge d'une cour supérieure dans quelqu'une des provinces du Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelqu'une de ces provinces. |

[31] *Supreme Court Act, 1875, supra*, s. 4, **Auth., vol. I, tab 12, p. 138-139, 156-157.**
[32] *Supreme Court Act, 1886*, *supra,* ss. 4(2), **Auth., vol. I, tab 13.**

33. Unlike subsequent statute revisions, the 1886 statute specified that the revised provisions would prevail where they differed from the original.[33]

34. During the period from 1886 to 1985 the English and French versions shared a similar structure. In each of these enactments, the English version has contained the words "*is or has been*" in relation to both judges and lawyers, with corresponding language used in the French version.[34] For example, in 1906 the provision read as follows:[35]

| | |
|---|---|
| 5. Any person may be appointed a judge who is or has been a judge of a superior court of any of the provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces. | 5. Peut être nommé juge quiconque est ou a été juge d'une cour supérieure, dans l'une des provinces du Canada, ou un avocat qui a pratiqué pendant au moins dix ans au barreau de l'une de ces provinces. |

35. The phrase « *est ou a été* » in the French version plainly applied to both judges and advocates, as the disjunctive « *ou* » was not preceded by a different verb tense, while « *qui a pratiqué* » in the past tense indicated a minimum practice requirement before appointment.

36. In 1927, the term « *qui a pratiqué* » was replaced with « *qui a exercé* » and « *de ces provinces* » replaced with « *des provinces* ».[36] In 1952, the term « *inscrit* » was first introduced.[37] None of these changes altered the meaning of the French text, as the term « *est ou a été* » continued to apply to both judges and advocates.

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[33] *Revised Statutes of Canada Act, 1886*, R.S.C. 1886, c. 4, s. 8, **Auth., vol. I, tab 14.**
[34] *Supreme Court Act, 1886 supra,* **Auth., vol. I, tab 13;** *Supreme Court Act*, R.S.C. 1906, c.139 [*Supreme Court Act, 1906*], **Auth., vol. I, tab 16**; *Supreme Court Act,* R.S.C. 1927, c. 35 [*Supreme Court Act,* 1927], **Auth., vol. I, tab 20**; *Supreme Court Act,* R.S. 1952, c. 259 [*Supreme Court Act, 1952*], **Auth., vol. II, tab 22**; *Supreme Court Act,* R.S.C. 1970, c. S-19, s. 5, **Auth., vol. II, tab 23.**
[35] *Ibid., Supreme Court Act, 1906,* s. 5.
[36] *Ibid., Supreme Court Act, 1927,* s. 5.
[37] *Ibid., Supreme Court Act, 1952,* s. 5.

| | |
|---|---|
| 5. Any person may be appointed a judge who is or has been a judge of a superior court of any of the provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces. | 5. Peut être nommé juge quiconque est ou a été juge d'une cour supérieure, de l'une des provinces du Canada, ou un avocat inscrit pendant au moins dix ans au barreau de l'une desdites provinces. |

37. Further revisions were made to the French text as part of the 1985 statute consolidation exercise. The phrase « *est ou a été* » was removed and the words « *actuels ou anciens* » were inserted after « *les juges* ».[38] The 1985 revision read as follows:

| | |
|---|---|
| 5. Any person may be appointed a judge who is or has 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. | 5. Les juges sont choisis parmi les juges actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province. |

38. In interpreting changes introduced through a revision, absent a specific provision to the contrary, there is a presumption that the legislature did not intend to make any substantive change in the law.[39] This presumption was acknowledged in section 4 of the 1985 consolidation statute, which expressly provided that the revisions "shall not be held to operate as new law" and should be construed and have effect as a consolidation of the law.[40] This presumption operates with even greater force where, as here, only one linguistic version is subject to revision.[41]

39. As for section 6, the English and French versions have changed little since 1886. As noted above, it was in 1886 that the various components contained within section 4 of the

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[38] *An Act respecting the Supreme Court of Canada,* R.S.C. 1985 c. S-26, s. 5.
[39] *Sullivan on the Construction of Statutes, supra* at 653-659, **Auth., vol. III, tab 76.** See also: Pierre Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough: Thompson Canada Ltd., 2000), at 53-54 [*Interpretation of Legislation in Canada*], **Auth., vol. III, tab 68**; *Flota Cubana de Pesca (Cuban Fishing Fleet) v. Canada (Minister of Citizenship and Immigration)*, [1998] 2 F.C. 303 (C.A.) at paras. 34-42 [*Flota Cabana*], **Auth., vol. II, tab 43**; *Ford* v. *Quebec (Attorney General),* [1988] 2 S.C.R. 712 at 745-747, paras. 38-39, **Auth., vol. II, tab 44**.
[40] *Revised Statutes of Canada, 1985 Act*, R.S.C. 1985, c.40 (3rd Supp.), s. 4, **Auth., vol. I, tab 10.**
[41] See: *Interpretation of Legislation in Canada*, *supra* at 54, 51. See also: *R v. Popovic and Askov*, [1976] 2 S.C.R. 308, **Auth., vol. II, tab 53;** *Flota Cubana, supra,* **Auth., vol. II, tab 43**.

1875 enactment were separated. The portions relating to professional qualifications became subsection 4(2) whereas the portions relating to the number of Quebec judges on the Court became subsection 4(3).[42]

40. The history of the revisions demonstrates that the discrepancies between the two versions of section 5 were the result of ordinary revision exercises rather than a deliberate attempt to change the law. These discrepancies cannot be taken to have altered Parliament's intention in 1886 to make clear that current membership in the bar of a province was not required.

**(b) Record of Parliamentary debates**

41. *Hansard* is generally regarded as a reliable source of evidence of Parliament's intent. Parliamentary speeches are "helpful, particularly insofar as they corroborate and do not contradict the meaning and purpose to be derived upon a reading of the words of the provision in the context of the legislative scheme as a whole."[43]

42. A review of the legislative debates reveals that the purpose for the requirement that a person have at least ten years standing at the bar of a province is to ensure that all individuals appointed to the Court have the knowledge and practical experience necessary to discharge the functions of a judge. There is no indication in the legislative record that eligibility was contingent on present, as opposed to past, membership in a provincial bar.[44]

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[42] *Supreme Court Act, 1886*, *supra* ss. 4(3), **Auth., vol. I, tab 13**.
[43] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 45, **Auth., vol. II, tab 51**; *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para. 35 [*Rizzo & Rizzo Shoes Ltd. (Re)*], **Auth., vol. III, tab 62**; *Re Canada 3000 Inc.,* 2006 SCC 24, [2006] 1 S.C.R. 865 at para. 57 [*Canada 3000*], **Auth., vol. II, tab 56.**
[44] *House of Commons Debates*, 3rd Parl., 2nd Sess., No. I (23 February 1875), (First Reading), at 284-289, **AGC Record, vol. I, tab 6, pp. 22-27;** (16 March 1875), (Second Reading), at 737-756, **AGC Record, vol. I, tab 7, pp. 36-55**; (30 March 1875), (Third Reading and passage), at 985-987, **AGC Record, vol. I, tab 10, pp. 142-**

43. Rather, what little discussion there was in 1875 focused on the need for at least ten years experience and knowledge of civil or common law. For example, one parliamentarian noted that "[n]o one should be appointed a Judge of this Supreme Court excepting a lawyer of ten years practice, or a Judge of one of the Superior Court, thereby admitting the principle that a Judge should be familiar with the practice of the law which he [sic] is to administer."[45]

44. With respect to the Act's current requirement of at least three members from Quebec, the debates confirm that the purpose was to ensure that a proportion of the bench was trained in civil law. The requirement was added to the 1875 legislation on a motion by a Quebec member of Parliament, the Hon. Toussaint Laflamme, who proposed that at least two Supreme Court judges ought to have knowledge of "Quebec's special system of laws."[46]

45. Other members of Parliament agreed. The Hon. David Mills said that "it was only reasonable that [Quebec] should have security that a portion of the court would understand the system of law which it would be called upon to administer."[47] The Hon. Louis Masson objected to the creation of the Supreme Court but was willing to adopt the amendment "so that the court would at least have two Judges that knew something of the law of Lower Canada."[48]

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**144**. See also: *Debates of the Senate*, 3rd Parl., 2nd Sess. (April 5, 1875) at 705-718, **AGC Record, vol. I, tab 11, pp. 167-173;** and (April 6, 1875) at 723-737, **tab 12, pp. 175-182.**

[45] *Ibid.* at 970, **AGC Record, vol. I, tab 10, p. 127.**

[46] *Ibid.* at 970-971, **AGC Record, vol. I, tab 10, pp. 127-128**.

[47] *Ibid.* per D. Mills at 972, **AGC Record, vol. I, tab 10, p. 129**.

[48] *Ibid.* per L. Masson, at 972, **AGC Record, vol. I, tab 10, p. 129**. See also: *Debates of the Senate*, 3rd Parl., 2nd Sess. (5 April 1875) at 705-706 (L. Lettelier), **AGC Record, vol. I, tab 11, p. 167**; *House of Commons Debates,* 13th Parl., 1st Sess., (9 April 1918) at 533, **AGC Record, vol. II, tab 14, p. 21.**

46. In 1918, Sir Wilfrid Laurier stated that the amendment had been adopted because "it was thought fair that two judges of the court should at least be versed in the civil law and not in the common law only."[49]

47. In 1949, Parliament increased the number of judges on the Court to nine and the representation of Judges appointed from Quebec to three.[50] As put by the then Minister of Justice, Stuart Sinclair Garson, the requirement that three judges be drawn from Quebec was aimed at ensuring a minimum level of knowledge of Quebec's civil code. He explained that this was necessary because:

> ...in that province they have a system of civil law which is altogether different in character from the common law that we inherited from England, and which prevails in the other provinces. While the clause says that the third judge shall be appointed from Quebec, the real purpose is to get upon the supreme court, when it becomes the court of last resort for Canadian lawsuits, three lawyers trained in the civil code rather than in the common law. It is that consideration, more than any geographical consideration of appointing a judge to represent this province or that one, that weighed in our deciding upon that particular subsection.[51] [emphasis added]

### iii. The scheme and object of the *Act* support the proposed interpretation

48. The object of the *Act* is to establish the Court as the general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada.[52] The Court's jurisdiction includes appellate civil and criminal jurisdiction within and throughout Canada, advisory functions and the determination of inter-governmental disputes.[53]

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[49] *Ibid*. at 533, **AGC Record, vol. II, tab 14, p. 21.**
[50] *An Act to amend the Supreme Court Act*, 1949, 13 George VI, chap. 37, s. 1, **Auth., vol. I, tab 21**.
[51] *House of Commons Debates*, 21st Parl., 1st Sess., No.1 (11 October 1949) at 662, **AGC Record, vol. III, tab 22, p. 12.** See also: Frank Mackinnon, "The Establishment of the Supreme Court of Canada" in W.R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McLelland and Stewart, 1964) at 112, **Auth., vol. III, tab 71**; James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution,* (Osgoode Society, 1985) at 8, **Auth., vol. III, tab 74.**
[52] *Supreme Court Act*, *supra*, s. 3, **Auth., vol. I, tab 11**.
[53] *Ibid.*, ss. 35-41, 53, 54.

49. The object of the legislation is met by requiring ten years standing at the Barreau du Québec. As a court of law and equity charged with applying both common law and civil law, there is no question that individuals appointed to the Court must be exemplary candidates with appropriate training and practical experience. Historically, Supreme Court nominees have been the most eminent scholars, jurists and advocates in the country. While necessary that at least three judges have received their training in civil law, it is not, for instance, recent knowledge of the civil code that qualifies them to take on this role; it is their ability to apply the code that is essential. Current membership at the bar does not in any event guarantee familiarity or expertise in civil law. Criminal law practitioners in Quebec who could meet a requirement of current membership may have no recent knowledge of the civil law.

50. In the past, the Court has drawn candidates not only from the bench and the bar, but also from academia and international organizations. A narrow interpretation of sections 5 and 6 could preclude similar appointments and would unnecessarily limit the pool of highly qualified civil law practitioners who are neither current nor former members of provincial superior courts nor current members of the bar.

51. Such an interpretation would also have the effect of precluding the appointment of judges of the Federal Courts altogether. This result is entirely at odds with the scheme of the *Act*, given the Court's jurisdiction over appeals from the Federal Courts.[54] Such appeals constitute a considerable proportion of the Court's workload: in 2012, the Court heard 10 appeals from judgments of the Federal Court of Appeal as compared to 15 from the Quebec Court of Appeal.[55]

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[54] *Ibid.,* ss. 35, 35.1, 37.1, 38, 40, 41, **AGC Auth, vol. I, tab 11.**
[55] Supreme Court of Canada, "Category 3: Appeals Heard" (28 February 2013) available online: http://www.scc-csc.gc.ca/case-dossier/stat/cat3-eng.aspx

52. Before turning to related statutes, brief comment should also be made on section 30(2) of the *Act*. This provision prescribes the process for appointing *ad hoc* judges to the Court to hear appeals when quorum is lacking.[56]

53. When construing legislation, it is often helpful to identify the problem the amendment was designed to address.[57] Subsection 30(2) was first introduced in 1918 in response to a situation in which the Court was unable to sit with a full bench.[58] The debates demonstrate that Parliament considered an amendment that would have required that *ad hoc* judges be drawn from the Exchequer Court for all appeals, and only if they were not available, would the Chief Justice then turn to a judge of the provincial superior courts.

54. The reason the amendment was rejected was not because of the lack of civil law experience on the Exchequer Court.[59] Quite the opposite. The Minister was concerned that given the frequent absences of the Senior Judge of that Court from Ottawa (who was trained in the common law), the result of calling up the Assistant Judge (who was trained in the civil law) would be to have three civilists (on a panel of five) hearing common law appeals.[60] The Minister was also concerned with placing the Chief Justice in the position of having to exercise his discretion to pass over the Assistant Judge if it was thought preferable that he not sit.[61]

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[56] *Supreme Court Act, supra*, s. 30, **Auth., vol. I, tab 11**.
[57] *Re Canada 3000 Inc., supra* at para. 57, **Auth., vol. II, tab 56**.
[58] *An Act to amend the Supreme Court Act*, SC 1918, c.7, s.1, **Auth., vol. I, tab 18**; *House of Commons Debates*, 13th Parl., 1st Sess. (2 April 1918) at 240, **AGC Record, vol. II, tab 13, p. 2.**
[59] *Ibid.* at 240-241, **AGC Record, vol. II, tab 13, pp. 2-3**; *House of Commons Debates*, 13th Parl., 1st Sess. (9 April 1918) at 520-536, **AGC Record, vol. II, tab 14, pp. 8-24**. See also: Ian Bushnell, *The Federal Court of Canada: A History, 1875-1992* (Toronto: University of Toronto Press, 1997) at 95-96, **Auth., vol. III, tab 67.** See also: *An Act to Amend the Exchequer Court Act*, S.C. 1912, c. 21, s. 1, **Auth., vol. I, tab 17.**
[60] *House of Commons Debates*, 13th Parl., 1st Sess. (2 April 1918) at 241, **AGC Record, vol. II, tab 13, p. 3**, (9 April 1918) at 521, 530-532, **AGC Record, vol. II, tab 14, pp. 9, 19-20**.
[61] *Ibid.* at 534, **AGC Record, vol. II, tab 14, p. 22.**

55. While there have been minor amendments to the language of section 30 there is no evidence that legislators have considered the substance of the provision since 1918.[62]

### iv. Similar provisions in related statutes support the proposed interpretation

56. When interpreting legislation, consideration of related statutes which deal with the same subject matter is often helpful.[63] Parliament has enacted minimum professional qualifications for the appointment of Federal Court judges in sections 5.3 and 5.4 of the *Federal Courts Act,* and for Superior Court judges in section 3 of the *Judges Act*. The minimum professional qualifications for Supreme Court appointments have also been the subject of constitutional discussions for many decades.[64] In both statutes and in each of the constitutional proposals put forward, current membership at the bar has never been a requirement for appointment.[65]

#### (a) *Federal Courts Act*

57. The closest comparator to the *Supreme Court Act* is found in the *Federal Courts Act*. Like section 5 of the *Supreme Court Act,* section 5.3 prescribes professional qualifications required for all appointments. Similarly, section 5.4 of the *Federal Courts Act* mirrors section 6 of the *Supreme Court Act* and requires that a certain number of the judges on the Federal Court

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[62] *An Act respecting the Supreme Court of Canada*, R.S.C. 1927, c.35, s. 5, **Auth., vol. I, tab 20**; *An Act respecting the Supreme Court of Canada*, R.S.C. 1952, c.259, s.5, **Auth., vol. II, tab 22**; *An Act respecting the Supreme Court of Canada*, R.S.C. 1970, c. S-19, **Auth., vol. II, tab 23**; *An Act respecting the Federal Court of Canada,* S.C. 1970, c.1, **Auth., vol. II, tab 24**; *An Act to revise references to the Court of Queen's Bench of the Province of Quebec*, S.C. 1974, c.19, **Auth., vol. II, tab 25**; *An Act respecting the Supreme Court of Canada*, R.S.C. 1985, c. S-26, **Auth., vol. II, tab 26**; *Courts Administration Service Act,* S.C. 2002, c.8, s. 175, **Auth., vol. II, tab 32**. See also *Debates,* House of Commons, 21st Parl., 1st Sess., vol. 1, 1949 **AGC Record, vols. II & III, tabs 17-22**; *Debates,* Senate, 21st Parl., 1st Sess., 1949, **AGC Record, vol. III, tabs 23-30.**

[63] *Sullivan on the Construction of Statutes*, *supra* at 355, **Auth., vol. III, tab 76**; *Mowat, supra* at paras. 57-58, **Auth., vol. II, tab 38**.

[64] This history is summarized in paragraphs 90-98 below.

[65] *Federal Courts Act*, R.S.C. 1985, c.F-7, as am., ss. 5.3, 5.4 [*Federal Courts Act, 1985*], **Auth., vol. I, tab 5**; *Judges Act*, R.S.C. 1985, c.J-1, as am., s. 3 [*Judges Act*], **Auth., vol. I, tab 8.**

and Federal Court of Appeal must be from Quebec. One need only "have been" a member of the bar, in order to meet the requirements of each of those provisions.

58. The *Federal Courts Act* and its predecessors, like the *Supreme Court Act*, were enacted pursuant to section 101 of the *1867 Act.* The two statutes share a common statutory root, being the original 1875 Act which established the Supreme Court and the Exchequer Court.[66] Notwithstanding the slight differences in wording that now exist, such closely related provisions ought to be given a coherent and consistent interpretation to achieve Parliament's singular intent.

59. When the *Federal Court Act* was first introduced in 1971, subsection 5(4*)* required that at least four of the ten judges "shall be persons who have been judges of the Court of Queen's Bench or of the Superior Court of the Province of Quebec, or have been members of the bar of that Province."[67]

60. The intention behind this requirement was readily apparent. The Minister of Justice at the time explained that subsection 5(4) was "in line with the concept used in the Supreme Court and also in line with the proportion of judges having civil law experience as opposed to common law experience on federal courts and federal tribunals."[68] Such a provision was necessary given that the Federal Court, like the Supreme Court, applies both the common law and civil law.[69]

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[66] *Supreme Court Act, 1875 supra,* **Auth., vol. I, tab 12**.
[67] *Federal Court Act*, S.C. 1970-71-72, c. 1, ss. 5(4), **Auth., vol. II, tab 24.**
[68] *Minutes and Proceedings of Evidence of the House of Commons Standing Committee on Justice and Legal Affairs,* 28th Parl., 2nd Sess., No. 31 (26 May 1970) at 31:59-31:60, **AGC Record, vol. III, tab 31, pp. 182-183.**
[69] *Interpretation Act, supra* at ss. 8.1 and 8.2, **Auth., vol. I, tab 7**; *Federal Law-Civil Law Harmonization Act, No.1*, S.C. 2001, c. 4 at Preamble, **Auth., vol. I, tab 6.**

61. In addition, a review of the French version of section 5.3 of the *Federal Courts Act* lends support to the proposition that any apparent ambiguity in the French version of section 5 of the *Supreme Court Act* introduced in 1985 was unintentional. It would appear from the construction of section 5.3 that if Parliament had truly intended to limit eligibility to judges or *current* members of the bar, it would have used the term « *depuis* » instead of « *pendant* ».

62. The English version of paragraph 5.3(b) of the *Federal Courts Act* states unambiguously that a person who "is or has been a barrister or advocate of at least ten years standing at the bar of any province" may be appointed to the Federal Courts. The corresponding phrase in the French version is « *pendant ou depuis au moins dix ans au barreau d'une province* ». In this context, the term « *depuis* » describes an action that started in the past and continues in the present, while « *pendant* » is used for past membership. [70]

63. The history of the legislation also helps to explain why there is no reference in sections 5 or 6 of the *Supreme Court Act* to the Federal Courts. In the original 1875 statute, the judges appointed to the Supreme Court were, at the same time, appointed as judges of the Exchequer Court.[71] By definition, an Exchequer Court judge could not be elevated to the Supreme Court. Although that changed soon after, the fact that section 5 did not specifically refer to the Exchequer Court likely reflected the fact that it had so few judges.[72]

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[70] *Federal Courts Act, 1985 supra,* ss. 5.3(b), **Auth., vol. I, tab 5**.
[71] *Supreme Court Act, 1875 supra,* s. 4, **Auth., vol. I, tab 12**.
[72] *Ibid.,* ss. 58-59, **Auth., vol. I, tab 12**.

**(b) *Judges Act* and other legal texts**

64. A review of the *Judges Act* may also assist. Section 3 sets out the eligibility criteria for the appointment of persons as judges of the superior courts of the provinces. Paragraph 3(a) states that a person is eligible for appointment who "is a barrister or advocate of at least ten years standing at the bar of a province", while paragraph 3(b) expressly allows for the appointment of a person who has been a barrister in the past and has also exercised duties and functions of a judicial nature on a court or tribunal, provided his or her combined experience as a lawyer and judicial officer is at least ten years.[73]

65. The English version of paragraph 3(a) is clear that current membership is required, particularly when contrasted with the language in paragraph 3(b). The corresponding language in the French version of paragraph 3(a) limits eligibility to « *les avocats inscrits au barreau d'une province depuis au moins dix ans.* »[74] Had Parliament intended to require current membership in section 5 of the *Supreme Court Act,* it would have used « *depuis* » rather than « *pendant* », as it did in 3(a) of the *Judges Act*.

66. Finally, reference may be made to the various proposals put forward by provincial and federal governments since 1971 to specifically entrench the conditions for appointment to the Supreme Court in the Constitution. These proposals expressly provided that a person who is or has been a judge on "any court established by the Parliament of Canada" is eligible for appointment. None of the proposals required current membership in the bar of any province.[75]

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[73] *Judges Act*, *supra,* s. 3, **Auth., vol. I, tab 8**.
[74] *Ibid.*, s. 3 [emphasis added].
[75] Constitutional Conference Proceedings, Appendix B: Canadian Constitutional Charter 1971, (Victoria: June 14, 1971) at arts. 21-42 [*Victoria Charter*], **AGC Record, vol. IV, tab 32, pp. 11-15;** *Bill C-60: The*

**v. Requiring current membership leads to absurd results**

67. As stated above, the purpose and text of sections 5 and 6 as well as the broader context for these provisions all lead to the conclusion that a person who is or has been an advocate of at least ten years standing at the Barreau du Québec may be appointed to the Court as a Quebec member.

68. A legislature does not intend to produce absurd consequences, namely, interpretations that are illogical, incoherent or incompatible with other provisions. Rather, legislative schemes are presumed to be coherent and effective, and provisions are presumed to be straightforward, exact, grammatically correct, concise and consistent.[76]

69. If section 6 were interpreted in isolation to require that only current members of the Barreau du Québec are eligible for appointment, this could lead to implausible and disparate results. For example, it could result in newly called advocates of Quebec with no legal experience being eligible for appointment, while judges of the Federal Courts with ten years at the Quebec bar prior to their appointment would be disqualified merely by virtue of their having accepted appointment to the Federal Court. Alternatively, it could result in advocates from Quebec with past but not present membership at the bar being ineligible while barristers of other provinces in a similar situation are eligible.

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*Constitutional Amendment Bill,* Text and Explanatory notes, 3rd Sess., 30th Parl., 1978, ss. 101-116 (Tabled: June 20, 1978) [*Bill C-60*], **AGC Record, vol. VI, tab 41, pp. 50-56**; First Ministers' Meeting on the Constitution, *A Guide to the Meech Lake Constitutional Accord* (Ottawa: 2-3 June 1987) at schedule, ss. 101(B)(1) and 101(B)(2) [*Meech Lake Accord*], **AGC Record, vol. IV, tab 33, pp. 70-71;** First Ministers' Meeting on the Constitution, *Draft Legal Text* (Ottawa: 2 October 1992) at 101(B)(1) and 101(B)(2) [*Charlottetown Accord*], **AGC Record, vol. IV, tab 34, p. 150.**

[76] *Interpretation of Legislation in Canada, supra* at 456, **Auth., vol. III, tab 68**; *Rizzo & Rizzo Shoes Ltd. (Re), supra* at para. 27, **Auth., vol. III, tab 62**; *Ulybel, supra* at para. 30, **Auth., vol. II, tab 55**; *Re Canada 3000 Inc.*, *supra* at para. 37, **Auth., vol. II, tab 56**.

70. As noted above, requiring current membership at the bar would necessarily exclude the appointment of any judge of the Federal Courts. The Federal Courts' jurisdiction is broad.[77] Federal Court judges have specialized knowledge of, and expertise in federal law, but they are also required to apply the law in accordance with "the rules, principles and concepts in force in the province at the time the enactment is being applied."[78] For matters arising in Quebec, Federal Court judges must apply the Civil Code and Quebec legislation. This bijural approach to the interpretation of legislation necessarily means that, like the justices of the Supreme Court, Quebec members of the Federal Courts must be versed in both the civil law and the common law.[79] Parliament requires that approximately one third of the bench be civilists.[80]

71. Precluding the appointment of these eminent Quebec jurists would deprive the Court of this important and necessary expertise. Parliament could not have intended this result.

## B. THE GOVERNMENT PROPOSES TO CONFIRM THIS INTERPRETATION THROUGH DECLARATORY PROVISIONS

72. For greater certainty, the government has proposed the enactment of declaratory legislation in order to confirm the intent of sections 5 and 6 of the *Act.* Clauses 471 and 472 of the *Economic Action Plan 2013 Act, No. 2* would add sections 5.1 and 6.1 to the *Act.*[81]

73. The Court has recently reaffirmed that it is within the prerogative of the legislature to enter the domain of the courts and offer a binding interpretation of its own law by enacting

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[77] *Federal Courts Act, 1985 supra* at ss. 4, 17-28, **Auth., vol. I, tab 5**.
[78] *Interpretation Act, supra* at s. 8.1, **Auth., vol. I, tab 7**.
[79] *St-Hilaire v. Canada (Attorney General)*, 2001 FCA 63, para. 1, per Létourneau J.A, para. 1, per Desjardins J.A., paras. 35-51, Décary J.A., **Auth., vol. III, tab 64**; *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334, at paras. 5-6, **Auth., vol. II, tab 33.**
[80] *Federal Courts Act, 1985 supra,* ss. 5(1), 5.1(1), 5.4, **Auth., vol. I, tab 5**.
[81] *Bill C-4, supra,* **Auth., vol. I, tab 1**.

declaratory legislation.[82] An interpretation which the legislature adopts by enacting a declaratory provision is applicable to all future cases as well as to cases that are pending when the provision comes into force.[83]

74. If enacted, the effect of the declaratory provisions will be to deem the *Act* to have always provided that a person who was, at any time, an advocate of at least ten years standing at the Barreau du Québec may be appointed as a member of the Court from Quebec.

## QUESTION 2

### A. PARLIAMENT HAS LEGISLATIVE AUTHORITY TO PRESCRIBE PAST OR PRESENT MEMBERSHIP AT THE BAR AS A CONDITION OF APPOINTMENT TO THE SUPREME COURT

75. This reference is not about the constitutional status of the Court or its fundamental features, including the number of judges of the Court who, by tradition or statute must be drawn from Quebec. Acceptance of the propositions advanced here will not require the Court to address or provide its opinion on those broader questions.[84]

76. The constitutional issue in this reference is narrow and discrete. The Court is asked to give its opinion on whether Parliament can legislate in relation to the currency of

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[82] *Régie des rentes du Québec* v. *Canada Bread Company Ltd.,* 2013 SCC 46, [*Canada Bread Company Ltd.*] at para. 26, **Auth., vol. III, tab 61**; *Sullivan on the Construction of Statutes, supra* at 682-683, **Auth., vol. III, tab 76**. See also: *Western Minerals Ltd.* v. *Gaumont,* [1953] 1 S.C.R. 345 at 352-353, **Auth., vol. III, tab 65**; *Québec (Attorney General)* v. *Healy,* [1987] 1 S.C.R. 158 at 165, **Auth., vol. II, tab 49**.

[83] *Canada Bread Company Ltd., supra* at para. 29, **Auth., vol. III, tab 61**.

[84] Warren J. Newman, "Constitutional Status of the Supreme Court of Canada" (2009), 74 S.C.L.R. (2d) 429 [*Constitutional Status of the Supreme Court of Canada*], **Auth., vol. III, tab 73**; P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., (Scarborough: Thomson Carswell, looseleaf, 2007+), at ch. 8.1, 4.2(c), 4.3(g) and 4.4, **Auth., vol. III, tab 70**; P.J. Monahan, *Constitutional Law*, 3d ed. (Toronto: Irwin Law, 2006), at 181, 193-194, **Auth., vol. III, tab 72**; Stephen A. Scott, "The Supreme Court of Canada and the 1987 Constitutional Accord", (Montreal: Les Éditions Thémis, 1987), **Auth., vol. III, tab 77**; W.R. Lederman, "Constitutional Procedure for the Reform of the Supreme Court of Canada", Les Cahiers de droit, vol. 26, n° 1, 1985, p. 195-204, **Auth., vol. III, tab 78.**

membership at the bar of a province as a condition of appointment. Section 101 of the *1867 Act* offers a complete answer to that inquiry.

77. A review of the text of the *Constitution Acts* and of the history of governmental initiatives for constitutional change shows that a requirement of current membership has never been entrenched in the Constitution. As such, neither of the procedures for amending the Constitution prescribed by paragraphs 41(d) or 42(1)(d) of the *1982 Act* operate to restrict Parliament's plenary powers under section 101 to legislate in relation to past or present membership at the bar of a province as a condition of appointment to the Court.

**i. Section 101 of the *Constitution Act, 1867* is a plenary power which has never been modified**

78. The legislative authority conferred on Parliament by section 101 of the *1867 Act* has never been limited, either through judicial interpretation or by constitutional amendment. By that provision, Parliament is granted exclusive legislative authority to provide for the "Constitution, Maintenance and Organization of a General Court of Appeal". This power is granted "notwithstanding anything in this Act" and may be exercised from "Time to Time".

79. Parliament first exercised this power when it established the Supreme and the Exchequer Courts in 1875. In an early challenge, the Judicial Committee of the Privy Council found provincial legislation which sought to limit appeals to the Court to be *ultra vires*, noting that if the Court's jurisdiction could be circumscribed by provincial legislation, "the result would

be the virtual defeat of the main purposes of the Court of Appeal".[85] The Committee found that the federal power could not be overridden by a power conferred by section 92 on the Provinces.[86]

80. In 1947, the Judicial Committee dismissed an appeal brought by several provinces from a decision of the Supreme Court upholding the authority of Parliament to amend the *Supreme Court Act* to eliminate all appeals from Canadian courts to any authority in the United Kingdom. Lord Jowitt L.C. held that Parliament's plenary authority under section 101 is "unqualified and absolute" and includes all ancillary powers necessary to enable Parliament to attain its objects fully and completely.[87] Lord Jowitt further noted that it would be "alien to the spirit" of the *Statute of Westminster, 1931* "to concede anything less than the widest amplitude of power to the Dominion legislature under s. 101 of the Act."[88] This power was upheld in the 1998 *Quebec Secession Reference* when this Court confirmed Parliament's legislative authority under section 101 to grant the Court a special advisory jurisdiction.[89]

81. While the Court has read sections 96 to 100 of the *1867 Act* as supporting a broad principle that judges enjoy security of tenure, remuneration and independence,[90] sections 97 and 98 apply only to Superior Court judges. By including the words "notwithstanding anything in this

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[85] *Crown Grain Co. Ltd. v. Day*, [1908] A.C. 504 at 507 [*Crown Grain*], **Auth., vol. II, tab 41**. See also *Québec Secession Reference*, [1998] 2 S.C.R. 217 at para. 11, [*Quebec Secession Reference*], **Auth., vol. III, tab 60.**
[86] *Crown Grain, Ibid*., at 506-507.
[87] *Attorney General for Ontario v. Attorney General for Canada and others*, [1947] A.C. 127 at 153 [*Attorney General for Ontario*], **Auth., vol. II, tab 35.**
[88] *Ibid.* at 154.
[89] *Québec Secession Reference, supra* at para. 11, **Auth., vol. III, tab 60.**
[90] *Reference re Remuneration of Judges of the Prov. Court (P.E.I.),* [1997] 3 S.C.R. 3 at paras. 83, 105-106, 163 [*Provincial Judges Reference*], **Auth., vol. III, tab 59.**

Act" in section 101, the clear intention of the drafters was that Parliament would have exclusive authority to legislate these matters for section 101 judges.[91]

82. The scope of section 101 has also not been modified by formal constitutional means. The jurisprudence of this Court provides that only a formal amendment can alter the distribution of legislative powers under the Constitution. Neither Parliament nor the legislatures of the provinces can divest themselves of, or abandon, the legislative powers conferred by the Constitution.[92]

83. Prior to April 17, 1982, an amendment to section 101 of the *1867 Act* could only have been accomplished through an Act of the Parliament of the United Kingdom. No acts have ever been enacted by that Parliament which purport to limit the Dominion Parliament's exclusive authority over matters relating to the Supreme Court.

84. After April 17, 1982, any amendment to section 101 of the *1867 Act* must follow the procedures set out in sections 41 and 42 of the *1982 Act*.[93] Since 1982, there have been no amendments to the Constitution that purport to limit the authority of Parliament under section 101 to legislate in relation to the Court. Indeed, Parliament has continued to amend the *Supreme Court Act* as necessary since 1982.[94]

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[91] See *Felipa v. Canada (Citizenship and Immigration),* 2011 FCA 272, [2012] 1 F.C.R. 3 at paras. 142-164, per Stratas, J.A., dissenting, and see paras. 78-79, per Sharlow and Dawson, JJ.A., **Auth., vol. II, tab 42**; *Attorney General for Ontario, supra* at 153, **Auth., vol. II, tab 35.**

[92] *Nova Scotia (Attorney General) v. Canada (Attorney General)*, [1950] S.C.R. 31 at 36, 40-41, 44 **Auth., vol. II, tab 46**; *Re Gray* (1918), 57 S.C.R. 150 at 157, 170-171, 176, **Auth., vol. III, tab 57**.

[93] *Constitution Act, 1982, supra*, ss. 52(3), **Auth., vol. I, tab 4**.

[94] *An Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, S.C. 1990, c. 8, ss. 33-49, **Auth., vol. II, tab 28**; *Miscellaneous Statute Law Amendment Act, 1993*, S.C. 1993, c. 34, ss. 115-117, **Auth., vol. II, tab 29**; *Criminal Law Amendment Act, 1994*, S.C. 1994, c. 44, ss. 98-102, **Auth., vol. II, tab 30**; *Criminal Law Improvement Act, 1996*, S.C. 1997, c. 18, s. 98-102, **Auth., vol. II, tab 31**; *Courts Administration Service Act*, S.C. 2002, c. 8, s. 175, **Auth., vol. II, tab 32.** See also *Interpretation Act, supra,* s. 42, **Auth., vol. I, tab 7**.

**ii. Parliament's authority to prescribe conditions for appointment relating to past or present membership at the bar is not affected by sections 41 or 42 of the *Constitution Act, 1982***

**(a) The function of paragraphs 41(d) and 42(1)(d) of the *Constitution Act, 1982* is to prescribe rules for amendments to the Constitution**

85. The only mention of the Supreme Court in the *Constitution Act, 1982* is in the amending procedures set out in Part V. Paragraph 41(d) requires that an amendment to the Constitution in relation to the composition of the Court be effected only with the approval of the House of Commons and Senate and each of the ten provincial legislative assemblies. Paragraph 42(1)(d) provides that any other amendments to the Constitution in relation to the Supreme Court must follow the process set out in section 38[95].

86. The function of sections 41 and 42 of the *1982 Act* is limited to prescribing which amendment process is to apply if and when amendments to the Constitution concerning the Court are contemplated. The references to the Court in paragraphs 41(d) and 42(1)(d) do not have the effect of introducing the condition of appointment respecting past or present membership at the bar into the Constitution. Nor, as explained below, is such condition a part of the written or unwritten Constitution. Thus, until it is made a part of the Constitution, paragraphs 41(d) and 42(1)(d) do not operate to limit Parliament's ability to legislate pursuant to section 101 of the *1867 Act*, with respect to this condition as it has done since 1875.

[95] *Constitution Act, 1982, supra*, ss. 38, 41, 42, **Auth., vol. I, tab 4**.

**(b) Successive constitutional accords have failed to entrench the professional qualifications required for appointment in the Constitution**

87. A review of the constitutional discussions and proposed amendments to the Constitution concerning the Supreme Court confirms that the professional qualifications required for appointment have never been entrenched in our Constitution. This history provides unique insight into precisely *how* entrenchment would have been accomplished by successive governments had they succeeded.

88. There have been calls to entrench certain features of the Supreme Court in the written Constitution since at least the 1950s.[96] While many of these proposals included provisions with respect to the professional qualifications required for appointment, in each case, the proposals did not require current membership in the bar of a province, including Quebec.

89. Similarly, each of the proposals provided that a person could be appointed as one of the three members of the Court from Quebec if the person was or had been a judge of a court of Quebec or a judge of any court established by Parliament so long as the person had at least ten years standing at the bar of Quebec.

***(i) The Victoria Charter***

90. The first serious attempt at a comprehensive accord arose following a series of First Ministers' Constitutional Conferences held in 1969.[97] The product of the talks which concluded on June 14, 1971 in Victoria is referred to as the *Victoria Charter*. Part IV of the

[96] Proceedings of the Constitutional Conference of Federal and Provincial Governments (Ottawa: 10-12 January 1950), at 31, **AGC Record, vol. V, tab 35, p. 5.**
[97] Constitutional Conference Proceedings, Second Meeting (Ottawa: 10-12 February 1969) at 364-371, **AGC Record, vol. V, tab 36 pp. 16-23.**

*Victoria Charter* included 21 provisions which would have established the Court and its composition, prescribed the professional qualifications required for appointment, and provided for a nomination and selection process that included a consultative role for provinces.[98] The *Victoria Charter* was never adopted because Saskatchewan and Quebec did not sign the political agreement prior to the deadline.[99]

91. The professional qualifications proposed by the *Victoria Charter* were consistent with the Attorney General's interpretation of sections 5 and 6 of the *Supreme Court Act.* Article 24 of the *Victoria Charter* provided that a person may be appointed who "has, for a total period of at least ten years, been a judge of any court in Canada or a barrister or advocate at the Bar of any Province." Article 25, which required at least three judges be appointed from Quebec, authorized the appointment of persons who "after having been admitted to the Bar of the Province of Quebec, have, for a total period of at least ten years, been judges of any Court of that Province, or of a court established by the Parliament of Canada or barristers or advocates at that Bar".[100]

***(ii) Bill C-60, 1978***

92. In the government's 1978 white paper entitled "A Time for Action", Prime Minister Trudeau lamented the absence of the Supreme Court in the Constitution, adding that its purely legislative status and the appointment procedure were called into question from time to time, "thereby detracting from the court's standing..."[101] Later that year, the government tabled Bill C-60, "*The Constitutional Amendment Bill*", which included numerous provisions relating to

[98] *Victoria Charter, supra* at Part IV, arts. 21-42, **AGC Record, vol. IV, tab 32, pp. 11-15.**
[99] See also: Gérard V. La Forest et al, *Towards a New Canada: A Research Study Prepared for the Canadian Bar Foundation* (Canadian Bar Association, 1978) at 59-60, **AGC Record, vol. VII, tab 57, pp. 112-113.**
[100] *Victoria Charter,* at arts. 24-25, **AGC Record, vol. IV, tab 32, p. 12.**
[101] Canada, *A Time for Action*, 3rd Sess., 30th Parl., 1978, at 20, **AGC Record, vol. V, tab 40, p. 117.**

the Supreme Court.[102] While not identical, the text of the proposed amendments concerning eligibility for appointment was consistent with that of the *Victoria Charter*.[103] Subject to the new provisions, Parliament's legislative authority to provide for matters relating to the Supreme Court, and to continue to provide for the constitution, maintenance and organization of courts for the better administration of the laws of Canada, was to be preserved.[104] The constitutional reform initiatives contained in Bill C-60 relating to the Senate were the subject of a reference to this Court.[105] Ultimately, Bill C-60 was not adopted.[106]

***(iii) The Constitution Act, 1982***

93. After another round of constitutional discussions in the summer of 1980, the government introduced a further resolution in the House of Commons.[107] The government's intention was to pursue the passage of a joint address to the U.K. Parliament to patriate the Constitution. All provinces except Ontario and New Brunswick opposed this action, leading to the *Patriation Reference*.[108]

94. The proposed resolution to amend the Constitution did not incorporate any provisions similar to those proposed in Bill C-60 concerning the Supreme Court.[109] Although the Joint Committee of the Senate and House of Commons on the Constitution of Canada which was

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[102] *Bill C-60 supra,* ss. 101-116, **AGC Record, vol. VI, tab 41, pp. 50-56**.
[103] *Ibid.*, s. 103, **AGC Record, vol. VI, tab 41, p. 50**.
[104] *Ibid.*, ss. 115-116, and see ss. 128(1), **AGC Record, vol. VI, tab 41, pp. 55-56, 59.**
[105] *Reference re Legislative Authority of the Parliament of Canada in Relation to the Upper House* (1979), [1980] 1 S.C.R. 54.
[106] See also: Barry L. Strayer, *Canada's Constitutional Revolution* (Edmonton: The University of Alberta Press, 2013) at 98-106 [*Canada's Constitutional Revolution*], **Auth., vol. III, tab 75**.
[107] Canada, *Proposed Resolution for a Joint Address to Her Majesty respecting the Constitution of Canada* (Ottawa: The Prime Minister, 1980) [*Proposal to Her Majesty*], **AGC Record, vol. VI, tab 42, pp. 79-103.** The provinces could not agree on any details concerning the structure and appointment procedure for the Supreme Court of Canada: Strayer, *Canada's Constitutional Revolution, supra* at 128, **Auth., vol. III, tab 75**.
[108] *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, **Auth., vol. III, tab 58.**
[109] *Proposal to Her Majesty, supra,* **AGC Record, vol. VI, tab 42**.

struck to examine the text of the proposed resolutions heard from Professor G. La Forest, as he then was, who gave evidence as to the need to entrench the Court,[110] no provisions of the kind contemplated in *Bill C-60* were discussed. The consolidated proposed amendments, published in February of 1981, contain no mention of the Court.[111]

95. The April Accord was negotiated and signed by all Premiers save for those from Ontario and New Brunswick during the First Ministers' Conference held in April 1981.[112] The only agreement that these eight provincial governments were able to reach in relation to the Supreme Court was to include reference to the Court and its composition in the proposed amending procedures.[113] These provisions were included without further changes in the final agreement negotiated at the First Ministers' Conference held in November 1981 and presented in the House of Commons on November 20, 1981.[114] They were then enacted by the U.K. Parliament in the *Canada Act 1982,* and form part of Part V of the *Constitution Act, 1982.*

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[110] *Debates of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada*, 32nd Parl., 1st Sess., No. 34 (8 January 1981) at 22 (Professor Gérard V. La Forest), **AGC Record, vol. VII, tab 72, p. 244.**

[111] Parliament, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, "Report to Parliament" in *Minutes of Proceedings and Evidence,* No. 57 (13 February 1981) [*Constitution Act, 1981*], **AGC Record, vol. VI, tab 43, pp. 104-141.**

[112] Premiers' Conference, *Constitutional Accord: Canadian Patriation Plan*, Doc 850-19/002 (Ottawa: 16 April 1981), **AGC Record, vol. VI, tab 43.2, pp. 157-160.**

[113] Premiers' Conference, Amending Formula for the Constitution of Canada: Text and Explanatory Notes, Doc 850-19/004 (Ottawa: 16 April 1981) Part A, s. 9(d) and 10(d), **AGC Record, vol. VI, tab 43.1, pp. 151-152**. The proposed formula reflected the desire to provide more than one method of amending the Constitution depending on the nature of the amendment. The agreement contemplated "an intensive three-year period of constitutional renewal based on the new formula." See also: Explanatory note, s. 10(d).

[114] *House of Commons Debates*, 32nd Parl., 1st Sess., No. XXI (20 November 1981) at 12983-13011, **AGC Record, vol. III, tab 31.1, pp. 184-213.** See also: Mary Dawson, "From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown" (2012), 57:4 McGill L.J. 955 at para. 38, **Auth., vol. III, tab 69.**

***(iv) The Meech Lake Accord and the Charlottetown Accord***

96. Neither of the two major constitutional accords negotiated since 1982 succeeded in entrenching matters relating to the Supreme Court in the Constitution.

97. The *Meech Lake Accord* was negotiated in 1987 but failed to be ratified as constitutional amendments when the necessary resolutions were not adopted by two provincial legislative assemblies. The Accord would have entrenched the qualifications for appointment to the Supreme Court in the Constitution. The specific proposals were similar to those in the *Victoria Charter*, and *Bill C-60*.[115] Notably, section 101E of the *Meech Lake Accord* would have reserved to Parliament the power to make laws under section 101 "except to the extent that such laws are inconsistent" with what was proposed to be entrenched.[116]

98. Another round of constitutional discussions began with the tabling of the Government of Canada's proposals for constitutional reform in 1991. These proposals were studied by the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada, which held hearings and released a report on February 28, 1992.[117] The proposals were then discussed by First Ministers, who reached agreement on the Charlottetown Accord on August 28, 1992.[118] This agreement was the subject of a national referendum on October 26,

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[115] *Meech Lake Accord, supra* at clause 6, ss. 101B(1) and (2), **AGC Record, vol. IV, tab 33, pp. 70-71**. At the First Ministers' Meeting at Meech Lake, April 30, 1987, ss. 41(d) and 42(1)(d) were understood to be anticipatory. Future changes to the Court or its composition would be subject to those procedures "[o]nce the Court has been entrenched." Background Information on Quebec's Conditions, Produced by the Prime Minister's Office, April 28, 1987, **AGC Record, vol. VI, tab 44.**

[116] *Ibid.* at clause 6, ss. 101E, **AGC Record, vol. IV, tab 33, p. 71.** See also: Parliament, Report of the Special Joint Committee of the Senate and the House of Commons, in *Minutes of Proceedings and Evidence*, No. 17 (9 September 1987) at 79-88 (Chairs: Hon. Arthur Tremblay, Sen. Chris Speyer, M.P.), **AGC Record, vol. VII, tab 46, pp. 22-30.**

[117] Parliament, "Report of the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada", in *Minutes of Proceedings and Evidence,* No. 66 (28 February 1992) (Chairs: Gérald Beaudoin, Dorothy Dobbie), **AGC Record, vol. VII, tab 54, pp. 84-92.**

[118] *Charlottetown Accord, supra*, **AGC Record, vol. IV, tab 34, p. 150.**

1992 and was rejected. The proposals relating to the professional qualifications required for appointment to the Supreme Court were identical to those proposed in the *Meech Lake Accord*.[119]

**(c) Conditions for appointment relating to past or present membership at the bar are not otherwise a part of the Constitution**

99. As noted above, there are no provisions in the text of the Constitution concerning past or present membership at the bar of a province for appointment to the Court. Subsection 52(2) of *1982 Act* lists the *1867 Act,* the *1982 Act* and other acts and instruments forming part of the Constitution. The *Supreme Court Act* is not one of the acts or instruments identified.[120]

100. Since this is the case, the Court must then consider whether this particular condition of appointment otherwise has some constitutional status, either as a constitutional convention, or through recognition as an unwritten principle of the Constitution.

101. This Court has recognized the distinction between legal and political constitutionalism, noting that statutory provisions which touch on or reflect fundamental constitutional principles do not gain the status of constitutional law.[121] Conventions are political rules of conduct that arise through the actions of political actors. In this case, the criteria are legal rules which Parliament has prescribed through legislation for over a hundred and thirty years.[122]

102. The only other means by which such conditions could gain constitutional status would be if they were somehow imported into the Constitution as an unwritten constitutional

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[119] *Ibid.* See also: Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services Canada, 1991), **AGC Record, vol. VII, tab 51, pp. 65-66, 73-74.**
[120] *Constitution Act, 1982, supra,* s. 52, Schedule, **Auth., vol. 1, tab 4.**
[121] *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at 87, **Auth., vol. II, tab 48**; *Re Resolution to Amend the Constitution*, *supra,* at 774-775, 783-784, 853-854, 880-881, **Auth., vol. III, tab 58**.
[122] *Ontario English Catholic Teachers Assn. v. Ontario (Attorney General),* 2001 SCC 15, [2001] 1 S.C.R. 470, paras. 63-66, **Auth., vol. II, tab 47.**

principle. To date, the unwritten constitutional principles which this Court has recognized are generally described as broad, structural and aspirational principles. These principles have not been used to import details that have not been previously articulated into the written text of the Constitution. Rather, they inform and infuse the written text with fundamental values.

103. This is demonstrated by a review of this Court's opinion in the *Provincial Judges' Reference*.[123] Writing for the majority, Chief Justice Lamer recognized that sections 96 to 100 did not extend to provincial courts.[124] Instead he traced the principle of judicial independence back to the *Act of Settlement, 1701* and found that the express provisions of the Constitution contained in sections 96 to 100 of the *1867 Act* and in paragraph 11(d) of the *1982 Act,* "should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*."[125]

104. In subsequent cases, the Court has been mindful that the *1982 Act* stresses the primacy of the text.[126] In the *Quebec Secession Reference,* the Court cautioned against liberal resort to unwritten constitutional principles, noting that they are not "an invitation to dispense with the written text".[127] More recently, in *Imperial Tobacco*, the Court repeated that unwritten principles are not "an invitation to trivialize or supplant the Constitution's written terms".[128]

105. In the *Provincial Judges Reference*, the Chief Justice noted that unwritten constitutional principles fill "gaps in the express terms of the constitutional text."[129] In the

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[123] *Provincial Judges Reference, supra* at paras. 95, 96, 97-104, 109, **Auth., vol. III, tab 59**.
[124] *Ibid.* at para. 85.
[125] *Ibid.* at para. 107, and paras. 83, 95, 106-107, 163. See also: para. 319, per LaForest J.
[126] *Constitution Act, 1982*, s. 52, **Auth., vol. I, tab 4**.
[127] *Québec Secession Reference, supra* at para. 53, **Auth., vol. III, tab 60**.
[128] *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 at paras. 66-67, **Auth., vol. II, tab 37.**
[129] *Provincial Judges Reference, supra* at para. 104, and para. 95, **Auth., vol. III, tab 59.**

present circumstances, there is no gap in the text. The particular requirement for appointment at issue has always been prescribed by legislation. This requirement does not reflect the broad, fundamental values that are typically the subject of unwritten principles.

106. The history of constitutional discussions reveals a deliberate choice not to include provisions relating to the professional qualifications for appointment to the Court in the Constitution of Canada. To conclude that the conditions of appointment relating to past or present membership at the bar of a province are an unwritten rule of the Constitution would be tantamount to amending the Constitution where the provincial, territorial and federal governments, despite several rounds of constitutional discussions, did not achieve this task.

107. There is no legal impediment to Parliament continuing to exercise its legislative authority under section 101 of the *1867 Act* to prescribe conditions of appointment concerning past or present membership at the bar of a province. The declaratory provisions set out in clauses 471 and 472 of Bill C-4 –*Economic Action Plan Act 2013, No. 2* are intended to clarify the conditions which have been applied since at least 1886. These provisions are consistent with those that apply in relation to the appointment of Superior Court and Federal Court judges. They are also consistent with the professional qualifications that the federal and provincial governments have contemplated entrenching in the Constitution since 1971.

## PART IV – COSTS

108. The Attorney General asks that there be no order as to costs.

## PART V – NATURE OF ORDER SOUGHT

109. The Attorney General of Canada submits that questions 1 and 2 should be answered in the affirmative.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at Toronto this 25th day of November, 2013.

René LeBlanc
Christine Mohr

Of Counsel for the Attorney General of Canada

# PART VI – TABLE OF AUTHORITIES

**A.**

**Secondary Sources**

# PART VII – APPENDIX "A" – STATUTES RELIED ON

***Supreme Court Act,* R.S.C., 1985, c. S-26**

Who may be appointed judges

**5.** Any person may be appointed a judge who is or has 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.

R.S., c. S-19, s. 5.

Three judges from Quebec

**6.** At least three of the judges shall be appointed 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.

R.S., c. S-19, s. 6; 1974-75-76, c. 19, s. 2.

***Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26**

Conditions de nomination

**5.** Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.

S.R., ch. S-19, art. 5.

Représentation du Québec

**6.** Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.

S.R., ch. S-19, art. 6; 1974-75-76, ch. 19, art. 2.

***Constitution Act, 1867,* 30 & 31 Victoria, c. 3 (U.K.)**

General Court of Appeal, etc.

**101.** The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time 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 of Canada.

***Loi constitutionnelle de 1867*, 30 & 31 Victoria, ch. 3 (R.U.)**

Cour générale d'appel, etc.

**101.** Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.

***Constitution Act, 1982***

Amendment by unanimous consent

**41.** An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

Amendment by general procedure

**42.** (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of

***Loi Constitutionnelle de 1982***

Consentement unanime

**41.** Toute modification de la Constitution du Canada portant sur les questions suivantes se fait par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province :

*a*) la charge de Reine, celle de gouverneur général et celle de lieutenant-gouverneur;

*b*) le droit d'une province d'avoir à la Chambre des communes un nombre de députés au moins égal à celui des sénateurs par lesquels elle est habilitée à être représentée lors de l'entrée en vigueur de la présente partie;

*c*) sous réserve de l'article 43, l'usage du français ou de l'anglais;

*d*) la composition de la Cour suprême du Canada;

*e*) la modification de la présente partie.

Procédure normale de modification

**42.** (1) Toute modification de la Constitution du Canada portant sur les questions suivantes se fait conformément au paragraphe 38(1) :

*a*) le principe de la représentation proportionnelle des provinces à la Chambre des communes prévu par la Constitution du Canada;

*b*) les pouvoirs du Sénat et le mode de sélection des sénateurs;

*c*) le nombre des sénateurs par lesquels une province est habilitée à être représentée et les conditions de résidence qu'ils doivent remplir;

Senators;

(*d*) subject to paragraph 41(*d*), the Supreme Court of Canada;

(*e*) the extension of existing provinces into the territories; and

(*f*) notwithstanding any other law or practice, the establishment of new provinces.

Exception

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

*d*) sous réserve de l'alinéa 41*d*), la Cour suprême du Canada;

*e*) le rattachement aux provinces existantes de tout ou partie des territoires;

*f*) par dérogation à toute autre loi ou usage, la création de provinces.

Exception

(2) Les paragraphes 38(2) à (4) ne s'appliquent pas aux questions mentionnées au paragraphe (1).