Court File No.: 35586

IN THE 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 the Order in Council, P.C. 2013-1105, dated October 22, 2013

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PART I- OVERVIEW OF POSITION (FACTS)

1. On October 4, 2013, it was announced that The Honourable Mr. Justice Nadon, a supernumerary judge of the Federal Court of Appeal, was to be appointed as a judge of the Supreme Court of Canada, to replace the Honurable Mr. Justice Fish, a Quebec judge appointed under s. 6 of the Supreme Court Act. A Toronto constitutional lawyer, Mr. Rocco Galati, immediately discussed the possibility of challenging this appointment with members of the Constitutional Rights Centre Inc. ("CRC"). It was decided that a challenge to the lawfulness under s. 6 of the *Supreme Court Act*[1] and constitutionality of this appointment would be brought in the Federal Court by Galati and the CRC. The Notice of Application was drafted and was being issued and served on October 7th, 2013, when, as it was later discovered, Justice Nadon was sworn in as a Justice of the Supreme Court of Canada.

2. Justice Nadon decided to not sit until and unless it was determined that he could lawfully do so.

3. The basis of the challenge is, *inter alia*, based on the following:

   (a) the appointment of judge of the Federal Court of Appeal as a Quebec judge of the Supreme Court of Canada ("Quebec judge"), in light of its wording, purpose and history, was not authorized by s. 6 of the *Supreme Court Act*;

   (b) Section 6 of the *Supreme Court Act* (together with section 5) were "constitutionalized" in 1982 by virtue of ss. 41(d) and 42(1)(d) of the *Constitution Act, 1982*;

   (c) The interpretation of s. 6 of the *Supreme Court Act,* precluding the appointment of a Federal Court of Appeal judge as a Quebec judge, is supported by the fact that it is a constitutional provision and by is supported by the unwritten constitutional principles of Federalism, Constitutionalism and the Rule of Law.

4. On October, 22nd, 2013, in response to the challenge, the following Declaratory provisions were passed by Parliament:

471. The *Supreme Court Act* is amended by adding the following after section 5:	**471. La *Loi sur la Cour suprême* est modifiée par adjonction, après l'article 5, de ce qui suit:**
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.	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:	**472. La même loi est modifiée par adjonction, après l'article 6, de ce qui suit** :
6.1 For greater certainty, for the purpose of section 6, a judge is	6.1 Pour l'application de l'article 6, il demeure entendu que les

[1] *Attorney General of Canada Record,* at pp. 9-18

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.

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.

5. Also, on October 22nd, 2013, pursuant to s. 53 of the *Supreme Court Act* the following questions were put before this Honourable Court:

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

Pending the Reference, the Federal Court application was stayed on consent. Galati and the CRC were granted intervener status, the right to each file a 20 page factum and each have 15 minutes oral argument.

6. The CRC respectfully submits that the questions do not focus on the key issues that arise in respect of the appointment of Justice Nadon, which is the factual sub-stratum of this Reference:

(a) the issue is **not** whether a **person** who was a member of the Barreau du Quebec can be appointed as a Quebec judge, but whether a **Federal Court of Appeal judge** who was a member of the Barreau du Quebece can be so appointed;

(b) this is so because the following key issues focus on the nature of the person as a judge and a judge of the Federal Court of Appeal or Federal Court of Canada ("Federal Court judge"):

(i) whether s. 6 of the *Supreme Court Act* must be read disjunctively with respect to judges and advocates;

(ii) whether the appointment of a Federal Court judge complies with Parliamentary intention and the constitutional purpose of sections 41(d) and/or 42(1)(d) of the Constitution Act,1982;

(iii) whether the appointment of a Federal Court judge complies with the unwritten constitutional principles of Federalism, Constitutionalism, the Rule of Law and the independence of the judiciary;

(c) Would a constitutional amendment pursuant to ss. 41(d) and/or 42(1)(d) of the *Constitution Act, 1982* be required to allow for an appointment of a Federal Court judge as a Quebec judge?

PART II- OVERVIEW OF POSITION (LAW)

7. The CRC respectfully submits, by way of overview, that:

A. **Sections 5 and 6 of the *Supreme Court Act* were constitutionlized** in 1982 by the Patriation of the Constitution and sections 41(d), or in the alternative, s. 42(1)(d) of the *Constitution Act, 1982*;

B. **Statutory and constitution interpretation principles** dictate that:

1. appointments made under s. 6 of the *Supreme Court Act* are ***either*** as a Judge or lawyer, disjunctively, and not a judge of a category not specified who was a lawyer in the past ;

2. If s. 5 does not allow for the appointment of Federal Court judges to the Supreme Court of Canada, then it necessarily follows that section 6 cannot allow the appointment of a Federal Court judge as a Quebec judge. However, if a Federal Court judge can be appointed under section 5, statutory and constitution interpretation principles dictate that section 6 must be interpreted to preclude the appointment of a Federal Court judge as a Quebec judge;

C. The unwritten constitutional principles of Federalism, Constitutionalism, the Rule of Law and the independence of the judiciary dictate the same result, without regard to ss. 41(d) and 42(1)(d), given the history, purpose, and composition of the Court.

PART III- THE ARGUMENT

A. CONSTITUTIONALIZATION OF THE SUPREME COURT OF CANADA BY THE *CONSTITUTION ACT, 1982*

8. It is respectfully submitted that the position of the Attorney General of Canada ("AG of Canada") , that the Supreme Court of Canada has not been constitutionalized is clearly wrong. The essence of the argument of the AG of Canada is:

(a) the *Supreme Court Act* has not been constitutionalized because it is not listed in the Schedule referred to in section 52(2) (b) of the *Constitution Act, 1982*;

(b) Unless the *Supreme Court Act* is expressly constitutionalized by listing , the amending formula has no effect on the constitutional nature of the Supreme Court of Canada;

(c) the only constitutional provision in respect of the Supreme Court of Canada is section 101 of the Constitution Act, 1867 which permits the creation, change or dissolution of the Supreme Court of Canada unilaterally by ordinary statute. [2]

9. The CRC challenges each of these propositions on the bases that:

(1) Non-Listing of the *Supreme Court Act*:

(a) The definition of the Constitution of Canada in section 52(2) of the *Constitution Act, 1982* is not an exhaustive list. It indicates that it "includes" the listed documents. This non-exhaustiveness, together with the preamble to the *Constitution Act, 1867*, is the constitutional mechanism which gives constitutional status and effect to unwritten constitutional principles as has been repeatedly been recognized by this Honourable Court;[3]

(b) The effective constitutionalization of legislation does not need to refer to that specific legislation to limit the authority of Parliament to amend or repeal such legislation. The constitutionlization of a principle may have the effect of constitutionalizing a statute or a portion of a statute.

(2) Effect of Amending formula:

(a) the Amending formula is a part of the *Constitution Act, 1982* and is therefore itself a part of the Constitution of Canada under section 52(2)(a) of the Constitution Act, 1982 (see also s.41(e) of the *Constitution Act, 1982*);

(b) The *Supreme Court Act* need not be constitutionalized, in whole or in part, to make the substance of its provisions constitutionally mandated. Parts of the *Supreme Court Act* or the substance of those provisions, as of 1982, have been constitutionalized;

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[2] Factum of the AG of Canada, paragraphs 11, 76-107

[3] *Provincial Judges Reference [1997] 3 S.C.R. 3,* AG of Canada's Book of Authorities, Tab 57, at pages 19-30, paragraphs 82-109; *Reference re Secession of Quebec, [1998] 2 S.C.R. 217,* Galati's Book of Authorities, Tab 18, paragraphs 53-55

(c) in light of the fact that no express provision of the Constitution of Canada mentions the Supreme Court of Canada, other than s. 41(d) and 42(1)(d) of the *Constitution Act,1982*, according to the AG of Canada, these provisions mean nothing.[4] This is absurd.

(d) the need for judicial interpretation as to meaning of the phrases: "the composition of" or "matters in relation to the Supreme Court" do not negate the constitutionalization of the Court;

(e) The fact that the Meech Lake Accord and the Charlottetown Accord were deemed to be necessary and the failure of those attempts at constitutional amendment make it clear that a constitutional amendment would be required to allow for the appointment of a Federal Court judge as a Quebec judge of this Court;

(f) The logic and consensus of most constitutional scholars support the proposition that the Amending formula of the *Constitution Act, 1982* had the effect of constitutionalizing aspects of the Supreme Court of Canada, at least including the requirements regarding the appointment of Quebec judges under s. 6 of the *Supreme Court Act,* as of 1982.

1. NON-LISTING OF THE *SUPREME COURT ACT*:

10. This Honourable Court has consistently held that the word "includes" in section 52(2) of the *Constitution Act,1982* mandates the definition of the Constitution of Canada as non-exhaustive.[5] Accordingly, the fact that the *Supreme Court Act* is not listed in the Schedule referred to in s. 52(2)(b) does not mean that portions of it are not, in fact or effectively, part of the Constitution of Canada. In fact, it would have been inappropriate to list the *Supreme Court Act*, since it was not the purpose of the *Constitution Act,1982* to constitutionalize every provision of that Act. Section 41(d) of the Constitution Act, 1982 only constitutionalized the "composition" of the Court. This includes, at least, sections 4-6, and possibly section 9 and/or 30.[6] Section 42(1)(d) only constitutionalized matters "in relation to... the Supreme Court of Canada", aside from the composition of the Court. This was not likely intended to constitutionlize every provision of the *Supreme Court Act*, but presumably only those provisions important, or perhaps essential, to

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[4] Cheffins, I. "The Constitution Act, 1982 and the Amending Formula: Political and Legal Implications" (1982) 4 Supreme Court Law Review 43, at pp. 53-54; Galati'sBook of Authorities, at Tab 5; Lederman, W.R., "Constitutional Procedure for the Reform of the Supreme Court of Canada", Les Cahiers de droit, 26, No. 1, 1985, pp 195-204, AG of Canada' Authorities, Tab 78, at p.54

[5] Footnote 2, *supra*

[6] Cheffins, I., *supra* at pp. 53-54; Galati's Book of Authorities, at Tab 5; Lederman, supra (AG of Canada' Authorities, Tab 78, at pp. 318--319)

the nature of the Court. This includes, at least, sections 3 and 54(1) of the Act, which define the nature of the Court as a general court of appeal under section 101 of the *Constitution Act, 1867* and section 35 of the Act, in respect of civil and criminal jurisdiction.[7]

11. The constitutionalizing of legislation through changes to the constitution, without constitutional mention of the statute, is a common phenomenon. It is the constitutional principle that has the effect of requiring the statutory provision to exist or continue. By way of Example, section 3 of the Charter constitutionalized aspects of the *Elections Act*, at the very least precluding Parliament and the Provincial Legislatures from eliminating or restricting the scope of the right to vote. Section 8 of the Charter constitutionalized provisions of the *Criminal Code* regarding the need for a search warrant, the test for its issuance and aspects of the procedure for the obtaining of a warrant under the *Criminal Code*. The failure to mention these statutes in section 52(2) did not undermine the constitutionalization of provisions of those pieces of legislation. In fact, since not every provision of the *Elections Act* or the *Criminal Code* has been constitutionalized, it would have been inappropriate to list the legislation as a part of the Constitution of Canada. The same applies to the *Supreme Court Act*.

2. EFFECT OF AMENDING FORMULA:

12. A negotiated agreement between most of the Provinces and the Federal Government was reached, that included an amending formula. It was this agreement that formed the basis of the *Constitution Act, 1982* which Patriated the Constitution of Canada though the *Canada Act* . The negotiated amending formula reflects a balancing of Provincial and Federal interests as a part of a Federal State reflecting the history of Canada and constitutional compromises in 1982.[8] The structure of the Federal State in 1867, and as amended by the U.K. Parliament between 1867 and 1982, was itself a result of history and constitutional compromise.[9] This historical context and the constitutional compromises also reflect the reality of Quebec's reluctance regarding or objections to the constitutional structure in 1867 and in 1982, even when Quebec did not agree.[10] It is in this context, that the inclusion of the Supreme Court of Canada in sections 41(d) and 42(1)(d) of the *Constitution Act, 1982* must be seen as an attempt to create a fair

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[7] Ibid.

[8] *Quebec Succession Reference, supra*, paragraphs 37-40, 42-43, 47, 59; *Reference re Projet de loi federal relatif au Senat,* [2013], Q.J. No. 7771 (C.A.), paragraphs 32, 34, 37, 39, 44

[9] Scott, *S.A., "The Canadian Constitutional Amendment Process" (1982) 45:4 Law and Contemporary Problems 249,* pp. 251-252; Hansard Debates re 1875 Supreme Court Act, AG of Canada, Record, Volume 1, Tab 7: Baby, p. 78; Ouimet, p. 104

amending formula with real constitutional impact that provided different levels or Provincial protection depending on the nature and extent of legitimate Provincial interests as a part of a federal state. This is consistent with the directives regarding other Federalism oriented institutions, such as the Senate, as reflected in the 1980 decision of this Court regarding amendment based on federalism interests of the Provinces.[11] The amending formula cannot reasonably be seen to be an abdication of legitimate Provincial interests in the make-up of the Supreme Court of Canada to the mercies of the Federal Government. The interests of Quebec in representation on the Court cannot be subject to eradication at the hands of Parliament. Such a position would be a betrayal of Quebec interests that would justify the succession of Quebec. The position of the AG of Quebec and Professor Hogg, that the provisions of s. 41(d) and 42(1)(d) have no effect and allow Parliament to change anything and everything in the *Supreme Court Act* is patently absurd.

13. The fact that the *Supreme Court Act* is not listed in the Schedule referred to in section 52(2)(b) of the *Constitution Act, 1982* is irrelevant to whether the "composition" of the Supreme Court of Canada and matters "in relation to" ... the Supreme Court of Canada that existed in 1982 can be changed without constitutional amendment. Sections 41(d) and 42(1)(d) are parts of the *Constitution Act, 1982* and therefore are a part of the Constitution of Canada pursuant to section 52(2)(a) of that Act, NOT the list under s. 52(2)(b). Section 52(2)(a) reads:

> (2) The Constitution of Canada includes
>
> (*a*) the *Canada Act 1982*, including this Act;

The terms of sections 41(d) and 42(1)(d), as a part of the constitutional amending formula, expressly preclude changes to the Constitution, which is defined by the terms of those provisions. Since the definition of the Constitution is not exhaustive and since the amending formula precludes amendment to aspects of the Supreme Court of Canada, those aspects are constitutionally protected, until and unless amended in accordance with the formula, regardless of whether the Supreme Court of Canada was constitutionally mandated before 1982. Since sections 41(d) and 42(1)(d) are part of the Constitution of Canada under s. 52(2)(a), any law that is inconsistent with the these aspects of the amending formula are of no force and effect under s. 52(1) of the *Constitution*

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[10] *Patriation Reference*, [1981] 1 S.C.R. 753, AG of Canada's Book of Authorities, Tab 58; *Quebec Succession Reference, supra*; Hansard debate re 1875 Supreme court Bill, AG of Canada's Record, Vol. 1, Tab 7, Taschereau, pp.37-39

[11] *Senate Reference*, [1980] 1 S.C.R. 54

Act, 1982. If the so-called declaratory provisions state the proper meaning of ss. 5 and 6 of the *Supreme Court Act,* they were unnecessary. If they dictate a different meaning than would otherwise flow from ss. 5 and 6, the declaratory provisions are unconstitutional and are of no force and effect, not because they contravene the *Supreme Court Act*, but because they contravene sections 41(d) or 42(1)(d) of the *Constitution Act, 1982*. Had Parliament tried this prior to 1982, subject to Federalism arguments, this would have been a lawful amendment to the Act.[12]

14. Whether ones calls this constitutional situation the constitutionalization of portions of the *Supreme Court Act*, the constitutionalization of the Supreme Court or the constitutionalization of the meaning or content of the effective state of the law with respect to the Supreme Court of Canada as of 1982, the effect is the same. The point is that the amending formula precludes any changes to the "composition" or matters "in relation to" the Supreme Court of Canada as of 1982. In most cases that means that provisions of the *Supreme Court Act* that deal with composition or other important aspects of the Court are fixed as of 1982. It is clear that ss. 5 and 6 of the *Act* fall within "composition". However, even if they did not, they are important provisions that would be covered by s. 42(1)(d).

15. In light of the fact that no express provision of the Constitution of Canada mentions the Supreme Court of Canada, other than s. 41(d) and 42(1)(d) of the *Constitution Act,1982*, according to the AG of Canada, these provisions mean nothing.[13] This is absurd. The Provinces and Federal Government would not have expended great time, effort and money negotiating an amending formula that had no effect. The Provinces certainly would not give up their Federalism interests so recently (at the time) affirmed in the context of Federal institutions in the 1980 *Senate Reference* to allow complete federal control of the Supreme Court of Canada. The interpretation by Professor Hogg and the AG of Canada that these provisions would apply to future amendments makes no sense either. Why would the Federal Government ever agree to create a constitutional amendment in relation to the Supreme Court now, when it supposedly has unfettered absolute authority? The Amending Provisions would only preclude the Provinces from amending the nature of the Court, since the Federal Government would have no reason to give up their unfettered power. This situation gives rise the following absurd, but possible, results:

- The amending Section 101 of the *Constitution Act, 1867* does not provide for the composition of the Court and therefore, according to the AG of Canada, the composition could be changed by a unilateral Act of Parliament. Parliament could

[12] *S.A. Scott, "The Canadian Constitutional Amendment Process" (1982) 45:4 Law and Contemporary Problems 249,* pp. 256-257

change the law to allow for non-lawyers to be appointed, only card-carrying Conservative Party members or only Federal Court judges. From the comments of the AG of Canada in Parliamentary Committee discussions regarding the so-called declaratory provisions, suggest that the last option is possible. [14] This is clearly contrary to the purpose of s. 41(d) of the *Constitution Act, 1982* , which had been agreed to by most Provinces and which requires unanimity to change the composition of the Court;

- According to the AG of Canada, the Supreme Court of Canada could be eliminated under Section 101 of the *Constitution Act, 1867*. [15] This is clearly contrary to the purpose of ss. 41(d) and 42(1)(d) of the *Constitution Act, 1982* which had been agreed to by most Provinces and which require constitutional amendment in relation to the Court (disbanding the Court constitutes a change to the composition of the Court from nine judges to zero);

16. The fact that it is difficult to know in the abstract what constitutes "matters in relation to ... the Supreme Court" under s. 42(1)(d) of the *Constitution Act, 1982* does not negate the constitutionalization of the Court. The Court will have to deal with the meaning of that phrase when the case demands it. However, that is the nature of the role of the Court to interpret constitutional provisions. The difficulty to know, in the abstract, what a phrase means, does not mean that the section is not constitutional or effective. In any case, it is clear that "composition" means the terms or conditions that determine who can be on a group,[16] court[17], panel of a court, [18] jury[19] or tribunal[20]. This necessarily includes ss. 5 and 6 of the *Supreme Court Act*. Accordingly, these provisions or their content are constitutionally entrenched.

17. The Meech Lake Accord reflects the fact that the Executives of every Province in Canada and nine of the eleven legislatures recognized that a Constitutional amendment was required to allow Federal Court judges to be appointed as Quebec judges of the

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[13] Cheffins, supra, at pp. 53-54; Galati's Book of Authorities, at Tab 5; Lederman, *supra*, AG of Canada' Authorities, Tab 78, at p.54

[14] See Galati Factum, paragraph 59

[15] S. Shetreet and J. Deschênes, Judicial Independence: The Contemporary Debate, (Dordrecht: Martinus Nijhoff Publishers, 1985), p. 61; Newman, W.J. Newman," The Constitutional Status of The Supreme Court of Canada" (2009) 47 Supreme Court Law Review (2d) 429 at 441, citing and disagreeing with Hogg; Hogg, Constitutional Law of Canada, 5th Ed, AG of Canada's Book of Authorities, Tab 70, at p. 154; P. Daly, "Submissions to Senate Standing Committee on Legal and Constitutional Affairs re Modifications to the Supreme Court Act", pp. 24-25

[16] *Minde v. Emineskin Cree Nation*, [2008] F.C.J.. No. 203 (C.A.), at paragraphs 32, 35 and 38; *Walia Properties Ltd. v. York Condominiums*, [2008] O.J. No. 2283 (C.A.); *Ashfield-Colbourne Wawanash v. Central Huron*, [2012] O.J. No. 745 (C.A.), at paragraphs 13 and 15

[17] *Winsor Homes Ltd. v. St. John's,* [1977] NJ. No. 45 (C.A.); *R. v. MacKay*, [1980] 2 S.C.R. 370; *Bissett v. Canada*, [1995] F.C.J. No. 1339 (T.D.)

[18] *R. v. Chung*,[1999] A.J. No. 248 (C.A.), leave refused; *Coomaraswamy v. Canada*, [2002] F.C.J. No. 395 (C.A.); *Gagne v. Authoritie des Marches Financials*, [2008] J.Q. No. 7830, paragraphs 46-49

[19] *R. v. Neeb*, [1996] O.J. No. 3787 (C.A.), at paragraph 34; *R. v. Lamirande*, [2002] M.J. No. 133 (C.A.)

[20] *Taylor v. Canada*, [20001] F.C.J. No. 1732 (T.D.), at paragraph 26; *Moreau-Berube v. New Brunswick*, [2002] 1 S.C.R. 249, at paragraph 50; *Gedge v. Hearing Aid Practicioners Board*, [2011] N.J. No. 238 (C.A.)

Supreme Court of Canada.[21] Moreover, the failure to amend the constitution suggests that proposed amendment is not the law.[22] In other words, the failure to pass an amendment to allow Federal Court judges to be appointed as Quebec judges suggests that they cannot be so appointed.

18. The logic and consensus of most constitutional scholars support the proposition that the Amending formula of the *Constitution Act, 1982* had the effect of constitutionalizing aspects of the Supreme Court of Canada, at least including the requirements regarding the appointment of Quebec judges under s. 6 of *the Supreme Court Act*, as of 1982. The CRC agrees with and adopts the submissions of Galati on this issue, wherein he quotes from and explains the positions of Professors Cheffins, Scott, Shetreet, Gall, Monahan and Daly and Messrs. Newman, Funston and Meehan.[23] In addition, Professor Lederman supports this position. His logic accords with the analysis above and most of the academics and writers cited by Galati. He says:

> In the second place, **it may be said that the new amending procedures of 1982 have in effect "constitutionalized, the Supreme Court of Canada** itself. Originally, the Court was established in 1875 by an ordinary statute of the Parliament of Canada, as authorized by section 10 I of the old *British North America Act* of 1867 which reads as follows :
>
> > 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.
>
> Thus, changes affecting the Court could be implemented by simple amendments of the *Supreme Court Act* , and, until April 17, 1982, that was indeed the way this was done from time to time over the years. **On the latter date, however, the Supreme Court of Canada was named in the new special amending procedures as subject to them.** Under Section 4l(d) of the *Constitution Act, 1982,* it is provided that any changes to " the composition of the Supreme Court of Canada, require the consent of the Parliament of Canada and the consents of all the legislatures of the ten provinces. Under sections 38(I) and 42(l)(d) of the *Constitution Act, 1982,* any other basic changes respecting" the Supreme Court of Canada, require the consent of the Parliament of Canada and the consents of seven out of the ten legislatures of the provinces, provided the consenting seven have at least 50% of the population of all the provinces.
>
> **In other words, on April 17, 1982, certain essential elements of the *Supreme Court Act* of the Parliament of Canada were removed from the ordinary statutory process in that Parliament and were raised to superior constitutional status as indicated. To the extent that it is inconsistent with this result, the original section 10 I of the *B.N.A. Act* of 1867 must be taken to have been rendered**

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[21] The CRC agrees with and adopts the Submissions of Galati on this issue contained in his factum in paragraphs 22-28; see also Daly, *supra*, at pp. 6-7

[22] Daly, *supra*, p. 12; see also *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),*[2011] 3 S.C.R. 471,AG of Canada's Book of Authorities, Tab 38, p. 270, paragraph 44

[23] Galati factum, in paragraphs 12-21; see also Galati's Book of Authorities: *G. Gall, The Canadian Legal System, 5th ed (Toronto: Carswell, 2004) (Tab 11; P.J. Monahan, Constitutional Law, 3d ed (Toronto: Irwin Law, 2006) (Tab 12; B.W. Funston, E. Meehan, Q.C., Canada's Constitutional Law in a Nutshell, 4th ed (Toronto: Carswell, 2013) at p. 37(Tab 14);*

inoperative on April 17, 1982, by necessary implication. All the provisions of the *Supreme Court Act* as they stood on that date continue, but certain sections of it that are basic now rest upon the superior constitutional foundation afforded by the new and special amending processes in the *Constitution Act. 1982.*

To be more precise, what are the detailed implications of sections 4l(d) and 42(1)(d) of the *Constitution Act, 1982?* To an important degree they are clearly inconsistent with the first part of section 10l of 1867 which deals with "General Court of Appeal for Canada ... **Section 52(2)(a) of the *Constitution Act, 1982* puts sections 4l(d) and 42(l)(d) in force from April 17, 1982, because they are part of "this Act** ... But also, section 52(2)(b) of the *Constitution Act, 1982* declares that section 101 of 1867 continues in force, with 1867 as its date of origin, because it is included in Item 1 of the Schedule to the *Constitution Act, 1982.* Thus we end up with specially entrenched constitutional provisions of different dates of origin that are to an important degree simply inconsistent with one another. There is no way restrictive definitions of key words can be used to eliminate the conflict altogether. **To the extent of the inconsistency, the respective constitutional provisions of the two different dates cannot live and operate together. In these circumstances, the governing rule of interpretation to solve the issue is that, to the extent of the inconsistency, the later provisions (those of 1982) override and render inoperative the earlier provision (that of 1867).**

In detail, I submit that the results of applying this rule of interpretation are as follows:

(a) The references in sections 41(d) and 42(1)(d) to« the Supreme Court of Canada .. are necessarily references to essential sections of the *Supreme Court Act* of the Parliament of Canada as it stood on April l7, 1982.

(b) The override rule of interpretation just given means that **we must now characterize each of the one hundred and two sections of the *Supreme Court Act* as falling into one of three categories**.

(I) Those sections that have to do with the **basic composition** of the Supreme Court of Canada.

Examples are:

Section 4. The Supreme Court shall consist of a chief justice to be called the Chief Justice of Canada, and eight puisne judges, who shall be appointed by the Governor in Council by letters
patent under the Great Seal.

***Section 6.* At least three of the judges shall be appointed from among the judges of the Court of Appeal, or of the Superior Court, or the barristers or advocates of the Province of Quebec.**

Section 9. (l) Subject to subsection (2), the judges hold office during good behaviour, but are removable by the Governor General on address of the Senate and House of Commons.
the age of seventy-five years.

(2) Those sections that have to do with **basic elements of the Court other than composition**.

Examples are:

Section 3. The court of common law and equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name as a general court of appeal for Canada ...

Section 35. The Supreme Court shall have, hold and exercise, an appellate civil and criminal jurisdiction within and throughout Canada.

Section 54(1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court is, in all cases,
final and conclusive.

(3) Those sections which are **secondary or incidental provisions of the *Supreme Court Act,*** having to do with detailed administration or operation of the Court, given that its essential elements have been settled by *the* sections falling within categories (1) and (2) above. Most of the one hundred and two sections of the *Supreme Court Act* would fall within this residual category, according to my reasoning.

Examples are:

Section 8. The judges shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within 40 kilometres thereof.

Section 103. (This section provides that the judges of the Supreme Court, or any five of them, may make general rules and orders regulating procedures, whereby the functions of the Court may be carried out. The full text of the section should be consulted.)

The residual category arises because I am reading section 42(1)(d) of the *Constitution Act, 1982* in a restrained way. It says that the special amending process it calls for applies, "subject to paragraph 4l(d) , to" the Supreme Court of Canada"· I am construing this to mean that the special amending process for section 42(l)(d) applies to" basic elements of the Supreme Court of Canada other than composition of the Court"· It does not make sense to consider that all one hundred and two sections of the present *Supreme Court Act* of the Parliament of Canada are now specially entrenched by the joint operation of sections 41(d) and 42(l)(d) of the *Constitution Act, 1982.* Moreover, this reading down of section 42(I)(d), if that is what it is has the effect of reducing the extent of the inconsistency between section 101 of 1867 and section 42(l)(d) of 1982. It leaves an important area of jurisdiction still operative for the Parliament of Canada as a matter of ordinary statute by virtue of section 101 of the *Constitution Act, 1867.* But sections 4l(d) and 42(l)(d) of the *Constitution Act. 1982* do have their intended effect. **They guarantee the continued existence of the Supreme Court by special entrenchment of its basic elements as those elements are manifested in *some* of the sections of the *Supreme Court Act* of the Parliament of Canada as it stood on April 17, 1982.**
[emphasis added]

B. STATUTORY AND CONSTITUTION INTERPRETATION PRINCIPLES

19. A constitutional provision must be interpreted in a purposive manner. A legislative provision must be interpreted in accordance with the intent of the legislature. In both cases, it is a question of the words and means to determine the purpose of the provision. The primary difference is that the subject to the constitution, the legislature can always amend the statute, whereas, in light of the difficulty in amending constitutional provisions, they must be interpreted having regard to the long term and the concept of the living tree of the constitution. In both cases, conflicting constitutional provisions or principles may limit the scope or meaning of the

provision in question. Accordingly, it is proposed that the wording of ss. 5 and 6 be examined; the techniques of determining purpose applied and then related constitutional principles be considered.

1. DISJUNCTIVE WORDING

20. Sections 5 and 6 both deal with the appointment of judges to the Supreme Court of Canada. Section 5 provides the general rules for the composition of the Court. Section 6 imposes additional requirements for the three Quebec judges. In both cases, categories of judges or lawyers are eligible for appointment. In both cases, though the operation of s. 5 and/or the *Judges Act*, a barrister or advocate must have been called to the bar and/or must have been practicing for at least 10 years. This is the requirement for the appointment of any federally appointed judge. Under section 5, leaving aside the issue of tense or timing, if it is a the judge being appointed, it must be a judge of the Provincial Superior Court (s. 96 judge). In light of the fact that all Provincial Court of Appeal judges are cross-appointed as Superior Court judges, this includes all judges of the Provincial Courts of Appeal. Under section 6, the three Quebec judges must also be Superior Court judges of Quebec (Court of Appeal or Superior Court). The question is whether, when the section specifies certain types of judges (Provincial Superior Court s. 96 judges), can another type of judge be appointed on the basis that s/he used to be a lawyer for 10 years. Since, all judges must have been lawyers for 10 years, the specification of Provincial Superior Court judge is rendered meaningless if other kinds of judges can be appointed on the basis that they used to be lawyers. If that was intended, there was no reason to specify certain types of judges. All that need have been said in s. 5 was a lawyer of 10 years or more. All that need to have been said in s. 6 is a Quebec lawyer of 10 years or more. Since the legislation uses the word "or", and the provision for judges would otherwise be unnecessary, this suggests that the sections must be interpreted disjunctively. In other words, either the person is being appointed is a judge (Superior Court) or the person is a lawyer (not a judge who used to be a lawyer).

21. In addition to the statutory interpretation principles discussed above, the unwritten constitutional principal of Federalism[24], the nature of section 96 judges as unifying forces in Federalism (because of the jurisdiction over Federal and Provincial matters (unlike

[24] *Quebec Succession Reference, supra*

the US Federal judges))[25] justifies an interpretation that allows the appointment of judges who are Provincial Superior Court judges. The unifying force does not arise to the same extent from a Federal Court judge. The appointment of other types of judges undermines the plain wording of the sections. This is also supported by section 30(2) of the *Supreme Court Act*.

2. TENSE AND TIMING: SS. 5 AND 6

(a) Section 5

22. The disjunctive reading of both sections precludes the use of past membership of a bar as a means of appointing a sitting judge. Accordingly, the disjunctive interpretation of the sections dictates a present tense interpretation of lawyer.

23. This fits the wording of the sections. There may be some debate about the English meaning of "is or has been" in section 5. The AG of Canada says that "has been" is clearly past tense. Galati says that "has been" is a continuous present tense. The AG of Canada says that in the English version, "is or has been" modifies both judges and lawyers. This is a possible reading, but not the only reading of the section since the words precede judges but are separated from the discussion of lawyers . The disjunctive issue suggests that the appointment of a lawyer only applies to a person practicing as a lawyer at the time of appointment. In light of the legitimate debate about the meaning of "has been", the ambiguity regarding whether "is of has been" modifies judges or judges and lawyers and the disjunctive issue, it is submitted that the English version is ambiguous.

24. The French version is not ambiguous. It says "parmi", which means "among". It is the same word that applies to both judges and advocates in s. 6. In the French version of s. 5, it is clear that the tense in respect of judges is different from the tense in respect of lawyers (judges: "ete ou a ete" vs. lawyers: "parmi"[26]. The use of the French word "pendant" does not modify when they are lawyers but modifies when they were called to the bar "inscrits pendant ". In other words, one was called to bar in the past, but one may or may not be a lawyer at the time of appointment. The use of "parmi" suggests that the lawyer must be among the members of the practicing bar at the time of appointment. This also fits the disjunctive issue.

25. However, this issue does not **have** to be decided in this application. It certainly can be decided. If a Federal Court judge cannot be appointed to the Supreme Court of Canada at all, then s/he cannot be appointed as a Quebec judge either.

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[25] *MacMillan-Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, at paragraphs, 15, 32, 36, 37

(b) Section 6

26. Regardless of how section 5 is interpreted, it is clear that a Federal Court judge who used to be called to the bar in Quebec cannot be appointed as a Quebec judge for the following reasons:

(a) The disjunctive nature of section 6 (judge or advocate) (*supra*);

(b) the use of "among" which means present tense;

(c) the different wording of s. 6 vs. s. 5

(d) the implication of s. 30(2);

(e) the purpose of s. 6 (Civil Code or Quebec interests) relating to current circumstances;

(f) the invalidity of the AG of Canada's arguments;

(g) The implications of the Meech Lake accord which failed to allow the appointment of Federal Court judges as Quebec judges (*supra*)

(h) The impact of the unwritten constitutional principles of Federalism, Constitutionalism and the Rule of Law.

27. The AG of Canada says that "among" has not been interpreted in the context of appointments and that it is neutral in respect of tense. The AG of Canada is wrong on both counts. "Among" means from the group at present. Even if the group is a group of persons who formerly had a particular status, i.e., a former judge, the person would have to be at the time of appointment one of the members of a pool of former judges (among). This is what the Federal Court of Appeal ruled in interpreting what tribunal was a court of competent jurisdiction under section 24 of the Charter in *Vincer*.[27] In that case, the question was whether the Board of Referees under the *Unemployment Insurance Act* ("UIA") was a court of competent jurisdiction under section 24 or whether it was the umpire. The Court concluded that it was the umpire, not the Board of Referees who was a court of competent jurisdiction. The provision regarding umpires under the UIA read:

> 92. (1) The Governor in Council may, **from among the judges of the Federal Court of Canada, appoint such number of umpires** as he considers necessary for the purposes of this Act and, subject to this Act, may

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[26] As is conceded by the AG of Canada, the present Consolidated Version of the Act, which refers to "actuels ou ancien" was never passed by Parliament and is not the law.

[27] *Canada v. Vincer*, [1987] F.C.J. No. 1124 (C.A.)

> prescribe their jurisdiction. [Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48 (as am. by S.C. 1980-81-82-83, c. 158, s. 55).]
>
> (1.1) Subject to subsection (1.3), **any judge of a superior, county or district court in Canada and any person who has held office as a judge of a superior, county or district court in Canada may**, at the request of the chief umpire made with the approval of the Governor in Council, **act as an umpire**, and while so acting has all the powers of an umpire. [Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48 (as am. by S.C. 1976-77, c. 54, s. 55).]

The Federal Court of Appeal interpreted "among" as "sitting" (paragraph 25). This Honourable Court came to a similar conclusion in *Tétreault-Gadoury* in respect of jurisdiction of the Board of Referees vs. the Umpire under s. 52(1) of the *Constitution Act, 1982*. Although the law with respect to section 52(1) of the *Constitution Act,1982* has changed, the interpretation of "among" as a sitting Federal Court judge is still valid.[28] The Court said:

> **19** At the opposite end of the spectrum is the umpire. **Section 92(1) of the Unemployment Insurance Act, 1971** (as am. by S.C. 1980-81-82-83, c. 158, s. 55), provides that **umpires are to be appointed from among the judges of the Federal Court.** The extensive legal training and experience required of a Federal Court judge ensures that the litigant will receive a capable determination of the constitutional issue. Such a determination would clearly not fall outside **the judge's normal area of expertise** and, since the umpire is already expected to hear appeals on all relevant questions of law, would not delay the proceedings to an unacceptable degree.

28. If section 5 allows the appointment of Federal Court judges to the Supreme Court of Canada, such a ruling would necessarily be premised on the interpretation that "is or has been" applies to lawyers as well as judges and that it means in the past or previously the person was a lawyer. If this is accepted, the wording in section 6 is clearly different. There is no reference to "is or has been" in section 6. There is only reference to "among" or "parmi", connoting present tense. If the use of "has been" is a past tense and the purpose was to have the same tense in s. 6, the same wording would have been used. The choice to use different words in the very next section, dealing with a sub-set of earlier section, connotes a deliberate choice to not allows the appointment of persons or judges who used to be lawyers to fulfil the Quebec judge requirement.

29. Section 30(1) of the *Supreme Court Act,* provides for the appointment of temporary, ***ad hoc*** judges where the Court sinks below quorum. It allows for the *ad hoc* sitting of s. 101 Judges. However, s. 30(2) precludes using Federal Court judges from sitting on Quebec appeals (not just civil law appeals): The section reads:

> (2) Unless two of the judges available fulfil the requirements of section 6, the *ad hoc* judge for the hearing of an appeal from a judgment rendered in the Province of Quebec shall be a judge of the Court of Appeal or a judge of the Superior Court of that Province designated in accordance with subsection (1).

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[28] *Tétreault-Gadoury v. Canada (Employment and Immigration Commission),* [1991] 2 S.C.R. 22, at para 19

This makes it clear that a Federal Court judge is not acceptable for Quebec cases and therefore not acceptable under s. 6 as a Quebec judge.[29]

30. The purpose of s. 6 of the Supreme Court Act is often assumed to be the need for familiarity with the Quebec Civil Code. That is one possible interpretation. There is much discussion of this topic in the Hansard debates in 1875 when the Supreme Court was first created. However, there are other references to a more general interest of Quebec.[30] There is nothing explicit in the appointment of an advocate from the Bareau du Quebec that guarantees such training or familiarity. A person could be practicing law but went to law school in another province and practices a type of law that requires no such familiarity (i.e., criminal law; administrative law; admiralty).[31] As set out above, section 30(2) does not specify an exclusion of Federal Court judges for Civil cases from Quebec but all cases from Quebec. This suggests that the real purpose is familiarity with the current legal culture and interests of Quebec.[32] The nature of the Quebec Civil Code is only one part of the legal culture. In either case, the association with and knowledge of the Quebec legal culture or system, to be effective, should be current.

31. The AG of Canada advances several additional arguments in support of their interpretation. None of these hold water:

(a) AG of Canada Factum: para 50: The AG of Canada argues that it is not good to narrow the pool of qualified candidates. However, while the purpose of s. 5 may include, implicitly, concerns about qualification, s. 6 is, by definition, a restriction of the pool to ensure that Quebec interests are protected. To the extent this Reference deals with s. 5 this may be a relevant consideration. However, in respect to s. 6 it misses the point;

(b) AG of Canada: para 51: The AG of Canada argues that there are a number of Appeals to the Supreme Court of Canada from the Federal Court of Appeal (on average 10 per year). It is suggested that this warrants representation by Federal Court judges on the Supreme Court of Canada. First, this is a practical concern and not a legal or constitutional concern. Second, since there have only been appointments of Federal Court judges in the last 30 years, it appears that the Court was able to cope without a Federal Court/Exchequer appointee for many decades. Third, if the appointment of Federal Court judges is permissible, there is no

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[29] Daly, supra, pp. 7-8; Plaxton and Mathen, "Purposive Interpretation, Quebec and the Supreme Court Act", (2013) 22:3 Constitutional Forum Constitutionnel 15, Galati's Book of Authorities, at pp. 17-18

[30] Hansard, 1875 Supreme Court Bill, *supra,* Tashereau, at p. 39; Ouimet, p. 104; Wright, at p. 128; Plaxton and Mathen, *supra*, 18, 20-22

[31] This was effectively conceded by AG of Canada, in their factum, paragraph 49

[32] Cyr, Hansard re "Declaratory" Bill, Justice Committee, November 21, 2013, pp. 24 and 27/32; Daly, supra at pp. 12, 14, 15; Plaxton and Mathen, supra, at pp. 18-22

reason such purported valuable expertise, if it is of real value, needs to come from a Quebec judge. In the past, it was never from a Quebec judge;

(c) AG of Canada: paras 52-55: The AG of Canada argues that section 30(2) was created for a historical reason that does not relate to the Quebec Civil Code. First, the CRC argues that the Quebec Civil Code is not the real focus, but familiarity with Quebec legal culture and interests, which include the Quebec Civil Code. In fact, section 30(2) does not deal with appeals from Quebec civil cases but any appeals from the Quebec Court of Appeal. Second, the issue is less about the historical reason and more about, the implication of s.30(2) for the interpretation of s. 6, which the AG of Canada does not even address;

(d) AG Canada: paras 57-66: The AG of Canada argues that other legislation, in particular the *Federal Courts Act* is similar in that it looks for Federal Court judges from Quebec. However, the wording is different. The sections talk about "have been". That is an issue relevant to section 5 of the *Supreme Court Act*. It is not similar in wording to s. 6 and therefore a different approach is mandated;

(e) AG of Canada: paras 67-71: The AG of Canada argues that absurd results flow from the interpretation advanced by Galati and/or the CRC. This is incorrect. The AG suggests that a newly called lawyer from Quebec could be appointed to the Supreme Court of Canada. This is false. Section 5 applies to all appointees, including Quebec appointees. It requires 10 years at the bar. Section 6 imposes additional requirements, but does not eliminate the requirement for 10 years. Further, the *Judges Act* requires that any judge have at least 10 years at the bar. This also applies to judges of the Supreme Court of Canada. In fact, it is the AG of Canada's interpretation that allows for a previous call to the bar for 10 years, without currency, that creates absurd results. It would allow the appointment of lawyers who had been at the bar for 10 years before they were disbarred. It would allow the appointment of judges who had been removed from office.

32. As a interpretative aid or as a separate basis to interpret section 6 of the *Supreme Court Act*, the unwritten constitutional principle of Federalism dictates that a Federal Court judge is not well-suited to be a Quebec judge. The unwritten constitutional principle of Federalism reflects historical compromises by Provinces and the Federal Government that reflect a legal response to political and cultural realities that existed at or near the time of Confederation and at the time of the Patriation of the Constitution. At both stages, Quebec had many objections to the constitutional compromises.[33] These were met, *inter alia*, by s. 6 and its predecessors.

[33] *Quebec Succession Reference, supra*, at paras 37-40, 42-44, 47, 55, 57

The protection of Quebec regional interests in Federalism overlaps with the need to protect Quebec as a linguistic and cultural minority in Canada.[34]

33. While some Federal Court judges will be from Quebec, not all have familiarity with the Quebec Civil Code before appointment. The is very little Quebec Civil Code litigation in the Federal Court. The vast majority of the litigation is administrative and industrial and intellectual property. Most civil litigation is against the Federal Government. Even in Quebec cases before the Federal Court or the Federal Court of Appeal, very little involves the Quebec Civil Code. More fundamentally, if the CRC is correct, that the focus is not the Quebec Civil Code but current familiarity with the legal Culture and interests of Quebec, Federal Court judges are more removed from this requirement than Quebec Provincial Court judges. They adjudicate on primarily federal law and do so throughout the country. While they will sit in Quebec sometimes, they reside in Ottawa.

34. The Rule of Law and the Principle of Constitutionalism are intertwined with the other three pillars discussed in the *Quebec Succession Reference*. It is thus submitted that the role of the Supreme Court as the necessary final arbiter of constitutional law [35] mandates its constitutional status even if sections 41(d) and 42(1(d) did not. Further, while not binding, Constitutional Conventions that are based on unwritten constitutional principles such as Federalism, the Protection of Minorities, the Rule of Law and Constitutionalism and judicial independence, such as section 6 of the Supreme Court Act, are enforceable as exemplifications of these unwritten constitutional principles. It is submitted that the Hansard debates in 1875 disclose that the 2 Quebec judge amendment was founded on the constitutional Convention regarding regional representation that was more compelling in respect of Quebec.[36]

PART IV- ORDER CONCERNING COSTS

35. It is respectfully submitted given that:

(a) the Governor-in-Council should have brought a Reference to this Honourable Court, ***prior to*** the nomination and appointment of the Honourable Justice Nadon, a declaratory relief sought by the Applicant in his Federal Court application;[37]

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[34] *Quebec Succession Reference, supra*, at paras 58-59

[35] *Vriend v.Alberta,* [1998] S.C.J. No. 29, paragraphs 52-57; Newman, supra, at pp. 439-41

[36] Hansard, 1875 Supreme Court Act, Baby, at p. 78; Snell, G & Vaughan,F, "The Supreme Court of Canada: History of the Intsitution", OsgoodeSociety, 1985, pp.1-15, AG of Canada's Book of Authorities, tab 74, at pp. 217-218

[37] *Attorney General of Canada Record, Tab 4, at p. 12, paragraph 1(f)*

(b) the Applicant's Federal Court application was over-taken by the within Reference to this Honourable Court;

(c) the public interest nature of the within Reference;

the Applicant be granted his costs, on a partial indemnity basis, on the within Intervention.[38]

PART V- NATURE OF ORDER SOUGHT

36. The CRC requests that the Court answer the questions as follows:

Question 1: No.

Question 2: No.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto, this 3rd day of January, 2014.

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[38] *Singh v. MEI,* [1985] S.C.R, 177 (SCC); *Ruby v. Canada,* [2002] S.C.J. No. 73 *; R. v. White,* [2010] SCC 59; *R. v. Caron,* [2011] SCC 5*; Richard v. Time Inc.,* 2012 SCC 8; *Antrim Truck Centre Ltd. v. Ontario,* 2013 SCC 13; *Conseil Scolaire Francophone,* [2013] S.C.J. No. 42, at paragraph 64

PART VI – TABLE OF AUTHORITIES

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Court File No.: 35586

IN THE 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 the Order in Council, P.C. 2013-1105, dated October 22, 2013

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