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 Order of Council, P.C. 2013-1105, dated October 22, 2013

MEMORANDUM OF ARGUMENT OF THE ATTORNEY GENERAL OF ONTARIO
(Rule 46 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

A. Overview

1. In addition to raising specific questions regarding the necessary qualifications for appointment to the Supreme Court of Canada, this Reference raises broader issues with respect to the constitutional role and status of both this Honourable Court as well as the federal courts. Ontario intervenes to address the necessary qualifications for Supreme Court appointments under s. 5 of the *Supreme Court Act* (the "Act") as well as to make submissions regarding these broader constitutional issues. Ontario takes no position on whether s. 6 of the Act imposes a different standard for the appointment of the three Supreme Court judges from Québec.

2. With regard to Question 1, Ontario's position is that former lawyers with at least ten years' standing at the bar of a province are eligible for appointment to the Supreme Court of Canada under s. 5 of the Act. This interpretation is supported both by the text of s. 5 as well as its underlying purpose.

3. With respect to the text, the English version of s. 5 is unambiguous – both current and former provincial superior court judges and current and former lawyers with at least ten years' standing at a provincial bar are clearly identified as being eligible for appointment to the Supreme Court of Canada. This is the only grammatically possible interpretation of the English version of s. 5. The French version that was in effect from 1886 to 1985 was similarly unambiguous in permitting the appointment of both former superior court judges as well as former lawyers with ten years' standing. Although the current French version of s. 5 continues to clearly authorize the appointment of both current and former superior court judges, it is at least arguable that the current French text could be read as permitting only the appointment of current, but not former, members of a provincial bar (apart from former members of a provincial bar who have been appointed to a provincial superior court). But the current French version of s. 5 was

only introduced as part of the 1985 statute revision which was expressly not intended to change the pre-existing law.

4. This textual analysis is consistent with the purpose of s. 5 – ensuring that appointees have sufficient experience and knowledge of the law to serve on the Supreme Court. It would be inconsistent with this purpose for a lawyer with ten years' standing at a provincial bar, who is acknowledged at that point to be eligible for appointment, to lose that eligibility by accepting an appointment to the federal courts. The federal courts have been established by Parliament as superior courts of record with broad and complex jurisdiction. The judges of these courts are appointed in the same manner as superior court judges and enjoy the same security of tenure and terms of office. Federal court judges include amongst their ranks many of Canada's most eminent jurists, a number of whom have gone on to serve with great distinction as members of the Supreme Court of Canada. It would be quite extraordinary, and clearly inconsistent with the purpose of s. 5 of the Act, to call into question the validity of post-1985 Supreme Court appointments from the federal courts, or to now exclude the federal court judiciary from consideration for such appointments in the future.

5. Moreover, the exclusion of federal court judges from the eligible pool of Supreme Court candidates would have the effect of creating a hierarchy amongst the federally-appointed judiciary in Canada. Under this hierarchical model, even a retired superior court judge who is no longer directly involved in the law would remain eligible for appointment to the Supreme Court until age 75, while all current federal court judges would be ineligible. Such a hierarchy would serve no discernible purpose, is undesirable as a matter of principle, and would undermine Parliament's intention of creating the federal courts to further the "better administration of the laws of Canada."

6. With respect to Question 2, Ontario's position is that Parliament no longer has the authority to unilaterally abolish the Supreme Court of Canada under s. 101 of the *Constitution Act, 1867*. Rather, given Canada's legal independence from Great Britain that was confirmed in 1982, along with the critical and essential role played by the Supreme Court of Canada within Canada's modern constitutional architecture, s. 101 now entails an obligation to "Maintain" the Supreme Court of Canada that Parliament has established. In short, at least since 1982, the existence and continued effective functioning of the Supreme Court of Canada is now guaranteed to Canadians, absent a constitutional amendment.

7. Moreover, the obligation to "Maintain" a "General Court of Appeal for Canada" that flows from s. 101 includes the maintenance of those characteristics that nourish and are essential to the fulfillment of its unique role. While it is not necessary for purposes of this Reference to provide an exhaustive catalogue of these essential characteristics, they must include, at a minimum, the qualifications necessary for appointment, including the fact that at least 3 judges of the Court must have training in civil law. The bijural character of the Supreme Court is central to its special role as a national Canadian institution.

8. Parliament cannot evade its constitutional obligations, or enlarge its legislative jurisdiction, through the use of so-called 'declaratory legislation.' Therefore, to the extent that Bill C-4 would alter or amend the qualifications required for appointment to the Supreme Court of Canada under either ss. 5 or 6 of the Act, its provisions are to that extent *ultra vires*.

B. Facts

(1) The *Economic Action Plan 2013 Act, No. 2* Has Now Been Passed

9. Although the *Economic Action Plan 2013 Act, No. 2* ("Bill C-4") as a whole was referred to the House of Common's Standing Committee on Finance after second reading, clauses 471 and 472 dealing with the qualifications for appointment to the Supreme Court were also referred

to the Standing Committee on Justice and Human Rights. Committee members heard testimony from Professors Carissima Mathen and Adam Dodek of the University of Ottawa and Minister of Justice Peter MacKay.[1] During clause-by-clause consideration by the Standing Committee on Finance, amendments moved by the Bloc Québécois to delete clauses 471 and 472 were ruled out-of-order while three Liberal amendments were defeated. The clauses were reported without amendment.[2]

10. The Senate authorized its committees to study Bill C-4 while it was still before the House of Commons. The Standing Committee on Legal and Constitutional Affairs was ordered to study clauses 471 and 472. It heard from Professor Paul Daly of the Université de Montréal, Professor Benoît Pelletier of the University of Ottawa, former Supreme Court Justice Michel Bastarache, Professor Mathen, and Minister MacKay. It also received written submissions from the Government of Québec and Professor Dodek.[3] The Chair and Deputy Chair of the Legal and Constitutional Affairs Committee then appeared before the Standing Committee on National Finance to present their committee's conclusions.[4]

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[1] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl., 2nd Sess., No. 5 (19 November 2013), **Ont. Record, Vol. II, Tab 16, pp. 107-18**; House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl., 2nd Sess., No. 6 (21 November 2013), **Ont. Record, Vol. II, Tab 17, pp. 131-49**

[2] House of Commons, Standing Committee on Finance, *Minutes of Proceedings*, 41st Parl., 2nd Sess., No. 12 (27 November 2013) at 22-23, **Ont. Record, Vol. II, Tab 18, pp. 170-71**; House of Commons, Standing Committee on Finance, *Evidence*, 41st Parl., 2nd Sess., No. 12 (27 November 2013) at 30-33, **Ont. Record, Vol. II, Tab 19, pp. 179-82;** House of Commons, Standing Committee on Finance, *First Report*, 41st Parl. 2nd Sess. (27 November 2013), **Ont. Record, Vol. II, Tab 20, p. 197**

[3] Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 41st Parl., 2nd Sess. (21 November 2013), **Ont. Record, Vol. III, Tab 21, pp. 1-31**; Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 41st Parl., 2nd Sess. (27 November 2013), **Ont. Record, Vol. III, Tab 22, pp. 63-80**; Senate, Standing Committee on Legal and Constitutional Affairs, *Second Report*, 41st Parl., 2nd Sess. (28 November 2013), **Ont. Record, Vol. III, Tab 23, p. 99**

[4] Senate, Standing Committee on National Finance, *Evidence*, 41st Parl., 2nd Sess. (3 December 2013), **Ont. Record, Vol. III, Tab 24, pp. 102-07**; Senate, Standing Committee on National Finance, *Third Report*, 41st Parl., 2nd Sess. (10 December 2013), **Ont. Record, Vol. III, Tab 24, pp. 114-25**

11. The House of Commons passed Bill C-4 on December 9, 2013. After Second Reading, the Senate referred it to the Standing Committee on National Finance. The Bill was reported without amendment. It was passed and given Royal Assent on December 12, 2013.[5]

PART II – QUESTIONS IN ISSUE

12. Ontario takes the following positions on the questions the Governor General in Council has referred to this Honourable Court for hearing and consideration:

Question 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 Québec pursuant to sections 5 and 6 of the *Supreme Court Act*?

Ontario's Position on Question 1:

(a) With regards to section 5 of the *Supreme Court Act*: Yes.

(b) With regards to section 6 of the *Supreme Court Act*: No position.

Question 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*?

Ontario's Position on Question 2:

No, to the extent that the legislation changes the qualifications needed for appointment to the Supreme Court of Canada.

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[5] Senate, Standing Committee on National Finance, *Fourth Report*, 41st Parl., 2nd Sess. (11 December 2013), **Ont. Record, Vol. III, Tab 26, p. 138**; *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40, **Ont. BOA, Vol. III, Tab 34**

PART III – ARGUMENT

A. Question 1 - Section 5 of the *Supreme Court Act* Permits the Appointment of Former Barristers or Advocates of 10 Years' Standing to the Supreme Court

13. Section 5 of the Act permits the appointment of former lawyers of ten years' standing at a provincial bar to the Supreme Court, including former lawyers who have subsequently served as a judge of the Federal Court, the Tax Court of Canada, or the Federal Court of Appeal (collectively, the "federal courts"). This interpretation is supported by both the text and purpose of s. 5.

(1) The English Text of s. 5 Expresses the Shared Meaning of the Provision

14. The English text of s. 5 is unambiguous:

> **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.[6]

There is only one verb in the provision's subordinate clause, namely, "is or has been." This verb must necessarily apply to both objects in the subordinate clause, namely, "a judge of a superior court of a province" as well as "a barrister or advocate of at least ten years standing at the bar of a province." This is the only grammatically possible reading of the clause. Otherwise, the second object in the sub-clause, a "barrister or advocate of at least ten years standing," would be an incomplete sentence fragment. Therefore, a person who "is or has been … a barrister or advocate of at least ten years standing" must be eligible for appointment to the Supreme Court under the English version of s. 5.

15. The current French text of s. 5 has a slightly different grammatical structure and is not as clear on this point:

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[6] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 5, **Cda. BOA, Vol. I, Tab 11**

> **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.[7]

It is grammatically possible to read the adjectives « actuels ou anciens » as only modifying « d'une cour supérieure provinciale » while « les avocats inscrits pendant au moins dix ans au barreau d'une province » could mean either lawyers who at some point had been enrolled for at least ten years at the bar of a province or lawyers who are currently so enrolled.

16. There was no such ambiguity, however, in the French versions of s. 5 that were in force from 1886 to 1985.[8] For example, based on the same grammatical analysis outlined above in paragraph 14, in the 1970-85 French versions the only verb in the subordinate clause (« est ou a été ») must apply to both objects in the clause, including « un avocat inscrit pendant au moins dix ans au barreau de l'une des provinces ». This is the only grammatically possible reading of this provision. Therefore, just as does the current English version, the pre-1985 French versions unambiguously permitted the appointment of a person who « est ou a été… un avocat inscrit pendant au moins dix ans au barreau de l'une des provinces ». Therefore there can be no question as to the validity of any appointments made to the Supreme Court of Canada prior to 1985 of persons who were former barristers or advocates of at least 10 years' standing, but not judges of a provincial superior court, including judges of the federal courts.

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[7] *Supreme Court Act*, *supra*, s. 5

[8] The table below sets out the English and French versions as they evolved historically. See *Supreme and Exchequer Courts Act*, R.S.C. 1886, c. 135, s. 4(2), **Cda. BOA, Vol. I, Tab 13** [Emphasis added]; *Supreme Court Act*, R.S.C. 1906, c. 139, s. 5, **Cda. BOA, Vol. I, Tab 15** [Emphasis added]; *Supreme Court Act*, R.S.C. 1927, c. 35, s. 5, **Cda. BOA, Vol. I, Tab 20** [Emphasis added]; *Supreme Court Act*, R.S.C. 1952, c. 259, s. 5, **Cda. BOA, Vol. II, Tab 22** [Emphasis added]; *Supreme Court Act*, R.S.C. 1970, c. S-19, s. 5, **Cda. BOA, Vol. II, Tab 23** [Emphasis added]

1886-1906	Any person … 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.	… 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.
1906-1927	Any person … 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.	… 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.
1927-1952	Any person … 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.	… quiconque ***est ou a été*** juge d'une cour supérieure de l'une des provinces du Canada, ou un avocat qui a exercé pendant au moins dix ans au barreau de l'une des provinces.
1952-1970	Any person … 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.	… 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.
1970-1985	Any person … 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 provinces.	… 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 des provinces.

17. The amendments to the French version of s. 5 in 1985 were not intended by Parliament to change the meaning of the provision; rather, they were made by the Statute Revision Commission as part of the 1985 statute revisions. The *Revised Statutes of Canada, 1985 Act* expressly provides that "the Revised Statutes shall not be held to operate as new law, but shall be construed and have effect as a consolidation of the law as contained in the Acts and portions of

Acts repealed by section 3 and for which the Revised Statutes are substituted."[9] A consolidation of the law does not change the existing law. Therefore, the changes to the French version of s. 5 made by the 1985 Statute Revision Commission should not be seen as changing the meaning established in 1886 and in place for a century: former barristers or advocates with at least 10 years' standing remain eligible for appointment to the Supreme Court.

18. For the reasons set out in paragraphs 23 to 29 of Canada's factum, Ontario submits that the shared meaning of the equally-valid English and French versions is to be found in the English text that unambiguously permits the appointment of both former judges and former lawyers and which has remained essentially unchanged for well over a century.[10]

19. If the contrary interpretation were adopted, beginning in 1985 with the change in the French version of s. 5, former lawyers with ten years' standing who until that point had been eligible for appointment to the Supreme Court, would have been rendered ineligible. This would have included all current and future judges of the federal courts. The only way for these jurists to have gained (or regained) their eligibility would have been if they had been appointed as judges of a provincial superior court, or else resigned their adjudicative positions altogether and been reinstated as members of a provincial bar. Meanwhile, retired superior court judges under age 75, along with lawyers who had maintained their bar membership but completely ceased the practice of law, would have remained eligible. If Parliament had intended to so significantly alter the rules governing eligibility for appointment to the Supreme Court and, indeed, to have removed the existing eligibility of such a large class of distinguished jurists, it would have done so clearly

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[9] *Revised Statutes of Canada, 1985 Act*, R.S.C. 1985, c. 40, s. 4 (3rd Supp.), **Cda. BOA, Vol. I, Tab 10**. *Cf.* the 1886 statute revision which expressly provided that the revised version prevailed to the extent of any inconsistency. *An Act respecting the Revised Statutes of Canada*, R.S.C. 1886, c. 4, s. 8, **Cda BOA, Vol. I, Tab 14**

[10] *Supreme Court Act*, *supra*, s. 5, **Cda. BOA, Vol. I, Tab 11** [Emphasis added]

and directly by amending both versions of the *Act*, rather than burying such a change to the French version of s. 5 in a global revision of the statute book.

(2) Barring Federal Court Judges from Appointment to the Supreme Court Is Inconsistent With the Purpose of s. 5

20. The purpose of s. 5, like all judicial qualification provisions, is to ensure that appointees have sufficient legal experience to properly carry out their duties. Excluding federal court judges who had ten years' standing at the bar before their appointment to the bench from being eligible for appointment to the Supreme Court is inconsistent with this purpose. Service as a judge of the federal courts enhances, rather than detracts from, a candidate's qualifications for appointment.

21. The federal courts are superior courts of record with a broad jurisdiction over the wide range of complex matters that fall within their remit as "additional courts for the better administration of the laws of Canada."[11] They are in no way second-class courts whose judges should be deemed ineligible for appointment to the Supreme Court.

22. The replacement of the former Exchequer Court by the Federal Court of Canada in 1970 was "designed to effect very substantial changes in the administration of justice in this country at the federal level."[12] The creation of the Federal Court of Canada "took place in the context of the enormous growth of federal regulatory regimes, the perceived need for a 'national perspective' on judicial review, and a concern about inconsistent supervision of federal public bodies by various provincial superior courts across the country." Accordingly, "the conclusion was reached that this superintending jurisdiction should be vested in a single court that enjoyed the same

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[11] *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 3-4, **Ont. BOA, Vol. III, Tab 35**

[12] House of Commons, *Debates*, 28th Parl., 2nd Sess. (25 March 1970) at 5469-71 and 5473, **Ont. Record, Vol. I, Tab 7, pp. 74-76 and 78**

nation-wide jurisdiction as the federal boards, commissions, and tribunals themselves."[13] The Court's appellate division (now the Federal Court of Appeal) was intended to replace this Court as the first court of appeal, leaving only the most important appeals to go on a second appeal to the Supreme Court "as is now the case with litigation before the superior courts of the provinces."[14]

23. Parliament's intention that federal court judges should enjoy a stature similar to that of judges of provincial superior courts can be seen in the terms of their appointment.[15] Like the judges of the provincial superior courts, federal court judges are appointed by the Governor in Council by letters patent under the Great Seal of Canada. Federal judges serve during good behaviour until age 75, as do judges of provincial superior courts, while judges of both the federal and the provincial superior courts can only be removed by the Governor General on addresses of both Houses of Parliament.

24. Since the federal courts are established by Parliament under s. 101 of the *Constitution Act, 1867*, they do not have inherent jurisdiction and can only hear cases founded in a statutory grant of jurisdiction nourished by an existing body of valid federal law. However, this Court has held that the powers conferred on the federal courts should not be interpreted narrowly. The creation of the Federal Court of Canada "substantially expanded the jurisdiction of the Exchequer Court … and by necessary implication, removed jurisdiction over many matters from the provincial superior courts."[16]

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[13] *Canada (A.G.) v. TeleZone Inc.*, [2010] 3 S.C.R. 585, 2010 SCC 62 at paras. 49-50, **Ont. BOA, Vol. I, Tab 3**
[14] House of Commons, *Debates*, 28th Parl., 2nd Sess. (25 March 1970) at 5470, **Ont. Record, Vol. I, Tab 7, p. 75**
[15] *Constitution Act, 1867* (U.K.), 30&31 Vict., c. 3, ss. 96-100; *Federal Courts Act*, *supra*, ss. 5.2-5.3 and 8, **Ont. BOA, Vol. III, Tab 35**
[16] *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 766, **Ont. BOA, Vol. I, Tab 7**; *Canada (H.R.C.) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paras. 33-41, **Ont. BOA, Vol. I, Tab 4**

25. The Federal Court was originally given exclusive original jurisdiction "in all cases where relief is claimed against the [federal] Crown" unless the Act expressly provided otherwise. Since 1990, that general jurisdiction has been concurrent with the provincial superior courts. It also has concurrent original jurisdiction over suits brought by the federal Crown. Together, the federal courts have exclusive original jurisdiction to judicially review any "federal board, commission or other tribunal." The Federal Court has exclusive or concurrent jurisdiction over intellectual property, citizenship appeals, Canadian maritime law, bills of exchange and promissory notes, aeronautics, and works and undertakings that extend beyond provincial boundaries. It also has jurisdiction over intergovernmental disputes and over disputes that arise outside provincial jurisdiction. The Federal Court of Appeal hears appeals from the Federal Court and the Tax Court of Canada as well as judicial reviews and appeals from "federal boards, commissions, or other tribunals."[17]

26. In addition to their usual duties, certain designated members of the Federal Court decide the most sensitive national security matters. Judges of the Federal Court and Federal Court of Appeal also serve as judges of the Court Martial Appeal Court, hearing service offence appeals involving Canadian Forces stationed around the world.[18]

27. Finally, like the provincial Courts of Appeal, appeals from the Federal Court of Appeal lie directly to the Supreme Court with leave. The Federal Court of Appeal has the same power to

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[17] *Federal Court Act*, S.C. 1970, c. 1, ss. 2 and 17-30 **Cda. BOA, Vol. II, Tab 24**; *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. 3-8, **Ont. BOA, Vol. III, Tab 36**; *Federal Courts Act, supra*, ss. 2 and 17-28, **Ont. BOA, Vol. III, Tab 35**; Frank Iacobucci, "The Federal Court of Canada: Some Comments on Its Origin, Traditions and Evolution" (1989-90) 11 Advoc. Q. 318 at 320-22, **Ont. BOA, Vol. II, Tab 27**

[18] *Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 38-38.17, **Ont. BOA, Vol. III, Tab 48;** *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, ss. 2 and 21-28, **Ont. BOA, Vol. III, Tab 49**; *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.05, **Ont. BOA, Vol. III, Tab 45**; *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 76-87.2, **Ont. BOA, Vol. III, Tab 52**; *National Defence Act*, R.S.C. 1985, c. N-5, s. 234-36, **Ont. BOA, Vol. III, Tab 53**; Iacobucci, "The Federal Court of Canada," *supra* at 324, **Ont. BOA, Vol. II, Tab 26**

grant leave to the Supreme Court as do provincial Courts of Appeal. Similarly, *per saltum* appeals lie from the Federal Court to this Court in the same way as they do from the provincial superior courts.[19]

28. Judges dealing with the wide range of matters that regularly come before the federal courts do not become less qualified for appointment to this Court than they were when they were practising law. To the contrary, the Act itself makes it clear that federal court judges are perfectly capable of carrying out the duties of a judge of this Court. Section 30 provides that whenever there is not a *quorum* of Supreme Court judges available, a judge of the Federal Court of Appeal, Federal Court, or Tax Court of Canada shall be requested to sit as an *ad hoc* judge of the Supreme Court. While doing so, the federal court judge "possesses the powers and privileges and shall discharge the duties of a puisne judge" of the Supreme Court. A provincial superior court judge can only be requested to sit as an *ad hoc* judge if all of the judges of the Federal Court of Appeal, the Federal Court, and the Tax Court of Canada are absent from Ottawa or unable to sit (or if the appeal is from Québec and less than two of the remaining Supreme Court judges are judges from Québec).[20]

29. Furthermore, excluding judges of the federal courts with ten years' standing at the bar from appointment to this Court would create a hierarchy amongst the federally-appointed judiciary. While a federal court judge with ten years' standing at the bar would be ineligible for appointment, current as well as retired or former superior court judges would remain eligible for appointment to the Supreme Court until age 75 regardless of whether they had maintained a connection with the practice of law. Creating such a hierarchy amongst federally-appointed

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[19] *Supreme Court Act*, *supra*, ss. 37-40, **Cda. BOA, Vol. I, Tab 11**
[20] *Supreme Court Act*, *supra*, s. 30, **Cda. BOA, Vol. I, Tab 11**

judges would, over time, diminish the perceived rank and status of the federal courts and may well discourage outstanding candidates from accepting appointment to those courts. Such a result would be inconsistent with the establishment of the federal courts as courts for the "better administration of the laws of Canada."

B. Question 1 – Ontario Takes No Position on Whether s. 6 of the *Supreme Court Act* Permits the Appointment of Former Québec Advocates of Ten Years' Standing to the Supreme Court as Judges from Québec

30. Section 6 of the *Supreme Court Act* applies only to appointments from Québec. Ontario therefore takes no position on whether s. 6 imposes stricter qualifications for appointment as a judge from Québec than the qualifications imposed by s. 5 on appointments generally.

C. Question 2 – Sections 471 and 472 of Bill C-4 Are *Ultra Vires* to the Extent that they Amend the Constitution of Canada in Relation to the Supreme Court of Canada

31. Ontario submits that, at least since 1982, the continued existence of the Supreme Court of Canada as a General Court of Appeal for Canada, including those fundamental features that are necessary to enable the Court to fulfill its essential role in Canada's scheme of constitutional government, are now constitutionally guaranteed to and for Canadians. Accordingly, Parliament cannot unilaterally abolish the Court, nor alter the essential features that constitute its lifeblood, through ordinary legislation under s. 101 of the *Constitution Act, 1867*.

32. One of the essential features that nourishes the Court's unique role is the qualifications needed for appointment to the Court, particularly the presence on the Court of three judges from Québec. Parliament cannot escape constitutional limitations on its jurisdiction through employing the device of 'declaratory legislation.' Therefore, to the extent that ss. 471 and 472 of Bill C-4 purport to alter the qualifications required for appointment, particularly as they relate to the qualifications of the three Québec members, those provisions are *ultra vires*.

(1) The Court Has Become an Essential Part of Canada's Constitutional Architecture

33. As this Court has held, Canada's "constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values."[21] As Canada evolved from a colony to an independent state, the Supreme Court assumed a growing role as the impartial, ultimate arbiter of federal-provincial differences, as an institution for ensuring uniform interpretation of the Constitution and federal laws, and as a vehicle for promoting cross-fertilization between Canada's two legal traditions (the common law and the civil law). In 1982, the Court took on an additional role as the ultimate arbiter of the fundamental rights promised to Canadians through the enactment of the *Canadian Charter of Rights and Freedoms* and the protection of the Aboriginal and treaty rights of the Aboriginal peoples of Canada. Accordingly, the Court's role has grown and matured to the extent that it now serves as a fundamental constitutional linchpin that is essential to the proper functioning of our entire scheme of government.[22]

34. Section 101 of the *Constitution Act, 1867* provides for the "Constitution" as well as the "Maintenance" by Parliament of the Supreme Court:

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.[23]

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[21] *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 at para. 33, **Ont. BOA, Vol. I, Tab 20**
[22] Newman, "The Constitutional Status of the Supreme Court of Canada" (2009), 74 S.C.L.R. (2d) 429 at 439-40, **Cda. BOA, Vol. III, Tab 73**; Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (1978) at 56, **Cda. Record, Vol. VII, Tab 57, p. 109**; *Reference re Secession of Québec*, *supra* at paras. 44, 56, and 74, **Ont. BOA, Vol. I, Tab 20**
[23] *Constitution Act, 1867*, *supra*, s. 101

Read literally, s. 101 is a mere grant of legislative jurisdiction that is permissive rather than mandatory: Parliament "may … from Time to Time" create a "General Court of Appeal for Canada" but is not obliged to do so. In fact, Parliament did not create the Supreme Court until 1875, seven years after Confederation.

35. In the first years after Confederation, however, there was no need for Canada to have its own Supreme Court. Canada was not yet an independent state. As part of the British Empire, its highest court of appeal was the General Court of Appeal for the Empire as a whole: the Imperial Privy Council. By virtue of her Royal Prerogative, the Queen was "the fountain of all justice throughout [her] dominions and exercises jurisdiction in [her] Council, which acts in an advisory capacity to the Crown." In 1833, a statutory Judicial Committee of the Privy Council consisting of holders of high judicial office in England and senior colonial judges appointed to the Imperial Privy Council had been created to conduct the Privy Council's judicial work.[24]

36. Although the decisions of the Privy Council were in form mere recommendations to Her Majesty in Council who implemented them by Order in Council, "according to constitutional convention it is unknown and unthinkable that [Her] Majesty in Council should not give effect to

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[24] Viscount Haldane, "The Work for the Empire of the Judicial Committee of the Privy Council" (1923) 1 Cambridge LJ 143 at 146-48 and 153, **Ont. BOA, Vol. II, Tab 23**; Frank Safford and George Wheeler, *The Practice of the Privy Council in Judicial Matters* (London: Sweet & Maxwell, 1901) at 1-2 and 699-707, **Ont. BOA, Vol. II, Tab 32**; Lord Neuberger, "The Judicial Committee of the Privy Council in the 21st Century" (speech delivered 11 October 2013, Isle of Man) at paras. 14-17, online: http://www.supremecourt.gov.U.K./docs/speech-131011.pdf. Accessed 9 December 2013, **Ont. BOA, Vol. II, Tab 30**; *Judicial Committee Act, 1833* (U.K.), 3&4 Will. IV, c. 46, ss. 1-3, **Ont. BOA, Vol. III, Tab 57**; *Judicial Committee Act, 1843* (U.K.), 6&7 Vict., c. 38, s. 1, **Ont. BOA, Vol. III, Tab 58**; *Judicial Committee Act, 1844* (U.K.), 7&8 Vict., c. 69, ss. 1 and 9, **Ont. BOA, Vol. III, Tab 59**; *Appellate Jurisdiction Act, 1876* (U.K.), 39&40 Vict., c. 59, ss. 6, 14, and 25, **Ont. BOA, Vol. III, Tab 60**; *Judicial Committee Act, 1881* (U.K.), 44&45 Vict., c. 3, s. 1, **Ont. BOA, Vol. III, Tab 61**; *Appellate Jurisdiction Act, 1887* (U.K.), 50&51 Vict., c. 70, ss. 3-5, **Ont. BOA, Vol. III, Tab 62**; *Judicial Committee Amendment Act, 1895* (U.K.), 58&59 Vict., c. 44, s. 1, **Ont. BOA, Vol. III, Tab 63**; *Appellate Jurisdiction Act, 1908* (U.K.), 8 Edw. VII, c. 51, s. 1, **Ont. BOA, Vol. III, Tab 64**

the report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the statute of 1833 all appeals within their purview are referred."[25]

37. At the time of Confederation, appeals lay to the Privy Council from the final courts of appeal of the Canadian colonies subject to varying subject matter and monetary limitations. A right of appeal to the Privy Council could also be granted by Imperial Order-in-Council or by special leave of the Queen in Council in a particular case.[26]

38. In the debates leading up to Confederation, Attorney-General East George Étienne Cartier expressed the common understanding of the Fathers of Confederation that "As long as we keep up our connection with the Mother Country, we shall always have our court of final appeal in Her Majesty's Privy Council." When the *BNA Act* was being debated at Westminster, the former Colonial Secretary made it clear that questions of constitutionality "would first be raised in the Colonial Law Courts, and would ultimately be settled by the Privy Council at home."[27] Accordingly, the nature and character of the ultimate arbiter of legal issues and disputes was a central concern of the drafters of 1867 Act. Because of the continued oversight of the Privy Council, the establishment of a General Court of Appeal for Canada was at that time desirable but not absolutely necessary.

39. Even when Parliament did decide to create a Supreme Court, it was not intended to replace the Privy Council as Canada's final appellate tribunal. The first two Supreme Court bills

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[25] *British Coal Corp. v. The King*, [1935] A.C. 500 at 511 (P.C.), **Ont. BOA, Vol. I, Tab 2**

[26] *British Coal Corp.*, *supra* at 511-12, **Ont. BOA, Vol. I, Tab 2**; *An Act respecting the Court of Error and Appeal*, C.S.U.C. 1859, c. 13, ss. 57-58, **Ont. BOA, Vol. III, Tab 55**; C.C.P. 1867, art. 1178, **Ont. BOA, Vol. III, Tab 56**; Order-in-Council dated 27 November 1852 (New Brunswick appeals) in Safford & Wheeler, *supra* at 380-89, **Ont. BOA, Vol. II, Tab 32**; Order-in-Council dated 20 March 1863 (Nova Scotia appeals) in Safford & Wheeler, *supra* at 384-89 and 391-92, **Ont. BOA, Vol. II, Tab 32**

[27] Province of Canada, Legislative Assembly, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 8th Parl., 3rd Sess. (2 March 1865) at 575-76, **Ont. Record, Vol. I, Tab 1, pp. 5-6**; U.K., H.C., *Parliamentary Debates*, 3rd ser., vol. 185, cols. 1319-20 (4 March 1867), **Ont. Record, Vol. I, Tab 2, p. 17**

introduced by Sir John A. Macdonald did not purport to limit appeals to the Privy Council, the Prime Minister maintaining that "we had no power to deprive a British subject of the right of going to the foot of the Throne for redress." Macdonald believed that it "was very important – especially in a country like ours, to have such a means of uniformity of law as to have the decisions of the great Courts of England as our authority."[28]

40. The Supreme Court bill that eventually became law, as originally introduced by Télesphore Fournier, the Mackenzie Government's Minister of Justice, did not at first contain any provision limiting Privy Council appeals. When an amendment was passed purporting to limit appeals to the Privy Council, the Imperial Government seriously considered disallowing the Act until the Law Officers determined that the clause was not actually effective to bar Privy Council appeals. Similarly, when Parliament attempted to end all appeals to the Privy Council in criminal matters, the Privy Council itself ruled the provision unconstitutional.[29]

41. It was only after the *Statute of Westminster* gave Parliament the power to legislate extraterritorially and to repeal Imperial statutes that the Supreme Court could replace the Privy Council as Canada's ultimate appellate tribunal. Exercising its newly granted authority,

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[28] House of Commons, *Debates*, 1st Parl., 2nd Sess. (21 May 1869) at 422-24, **Ont. Record, Vol. I, Tab 3, pp. 19-21**; House of Commons, *Debates*, 1st Parl., 3rd Sess. (18 March 1870) at 502-08, **Ont. Record, Vol. I, Tab 4, pp. 23-29**; House of Commons, *Debates*, 1st Parl., 3rd Sess. (10 May 1870) at 1498, **Ont. Record, Vol. I, Tab 5, p. 31**

[29] *An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, S.C. 1875, c. 11, s. 47 ("*Supreme and Exchequer Courts Act, 1875*") , **Cda. BOA, Vol. I, Tab 12**; House of Commons, 3rd Parl., 2nd Sess., *Debates* (30 March 1875) at 976-83, **Cda. Record, Vol. I, Tab 10, pp. 133-40;** *Correspondence respecting the Supreme and Exchequer Courts of Canada* (London: n.p., 1876), **Ont. Record, Vol. I, Tab 6, pp. 32-72**; Bora Laskin, "The Supreme Court of Canada: The First One Hundred Years" (Sept. 1975) 53:3 Cdn. Bar Rev. 459 at 460-63, **Ont. BOA, Vol. II, Tab 28;** Michael John Herman, "The Founding of the Supreme Court of Canada and the Abolition of the Appeal to the Privy Council," (1976) 8:7 Ottawa L.R. 7 at 12-23 and 27-28, **Ont. BOA, Vol. II, Tab 24;** Frank Iacobucci, "The Supreme Court of Canada: Its History, Powers and Responsibilities" (2002) 4 J. of Appellate Practice and Process 27 at 28-29, **Ont. BOA, Vol. II, Tab 27**; *An Act to amend the law respecting Procedure in Criminal Cases*, S.C. 1887, c. 50, s. 1, **Ont. BOA, Vol. III, Tab 41**; *An Act further to amend the law respecting Procedure in Criminal Cases*, S.C. 1888, c. 43, s. 1, **Ont. BOA, Vol. III, Tab 42**; *Criminal Code*, R.S.C. 1906, c. 146, s. 1025, **Ont. BOA, Vol. III, Tab 43**; *R. v. Nadan*, [1926] A.C. 483 at 491-93 (P.C.), **Ont. BOA, Vol. I, Tab 14**

Parliament re-enacted the provision barring criminal appeals to the Privy Council in 1933 and abolished civil appeals (including appeals directly from provincial courts) in 1949. Even though the final abolition of Privy Council appeals was hotly contested in Parliament, the Privy Council ultimately upheld Parliament's power to abolish both criminal and civil appeals. In 1949, therefore, the Supreme Court at last truly assumed the role of the "General Court of Appeal for Canada."[30]

42. The final step required to make the Supreme Court a court devoted to determining questions of nation-wide public importance was taken in 1975 when appeals as of right were abolished (except for references to provincial courts of appeal and a limited range of criminal cases). The Court was given the discretion, similar to the discretion already possessed by the House of Lords and the United States Supreme Court, to hear only those cases which it or a provincial or federal Court of Appeal felt were of sufficient "public importance" to warrant granting leave.[31]

43. Free of the supervising authority of the Privy Council and the need to hear cases of purely private interest merely because they involved a certain monetary value, this Court became free to

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[30] *An Act to amend the Criminal Code*, S.C. 1933, c. 53, s. 17, **Ont. BOA, Vol. III, Tab 44**; *British Coal Corp.*, [1935] A.C. 500 at 516-23, **Ont. BOA, Vol. I, Tab 2**; *An Act to amend the Supreme Court Act*, S.C. 1949, c. 37, s. 3, **Cda. BOA, Vol. I, Tab 21**; *Ontario (A.G.) v. Canada (A.G.)*, [1947] A.C. 127 at 145-55 (P.C.), **Cda. BOA, Vol. II, Tab 35**; Laskin, "The Supreme Court of Canada: The First One Hundred Years," *supra* at 459, **Ont. BOA, Vol. II, Tab 28**; Herman, *supra* at 28-31, **Ont. BOA, Vol. II, Tab 24**; Iacobucci, "The Supreme Court of Canada," *supra* at 29-30, **Ont. BOA, Vol. II, Tab 27**

[31] Canadian Bar Association, *Report of the Special Committee of the Canadian Bar Association on the Caseload of the Supreme Court of Canada* at 8-11 and 14-15, **Ont. Record, Vol. I, Tab 8, pp. 115-18 and 121-22**; Senate, *Debates*, 30th Parl., 1st Sess., Vol. I (15 October 1974) at 103-06, **Ont. Record, Vol. I, Tab 9, pp. 187-90**; House of Commons, *Debates*, 30th Parl., 1st Sess., Vol. III (12 December 1974) at 2193-95, **Ont. Record, Vol. II, Tab 10, pp. 2-4**; *An Act to amend the Supreme Court Act and to make related amendments to the Federal Court Act*, S.C. 1974-75-76, c. 18, ss. 3, 5, and 9, **Ont. BOA, Vol. III, Tab 33**; *Supreme Court Act*, *supra*, s. 40, **Cda. BOA, Vol. 1, Tab 11**; Laskin, "The Supreme Court of Canada: The First One Hundred Years," *supra* at 463-64, **Ont. BOA, Vol. II, Tab 28**; Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada," (Sept.1975) 53:3 Cdn. Bar Rev. 469 at 474-75, **Ont. BOA, Vol. II, Tab 29**; Iacobucci, "The Supreme Court of Canada," *supra* at 30-31, **Ont. BOA, Vol. II, Tab 27**

act as befits the ultimate "General Court of Appeal for Canada." In light of the expansion of its jurisdiction and ability to control its own docket, its "mandate became oriented less to error correction and more to development of the jurisprudence." The Court decided that "the powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee" and that "its jurisdiction should be as comprehensive respecting federal and provincial laws as is that of the lower courts, subject to the screening of cases for their national importance."[32]

44. In light of its national role, the Court declared that it was not bound by its or the Privy Council's previous decisions (although it would not depart from them lightly). It held that not only the strict *ratio decidendi* of its decisions, but also "a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative," was binding on lower courts. And it decided that it could grant leave to appeal in any case it found to be of national importance, including cases where leave to appeal a first-level decision to the Court of Appeal has been denied and criminal cases in which the *Criminal Code* does not provide for an appeal.[33]

45. Nor, in the exercise of its "'unifying jurisdiction' over the provincial courts," is the Court "restricted to the identical powers of the lower courts from which an appeal is made." Rather, it can exercise the powers necessary "to enable this Court to discharge its role at the apex of the

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[32] *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198 at 212-13 (Rand J.), **Ont. BOA, Vol. I, Tab 17**; *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 398-99, **Ont. BOA, Vol. I, Tab 11**; *R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76 at para. 53, **Ont. BOA, Vol. I, Tab 12**; Iacobucci, "The Supreme Court of Canada," *supra* at 39-40, **Ont. BOA, Vol. II, Tab 27**

[33] *A.V.G. Management Science Ltd. v. Barwell Developments Ltd.*, [1979] 2 S.C.R. 43 at 57, Ont. BOA, Vol. I, Tab 1; *R. v. Gardiner*, *supra* at 390-405, **Ont. BOA, Vol. I, Tab 11**; *MacDonald v. Montreal (City)*, [1986] 1 S.C.R. 460 at 503-04 and 506-10, **Ont. BOA, Vol. I, Tab 9**; *R. v. Salituro*, [1991] 3 S.C.R. 654 at 665-66, **Ont. BOA, Vol. I, Tab 15**; *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835 at 858-62, **Ont. BOA, Vol. I, Tab 5**; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 at paras. 20-21, **Ont. BOA, Vol. I, Tab 13**; *R. v. Henry*, *supra* at paras. 44 and 52-59, **Ont. BOA, Vol. I, Tab 12**; *R. v. Shea*, [2010] 2 S.C.R. 17, 2010 SCC 26 at paras. 3-12, **Ont. BOA, Vol. I, Tab 16**

Canadian judicial system, as the court of last resort for all Canadians." As "the words 'general court of appeal' in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions," the Court's powers can include the power to answer reference questions dealing with provincial or even international law, notwithstanding the original jurisdiction of the provincial superior courts.[34]

46. As Canada evolved into an independent country and this Court evolved into a supervisory ultimate court of appeal devoted to matters of national importance, what was once permissive became mandatory. The *Canada Act 1982* confirmed Canada's legal independence from the United Kingdom and the fact that Canada can no longer rely on the existence of the Privy Council as a general court of appeal.[35] The *Constitution Act, 1982* also confirmed that Canada is now a constitutional democracy, with the Constitution of Canada serving as the supreme law of Canada. The proper enforcement and interpretation of such a supreme law requires an authoritative arbiter, namely, the Supreme Court of Canada. Thus, given Canada's modern constitutional architecture and the essential status and role played by the Supreme Court in that structure, s. 101 of the *Constitution Act, 1867* must now be read as requiring that Parliament "Maintain" the "General Court of Appeal for Canada" that it has "Constituted."

47. This interpretation of s. 101, as entailing not merely a grant of jurisdiction but also as imposing limitations on Parliament's legislative authority, is broadly analogous to the manner in which this Court has interpreted ss. 92(14) and 96 of the *Constitution Act, 1867*:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next	**92.** Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets

[34] *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at 317-19, **Ont. BOA, Vol. I, Tab 5**; *Reference re Secession of Québec*, *supra* at paras. 6-23, **Ont. BOA, Vol. I, Tab 20**
[35] *Canada Act, 1982* (U.K.), 1982, c.11, s.2

hereinafter enumerated; that is to say, … 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts. … **96.** The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.	ci-dessous énumérés, savoir : … 14. L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux; … **96.** Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.[36]

Although in literal terms, s. 92(14) is a grant of legislative jurisdiction and s. 96 a mere appointing power, this Court has repeatedly held that the judicature provisions of the Constitution were intended to create "a strong constitutional basis for national unity, through a unitary judicial system." Section 96 limits both Parliament and the provincial legislatures. Neither level of government can remove the core jurisdiction of the provincial superior courts without a constitutional amendment.[37]

48. Section 101 should similarly be interpreted as requiring that Parliament Maintain a "General Court of Appeal for Canada," including the maintenance of those features needed to allow the Court to fulfill its unique national role.[38] Just as the "presence of a federally staffed and remunerated bench across the country has served as a unifying force in Canada," so too has the existence of a supreme appellate tribunal that can hear appeals from any court in Canada on any

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[36] *Constitution Act, 1867, supra*, ss. 92(14) and 96
[37] *Reference re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 at 728, **Ont. BOA, Vol. I, Tab 18**; *MacMillan Bloedel v. Simpson*, [1995] 4 S.C.R. 725 at paras. 10-11, 15, and 36-37, **Ont. BOA, Vol. I, Tab 10**; *Reference re Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 at paras. 26 and 72-73, **Ont. BOA, Vol. I, Tab 19**
[38] Newman, *supra* at 436-43, **Cda. BOA, Vol. III, Tab 73**

legal matter, including on matters of common and civil law. The "constitutionally guaranteed existence" of independent courts of inherent jurisdiction in each province is "one of the ultimate safeguards of the rule of law in this country."[39] The existence of one national "General Court of Appeal for Canada" that can resolve differences of opinion between the provincial superior courts, answer legal questions of general public importance, and offer definitive interpretations of the supreme law of Canada, is an equal, if not greater, safeguard.

49. This reading of s. 101 is supported and reinforced by the unwritten constitutional principles identified by this Court in the *Québec Secession Reference*.[40] The **federalism principle** requires there to be an ultimate, impartial tribunal that can definitively settle disputes between the federal and provincial orders of government as to their respective spheres of authority. The **democratic principle** is advanced by allowing for the participation of, and accountability to, the people through public institutions created under the Constitution and supported and protected by the Court. In interpreting and applying the *Canadian Charter of Rights and Freedoms* and other constitutional rights provisions in a consistent manner across the country, the Court facilitates the **protection of minorities** as well as the protection of the **Aboriginal and treaty rights** of the Aboriginal peoples of Canada. This Court is the critical and essential guardian of **constitutionalism and the rule of law**, providing ultimate authoritative interpretations of the supreme law of Canada. In this way, the Court "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs" and provides a "shield for individuals from arbitrary state action."[41]

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[39] *Reference re Residential Tenancies Act (N.S.)*, *supra* at para. 72, **Ont. BOA, Vol. I, Tab 19**
[40] *Reference re Secession of Québec*, *supra* at paras. 49-82, **Ont. BOA, Vol. I, Tab 20**
[41] *Reference re Secession of Québec*, *supra* at para. 70, **Ont. BOA, Vol. I, Tab 20**

(2) The Essential Role of the Supreme Court Has Been Guaranteed at Least Since 1982

50. It is unnecessary for purposes of this Reference to specify the precise moment at which the continued existence of the Supreme Court of Canada became guaranteed to Canadians. It is sufficient to conclude that, at least since 1982 when Canada attained formal legal independence through the *Canada Act 1982*[42] and the supremacy of the Constitution was affirmed by s. 52 of the *Constitution Act, 1982*, the continued existence of the Supreme Court has been a constitutionally guaranteed feature of the Canadian constitutional order. Indeed, ss. 41(d) and 42(1)(d) implicitly assume the continued existence of the Supreme Court of Canada.[43] Viewed in its modern context, therefore, s. 101 of the *Constitution Act, 1867* must now be read as entailing an obligation on Parliament to "Maintain" the Supreme Court of Canada as a national institution capable of fulfilling its essential role.

51. The original version of the federal constitutional proposals tabled by Prime Minister Trudeau in October 1980 did not make any mention of the Supreme Court. In April 1981, however, the Premiers of eight provinces[44] proposed an alternate amending formula (the "April Accord") based on the equality of the provinces. After this Court decided in September 1981 that there was a constitutional convention requiring the federal government obtain the substantial consent of the provinces before requesting an amendment affecting provincial powers, the federal government and all provinces except Québec agreed on an alternative package of

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[42] *Canada Act 1982*, *supra*, s. 2
[43] *Constitution Act, 1982*, ss. 41(d), 42(1)(d) and 52, being Schedule B to the *Canada Act 1982* (U.K.), *supra*
[44] Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Prince Edward Island, Québec, and Saskatchewan.

proposals to allow patriation of the Constitution. One of the key features of this alternative package was acceptance of the amending procedures set out in the April Accord.[45]

52. The amending formula enacted as Part V of the *Constitution Act, 1982* makes express reference to the Supreme Court of Canada. Section 41(d) provides that constitutional amendments relating to the "composition of the Supreme Court of Canada" require the unanimous consent of the Senate, the House of Commons, and all ten provincial legislatures. Section 42(1)(d) provides that other constitutional amendments relating to the Supreme Court require the consent of the Senate, the House of Commons, and the legislatures of seven provinces with at least 50% of the aggregate provincial population.[46]

53. Academic commenters have divided on the significance and legal effect of these provisions, some noting that the *Supreme Court Act* is not included in the Schedule of Acts and orders included within the definition of the "Constitution of Canada" in s. 52(2) of the *Constitution Act, 1982*.[47]

54. It should be emphasized, however, that Ontario is not suggesting that the definition of the "Constitution of Canada" should be read as including the *Supreme Court Act*. Nor does Ontario

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[45] Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, **Cda. Record, Vol. VI, Tab 42**; *Amending Formula for the Constitution of Canada: Text and Explanatory Notes* (Ottawa: 16 April 1981), **Cda. Record, Vol. VI, Tab 43.1**; *Constitutional Accord: Canadian Patriation Plan* (Ottawa: 16 April, 1981), **Cda. Record, Vol. VI, Tab 43.2**; *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 908-09, **Cda. BOA, Vol. III, Tab 58**; *First Ministers' Agreement on the Constitution* (Ottawa: 5 November 1981), **Ont. Record, Vol. II, Tab 14, pp. 89-94**

[46] *Constitution Act, 1982*, *supra*, ss. 41(d) and 42(1)(d)

[47] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., looseleaf (Scarborough: Thomson Carswell, 2007) at paras. 4.2(c), 4.3(g), and 8.1, **Cda. BOA, Vol. III, Tab 70**; Benoît Pelletier, *La modification constitutionnelle au Canada* (Scarborough: Carswell, 1996) at 52-54, 73-75, 214, and 278-81, **Ont. BOA, Vol. II, Tab 31**; Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 41st Parl., 2nd Sess. (21 November 2013) at 13 (Prof. Pelletier), **Ont. Record, Vol. III, Tab 21, p. 13**; *Amending Formula for the Constitution of Canada: Text and Explanatory Notes* (Ottawa: 16 April 1981) at 10, **Cda. Record, Vol. VI, Tab 43.1, p. 152**; First Ministers' Meeting on the Constitution, *A Guide to the Meech Lake Constitutional Accord* (Ottawa: 2-3 June 1987) at 6 and 17-18, **Cda. Record, Vol. IV, Tab 33, pp. 61 and 70-71**; First Ministers' Meeting on the Constitution, Draft Legal Text (Ottawa: 9 October 1992) at 24-26, **Cda. Record, Vol. IV, Tab 34, pp. 149-51**

claim that ss. 41(d) or 42(1)(d) of the *Constitution Act, 1982* have themselves constitutionalized the Supreme Court in whole or in part. Rather, Ontario argues that s. 101 of the *Constitution Act, 1867,* must now be interpreted as requiring Parliament to "Maintain" the Supreme Court of Canada as a "General Court of Appeal for Canada." This inherent limit is constitutionally entrenched by virtue of the fact that s. 101 of the *Constitution Act, 1867* is itself an express part of the Constitution of Canada. The constitutionally guaranteed status of the Supreme Court of Canada therefore flows from s. 101 itself, as opposed to through an extended definition of the Constitution of Canada based on the references to the Supreme Court in ss. 41 and 42 of the *Constitution Act, 1982*.

55. It is not a novel proposition to hold that certain aspects of a country's judicial structure can come to be constitutionally protected. In Australia, for example, the federal Constitution sets out in detail the qualifications, powers, and jurisdiction of the federal courts. It also grants the federal Parliament the power to invest State courts with federal judicial power. The State courts, however, were created by the pre-existing State constitutions. The provisions of the federal Constitution concerning the appointment, tenure, and remuneration of federal judges and the separation of judicial from executive and legislative power do not expressly apply to them. Yet the High Court of Australia has held that the federal constitution's grant of appeals to the High Court from State supreme courts and the power to invest State courts with federal jurisdiction implies that, at a minimum, each State must have a Supreme Court at the apex of its judicial system from which appeals may be taken to the High Court and which is capable of receiving federal judicial power. The enactment of the Australian federal Constitution therefore impliedly constitutionalized the existence of the State Supreme Courts and prevented State legislatures

from conferring powers on a State court that "substantially impair its institutional integrity" or are "incompatible with, or repugnant to, the exercise of judicial power."[48]

56. Similarly, even though ss. 96-100 of the *Constitution Act, 1867* and s. 11(d) of the *Constitution Act, 1982* expressly provide certain protections for judicial independence, this Court has held that "there are serious limitations to the view that the express provisions of the Constitution comprise an exhaustive and definitive code for the protection of judicial independence." Rather, it found that "judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*" which was "recognized and affirmed by the preamble to the *Constitution Act, 1867*."[49]

57. This Court has previously interpreted the grant of legislative power to establish a "General Court of Appeal for Canada" in s. 101 of the *Constitution Act, 1867* as being subject to certain limits. In the *Secession Reference* the Court considered whether the grant of advisory jurisdiction pursuant to s. 53 of the Act was validly conferred on the Court. This Court reasoned that s. 53 was only valid if it was legislation in relation to the constitution or organization of a "general court of appeal." In the Court's view, this issue turned on two questions: (1) whether a "general court of appeal" may properly exercise an original jurisdiction; and (2) whether a general court of appeal may properly undertake other legal functions. The Court went on to

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[48] *Constitution* (Cth.), ss. 71, 73(ii), and 77(iii), **Ont. BOA, Vol. III, Tab 65**; *Kable v. Director of Public Prosecutions (NSW)* (1996), 189 C.L.R. 51, 138 A.L.R. 577 at 604-09 (Toohey J.), 611-12 and 614-16 (Gaudron J.), 617-24 (McHugh J.), and 639-44 (Gummow J.), **Ont. BOA, Vol. I, Tab 8**; *South Australia v. Totani*, [2010] HCA 39, 271 A.L.R. 662 at paras. 69-74 and 82-83 (French C.J.), 141-49 (Gummow J.), 201-07 and 225-26 (Hayne J.), 425-28 and 432-36 (Crennan and Bell JJ.), and 438, 443-46, and 479-81 (Kiefel J.), **Ont. BOA, Vol. I, Tab 21**; *Wainohu v. NSW*, [2011] HCA 24, 278 A.L.R. 1 at paras. 44-59 and 66-68 (French CJ and Kiefel J) and 104-09 (Gummow, Hayne, Crennan, and Bell JJ.), **Ont. BOA, Vol. II, Tab 22**

[49] *Reference re Remuneration of Judges of the Prov. Court (P.E.I.)*, [1997] 3 S.C.R. 3 at paras. 82-109, **Cda. BOA, Vol. III, Tab 59** [Emphasis in original]

uphold the validity of s. 53 on the basis that there was nothing objectionable in a final appellate court exercising original jurisdiction on an exceptional basis.[50]

58. While these comments were made in the context of a positive grant of jurisdiction to the Court, the converse must also be true, namely, that an attempt by Parliament to deprive or remove jurisdiction from the Court, to a degree or in a manner that would be inconsistent with its role as a "General Court of Appeal for Canada," must similarly be *ultra vires*.

59. Nor is this interpretation of s. 101 of the *Constitution Act, 1867* contradicted by the fact that the Meech Lake and Charlottetown Accords attempted to entrench more extensive provisions regarding the Supreme Court. The fact that the existence and effective functioning of the Court is already constitutionally guaranteed does not preclude the relevant political authorities from seeking greater clarity by adding express provisions to the Constitution. As Professor Hogg has noted, it would be desirable and valuable to clarify the constitutional status of the Supreme Court through express amendment:

> The references to the Supreme Court of Canada in ss. 41(d) and 42(1)(d) of the Constitution Act, 1982 have created an intolerably confusing situation. While it is probable that these references are ineffective as long as the Court is not provided for in the Constitution of Canada, this is by no means clear; ***and it is possible that the Supreme Court Act, or some as yet unidentified parts of the Supreme Court Act, cannot now be amended by the ordinary legislative process***. The situation cries out for clarification, and clarification has now been provided by the Meech Lake Constitutional Accord.[51]

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[50] *Reference re Secession of Québec*, *supra*, at paras. 6-15, **Ont. BOA, Vol. I, Tab 20**

[51] Peter W. Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988) at 30 [Emphasis added], **Ont. BOA, Vol. II, Tab 25** See also Canadian Bar Association, *Report of the Canadian Bar Association Committee on The Supreme Court of Canada* (Ottawa: Canadian Bar Association, 1987) at 13-14, **Ont. Record, Vol. II, Tab 15, pp. 99-100**

60. The Special Joint Committee on the 1987 Constitutional Accord struck to consider the Meech Lake was of the view that the Supreme Court had already been entrenched in the Constitution:

> Accordingly, in 1982, after much discussion about the Court's constitutional status, ***the Supreme Court of Canada was 'entrenched' in the Constitution of Canada by sections 41(d) and 42(1)(d) of the Constitution Act, 1982.*** That is to say, the status of the Supreme Court was for the first time reflected in the Constitution of Canada and ***certain aspects of the Supreme Court were immunized from unilateral legislative change by the Parliament of Canada***.

At the same time, the Special Committee felt that there was a need to provide greater clarity. As "commentators dealing with these parts of the amending formula have characterized them as ambiguous" and "the Court's actual existence was in the view of some critics, still dependent on the *Supreme Court Act*, which is simply an Act of Parliament," the Committee recommended proceeding with the proposal to expressly entrench the essential aspects of the Supreme Court in the Constitution.[52]

61. Moreover, both the Meech Lake and the Charlottetown Accords proposed changing the qualifications and method of appointment of Supreme Court judges and therefore required a constitutional amendment in any event. Both Accords would have allowed any person to be appointed to the Supreme Court "who, after having been admitted to the bar of a province or territory, has, for a ***total*** of at least ten years, ***been*** a judge of ***any court in Canada*** or a member of the bar of ***any province or territory***."[53] For example, a judge appointed to a provincial court

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[52] Senate and House of Commons, Special Joint Committee on the 1987 Constitutional Accord, *Minutes of Proceedings and Evidence*, 33rd Parl., 2nd Sess., No. 17 (9 September 1987) at 80, **Cda. Record, Vol. VII, Tab 46, p. 23** [Emphasis added]

[53] First Ministers' Meeting on the Constitution, *A Guide to the Meech Lake Constitutional Accord* (Ottawa: 2-3 June 1987), s. 101B(1), **Cda. Record, Vol. IV, Tab 33, p. 70** [Emphasis added]; First Ministers' Meeting on the Constitution, *Draft Legal Text* (Ottawa: 2 October 1992), s. 101B(1), **Cda. Record, Vol. IV, Tab 34, p. 150** [Emphasis added]

with seven years' standing at the bar would have become eligible for appointment after three years' service on the bench even though he or she would not have been eligible under the current s. 5.[54] Similarly, a person who had practiced in more than one province or territory for a total of ten years would have been eligible for appointment even if he or she did not have ten years' standing in any one province.

62. Similar changes would have been made to the qualifications for appointment as a judge from Québec. Any persons "who, after having been admitted to the bar of Québec, have, for ***a total*** of at least ten years, been judges of ***any court*** of Québec or of ***any court established by the Parliament of Canada***, or members of the bar of Québec" would have been eligible for appointment.[55] Thus, judges of the Cour du Québec or the federal courts would have been eligible for appointment even if they had not had ten years' standing at the Barreau du Québec. Both the Meech Lake and Charlottetown Accords recognized that the qualifications for appointment to the Supreme Court, including particularly the qualifications of the three judges from Québec, were an essential characteristic of the institution.

(3) The Characteristics Necessary to Enable the Court to Fulfill Its Role as a General Court of Appeal for Canada

63. Ontario's position is that the obligation to "Maintain" a "General Court of Appeal for Canada" under s. 101 must include those features or characteristics that are essential to the fulfillment of the Court's modern, unique role in the Canadian constitutional context. But what

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[54] British Columbia, Manitoba, Nova Scotia and P.E.I. all allow appointment to their provincial court with only five years'standing at the bar. *Provincial Court Act*, R.S.B.C. 1996, c. 379, s. 6(2), **Ont. BOA, Vol. III, Tab 37**; *Provincial Court Act*, C.C.S.M., c. C275, s. 3(2), **Ont. BOA, Vol. III, Tab 38**; *Provincial Court Act*, R.N.S. 1989, c. 238, s. 5, **Ont. BOA, Vol. III, Tab 39**; *Provincial Court Act*, R.S.P.E.I. 1988, c. P-25, s. 2(2), **Ont. BOA, Vol. III, Tab 40**

[55] First Ministers' Meeting on the Constitution, A Guide to the Meech Lake Constitutional Accord (Ottawa: 2-3 June 1987), s. 101B(2), **Cda. Record, Vol. IV, Tab 33, p. 71** [Emphasis added]; First Ministers' Meeting on the Constitution, Draft Legal Text (Ottawa: 2 October 1992), s. 101B(2), **Cda. Record, Vol. IV, Tab 34, p. 150** [Emphasis added]

are these essential features? While it is not necessary for purposes of this Reference to provide a detailed or exhaustive list, Ontario suggests that, a minimum, the following are clearly fundamental to its fulfilment of the Court's modern role:

(a) the continued existence of the Court;

(b) its exercise of exclusive, ultimate appellate jurisdiction over a wide range of civil and criminal matters within and for Canada;

(c) the independence of the Court and its judges;

(d) the composition of the Court, including the representation of Québec's unique civil law system by a substantial number of judges trained in civil law; and

(e) the qualifications for appointment as a judge.

The Court's Continued Existence:

64. For the reasons already described above at paras 33 to 58, the Court plays an essential role in Canada's constitutional architecture and could only be abolished through a constitutional amendment enacted in accordance with Part V of the *Constitution Act, 1982*. It is not necessary on this Reference to determine the precise level of consent that would be required for such an amendment.

The Court's Broad Jurisdiction:

65. Unlike the Supreme Court of the United States, this Court has always exercised a general appellate jurisdiction over both the provincial and federal courts, whether the questions at issue arose from the constitution, the common law, or federal or provincial legislation. No area of law or legal subject matter is immune from review by Canada's highest court. It is a "***General*** Court

of Appeal for Canada," not just a specialized constitutional or federal court, and this has become a key feature of its role as a national institution.[56]

66. The question of whether Parliament should grant the Supreme Court jurisdiction to review decisions of provincial courts on matters of provincial law was hotly contested, first in 1875 when the Court was being established and again in 1949 when appeals to the Privy Council were being abolished. Ultimately, the decision taken in 1875 and affirmed again in 1949 was that the Court should enjoy a broad appellate jurisdiction over all decisions of the provincial courts.[57]

67. Although submissions were made to the 1978 Task Force on Canadian Unity suggesting that the Supreme Court should become a specialized Constitutional Court or be limited to the interpretation of federal statutes rather than continuing to be a General Court of Appeal, the Task Force rejected that submission. In addition to the "inevitable difficulty in many cases of separating constitutional and non-constitutional issues," the Task Force found that "there is an advantage in having one federal appeal court interpreting all legislation and that it is important for Québec to participate as fully in all federal institutions as the other provinces." It therefore

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[56] Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada," *supra* at 471-73, **Ont. BOA, Vol. II, Tab 29**; *Supreme and Exchequer Courts Act, 1875*, *supra*, ss. 11, 15-23, 27, 48-49, and 51-57, **Cda. BOA, Vol. I, Tab 12**; *Supreme Court Act*, *supra*, ss. 35-42, **Cda. BOA, Vol. I, Tab 11**; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 183(3), **Ont. BOA, Vol. III, Tab 46**; *Canada Elections Act*, S.C. 2000, c. 9, s. 532, **Ont. BOA, Vol. III, Tab 47**; *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 15(1)-(2), **Ont. BOA, Vol. III, Tab 50**; *Competition Act*, R.S.C. 1985, c. C-34, s. 34(3.1), **Ont. BOA, Vol. III, Tab 51**; *Criminal Code*, R.S.C. 1985, c. C-46, ss. 691-93 and 784, **Ont. BOA, Vol. III, Tab 45**; *National Defence Act*, R.S.C. 1985, c. N-5, s. 245, **Ont. BOA, Vol. III, Tab 53**; *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 107, **Ont. BOA, Vol. III, Tab 54**

[57] House of Commons, *Debates*, 3rd Parl., 2nd Sess. (23 February 1875) at 288, **Cda. Record, Vol. I, Tab 6, p. 26**; House of Commons, *Debates*, 3rd Parl., 2nd Sess. (16 March 1875) at 738-44, 746-50, and 753-56, **Cda. Record, Vol. I, Tab 7, pp. 37-43, 45-49, and 52-55**; House of Commons, *Debates*, 3rd Parl., 2nd Sess.(25 March 1875) at 921-28, **Cda. Record, Vol. I, Tab 8, pp. 78-85**; House of Commons, *Debates*, 3rd Parl., 2nd Sess. (27 March 1875) at 932-42, **Cda. Record, Vol. I, Tab 9, pp. 96-106**; House of Commons, *Debates*, 3rd Parl., 2nd Sess. (30 March 1875) at 969-70 and 986-87, **Cda. Record, Vol. I, Tab 10, pp. 126-27 and 143-44**; Senate, *Debates*, 3rd Parl., 2nd Sess. (6 April 1875) at 735-36, **Cda. Record, Vol. I, Tab 12, p. 181**; House of Commons, *Debates*, 21st Parl., 1st Sess. (27 September 1949) at 299-301, **Cda. Record, Vol. II, Tab 20, pp. 133-35**

recommended that the Supreme Court continue to hear "all types of cases both constitutional and non-constitutional and in relation to the interpretation of both central and provincial statutes."[58]

68. The year before, the Canadian Bar Association's Committee on the Constitution had similarly concluded that in order to properly play its symbolic and legal roles in Canada's constitutional architecture, the Supreme Court should remain a court with broad jurisdiction:

> The existing Supreme Court is far more than a constitutional court, however. It is a general court of appeal for Canada. Potentially, it can pronounce on any kind of legal issue. We think this should be continued. For the reasons given in discussing the courts generally, we believe the ordinary courts in the provinces should generally continue to hear all matters, federal and provincial. … Symbolically too, it is important that the highest court in the land be seen as not above considering ordinary problems of everyday life from time to time. Cases like that of *Murdoch* have caused national soul-searching about fundamental values in this country.
>
> A specialized court would require cumbersome and expensive procedures. Any system that would prevent the Supreme Court of Canada from acting as a general court of appeal would have to provide a mechanism for distinguishing the areas subject to Supreme Court appeal from those that would terminate with the final court in the province. This would involve either elevating the case to the Supreme Court of Canada for a decision upon jurisdiction or the establishment of a separate tribunal of conflicts to delineate the jurisdiction between the Supreme Court of Canada and the final provincial appellate court.
> …
>
> A further difficulty is that it is often very difficult to identify, for example, a "constitutional" case or a case founded on a federal statute. Cases often involve federal or constitutional law only tangentially. Constitutional or federal law issues are often intricately related to issues of civil rights within provincial jurisdiction. It is often necessary to determine these issues before the constitutional issue arises or can be determined: To separate appellate jurisdiction might invite protracted and complicated litigation and appeals on one issue followed by a remand and renewed litigation and appeals on the remaining issues. Such complexity is highly undesirable.

Although many of the proposals to expressly entrench the Supreme Court in the Constitution would have constitutionally guaranteed its jurisdiction to hear constitutional cases, none of them

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[58] Task Force on Canadian Unity, *A Future Together* (Ottawa: January 1979) at 100-01, **Ont. Record, Vol. II, Tab 11, pp. 21-22**

would have deprived it of the ability to act as a General Court of Appeal with jurisdiction to hear appeals from any court on any matter the Court decided to be of public importance.[59]

69. The Court's broad jurisdiction to hear all manner of appeals, whether constitutional or non-constitutional and whether involving federal or provincial law, is therefore one of its essential features. Since 1982, any attempt to deprive the Court of that general jurisdiction would require a constitutional amendment. Of course, Parliament can continue to regulate the form and manner of the exercise of this jurisdiction, such as procedural details, or the scope for continued appeals as of right, provided that any such changes do not amount to a direct or indirect attempt to derogate from the Court's role as a General Court of Appeal for Canada.

The Court's Independence:

70. It has always been accepted that the judges of the Supreme Court should enjoy the same independence as the judges of the provincial superior courts. Whether or not ss. 99 and 100 of the *Constitution Act, 1867* (respectively providing provincial superior court judges with tenure during good behaviour until age 75 and requiring their remuneration to be fixed by Parliament) apply directly to Supreme Court judges, the tenure of Supreme Court judges during good behaviour has always been guaranteed by the Act and their remuneration has always been set out in federal statute.[60] The constitutional principles of judicial independence also apply to the

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[59] Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (1978) at 56-57, **Cda. Record, Vol. VII, Tab 57, pp. 109-10**; Constitutional Conference, Second Meeting, *The Constitution and the People of Canada* (Ottawa: 10-12 February 1969) at 84, **Cda. Record, Vol. V, Tab 37, p. 50**; Constitutional Conference, *Proceedings* (Victoria: 14 June 1971), Art. 35, **Cda. Record, Vol. IV, Tab 32, p. 14**; Bill C-60, *Constitutional Amendment Act, 1978*, 30th Parl., 3rd Sess., cl. 112, **Cda. Record, Vol. VI, Tab 41, pp. 54-55**; Federal-Provincial Conference of First Ministers, *Report of the Continuing Committee of Ministers on the Constitution to First Ministers: Supreme Court* (Ottawa: 8-12 September 1980) Appendix A, s. 8, **Ont. Record, Vol. II, Tab 12, p. 44**; Federal-Provincial Conference of First Ministers on the Constitution, *Proposal for a common stand of the Provinces* (Ottawa: 8-12 September 1980) Appendix D, s. 8, **Ont. Record, Vol. II, Tab 13, p. 70**

[60] *Supreme and Exchequer Courts Act, 1875*, *supra*, ss. 5-7, **Cda. BOA, Vol. I, Tab 12**; *An Act to amend the Supreme Court Act*, S.C. 1927, c. 38, s. 1, **Cda. BOA, Vol. I, Tab 19**; *An Act to amend the Supreme Court Act*, S.C.

Supreme Court.[61] Several proposals to either make ss. 99 and 100 apply directly to the Supreme Court or to insert analogous provisions into the Constitution have been raised over the years but none has ever been enacted.[62] The independence of the Supreme Court and its judges is an essential feature of its role as a supreme appellate court and cannot be affected without a constitutional amendment.

The Court's Composition:

71. Although the size of the Court has expanded from six to seven and now to nine judges as Canada has grown, it has always remained small enough to sit as a full court in major cases. Further, as a "General Court of Appeal for ***Canada***," the Court's composition has always reflected the bijural nature of Canada's legal system. In recognition of the unique nature of Québec's civil law system, the Court has always included a fixed and substantial number of judges appointed from Québec. Originally, two judges were required to be from Québec, a feature that was critical to the grant of jurisdiction to the Court over civil law matters in 1875. That number was increased to three when the size of the court was increased to nine judges.

1949, c. 37, s. 1, **Cda. BOA, Vol. I, Tab 21**; *Supreme Court Act*, *supra*, s. 9, **Cda. BOA, Vol. I, Tab 11**; *Judges Act*, R.S.C. 1985, c. J-1, s. 9, **Cda. BOA, Vol. I, Tab 8**

[61] *Reference re Remuneration of Judges of the Prov. Court (P.E.I.), supra* at paras. 82-109, **Cda. BOA, Vol. III, Tab 59**

[62] Constitutional Conference, Second Meeting, *The Constitution and the People of Canada* (Ottawa: 10-12 February 1969) at 82, **Cda. Record, Vol. V, Tab 37, p. 49**; Constitutional Conference, *Proceedings* (Victoria: 14 June 1971), Arts. 34 and 41, **Cda. Record, Vol. IV, Tab 32, pp. 14-15**; Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (1978) at 59, **Cda. Record, Vol. VII, Tab 57, p. 112**; Bill C-60, *Constitutional Amendment Act, 1978*, 30th Parl., 3rd Sess., cls. 109-10, **Cda. Record, Vol. VI, Tab 41, p. 53**; Task Force on Canadian Unity, *A Future Together* (Ottawa: January 1979) at 102, **Ont. Record, Vol. II, Tab 11, p. 23**; Federal-Provincial Conference of First Ministers, *Report of the Continuing Committee of Ministers on the Constitution to First Ministers: Supreme Court* (Ottawa: 8-12 September 1980) Appendix A, s. 6, **Ont. Record, Vol. II, Tab 12, p. 43**; Federal-Provincial Conference of First Ministers on the Constitution, *Proposal for a common stand of the Provinces* (Ottawa: 8-12 September 1980) Appendix D, s. 6, **Ont. Record, Vol. II, Tab 13, p. 69**; First Ministers' Meeting on the Constitution, *A Guide to the Meech Lake Constitutional Accord* (Ottawa: 2-3 June 1987), s. 101D, **Cda. Record, Vol. IV, Tab 33, p. 71**; First Ministers' Meeting on the Constitution, *Draft Legal Text* (Ottawa: 2 October 1992), s. 101E, **Cda. Record, Vol. IV, Tab 35, p. 151**

When Bill C-60 proposed increasing the size of the Court to 11 judges, it would have required four judges to be from Québec.[63]

72. Proposals have been made to require the Court's Québec judges to hear all appeals dealing solely with civil law issues, either alone or as the majority of a panel of judges. None of those proposals was enacted. Instead, the Court has, as the CBA recommended in 1978, respected the unique nature of civil law appeals by denying leave where no general issue of national importance is raised and often sitting a panel of five judges, including the three Québec judges, when a case predominantly involves civil law issues.[64]

73. It is clear from the explanatory notes to the 1981 April Accord that the intent of s. 41(d) was to require unanimous consent before any further change to the composition of the Supreme Court could be made, particularly to Québec's right to have three judges appointed from Québec.[65]

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[63] *Supreme and Exchequer Courts Act, 1875*, *supra*, ss. 3-4, **Cda. BOA, Vol. I, Tab 12**; *Supreme Court Act*, *supra*, ss. 4 and 6, **Cda. BOA, Vol. I, Tab 11**; House of Commons, *Debates*, 3rd Parl., 2nd Sess. (30 March 1875) at 970-74, **Cda. Record, Vol. I, Tab 10, pp. 127-31**; House of Commons, *Debates*, 21st Parl., 1st Sess. (11 October 1949) at 662-65, **Cda. Record, Vol. III, Tab 22, pp. 12-15**; Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (1978) at 60-61, **Cda. Record, Vol. VII, Tab 57, pp. 113-14**; Bill C-60, *Constitutional Amendment Act, 1978*, 30th Parl., 3rd Sess., cls. 102 and 104-05, **Cda. Record, Vol. VI, Tab 41, pp. 49-50**

[64] Constitutional Conference, Second Meeting, *The Constitution and the People of Canada* (Ottawa: 10-12 February 1969) at 84, **Cda. Record, Vol. V, Tab 37, p. 50**; Constitutional Conference, *Proceedings* (Victoria: 14 June 1971), Art. 39, **Cda. Record, Vol. IV, Tab 32, p. 15**; Bill C-60, *Constitutional Amendment Act, 1978*, 30th Parl., 3rd Sess., cl. 111, **Cda. Record, Vol. VI, Tab 41, p. 50**; Task Force on Canadian Unity, *A Future Together* (Ottawa: January 1979) at 101, **Ont. Record, Vol. II, Tab 11, p. 22**; Federal-Provincial Conference of First Ministers, *Report of the Continuing Committee of Ministers on the Constitution to First Ministers: Supreme Court* (Ottawa: 8-12 September 1980) Appendix B, **Ont. Record, Vol. II, Tab 12, pp. 45-47**; Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (1978) at 58, **Cda. Record, Vol. VII, Tab 57, p. 111**

[65] Amending Formula for the Constitution of Canada: Text and Explanatory Notes (Ottawa: 16 April 1981) at 10, **Cda. Record, Vol. VI, Tab 43.1, p. 151**

The Qualifications for Appointment as a Judge:

74. As discussed above, the qualifications for appointment as a judge of the Supreme Court have remained essentially the same since it was created – either ten years' standing at the bar of a province or service of any length on a provincial superior court or court of appeals.[66]

75. Although there have been several proposals over the years to permit persons with a total of ten years' standing at the bar and service on any court to qualify for appointment to the Supreme Court, none of those proposals has ever been enacted.[67]

76. Determining who is eligible to serve on the Supreme Court is an essential feature of the institution since it ensures that the judges of the Court have suitable legal qualifications and stature to effectively sit on Canada's highest judicial authority. Any changes to those qualifications would affect the Court's ability to fulfill its role, as well as the pool of candidates available for appointment, thereby requiring a constitutional amendment.

77. For example, the purpose of reserving three seats for Québec judges is to ensure that the Court has a substantial number of judges with an appreciation and understanding of Québec's unique civil law tradition. Changes to the qualifications of the Québec judges that would undermine their ability to do so (e.g. a mere residency requirement with no requirement of any

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[66] *Supreme and Exchequer Courts Act, 1875, supra*, s. 4, **Cda. BOA, Vol. I, Tab 12**; *Supreme Court Act, supra*, ss. 5-6, **Cda. BOA, Vol. I, Tab 11**

[67] Constitutional Conference, Second Meeting, *The Constitution and the People of Canada* (Ottawa: 10-12 February 1969) at 84, **Cda. Record, Vol. V, Tab 37, p. 50**; Constitutional Conference, *Proceedings* (Victoria: 14 June 1971), Arts. 24-25, **Cda. Record, Vol. IV, Tab 32, p. 12**; Bill C-60, *Constitutional Amendment Act, 1978*, 30th Parl., 3rd Sess., cl. 103, **Cda. Record, Vol. VI, Tab 41, p. 49**; Federal-Provincial Conference of First Ministers, *Report of the Continuing Committee of Ministers on the Constitution to First Ministers: Supreme Court* (Ottawa: 8-12 September 1980) Appendix A, s. 3, **Ont. Record, Vol. II, Tab 12, p. 43**; Federal-Provincial Conference of First Ministers on the Constitution, *Proposal for a common stand of the Provinces* (Ottawa: 8-12 September 1980) Appendix D, s. 3, **Ont. Record, Vol. II, Tab 13, p. 69**; First Ministers' Meeting on the Constitution, *A Guide to the Meech Lake Constitutional Accord* (Ottawa: 2-3 June 1987), s. 101B, **Cda. Record, Vol. IV, Tab 33, pp. 70-71**; First Ministers' Meeting on the Constitution, *Draft Legal Text* (Ottawa: 2 October 1992), s. 101B, **Cda. Record, Vol. IV, Tab 35, p. 150**

civil law training or qualifications) would likely be a change to the Court's composition requiring approval under the unanimity procedure pursuant to s. 41(d).

(4) To the Extent that Bill C-4 Alters the Existing Qualifications for Appointment to the Court, It Is *Ultra Vires*

78. This Court has recently confirmed that the legislature may offer a binding interpretation of its own law by enacting declaratory legislation.[68] However this conclusion was reached in the non-constitutional context and concerned the degree to which the legislative could enter the domain of the judiciary and establish interpretations that are binding on third parties. The Court did not consider whether, or in what manner, declaratory legislation could operate in the constitutional context.

79. The very nature of a constitutional limitation is that it is not subject to amendment by ordinary legislation, whether of a 'declaratory' or other character. It is therefore axiomatic that Parliament cannot employ declaratory legislation to escape from or override constitutional limitations that flow from s. 101 of the *Constitution Act, 1867*.

80. Ontario has argued that s. 5 of the Act already permits the appointment of former lawyers with more than 10 years' standing at the bar of a province. However, assuming *arguendo* that we are wrong on this point and s. 5 does not authorize such appointments, Parliament cannot change or amend this rule through ordinary legislation. To the degree, therefore, that ss. 471-72 of Bill C-4 change the existing qualifications for appointment to the Supreme Court, either generally or with respect to appointees from Québec, these provisions are in relation to one of the essential features of the Court and are *ultra vires* Parliament's authority to enact unilaterally. The fact that these provisions are described as being "declaratory" is immaterial, as such a characterization

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[68] *Régie des rentes du Québec v. Canada Bread Company*, 2013 SCC 46 at paras. 26-29, **Cda. BOA, Vol. III, Tab 61**

cannot expand Parliament's jurisdiction or enable it to overcome the limitations inherent in s. 101 of the *Constitution Act, 1867*.

PART IV – SUBMISSIONS ON COSTS

81. As an intervener, Ontario submits that costs should not be awarded to or against it.

PART V – SUBMISSIONS ON DISPOSITION

82. Ontario submits that the reference questions should be answered as follows:

Question 1:

(a) With regards to section 5 of the *Supreme Court Act*: Yes.

(b) With regards to section 6 of the *Supreme Court Act*: No position.

Question 2:

No, to the extent that the legislation changes the qualifications needed for appointment to the Supreme Court of Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3RD DAY OF JANUARY, 2014.

_____
Patrick J. Monahan

_____
Josh Hunter

Counsel for the Attorney
General of Ontario

PART VI – TABLE OF AUTHORITIES

TEXTS

PART VII – STATUTES AND REGULATIONS

1. *Constitution Act, 1867* (U.K.), 30&31 Vict., c. 3, ss. 92(14) and 96-101

2. *Canada Act 1982* (U.K.), 1982, c. 11, s. 2

3. *Constitution Act, 1982*, ss. 11(d), 38(1), 41(d), 42(1)(d), and 52, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

4. *An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, S.C. 1875, c. 11, ss. 3-7, 11, 15-23, 27, 47-49, and 51-57

5. *Supreme and Exchequer Courts Act,* R.S.C. 1886, c. 135, s. 4(2)

6. *Supreme Court Act*, R.S.C. 1906, c. 139, s. 5

7. *Supreme Court Act*, R.S.C. 1927, c. 35, s. 5

8. *An Act to amend the Supreme Court Act*, S.C. 1927, c. 38, s. 1

9. *An Act to amend the Supreme Court Act*, S.C. 1949, c. 37, ss. 1 and 3

10. *Supreme Court Act*, R.S.C. 1952, c. 259, s. 5

11. *Supreme Court Act*, R.S.C. 1970, c. S-19, s. 5

12. *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 4-6, 9, 30, and 35-42

13. *An Act to amend the Supreme Court Act and to make related amendments to the Federal Court Act*, S.C. 1974-75-76, c. 18, ss. 3, 5, and 9

14. *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40, ss. 471-72

15. *Federal Court Act*, S.C. 1970, c. 1, ss. 2 and 17-30

16. *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 2-4, 5.2-5.3, 8, and 17-28

17. *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. 3-8

18. *Judges Act*, R.S.C. 1985, c. J-1, s. 9

19. *Provincial Court Act*, R.S.B.C. 1996, c. 379, s. 6(2)

20. *Provincial Court Act*, C.C.S.M., c. C275, s. 3(2)

21. *Provincial Court Act*, R.N.S. 1989, c. 238, s. 5

22. *Provincial Court Act*, R.S.P.E.I. 1988, c. P-25, s. 2(2)

23. *An Act respecting the Revised Statutes of Canada*, R.S.C. 1886, c. 4, s. 8

24. *Revised Statutes of Canada, 1985 Act*, R.S.C. 1985, c. 40, s. 4 (3rd Supp.)

25. *An Act to amend the law respecting Procedure in Criminal Cases*, S.C. 1887, c. 50, s. 1

26. *An Act further to amend the law respecting Procedure in Criminal Cases*, S.C. 1888, c. 43, s. 1

27. *Criminal Code*, R.S.C. 1906, c. 146, s. 1025

28. *An Act to amend the Criminal Code*, S.C. 1933, c. 53, s. 17

29. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 83.05, 691-93 and 784

30. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 183(3)

31. *Canada Elections Act*, S.C. 2000, c. 9, s. 532

32. *Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 38-38.17

33. *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, ss. 2 and 21-28

34. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 15(1)-(2)

35. *Competition Act*, R.S.C. 1985, c. C-34, s. 34(3.1)

36. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 76-87.2

37. *National Defence Act*, R.S.C. 1985, c. N-5, s. 234-36 and 245

38. *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 107

39. *An Act respecting the Court of Error and Appeal*, C.S.U.C. 1859, c. 13, ss. 57-58

40. C.C.P. 1867, art. 1178

41. Order-in-Council dated 27 November 1852

42. Order-in-Council dated 20 March 1863

43. *Judicial Committee Act, 1833* (U.K.), 3&4 Will. IV, c. 46, ss. 1-3

44. *Judicial Committee Act, 1843* (U.K.), 6&7 Vict., c. 38, s. 1

45. *Judicial Committee Act, 1844* (U.K.), 7&8 Vict., c. 69, ss. 1 and 9

46. *Appellate Jurisdiction Act, 1876* (U.K.), 39&40 Vict., c. 59, ss. 6, 14, and 25

47. *Judicial Committee Act, 1881* (U.K.), 44&45 Vict., c. 3, s. 1

48. *Appellate Jurisdiction Act, 1887* (U.K.), 50&51 Vict., c. 70, ss. 3-5

49. *Judicial Committee Amendment Act, 1895* (U.K.), 58&59 Vict., c. 44, s. 1

50. *Appellate Jurisdiction Act, 1908* (U.K.), 8 Edw. VII, c. 51, s. 1

51. *Constitution* (Cth.), ss. 71, 73(ii), and 77(iii)

Constitution Act, 1867 (U.K.), 30&31 Vict., c. 3, ss. 92(14) and 96-101

VI. DISTRIBUTION OF LEGISLATIVE POWERS

...

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

...

VII. JUDICATURE

Appointment of Judges

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of Judges in Ontario, etc.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

VI. DISTRIBUTION DES POUVOIRS LÉGISLATIFS

...

POUVOIRS EXCLUSIFS DES LEGISLATURES PROVINCIALES

Sujets soumis au contrôle exclusif de la législation provinciale

92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

...

14. L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;

...

VII. JUDICATURE

Nomination des juges

96. Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

Choix des juges dans Ontario, etc.

97. Jusqu'à ce que les lois relatives à la propriété et aux droits civils dans Ontario, la Nouvelle-Écosse et le Nouveau-Brunswick, et à la procédure dans les cours de ces provinces, soient rendues uniformes, les juges des cours de ces provinces qui seront nommés par le gouverneur-général devront être choisis parmi les membres des barreaux respectifs de ces provinces.

Choix des juges dans Québec

98. Les juges des cours de Québec seront choisis parmi les membres du barreau de cette province.

Tenure of office of Judges

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Termination at age 75

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

Salaries, etc., of Judges

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

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.

Durée des fonctions des juges

99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.

Cessation des fonctions à l'âge de 75 ans

(2) Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent article, cessera d'occuper sa charge lorsqu'il aura atteint l'âge de soixante-quinze ans, ou à l'entrée en vigueur du présent article si, à cette époque, il a déjà atteint ledit âge.

Salaires, etc. des juges

100. Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l'Amirauté, lorsque les juges de ces dernières sont alors salariés, seront fixés et payés par le parlement du Canada.

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.

Canada Act 1982 (U.K.), 1982, c. 11, s. 2

Termination of power to legislate for Canada

2. No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law.

Cessation du pouvoir de légiférer pour le Canada

2. Les lois adoptées par le Parlement du Royaume-Uni après l'entrée en vigueur de la Loi constitutionnelle de 1982 ne font pas partie du droit du Canada.

Constitution Act, 1982, ss. 11(d), 38(1), 41(d), 42(1)(d), and 52, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

...

LEGAL RIGHTS

...

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

...

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

...

GARANTIES JURIDIQUES

...

Affaires criminelles et pénales

11. Tout inculpé a le droit :

...

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

...

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

General procedure for amending Constitution of Canada

38. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(*a*) resolutions of the Senate and House of Commons; and

(*b*) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

...

PARTIE V

PROCÉDURE DE MODIFICATION DE LA CONSTITUTION DU CANADA

Procédure normale de modification

38. (1) La Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée à la fois :

a) par des résolutions du Sénat et de la Chambre des communes;

b) par des résolutions des assemblées législatives d'au moins deux tiers des provinces dont la population confondue représente, selon le recensement général le plus récent à l'époque, au moins cinquante pour cent de la population de toutes les provinces.

...

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:

...

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

...

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 :

...

d) la composition de la Cour suprême du Canada;

...

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):

...

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

...

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) :

...

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

...

PART VII

GENERAL

PARTIE VII

DISPOSITIONS GÉNÉRALES

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Primauté de la Constitution du Canada

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Constitution du Canada

(2) La Constitution du Canada comprend :

a) la *Loi de 1982 sur le Canada*, y compris la présente loi;

b) les textes législatifs et les décrets figurant à l'annexe;

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Modification

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.