

**In the Matter of a Reference by the Governor in Council Concerning Sections 5 and 6**

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**Court :** Canada Supreme Court

**Decided On :** Mar-21-2014

**Judge :** The Honourable Chief Justice Mr. McLachlin, LeBel, Abella, Cromwell, Moldaver, Karakatsanis & Wagner

**Appeal No. :** 35586

**Advocate for Pet/Ap. :** René LeBlanc and Christine Mohr, for the Attorney General of Canada. Patrick J. Monahan and Josh Hunter, for the intervener the Attorney General of Ontario. André Fauteux and Jean François Beaupré, for the intervener the Attorney General of Quebec. Sébastien Grammond, Jeffrey Haylock and Nicolas M. Rouleau, for the interveners Robert D'Arcy, Alice Desjardins and Gilles L'Écuyer. Rocco Galati, on his own behalf. Sébastien Grammond, for the intervener the Canadian Association of Provincial Court Judges. Paul Slansky, for the intervener the Constitutional Rights Centre Inc.

**Judgement :**

The Chief Justice and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. "

## **I. Introduction**

[1] The Supreme Court Act provides that three of the nine judges of the Supreme Court of Canada must be appointed from among the judges of the Court of

Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province?: R.S.C. 1985, c. S-26, s. 6. This reference seeks our opinion on two aspects of the eligibility requirements for appointment to these three Quebec seats.

[2] The first is whether a person who was at any time an advocate of at least 10 years standing at the Barreau du Québec qualifies for appointment under s. 6 as being œfrom among the advocates of that Province?. If the answer to the first question is no, the second question arises. It is whether Parliament can enact legislation to make such a person eligible for appointment to one of the three Quebec seats on the Court. The answer to these questions ” which on their face raise issues of statutory interpretation ” engage more fundamental issues about the composition of the Court and its place in Canada’s legal and constitutional order.

[3] These questions arise in the context of the appointment under s. 6 of the Honourable Marc Nadon, a supernumerary judge of the Federal Court of Appeal and formerly, but not at the time of this appointment, a member of the Quebec bar of more than 10 years standing. Justice Nadon was not a judge of the Court of Appeal or the Superior Court of the Province of Quebec and therefore was not eligible for appointment on that basis. The narrow question is thus whether he was eligible for appointment because he had previously been a member of the Quebec bar.

[4] In our view, the answer to this question is no: a current judge of the Federal Court of Appeal is not eligible for appointment under s. 6 as a person who may be appointed œfrom among the advocates of that Province?. This language requires that, at the time of appointment, the appointee be a current member of the Quebec bar with at least 10 years standing.

[5] On the question of whether Parliament can enact legislation purporting to declare a binding interpretation of s. 6 and thereby permit the appointment of a former member of the bar to one of the Quebec positions on the Court, our view is that the answer is also no. The eligibility requirements set out in s. 6 relate to the composition of the Court and are, therefore, constitutionally protected. Under s.

41(d) of the Constitution Act, 1982, any amendment in relation to the composition of the Supreme Court of Canada may only be made by proclamation issued by the Governor General under the Great Seal of Canada authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province.

[6] The practical effect is that the appointment of Justice Nadon and his swearing-in as a judge of the Court were void ab initio. He remains a supernumerary judge of the Federal Court of Appeal.

## **II. The Reference Questions**

[7] On October 22, 2013, the Governor General in Council issued Order in Council P.C. 2013-1105 under s. 53 of the Supreme Court Act, which referred to this Court the following questions:

(1) Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the Supreme Court Act?

(2) Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled Economic Action Plan 2013 Act, No. 2?

[8] These questions concern the proper interpretation of ss. 5 and 6 of the Supreme Court Act and Parliament's authority to amend them. Our opinion, issued pursuant to s. 53(4) of the Act, limits itself to the legal and jurisdictional issues necessary to answer the questions. We are not asked about nor opine on the advantages or disadvantages of the eligibility requirements codified in ss. 5 and 6 of the Act and possible changes to them.

## **III. Background**

[9] On September 30, 2013, the Prime Minister of Canada announced the nomination of Justice Marc Nadon, a supernumerary judge of the Federal Court of Appeal, to the Supreme Court of Canada. On October 3, 2013, by Order in Council P.C. 2013-1050, Justice Nadon was named a judge of the Supreme Court of Canada, replacing Justice Morris Fish as one of the three judges appointed from Quebec pursuant to s. 6 of the Supreme Court Act. He was sworn in as a member of the Court on the morning of October 7, 2013.

[10] The same day, the appointment was challenged by an application before the Federal Court of Canada: Federal Court File No. T-1657-13. Justice Nadon decided not to participate in any matters before the Court.

[11] On October 22, 2013, the Governor General in Council referred the two questions set out earlier to this Court for hearing and consideration pursuant to s. 53 of the Supreme Court Act. On the same day, Bill C-4, Economic Action Plan 2013 Act, No. 2, was introduced in the House of Commons. Clauses 471 and 472 of Bill C-4 proposed to amend the Supreme Court Act by adding ss. 5.1 and 6.1. These provisions were subsequently passed and received Royal Assent on December 12, 2013: S.C. 2013, c. 40. The new s. 6.1 seeks to make it clear that a former member of the Quebec bar is eligible for appointment under s. 6.

[12] Sections 5, 5.1, 6 and 6.1 of the Act now read as follows:

5. Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

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

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

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

#### **IV. Question 1**

##### **A. The Issue**

(1) Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the Supreme Court Act?

[13] Section 5 of the Supreme Court Act sets out the general eligibility requirements for appointment to the Supreme Court of Canada by creating four groups of people who are eligible for appointment: (1) current judges of a superior court of a province, including courts of appeal; (2) former judges of such a court; (3) current barristers or advocates of at least 10 years standing at the bar of a province; and (4) former barristers or advocates of at least 10 years standing.

[14] Section 6 of the Act sets out the specific eligibility requirements for appointment to the Supreme Court as a judge for the province of Quebec. The provision expressly identifies two categories of people who are eligible for appointment: (1) judges of the Court of Appeal and Superior Court of Quebec, and (2) members of the Quebec bar.

[15] The question in this reference is whether the second category in s. 6 of the Act encompasses both current and former members of the Quebec bar, or whether it limits eligibility to current members of the bar. Justice Nadon does not belong to the first category " he was not a judge of the Court of Appeal or of the Superior Court of Quebec " and was not a current member of the Quebec bar at the time of his appointment. He is, however, a former member of the Quebec bar of more than 10 years standing. His eligibility for appointment thus turns on the scope of the second category " i.e. on whether a person is eligible for appointment to the Supreme Court of Canada under s. 6 of the Act on the basis of former

membership of the Quebec bar.

[16] The Attorney General of Canada submits that s. 5 sets out the general eligibility criteria and allows both former and current members of the bar to be appointed to the Supreme Court. In his view, s. 6 does not restrict or otherwise substantively modify these criteria; rather, it functions to ensure that judges appointed for Quebec fulfil the general eligibility requirements in the province of Quebec.

[17] In our view, s. 6 narrows the pool from the four groups of people who are eligible under s. 5 to two groups who are eligible under s. 6. By specifying that three judges shall be selected from among the members of a specific list of institutions, s. 6 requires that persons appointed to the three Quebec seats must, in addition to meeting the general requirements of s. 5, be current members of these institutions.

[18] We come to this conclusion for four main reasons. First, the plain meaning of s. 6 has remained consistent since the original version of that provision was enacted in 1875, and it has always excluded former advocates. Second, this interpretation gives effect to important differences in the wording of ss. 5 and 6. Third, this interpretation of s. 6 advances its dual purpose of ensuring that the Court has civil law expertise and that Quebec's legal traditions and social values are represented on the Court and that Quebec's confidence in the Court be maintained. Finally, this interpretation is consistent with the broader scheme of the Supreme Court Act for the appointment of ad hoc judges.

## B. General Principles of Interpretation

[19] The Supreme Court Act was enacted in 1875 as an ordinary statute under the authority of s. 101 of the Constitution Act, 1867 (S.C. 1875, c.11). However, as we explain below, Parliament's authority to amend the Act is now limited by the Constitution. Sections 5 and 6 of the Supreme Court Act reflect an essential feature of the Supreme Court of Canada " its composition " which is constitutionally protected under Part V of the Constitution Act, 1982. As such, they must be interpreted in a broad and purposive manner and understood in their

proper linguistic, philosophic and historical context: *Hunter v. Southam Inc.*, 1984 Can LII 33 (SCC), [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, at p. 136; *R. v. Big M Drug Mart Ltd.*, 1985 Can LII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344.

### C. Legislative History of Sections 5 and 6

[20] The eligibility requirements for appointments from Quebec are the result of the historic bargain that gave birth to the Court in 1875. Sections 5 and 6 in the current Act descend from the original eligibility provision found in s. 4 of the 1875 Act. It is therefore useful to review the legislative history of the eligibility provisions. As we shall discuss, only the 1886 amendment to the Act substantively changed the general eligibility requirements for appointment to the Court under what is now s. 5. There have been no substantive changes to the criteria for appointments from Quebec since the Act was introduced in 1875.

[21] The 1875 Act set out in a single provision the appointment process, the number of judges (one chief justice and five puisne judges), the general eligibility requirements, and the specification that two judges shall come from the bench or bar of Quebec: s. 4. The portion of s. 4 that evolved into ss. 4, 5 and 6 of the current Act stated:

4. [Qualification of Chief Justice and Judges, respectively.] Her Majesty may appoint, by letters patent, under the Great Seal of Canada, one person, who is, or has been, a Judge of one of the Superior Courts in any of the Provinces forming part of the Dominion of Canada, or who is a Barrister or Advocate of at least ten years standing at the Bar of any one of the said Provinces, to be Chief Justice of the said Court, and five persons who are, or have been, respectively, Judges of one of the said Superior Courts, or who are Barristers or Advocates of at least ten years standing at the Bar of one of the said Provinces, to be Puisne Judges of the said Court, two of whom at least shall be taken from among the Judges of the Superior Court or Court of Queens Bench, or the Barristers or Advocates of the Province of Quebec;

This provision contemplated the appointment of only current lawyers to the Court, both for Quebec and for the rest of the country.

[22] The only substantive change to the eligibility requirements took place in 1886 as part of statutory revisions (R.S.C. 1886, c. 135). Section 4 was divided into several subsections, including ss. 4(2) and 4(3) setting out the general requirements for appointment and, more specifically, the requirements for Quebec appointments. Notably, the language in s. 4(2) (now s. 5) was broadened to encompass any person who œis or has been? (œsera ou aura t?) a barrister or advocate. Sections 4(2) and 4(3) read:

2. [Who may be appointed judge.] Any person may be appointed a judge of the court who is or has been a judge of a superior court of any of the Provinces of Canada, or a barrister or advocate of at least ten years standing at the bar of any of the said Provinces:

3. [Judges from bar of Quebec.] Two at least of the judges of the court shall be appointed from among the judges of the Court of Queens Bench, or of the Superior Court, or the barristers or advocates of the Province of Quebec:

[23] We have underlined key aspects of the wording in each official language of the revisions of 1886, which we will discuss below. The 1886 Act contemplated the appointment of current or former lawyers to the Court generally, but it did not change the more restrictive language for the Quebec appointments. The revisions of 1886 stipulated that where the effect of the revised statutes is different from that of the repealed laws, œthe provisions contained in [the Revised Statutes] shall prevail?: An Act respecting the Revised Statutes of Canada, R.S.C. 1886, c. 4, s. 8.

[24] In 1906, ss. 4(2) and 4(3) became ss. 5 and 6, but no substantive changes were made: R.S.C. 1906, c. 139.

[25] In 1927, one judge was added for a total of seven judges on the Court, but the number of Quebec judges remained two: S.C. 1926-27, c. 38, s. 1; R.S.C. 1927, c. 35, ss. 4 and 6. The Court was enlarged again in 1949, when the number of

judges of the Court increased to nine and the ratio of Quebec judges was preserved by increasing their number to three: An Act to amend the Supreme Court Act, S.C. 1949 (2nd Sess.), c. 37, s.1.

[26] The current text of ss. 5 and 6 dates to the statutory revisions of 1985. These revisions changed the French wording of ss. 5 and 6, creating an ambiguity that will be discussed below, but did not change the English wording. Parliament did not intend any substantive changes at this time: Legislation Revision and Consolidation Act, R.S.C. 1985, c. S-20, s. 6. The 1985 text provides:

5. [Who may be appointed judges] 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. [Three judges from Quebec] At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

[27] In summary, other than the increase from two Quebec judges to three in s. 6, there have been no substantive amendments to ss. 5 and 6 between the 1886 revisions, which explicitly took precedence over the previous version, and the version currently in force.

#### D. Section 5

[28] To repeat, s. 5 of the Act sets out the eligibility requirements that apply generally to appointments to the Court. The section creates four groups of people who are eligible for appointment: (1) current judges of a superior court of a province, including courts of appeal; (2) former judges of such a court; (3) current barristers or advocates of at least 10 years standing at the bar of a province; and (4) former barristers or advocates of at least 10 years standing. Thus, the section authorizes the appointment to the Court of current or former barristers or advocates of at least 10 years standing at the bar of a province.

[29] The English version of s. 5 is unambiguous. The specification *is or has been?* clearly applies to both judges of a superior court of a province and

barristers or advocates of at least 10 years standing at the bar of a province. This is confirmed by the provisions legislative history. Under the 1875 Act, appointments were limited to persons œwho are, or have been, respectively, Judges of one of the said Superior Courts, or who are Barristers or Advocates?: s. 4. The 1875 Act excluded former advocates from appointment. It permitted the appointment of current or former judges and current, but not former, advocates. As part of statutory revisions of 1886, however, the specification œis or has been? was extended to both judges and advocates, thereby including former advocates as a fourth category of eligible candidates. As we have observed, the changes made under the 1886 statutory revision were intended to have substantive effect.

[30] To the extent that there are ambiguities in the French version of s. 5, they were created by the 1985 revision. Prior to 1985, the wording of the French text (œest ou a t?) closely mirrored that of the English text (œis or has been?). Between 1886 and 1985, both versions plainly encompassed current as well as former advocates. The English version continues to do so. The French version now requires the selection of judges œparmi les juges, actuels ou anciens? or œparmi les avocats inscrits pendant au moins dix ans?. It might be suggested that the current wording excludes advocates who are not current members of the bar, because the specification œactuels ou anciens? is not applied to them. We reject this argument.

[31] The 1985 change to the French version of s. 5 did not change its meaning. This amendment was part of statutory revisions which were not intended to effect substantive change: s. 6 of the Legislation Revision and Consolidation Act; *Sarvanis v. Canada*, 2002 SCC 28 (Can LII), 2002 SCC 28, [2002] 1 S.C.R. 921, at para. 13. In short, the meaning of the text of the English and French versions remains the same as before the 1985 revision.

[32] We reach the same conclusion by applying the shared meaning rule of bilingual interpretation, which requires that where the words of one version may raise an ambiguity, one should look to the other official language version to determine whether its meaning is plain and unequivocal: Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 99-116; Pierre-Andr Ct, in

collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 347-49; *R. v. Daoust*, 2004 SCC 6 (Can LII), 2004 SCC 6, [2004] 1 S.C.R. 217, at para. 28. The English version of the text is unambiguous in its inclusion of former advocates for appointment, while the French version is reasonably capable of two interpretations: one which excludes former advocates from appointment, and one which includes them. The meaning common to both versions is only found in the unambiguous English version, which is therefore the meaning we should adopt.

[33] Finally, the inclusion of former advocates of at least 10 years standing at the bar is consistent with the purpose of s. 5, which is to ensure that appointees to the Court have adequate legal experience.

[34] In the result, judges of the Federal Court or Federal Court of Appeal will generally qualify for appointment under s. 5 on the basis that they were formerly barristers or advocates of at least 10 years standing.

#### E. Section 6

[35] Section 6 specifies that at least three of the nine judges appointed to the Court «shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province? («sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci?»).

[36] The Attorney General of Canada argues that ss. 5 and 6 must be read together as complementary provisions, so that the requirement of at least 10 years standing at the bar applies to appointments from Quebec. Since s. 6 makes no reference to how many years an appointee must have been at the bar, reading it without s. 5 would lead to the absurd result that a highly inexperienced lawyer would be eligible for appointment to the Court, the Attorney General says.

[37] We agree that ss. 5 and 6 must be read together. We also agree that the requirement of at least 10 years standing at the bar applies to appointments from Quebec. We disagree, however, with the Attorney General's ultimate conclusion

that reading these provisions together in a complementary way permits the appointment of former advocates of at least 10 years standing to the Quebec seats on the Court. Section 6 does not displace the general requirements under s. 5 that apply to all appointments to the Supreme Court. Rather, it makes additional specifications in respect of the three judges from Quebec. One of these is that they must currently be a member of the Quebec bar.

[38] We reach this conclusion based on the plain meaning and purpose of s. 6, and the surrounding statutory context.

#### (1) The Plain Meaning of Section 6

[39] The language of s. 5 is general (œ[a]ny person may be appointed a judge?), whereas the language of s. 6 is restrictive (œ[a]t least three of the judges shall be appointed from among?). As such, s. 6 limits the pool of candidates. It is undisputed that s. 6 does so geographically by requiring that the appointments be made from one of the listed institutions in Quebec. The issue is whether s. 6 also imposes a requirement of current membership in one of the listed institutions.

[40] The Attorney General of Canada argues that the plain meaning of s. 6 does not require current membership in the bar of Quebec. He submits that the phrase œfrom among? (œparmi? in French) does not contain a temporal element and, as a result, s. 6 imports s. 5s temporal specifications (œis or has been?).

[41] We do not agree. There is an important change in language between s. 5 and s. 6. Section 5 refers to both present and former membership in the listed institutions by using the words œis or has been? in the English version and œactuels ou anciens? in the French version. By contrast, s. 6 refers only to the pool of individuals who are presently members of the bar (œshall be appointed from among? and œsont choisis parmi?). The significance of this change is made clear by the plain meaning of the words used: the words œfrom among the judges? and œparmi les juges? do not mean œfrom among the former judges? and œparmi les anciens juges?, and the words œfrom among the advocates? and œparmi les avocats? do not mean œfrom among the former advocates? and œparmi les anciens avocats?.

[42] It is a principle of interpretation that the mention of one or more things of a particular class excludes, by implication, all other members of the class: Sullivan, at pp. 243-44. By enumerating the particular institutions in Quebec from which appointments shall be made, s. 6 excludes all other institutions. Similarly, by specifying that three judges shall be appointed from among the judges and advocates (i.e. members) of the identified institutions, s. 6 impliedly excludes former members of those institutions and imposes a requirement of current membership.

[43] The fact that ss. 5 and 6 originated in a single provision " s. 4 of the 1875 Act " does not undermine our interpretation, because the same textual observations could be made with respect to the original provision. Then, as now, the general requirements for appointment were phrased generally whereas the specification for Quebec judges was expressed more restrictively: œ. . . two of whom at least shall be taken from among the Judges of the Superior Court or Court of Queens Bench, or the Barristers or Advocates of the Province of Quebec . . .?.

[44] Indeed, s. 4 of the 1875 Act adds weight to our conclusion that former advocates are excluded from appointment as Quebec judges. From 1875 until the revisions of 1886, eligibility extended to persons œwho are, or have been, respectively, Judges . . . or who are Barristers or Advocates?. The Quebec requirement was first enacted alongside this general language, which clearly excluded former advocates from appointment. When the general requirements were broadened in 1886, rendering former advocates eligible, the wording of the Quebec requirement did not substantively change. With the exception of the increase from two judges to three in 1949, the wording of the Quebec requirement has remained substantively unchanged since 1875. Absent any express intention to amend the Quebec requirement since its enactment in 1875, we find that s. 6 retains its original meaning and excludes the appointment of former Quebec advocates to the designated Quebec seats. The requirement of current membership in the Quebec bar has been in place " unambiguous and unchanged " since 1875.

[45] In summary, on a plain reading, s. 5 creates four groups of people eligible for appointment: current and former judges of a superior court and current and former barristers or advocates of at least 10 years standing at the bar. But s. 6 imposes a requirement that persons appointed to the three Quebec seats must, in addition to meeting the general requirements of s. 5, be current members of the listed Quebec institutions. Thus, s. 6 narrows eligibility to only two groups for Quebec appointments: current judges of the Court of Appeal or Superior Court of Quebec and current advocates of at least 10 years standing at the bar of Quebec.

## (2) The Purpose of Section 6

[46] This textual analysis is consistent with the underlying purpose of s. 6. The Attorney General of Canada submits that the purpose of s. 6 is simply to ensure that three members of this Court are trained and experienced in Quebec civil law and that this purpose is satisfied by appointing either current or former Quebec advocates, both of whom would have civil law training and experience.

[47] While the Attorney General of Canada's submissions capture an important purpose of the provision, a review of the legislative history reveals an additional and broader purpose.

[48] Section 6 reflects the historical compromise that led to the creation of the Supreme Court. Just as the protection of minority language, religion and education rights were central considerations in the negotiations leading up to Confederation (*Reference re Secession of Quebec*, 1998 Can LII 793 (SCC), [1998] 2 S.C.R. 217 (œSecession Reference?), at paras. 79-82), the protection of Quebec through a minimum number of Quebec judges was central to the creation of this Court. A purposive interpretation of s. 6 must be informed by and not undermine that compromise.

[49] The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the functioning and the legitimacy of the Supreme

Court as a general court of appeal for Canada. This broader purpose was succinctly described by Professor Russell in terms that are well supported by the historical record:

. . . the antipathy to having the Civil Code of Lower Canada interpreted by judges from an alien legal tradition was not based merely on a concern for legal purity or accuracy. It stemmed more often from the more fundamental premise that Quebecs civil-law system was an essential ingredient of its distinctive culture and therefore it required, as a matter of right, judicial custodians imbued with the methods of jurisprudence and social values integral to that culture. [Emphasis in original.]

(Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (1969), at p. 8)

[50] At the time of Confederation, Quebec was reluctant to accede to the creation of a Supreme Court because of its concern that the Court would be incapable of adequately dealing with questions of the Quebec civil law (Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (1992), at pp. 4-5; Russell, at pp. 8-9). Various Members of Parliament for Quebec expressed concerns about a œSupreme Tribunal of Appeal? that would be composed of Judges, the great majority of whom would be unfamiliar with the civil laws of Quebec, which tribunal would be called upon to revise and would have the power to reverse the decisions of all their Quebec Courts . . . .

(Debates of the House of Commons, 2nd Sess. 3rd Parl. (the œ1875 Debates?), March 16, 1875, at p. 739, Henri Thomas Taschereau, M.P. for Montmagny, Quebec)

[51] The bill creating the Supreme Court was passed only after amendments were made responding specifically to Quebecs concerns. Most significantly, the amended bill that became the Supreme Court Act provided that two of the six judges œshall be taken from among the Judges of the Superior Court or Court of Queens Bench, or the Barristers or Advocates of the Province of Quebec?: s. 4 of the 1875 Act.

[52] In debating the proposed establishment of the Supreme Court in 1875, members of Parliament on both sides of the House of Commons were conscious of the particular situation of Quebec and the need to ensure civil law expertise on the Court. At second reading, Mr. Taschereau of the governing Liberal Party described Quebec's special interest in the bill:

This interest arises out of the civil appellate jurisdiction proposed to be given to the Supreme Court, and of the peculiar position of that Province with regard to her institutions and her laws compared with those of the other Provinces. Situated as she is, no Province in the Dominion is so greatly interested as our own in the passage of the Act now under discussion, and which before many days are over, will form a most important chapter in the statute books of the Dominion.

(1875 Debates, March 16, 1875, at p. 738)

[53] Toussaint Antoine Rodolphe Laflamme introduced the provision for a minimum number of Quebec judges. He described the requirement as a matter of right for Quebec: æHe understood if this Supreme Court was to regulate and definitely settle all the questions which involved the interests of Lower Canada, that Province was entitled to two of the six Judges? (1875 Debates, March 27, 1875, at p. 938). Mr. Laflamme reasoned that with two judges (one third) on the Supreme Court, Quebec æwould have more and better safeguards than under the present system?, namely appeals to the Privy Council (ibid.). Tlesphore Fournier, Minister of Justice and principal spokesman for the bill, argued that the two judges would contribute to the civil law knowledge of the bench as a whole: æ. . . there will be among the Judges on the bench, men perfectly versed in the knowledge of the laws of that section of the Confederation, will be able to give the benefits of their lights to the other Judges sitting with them? (1875 Debates, March 16, 1875, at p. 754). David Mills, a supporter of the bill, defended the Quebec minimum against critics who attacked it as æsectionalist?. In his view, in light of the æentirely different system of jurisprudence? in Quebec, æit was only reasonable that she should have security that a portion of the Court would understand the system of law which it would be called upon to administer? (1875 Debates, March 30, 1875, at p. 972 (emphasis added)).

[54] Quebec's confidence in the Court was dependent on the requirement of two (one third) Quebec judges. Jacques-Olivier Bureau, a Senator from Quebec, saw fit to entrust the rights of his compatriots . . . to this Supreme Court, as he considered their rights would be quite safe in a court of which two of the judges would have to be taken from the Bench of that Province? (Debates of the Senate, 2nd Sess., 3rd Parl., April 5, 1875, at p. 713). The comments of Joseph-Aldric Ouimet, Liberal-Conservative Member for Laval, also underline that it was a matter of confidence in the Court:

In Quebec an advocate must have ten years practice before he can be a Judge. The Judges from the other Provinces might have the finest intelligence and the best talent possible and yet not give such satisfaction to the people of Quebec as their own judiciary.

(1875 Debates, March 27, 1875, at p. 940)

[55] Government and opposition members alike saw the two seats (one third) for Quebec judges as a means of ensuring not only the functioning, but also the legitimacy of the Supreme Court as a federal and bilingual institution.

[56] Viewed in this light, the purpose of s. 6 is clearly different from the purpose of s. 5. Section 5 establishes a broad pool of eligible candidates; s. 6 is more restrictive. Its exclusion of candidates otherwise eligible under s. 5 was intended by Parliament as a means of attaining the twofold purpose of (i) ensuring civil law expertise and the representation of Quebec's legal traditions and social values on the Court, and (ii) enhancing the confidence of Quebec in the Court. Requiring the appointment of current members of civil law institutions was intended to ensure not only that those judges were qualified to represent Quebec on the Court, but that they were perceived by Quebecers as being so qualified.

[57] It might be argued that excluding former advocates of at least 10 years standing at the Quebec bar does not perfectly advance this twofold purpose because it might exclude from appointment candidates who have civil law expertise and who would in fact bring Quebec's legal traditions and social values to the Court. In other words, it could be argued that our reading of s. 6 is under-

inclusive when measured against the provisions objectives.

[58] This argument is not convincing. Parliament could have adopted different criteria to achieve the twofold objectives of s. 6 " for instance by requiring a qualitative assessment of a candidates expertise in Quebecs civil law and legal traditions " but instead it chose to advance the provisions objectives by specifying objective criteria for appointment to one of the Quebec seats on the Court. In the final analysis, lawmakers must draw lines. The criteria chosen by Parliament might not achieve perfection, but they do serve to advance the provisions purpose: see Michael Plaxton and Carissima Mathen, œPurposive Interpretation, Quebec, and the Supreme Court Act? (2013), 22 Const. Forum const. 15, at pp. 20-22.

[59] We earlier concluded that a textual interpretation of s. 6 excludes former advocates from appointment to the Court. We come to the same conclusion on purposive grounds. The underlying purpose of the general eligibility provision, s. 5, is to articulate minimum general requirements for the appointment of all Supreme Court judges. In contrast, the underlying purpose of s. 6 is to enshrine the historical compromise that led to the creation of the Court by narrowing the eligibility for the Quebec seats. Its function is to limit the Governor in Councils otherwise broad discretion to appoint judges, in order to ensure expertise in civil law and that Quebecs legal traditions and social values are reflected in the judges on the Supreme Court, and to enhance the confidence of the people of Quebec in the Court.

[60] In reaching this conclusion, we do not overlook or in any way minimize the civil law expertise of judges of the Federal Court and Federal Court of Appeal. For instance, s. 5.4 of the Federal Courts Act, R.S.C. 1985, c. F-7, in many ways reflects s. 6 of the Supreme Court Act by requiring that a minimum number of judges on each court be drawn from Quebec institutions. The role of Quebec judges on the federal courts is a vital one. Nevertheless, s. 6 makes clear that judges of the federal courts are not, by virtue of being judges of those courts, eligible for appointment to the Quebec seats on this Court. The question is not whether civilist members of the federal courts would make excellent judges of the Supreme Court of Canada, but whether they are eligible for appointment under s.

6 on the basis of being former rather than current advocates of the Province of Quebec. We conclude that they are not.

[61] Some of the submissions before us relied heavily on the context provided by constitutional negotiations following the patriation of the Constitution in 1982, particularly on Quebec's agreement to proposed constitutional reforms that would have explicitly rendered Federal Court and Federal Court of Appeal judges eligible for appointment to one of the Quebec seats on the Court. The Charlottetown Accord went furthest by stipulating that it was entrenching the current Supreme Court Act requirement of *œnine* members, of whom three must have been admitted to the bar of Quebec (civil law bar)? (Consensus Report on the Constitution: Charlottetown (1992), at p. 8). This showed, it was argued, that these eligibility requirements were acceptable to Quebec.

[62] We do not find this argument compelling. The Meech Lake and Charlottetown negotiations over the eligibility requirements for the Court took place in the context of wider negotiations over federal-provincial issues, including greater provincial involvement in Supreme Court appointments. In the case of Quebec, the proposed changes would have diminished the significance of s. 6 as the sole safeguard of Quebec's interests on the Supreme Court by requiring the Governor General in Council to make an appointment from a list of names submitted by Quebec. In this context, we should be wary of drawing any inference that there was a consensus interpretation of s. 6 different from the one that we adopt.

### (3) Surrounding Statutory Context

[63] The broader scheme of the Supreme Court Act reinforces the conclusion reached through a textual and purposive analysis. In addition to addressing who is eligible to be appointed a judge of the Supreme Court of Canada, the Act addresses which judges of other courts are eligible to sit as *ad hoc* judges of the Court. Judges of the federal courts and the Tax Court of Canada, while eligible to sit as *ad hoc* judges generally, are not eligible to sit in Quebec appeals when the quorum of the Court does not include at least two judges appointed under s. 6. In other words, the provisions governing eligibility to sit as an *ad hoc* judge of the Court reflect the same distinction between general eligibility and eligibility for one

of the Quebec seats. The point is not that these judges are excluded under s. 6 simply because they are excluded under s. 30(2) of the Act. Rather, the point is that the exclusion under s. 30(2) is part of the overall context that must be taken into account in interpreting ss. 5 and 6 of the Act.

[64] In principle, a quorum of the Court consists of five judges: ss. 25 and 29 of the Act. When there is no quorum, s. 30(1) stipulates that an ad hoc judge may be drawn from (a) the Federal Court of Appeal, the Federal Court, or the Tax Court of Canada, or, in their absence, from (b) provincial superior courts. However, under s. 30(2), unless two of the judges available to constitute a quorum fulfil the requirements for appointment under s. 6 " that is, were appointed from the bench or bar of Quebec " an ad hoc judge for a Quebec appeal must be drawn from the Court of Appeal or Superior Court of Quebec.

[65] Thus, while judges of the Federal Court, the Federal Court of Appeal and the Tax Court of Canada meet the general eligibility requirements for appointment as an ad hoc judge of this Court under s. 30(1), they do not meet the more restrictive eligibility requirements for an ad hoc judge replacing a Quebec judge under s. 30(2). Section 30(2) expressly refers to judges who œfulfil the requirements of section 6? and so the two sections are explicitly linked. Moreover, ss. 5 and 6 and ss. 30(1) and 30(2) reflect the same distinction between the general eligibility requirements (s. 5 and s. 30(1)) and the more restrictive eligibility requirements for the Quebec seats on the Court (s. 6 and s. 30(2)).

[66] This exclusion of Federal Court and Federal Court of Appeal judges from appointment as ad hoc judges for Quebec lends support to the conclusion that those judges are similarly excluded from appointment to the Court under s. 6.

[67] It was argued that we should give no weight to the wording of s. 30 because it is an obsolete provision that has not been used since the second decade of the 20th century. We do not agree. The statutory history suggests that the exclusion of judges of the federal courts as ad hoc judges for Quebec cases was not a mere oversight. In the 1970s after the establishment of the Federal Court, s. 30(1) of the Supreme Court Act was revised to refer to the Federal Court (Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 64). Despite the fact that the very purpose of

the revision was to incorporate references to the Federal Court into the Act, as was done in s. 30(1), Parliament did not amend the immediately adjacent provision, s. 30(2). There was similarly no amendment to s. 30(2) when, in 2002, s. 30(1) was amended to refer to the newly separate Federal Court of Appeal and the Tax Court of Canada (S.C. 2002, c. 8, s. 175). While certainly not conclusive, the repeated failure to include the Quebec appointees to the Federal Court and Federal Court of Appeal among the judges who may serve as ad hoc judges of this Court in place of s. 6 judges suggests that the exclusion was deliberate. This in turn is consistent with members of those same courts not being eligible for appointment under s. 6.

[68] When s. 30 was first enacted in 1918 (S.C. 1918, c. 7, s. 1), the assistant judge of the Exchequer Court was a judge from Quebec. Appointing him as an ad hoc judge to hear an appeal from one of the common law provinces would have meant that a majority of the quorum hearing the appeal would be jurists trained in the civil law. Parliament deemed this undesirable. This legislative history explains why the assistant judge of the Exchequer Court was excluded from serving as an ad hoc judge on appeals from common law provinces. But it does not explain why that judge was also excluded from serving as an ad hoc judge on appeals from Quebec even though that would have maintained Quebec's representation on appeals from that province. Parliament has, since it first provided for ad hoc judges, consistently precluded judges of the federal courts or their predecessor, the Exchequer Court, from sitting on Quebec appeals as ad hoc judges of the Supreme Court. If this is an anomaly, it is one that Parliament deliberately created and has consistently maintained.

## **CONCLUSION**

[69] We therefore conclude that s. 5 establishes general eligibility requirements for a broad pool of persons eligible for appointment to the Supreme Court of Canada. In respect of the three Quebec seats, s. 6 leads to a more restrictive interpretation of the eligibility requirements in order to give effect to the historical compromise aimed at protecting Quebec's legal traditions and social values.

[70] We conclude that a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec, may be appointed to the Supreme Court pursuant to s. 5 of the Supreme Court Act, but not s. 6. The three appointments under s. 6 require, in addition to the criteria set out in s. 5, current membership of the Barreau du Québec or of the Court of Appeal or Superior Court of Québec. Therefore, a judge of the Federal Court or Federal Court of Appeal is ineligible for appointment under s. 6 of the Act.

[71] We note in passing that the reference questions do not ask whether a judge of the Federal Court or Federal Court of Appeal who was a former advocate of at least 10 years standing at the Québec bar could rejoin the Québec bar for a day in order to be eligible for appointment to this Court under s. 6. We therefore do not decide this issue.

## **V. Question 2**

### **A. The Issue**

(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?

[72] In light of our conclusion that appointments to the Court under s. 6 require current membership of the Barreau du Québec or of the Court of Appeal or Superior Court of Québec, in addition to the criteria set out in s. 5, it is necessary to consider the second question, which is whether Parliament can enact declaratory legislation that would alter the composition of the Supreme Court of Canada.

[73] The Attorney General of Canada argues that the eligibility requirements for appointments under s. 6 have not been entrenched in the Constitution, and that Parliament retains the plenary power under s. 101 of the Constitution Act, 1867 to unilaterally amend the eligibility criteria under ss. 5 and 6.

[74] We disagree. Parliament cannot unilaterally change the composition of the Supreme Court of Canada. Essential features of the Court are constitutionally protected under Part V of the Constitution Act, 1982. Changes to the composition of the Court can only be made under the procedure provided for in s. 41[1] of the Constitution Act, 1982 and therefore require the unanimous consent of Parliament and the provincial legislatures. Changes to the other essential features of the Court can only be made under the procedure provided for in s. 42[2] of the Constitution Act, 1982, which requires the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces.

[75] We will first discuss the history of how the Court became constitutionally protected, and then answer the Attorney General of Canada's arguments on this issue. Finally, we will discuss the effect of the declaratory provisions enacted by Parliament.

## B. Evolution of the Constitutional Status of the Supreme Court

[76] The Supreme Court's constitutional status initially arose from the Court's historical evolution into an institution whose continued existence and functioning engaged the interests of both Parliament and the provinces. The Court's status was then confirmed by the Constitution Act, 1982, which reflected the understanding that the Court's essential features formed part of the Constitution of Canada.

### (1) The Supreme Court's Evolution Prior to Patriation

[77] At Confederation, there was no Supreme Court of Canada. Nor were the details of what would eventually become the Supreme Court expounded in the Constitution Act, 1867. It was assumed that the ultimate judicial authority for Canada would continue to be the Judicial Committee of the Privy Council in London. For example, George-Étienne Cartier, then the Attorney General for Canada East, expressed the view that "we shall always have our court of final appeal in Her Majesty's Privy Council", even if a general court of appeal for Canada were to be established domestically: Province of Canada, Legislative Assembly, Parliamentary Debates on the Subject of the Confederation of the

British North American Provinces, 3rd Sess., 8th Parl., March 2, 1865, at p. 576.

[78] The Constitution Act, 1867, however, gave Parliament the authority to establish a general court of appeal for Canada:

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.

[79] The Parliamentary debates between 1868 and 1875 over whether to create a Supreme Court were instigated by Sir John A. Macdonald, who was Canada's Prime Minister and Minister of Justice from 1867 to 1873. He introduced bills for the establishment of the Supreme Court in 1869 and again in 1870 in the House of Commons. Both bills, which did not reserve any seats on the Court for Quebec jurists, faced staunch opposition from Quebec in Parliament. The first bill died on the order paper and the second was withdrawn.

[80] In addition to Quebec's opposition, the nature of the courts' jurisdiction was contested, and many questioned whether a general court of appeal was even needed. Since an appeal to the Privy Council was available and Ontario and Quebec already had provincial courts of appeal, a Supreme Court would only be an intermediate step on the way to London.

[81] The bill that finally became the Supreme Court Act was introduced in 1875 by the federal Minister of Justice, Tiesphore Fournier, and was adopted after several amendments (1875 Debates, February 23, 1875, at pp. 284-85). The new Supreme Court had general appellate jurisdiction over civil, criminal, and constitutional cases. In addition, the Court was given an exceptional original jurisdiction not incompatible with its appellate jurisdiction, for instance to consider references from the Governor in Council: *Re References by Governor-General in Council* 1910 Can LII 29 (SCC), (1910), 43 S.C.R. 536, affirmed on appeal to the Privy Council, [1912] A.C. 571 (sub nom. *Attorney-General for Ontario v. Attorney-General for Canada*); *Secession Reference*, at para. 9.

[82] Under the authority newly granted by the Statute of Westminster, 1931, Parliament abolished criminal appeals to the Privy Council in 1933 (An Act to amend the Criminal Code, S.C. 1933, c. 53, s. 17). Of even more historic significance, in 1949, it abolished all appeals to the Privy Council (An Act to amend the Supreme Court Act, s. 3). This had a profound effect on the constitutional architecture of Canada. The Privy Council had exercised ultimate judicial authority over all legal disputes in Canada, including those arising from Canada's Constitution. It played a central role in this country's constitutional structure, by, among other things, delineating the contours of federal and provincial jurisdiction through a number of landmark cases that continue to inform our understanding of the division of powers to this day (John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (2002); Warren J. Newman, "The Constitutional Status of the Supreme Court of Canada?" (2009), 47 S.C.L.R. (2d) 429, at p. 439). As Warren Newman explains,

. . . the supreme appellate function of the Judicial Committee of the Privy Council was an integral part of the Canadian judicial system until it was ultimately displaced by the Parliament of Canada in favour of the Supreme Court. Canadians could do without a general court of appeal for Canada as long as the Judicial Committee continued to play that role. With the abolition of appeals to the Privy Council, the appellate jurisdiction of the Supreme Court of Canada became essential. [p. 434]

[83] The abolition of appeals to the Privy Council meant that the Supreme Court of Canada inherited the role of the Council under the Canadian Constitution. As a result, the Court assumed the powers and jurisdiction "no less in scope than those formerly exercised in relation to Canada by the Judicial Committee" (*Reference re The Farm Products Marketing Act*, 1957 Can LII 1 (SCC), [1957] S.C.R. 198, at p. 212), including adjudicating disputes over federalism. The need for a final, independent judicial arbiter of disputes over federal-provincial jurisdiction is implicit in a federal system:

Inherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers (*Reference re*

Remuneration of Judges of the Provincial Court of Prince Edward Island, 1997 Can LII 317 (SCC), [1997] 3 S.C.R. 3, at para. 124). That impartial arbiter is the judiciary, charged with œcontrol[ling] the limits of the respective sovereignties? (Northern Telecom Canada Ltd. v. Communication Workers of Canada, 1983 Can LII 25 (SCC), [1983] 1 S.C.R. 733, at p. 741).

(Reference re Securities Act, 2011 SCC 66 (Can LII), 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 55; see also Secession Reference, at para. 53.)

[84] In addition, the elevation in the Courts status empowered it to exercise a œunifying jurisdiction over the provincial courts?: Hunt v. TandN plc, 1993 Can LII 43 (SCC), [1993] 4 S.C.R. 289, at p. 318; Bank of Montreal v. Metropolitan Investigation and Security (Canada) Ltd., 1974 Can LII 183 (SCC), [1975] 2 S.C.R. 546, at p. 556. The Supreme Court became the keystone to Canadas unified court system. It œacts as the exclusive ultimate appellate court in the country? (Secession Reference, at para. 9). In fulfilling this role, the Court is not restricted to the powers of the lower courts from which an appeal is made. Rather, the Court may exercise the powers necessary to enable it œto discharge its role at the apex of the Canadian judicial system, as the court of last resort for all Canadians?: R. v. Gardiner, 1982 Can LII 30 (SCC), [1982] 2 S.C.R. 368, at p. 404, per Dickson J.; Hunt, at p. 319.

[85] With the abolition of appeals to the Judicial Committee of the Privy Council, the continued existence and functioning of the Supreme Court of Canada became a key matter of interest to both Parliament and the provinces. The Court assumed a vital role as an institution forming part of the federal system. It became the final arbiter of division of powers disputes, and became the final word on matters of public law and provincial civil law. Drawing on the expertise of its judges from Canadas two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system.

[86] The role of the Supreme Court of Canada was further enhanced as the 20th century unfolded. In 1975, Parliament amended the Supreme Court Act to end appeals as of right to the Court in civil cases (S.C. 1974-75-76, c. 18). This gave the Court control over its civil docket, and allowed it to focus on questions of public legal importance. As a result, the Courts œmandate became oriented less to error correction and more to development of the jurisprudence?: R. v. Henry, 2005 SCC 76 (Can LII), 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 53.

[87] As a result of these developments, the Supreme Court emerged as a constitutionally essential institution engaging both federal and provincial interests. Increasingly, those concerned with constitutional reform accepted that future reforms would have to recognize the Supreme Courts position within the architecture of the Constitution.

## (2) The Supreme Court and Patriation

[88] We have seen that the Supreme Court was already essential under the Constitutions architecture as the final arbiter of division of powers disputes and as the final general court of appeal for Canada. The Constitution Act, 1982 enhanced the Courts role under the Constitution and confirmed its status as a constitutionally protected institution.

[89] Patriation of the Constitution was accompanied by the adoption of the Canadian Charter of Rights and Freedoms, which gave the courts the responsibility for interpreting and remedying breaches of the Charter. Patriation also brought an explicit acknowledgement that the Constitution is the œsupreme law 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.

The existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause. The judiciary became the œguardian of the constitution? (Hunter, at p. 155, per Dickson J.). As such, the

Supreme Court of Canada is a foundational premise of the Constitution. With the adoption of the Constitution Act, 1982, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy: *Secession Reference*, at para. 72.

[90] Accordingly, the Constitution Act, 1982 confirmed the constitutional protection of the essential features of the Supreme Court. Indeed, Part V of the Constitution Act, 1982 expressly makes changes to the Supreme Court and to its composition subject to constitutional amending procedures.

[91] Under s. 41(d), the unanimous consent of Parliament and all provincial legislatures is required for amendments to the Constitution relating to the composition of the Supreme Court. The notion of composition refers to ss. 4(1), 5 and 6 of the Supreme Court Act, which codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982. By implication, s. 41(d) also protects the continued existence of the Court, since abolition would altogether remove the Court's composition.

[92] The textual origin of Part V was the April Accord of 1981 (Constitutional Accord: Canadian Patriation Plan (1981)), to which eight provinces, including Quebec, were parties. The explanatory notes to this Accord confirm that the intention was to limit Parliament's unilateral authority to reform the Supreme Court. That sentiment finds particular expression in the explanatory note for what became s. 41, which requires unanimity for amendments relating to five matters, including the composition of the Supreme Court: "This section recognizes that some matters are of such fundamental importance that amendments in relation to them should require the consent of all the provincial Legislatures and Parliaments" (p. 9 (note 9)). Pointedly, the explanatory note to s. 41(d) states: "This clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or Bench of Quebec and are, therefore, trained in the civil law" (p. 9 (note 9(d))). The intention of the provision was demonstrably to make it difficult to change the composition of the Court, and to ensure that Quebec's representation was given special constitutional protection.

[93] The fact that the composition of the Supreme Court of Canada was singled out for special protection in s. 41(d) is unsurprising, since the Courts composition has been long recognized as crucial to its ability to function effectively and with sufficient institutional legitimacy as the final court of appeal for Canada. As explained above, the central bargain that led to the creation of the Supreme Court in the first place was the guarantee that a significant proportion of the judges would be drawn from institutions linked to Quebec civil law and culture. The objective of ensuring representation from Quebecs distinct juridical tradition remains no less compelling today, and implicates the competence, legitimacy, and integrity of the Court. Requiring unanimity for changes to the composition of the Court gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent. Protecting the composition of the Court under s. 41(d) was necessary because leaving its protection to s. 42(1)(d) would have left open the possibility that Quebecs seats on the Court could have been reduced or altogether removed without Quebecs agreement.

[94] Section 42(1)(d) applies the 7/50 amending procedure to the essential features of the Court, rather than to all of the provisions of the Supreme Court Act.[3] The express mention of the Supreme Court of Canada in s. 42(1)(d) is intended to ensure the proper functioning of the Supreme Court. This requires the constitutional protection of the essential features of the Court, understood in light of the role that it had come to play in the Canadian constitutional structure by the time of patriation. These essential features include, at the very least, the Courts jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence.

[95] In summary, the Supreme Court gained constitutional status as a result of its evolution into the final general court of appeal for Canada, with jurisdiction to hear appeals concerning all the laws of Canada and the provinces, including the Constitution. This status was confirmed in the Constitution Act, 1982, which made modifications of the Courts composition and other essential features subject to stringent amending procedures.

C. The Arguments of the Attorney General of Canada

[96] The Attorney General of Canada argues (i) that the mention of the Supreme Court in the Constitution Act, 1982 has no legal force, and (ii) that the failed attempts to entrench the eligibility requirements in the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992 demonstrate that Parliament and the provinces understood those requirements not to have been entrenched in 1982.

#### (1) The 'Empty Vessels' Theory

[97] The Attorney General of Canada contends that the Supreme Court is not protected by Part V, because the Supreme Court Act is not enumerated in s. 52 of the Constitution Act, 1982 as forming part of the Constitution of Canada. He essentially argues that the references to the 'Supreme Court' in ss. 41(d) and 42(1)(d) are 'empty vessels' to be filled only when the Court becomes expressly entrenched in the text of the Constitution: see for example Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 4-21. It follows from this, he argues, that Parliament retains the power to unilaterally make changes to the Court under s. 101 of the Constitution Act, 1867 until such time as the Court is expressly entrenched.

[98] This contention is unsustainable. It would mean that the framers would have entrenched the Courts exclusion from constitutional protection: Stephen A. Scott, 'Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes?' (1982), 20 U.W.O.L. Rev. 247, at p. 272; Stephen A. Scott, 'The Canadian Constitutional Amendment Process?' (1982), 45 Law and Contemp. Probs. 249, at p. 261; see also Patrick J. Monahan and Byron Shaw, *Constitutional law* (4th ed. 2013), at p. 204. It would also mean that the provinces agreed to insulate this unilateral federal power from amendment except through the exacting procedures in Part V.

[99] Accepting this argument would have two practical consequences that the provinces could not have intended. First, it would mean that Parliament could unilaterally and fundamentally change the Court, including Quebecs historically guaranteed representation, through ordinary legislation. Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces. Second, it would mean that the Court would have less protection than at any other

point in its history since the abolition of appeals to the Privy Council. This outcome illustrates the absurdity of denying Part V its plain meaning. The framers cannot have intended to diminish the constitutional protection accorded to the Court, while at the same time enhancing its constitutional role under the Constitution Act, 1982.

[100] Our constitutional history shows that ss. 41(d) and 42(1)(d) of the Constitution Act, 1982 were enacted in the context of ongoing constitutional negotiations that anticipated future amendments relating to the Supreme Court. The amending procedures in Part V were meant to guide that process. By setting out in Part V how changes were to be made to the Supreme Court and its composition, the clear intention was to freeze the status quo in relation to the Courts constitutional role, pending future changes: Monahan and Shaw, at pp. 204-5; W. R. Lederman, "Constitutional Procedure and the Reform of the Supreme Court of Canada?" (1985), 26 C. de D. 195, at p. 200; Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 233-34. This reflects the political and social consensus at the time that the Supreme Court was an essential part of Canada's constitutional architecture.

[101] It is true that at Confederation, Parliament was given the authority through s. 101 of the Constitution Act, 1867 to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada?". Parliament undoubtedly has the authority under s. 101 to enact routine amendments necessary for the continued maintenance of the Supreme Court, but only if those amendments do not change the constitutionally protected features of the Court. The unilateral power found in s. 101 of the Constitution Act, 1867 has been overtaken by the Courts evolution in the structure of the Constitution, as recognized in Part V of the Constitution Act, 1982. As a result, what s. 101 now requires is that Parliament "maintain" and "protect" the essence of what enables the Supreme Court to perform its current role.

## (2) The Meech Lake Accord and the Charlottetown Accord

[102] The Attorney General of Canada argues that the Meech Lake Accord and the Charlottetown Accord would have expressly entrenched the qualifications for appointment to the Court in the Constitution, and that the failure to adopt these

constitutional amendments means that the qualifications for appointment to the Court are not entrenched.

[103] We cannot accept this argument. As discussed above, the enactment of the Constitution Act, 1982 protected the status quo regarding the Supreme Court. That expressly included the Courts composition, of which Quebecs representation on the Court is an integral part. The Meech Lake Accord and the Charlottetown Accord would have reformed the appointment process for the Court, and would have required that the Quebec judges on the Court be appointed from a list of candidates submitted by Quebec. These failed attempts at reform are evidence only of attempts at a broader reform of the selection process, but they shed no light on the issue of the Courts existing constitutional protection. The failure of the Meech Lake Accord and Charlottetown Accord simply means that the status quo regarding the Courts constitutional role remains intact.

#### D. The Effects of the Declaratory Provisions Enacted by Parliament

[104] Changes to the composition of the Supreme Court must comply with s. 41(d) of the Constitution Act, 1982. Sections 4(1), 5 and 6 of the Supreme Court Act codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982. Of particular relevance is s. 6, which reflects the Courts bijural character and represents the key to the historic bargain that created the Court in the first place. As we discussed above, the guarantee that one third of the Courts judges would be chosen from Quebec ensured that civil law expertise and that Quebecs legal traditions would be represented on the Court and that the confidence of Quebec in the Court would be enhanced.

[105] Both the general eligibility requirements for appointment and the specific eligibility requirements for appointment from Quebec are aspects of the composition of the Court. It follows that any substantive change in relation to those eligibility requirements is an amendment to the Constitution in relation to the composition of the Supreme Court of Canada and triggers the application of Part V of the Constitution Act, 1982. Any change to the eligibility requirements for appointment to the three Quebec positions on the Court codified in s. 6 therefore

requires the unanimous consent of Parliament and the 10 provinces.

[106] Since s. 6.1 of the Supreme Court Act (cl. 472 of Economic Action Plan 2013 Act, No. 2) substantively changes the eligibility requirements for appointments to the Quebec seats on the Court under s. 6, it seeks to bring about an amendment to the Constitution of Canada on a matter requiring unanimity of Parliament and the provincial legislatures. The assertion that s. 6.1 is a declaratory provision does not alter its import. Section 6.1 is therefore ultra vires of Parliament acting alone. However, s. 5.1 (cl. 471) does not alter the law as it existed in 1982 and is therefore validly enacted under s. 101 of the Constitution Act, 1867, although it is redundant.

## **VI. Responses to the Reference Questions**

[107] We answer the reference questions as follows:

(1) Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the Supreme Court Act?

Answer: No.

(2) Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled Economic Action Plan 2013 Act, No. 2?

Answer: With respect to the three seats reserved for Quebec on the Court, the answer is no. With respect to the declaratory provision set out in clause 472, the answer is no. With respect to clause 471, the answer is yes.

The following is the opinion of

Moldaver J. "

## I. Introduction

[108] On October 22, 2013, the Governor General in Council referred the following two questions to this Court for determination pursuant to s. 53 of the Supreme Court Act, R.S.C. 1985, c. S-26 (œAct?):

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

[109] This reference stems from the appointment of the Honourable Justice Marc Nadon to fill one of the three seats on this Court allocated to the Province of Quebec. Justice Nadon is a former member of the Quebec bar of almost 20 years standing. At the time of his appointment to this Court, he was a judge of the Federal Court of Appeal.[4]

[110] The issue raised in Question 1 is whether former advocates of the Quebec bar of at least 10 years standing meet the eligibility requirements in the Supreme Court Act for appointment to the Quebec seats on this Court. That is a legal issue, not a political one. It is not the function of this Court to comment on the merits of an appointment or the selection process that led to it. Those are political matters that belong to the executive branch of government. They form no part of our mandate.

[111] The answer to Question 1 lies in the correct interpretation of ss. 5 and 6 of the Act. For reasons that follow, I would answer Question 1 in the affirmative. Under ss. 5 and 6 of the Act, both current and past advocates of at least 10 years standing at the Quebec bar are eligible for appointment to this Court. In view of my

answer to Question 1, the legislation to which Question 2 refers is redundant. It does nothing more than restate the law as it exists. Accordingly, I find it unnecessary to answer Question 2.

[112] That said, as the majority reasons make clear, a different response to Question 1 brings Question 2 to the forefront and makes it far from redundant. It gives rise to constitutional issues that are profoundly important to this Court and its place in our constitutional democracy.

[113] With that in mind, although I need not address the constitutional issues in view of my response to Question 1, I choose to do so to this extent. The coexistence of two distinct legal systems in Canada " the civil law system in Quebec and the common law system elsewhere " is a unique and defining characteristic of our country. It is critical to both Quebec and Canada as a whole that persons with training in civil law form an integral part of this countrys highest court. Indeed, a guarantee to that effect was central to the bargain struck between Parliament and Quebec when the Supreme Court was first created in 1875.[5]

[114] Section 6 of the Act protects Quebecs right to have three seats on this Court. Like the majority, I agree that this guarantee has been constitutionally entrenched, and that the three seats allotted to Quebec are an integral part of this Courts composition. As such, any change in this regard would require the unanimous consent of the Senate, the House of Commons, and the legislative assembly of each province under s. 41(d) in Part V of the Constitution Act, 1982.

[115] I stop there, however. I do so because I have difficulty with the notion that an amendment to s. 6 making former Quebec advocates of at least 10 years standing eligible for appointment to the Court would require unanimity, whereas an amendment that affected other features of the Court, including its role as a general court of appeal for Canada and its independence, could be achieved under s. 42(1)(d) of the Constitution Act, 1982 using the 7-50 formula. Put simply, I am not convinced that any and all changes to the eligibility requirements will necessarily come within æthe composition of the Supreme Court of Canada? in s. 41(d).

[116] Be that as it may, the first question before us today raises a much narrower issue. Specifically, we are asked to decide whether Quebec appointees are subject to more stringent eligibility requirements than their common law counterparts.

[117] All members of this Court agree that under s. 5 of the Act, both current and former members of a provincial bar of at least 10 years standing, and both current and former judges of a provincial superior court, are eligible for appointment to this Court. We part company, however, on whether s. 6 restricts the eligibility criteria, in the case of the three Quebec seats, to only current members of the Quebec bar and current judges of Quebecs superior courts. My colleagues conclude that it does; I reach the opposite conclusion. In my respectful view, the same eligibility criteria in s. 5 apply to all appointees, including those chosen from Quebec institutions to fill a Quebec seat. The currency requirement is not supported by the text of s. 6, its context, its legislative history, or its underlying object. Nor is such a requirement supported by the scheme of the Supreme Court Act. In short, currency has never been a requirement under s. 6 and, in my view, any attempt to impose it must be rejected.

## **II. Analysis**

### **A. The Text, Context and History of Sections 5 and 6**

[118] Sections 5 and 6 of the Act are central to the current debate:

5. [Who may be appointed judges] 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. [Three judges from Quebec] At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

[119] Section 5 sets out the threshold eligibility requirements to be appointed a judge of this Court. Section 6 guarantees three Quebec seats on the Court by specifying that, for at least three of the judges, the bar mentioned in s. 5 is the

Barreau du Québec and the superior courts mentioned in s. 5 are the Superior Court of Québec and the Québec Court of Appeal. Put another way, s. 6 builds on s. 5 by requiring that for three of the seats on this Court, the candidates who meet the criteria of s. 5 must be chosen from three Québec institutions (the Barreau du Québec, the Québec Court of Appeal, and the Superior Court of Québec). Section 6 does not impose any additional requirements.

[120] Although the current French version of s. 5 may be cloudy, the current English version is clear. My colleagues point out, and I agree, that the English version therefore governs the interpretation of s. 5 according to the shared meaning rule of bilingual interpretation. As the words *œis or has been?* indicate, individuals are eligible for appointment if they are current or former members of a provincial bar of at least 10 years standing, or if they are current or former judges of a superior court. My colleagues accept this to be the case. However, for the Québec seats, they say that s. 6 imposes the additional requirement that candidates must be current members of the Québec bar or current judges of a superior court.

[121] With respect, I disagree. Sections 5 and 6 are inextricably linked ” and that is the key to appreciating that the minimum eligibility requirements of s. 5 apply equally to the Québec appointees referred to in s. 6. Nowhere is this link more evident than in the wording of ss. 5 and 6 themselves, which I repeat here for ease of reference with key words emphasized:

5. [Who may be appointed judges] 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. [Three judges from Québec] At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province.

[122] First, the words *œ[a]ny person?* in s. 5 are a clear indication that the eligibility requirements set out in that section apply to all appointees. Second, the words *œthe judges?* in s. 6 refer explicitly to the description of the judges provided

in s. 5. Manifestly, one must read s. 5 in order to understand which judges s. 6 is referring to and what their eligibility requirements are.

[123] Apart from these textual cues, an absurdity results if s. 6 is not read in conjunction with s. 5. Section 6 says nothing about the length of Quebec bar membership required before an individual will be eligible for one of the Quebec seats on this Court. Hence, for the purposes of s. 6, if it is not read in conjunction with s. 5, any member of the Quebec bar, including a newly minted member of one days standing, would be eligible for a Quebec seat on this Court. Faced with this manifest absurdity, the majority acknowledges that the phrase œadvocates of that Province? in s. 6 must be linked to the 10-year eligibility requirement for members of the bar specified in s. 5.

[124] But that, they say, is where the link ends. It does not extend to the fact that under s. 5, both current and past members of the bar of at least 10 years standing are eligible. With respect, this amounts to cherry-picking. Choosing from s. 5 only those aspects of it that are convenient ” and jettisoning those that are not ” is a principle of statutory interpretation heretofore unknown.

[125] Given that s. 6 contains an explicit reference to the eligibility criteria set out in s. 5 and that an absurdity would result if s. 6 did not take its meaning from s. 5, the next logical question to ask is: What is it in s. 6 that imposes a currency requirement on Quebec appointees? The answer, in my view, is nothing.

[126] Contrary to the view of the majority, the words œfrom among? found in s. 6 do not, with respect, impose a currency requirement on Quebec appointees. The words convey no temporal meaning. They take their meaning from the surrounding context and cannot, on their own, support the contention that a person must be a current member of the bar or bench to be eligible for a Quebec seat. In short, they do not alter the group to which s. 6 refers ” the group described in s. 5.

[127] If Parliament had intended to distinguish Quebec appointees from other appointees by requiring that Quebec judges be current judges or current advocates, surely it would have said so in clear terms. It would not have masked this crucial distinction between Quebec candidates and non-Quebec candidates by

using words as ambiguous and inconclusive as *œfrom among?*. The addition of the word *œcurrent?* before the words *œjudges?* and *œadvocates?* in s. 6 would have been a simple " and obvious " solution.

[128] Not only do the words *œfrom among?* not convey any temporal meaning, they support the view that ss. 5 and 6 are inextricably linked. This is apparent when one considers the words of the original 1875 Act (S.C. 1875, c.11). At the time, ss. 5 and 6 were part of the same sentence " s. 4 of the 1875 Act. That provision set out the eligibility criteria for appointment to the newly created Supreme Court:

4. Her Majesty may appoint, by letters patent, under the Great Seal of Canada, one person, who is, or has been, a Judge of one of the Superior Courts in any of the Provinces forming part of the Dominion of Canada, or who is a Barrister or Advocate of at least ten years standing at the Bar of any one of the said Provinces, to be Chief Justice of the said Court, and five persons who are, or have been, respectively, Judges of one of the said Superior Courts, or who are Barristers or Advocates of at least ten years standing at the Bar of one of the said Provinces, to be Puisne Judges of the said Court, two of whom at least shall be taken from among the Judges of the Superior Court or Court of Queens Bench, or the Barristers or Advocates of the Province of Quebec; and vacancies in any of the said offices shall, from time to time, be filled in like manner. The Chief Justice and Judges of the Supreme Court shall be respectively the Chief Justice and Judges of the Exchequer Court: they shall reside at the City of Ottawa, or within five miles thereof.

[129] This provision uses the words *œfrom among?* in relation to Quebec superior court judges. And yet, the surrounding context, namely, the earlier use of the words *œwho are, or have been, respectively, Judges?*, makes it abundantly clear that eligibility for the Quebec seats extended to both current and former judges " and nothing has ever changed in that regard. Nowhere in Hansard has it ever been suggested " nor in any subsequent revisions has it ever been proclaimed " that former judges of the Quebec superior courts are not eligible for appointment to this Court. What did change was that in 1886, former barristers and advocates

of at least 10 years standing became eligible for appointment to this Court, along with current barristers and advocates (R.S.C. 1886, c. 135, s. 4(2)).

[130] And once it is understood that current and former judges of the Quebec superior courts have always been included in the eligibility pool, it is a short step to realize that the 1886 amendments did not reduce the eligible groups for Quebec judges to two " rather, they increased the number of eligible groups in Quebec (and elsewhere in Canada) from three to four.[6] One can scour the Hansard debates of 1875 " or at any point in time since then " and find no mention that Parliament intended to narrow the four groups of eligible candidates under s. 5 to only two groups in the case of Quebec. In short, the four group/two group distinction has no foundation in fact or law.

[131] To summarize, the plain wording and legislative history of ss. 5 and 6 support the conclusion that the same eligibility requirements set out in s. 5 apply to Quebec appointees. Furthermore, a consideration of the broader scheme of the Supreme Court Act " and specifically, s. 30 " does not assist in the interpretation of ss. 5 and 6. I include the following discussion of that section only to explain why it does not favour either interpretation of ss. 5 and 6.

#### B. Section 30 of the Supreme Court Act

[132] Section 30 of the Act is by and large a historical anomaly. It concerns the appointment of ad hoc judges to this Court:

30. (1) [Appointment of ad hoc judge] Where at any time there is not a quorum of the judges available to hold or continue any session of the Court, owing to a vacancy or vacancies, or to the absence through illness or on leave or in the discharge of other duties assigned by statute or order in council, or to the disqualification of a judge or judges, the Chief Justice of Canada, or in the absence of the Chief Justice, the senior puisne judge, may in writing request the attendance at the sittings of the Court, as an ad hoc judge, for such period as may be necessary,

(a) of a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada; or

(b) if the judges of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada are absent from Ottawa or for any reason are unable to sit, of a judge of a provincial superior court to be designated in writing by the chief justice, or in the absence of the chief justice, by any acting chief justice or the senior puisne judge of that provincial court on that request being made to that acting chief justice or that senior puisne judge in writing.

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

[133] Because federal court judges from Quebec are not listed in s. 30(2), and thus cannot act as ad hoc judges on Quebec appeals when the statutory quorum is not met and two or more Quebec judges on this Court are unavailable,[7] the interveners Rocco Galati and the Constitutional Rights Centre Inc. submit that they should not be eligible for appointment to the permanent Quebec seats on this Court. My colleagues rely on this as support of the currency requirement, which has the effect of excluding judges of the federal courts from appointment to the permanent Quebec seats.

[134] For the reasons that follow, I do not accept these submissions. Section 30 does not assist in the interpretation of the eligibility requirements set out in ss. 5 and 6 of the Act. In this regard, I am in essential agreement with the submissions of Dean Sbastien Grammond[8] on behalf of the interveners Robert Dcary, Alice Desjardins and Gilles Ltourneau.

[135] As indicated, s. 30 is a historical anomaly. In order to explain why Quebec judges on the federal courts are not mentioned in s. 30(2), it is necessary to trace the legislative history of this provision. The provision was first enacted in 1918 (S.C. 1918, c. 7, s. 1). At the time, there were only six judges on the Court, and the statutory quorum was set at five. As a result, if two or more judges were

unavailable for whatever reason, the quorum was not met and cases could not be heard. In 1918, the Court faced a crisis resulting from the absence of several judges. Parliament responded by introducing the concept of ad hoc judges into the Act. These ad hoc judges would temporarily fulfill the functions of a Supreme Court judge so that the quorum would be met and cases could be heard.

[136] For practical reasons, Parliament wanted an ad hoc judge to first be appointed from the Exchequer Court (the predecessor to the federal courts), as that court was also located in Ottawa. At the time, there were only two judges on the Exchequer Court " the œjudge? and the œassistant judge? (An Act to amend the Exchequer Court Act, S.C. 1912, c. 21, s. 1).

[137] Importantly, the assistant judge at the time was a judge from Quebec. Appointing any judge of the Exchequer Court to sit as an ad hoc judge could thus have resulted in the assistant judge " a Quebec judge " being appointed. This created the possibility that, if the loss of quorum on this Court was due to the absence of two common law judges, a majority of civil law judges might hear a common law case.

[138] Parliament sought to avoid this result by specifying that only œthe judge? of the Exchequer Court could be appointed an ad hoc judge " a term that necessarily excluded the assistant judge. In response to Quebec's displeasure, Parliament accepted that if the loss of quorum was caused by the absence of two or more Quebec judges, and if it was a Quebec case, the ad hoc judge would be chosen from that province's superior courts.[9]

[139] In sum, Parliament had in mind two specific goals when it created s. 30 " the primary goal of ensuring this Court could continue to exercise its functions, and the secondary goal of ensuring that civil law judges could not form a majority on common law cases. The substance of s. 30 was last considered by Parliament in 1920, when an amendment to the Exchequer Court Act allowed any member of the Exchequer Court to be appointed as ad hoc judge (S.C. 1920, c. 26, s. 1; R.S.C. 1927, c. 35, s. 5). At that time, it was impossible to include Quebec federal court judges in s. 30(2), as the federal courts did not exist and the Exchequer Court that did exist had no reserved Quebec seats.

[140] The majority states that the repeated failure to include the Quebec appointees to the Federal Court and Federal Court of Appeal among the judges who may serve as ad hoc judges of this Court in place of s. 6 judges suggests that the exclusion was deliberate? (para. 67). In fact, the evidence suggests the opposite. Updating the names of the courts mentioned in the provision was done by means of statutory revisions that were organizational in nature and necessarily related only to s. 30(1), as s. 30(2) contained no reference to the Exchequer Court and did not require updating.[10] Given that s. 30 has, for all intents and purposes, become obsolete since the number of judges on this Court was increased to nine,[11] it is hardly surprising that the substance of s. 30 has not been foremost on Parliament's mind.

[141] My colleagues note that s. 30(2) refers to s. 6 "unless two of the judges available fulfil the requirements of section 6?" and from this, they state that the sections are explicitly linked? (para. 65). That the opening line of s. 30(2) refers to s. 6 does not aid in the interpretation of what s. 6 means. Indeed, s. 30 clearly contemplates that only current judges of the named courts can be appointed ad hoc judges of this Court for all appeals, not just Quebec appeals. This is notwithstanding that s. 5 allows both current and former judges to qualify for the permanent seats. Just as the s. 30(1) requirements for ad hoc judges have no effect on the s. 5 eligibility requirements for permanent judges (a point on which all members of this Court agree), s. 30(2) cannot be used in support of a currency requirement in s. 6 for permanent judges.

[142] For these reasons, I am of the view that s. 30 is of no assistance in the interpretation of ss. 5 and 6.

[143] No statutory interpretation exercise is complete without considering the legislative objectives underlying the provisions at issue. It is to these objectives that I now turn.

## C. The Legislative Objectives

### (1) The Purpose of Sections 5 and 6

[144] Section 5, as I have explained, sets out minimum eligibility criteria for the pool of potential candidates. The very broad eligibility requirements in s. 5 ensure that the executive branch can choose from among the largest possible pool of candidates who meet the basic eligibility requirements.

[145] The legislative objective underlying s. 6 is different. The objective of s. 6 is, and always has been, to ensure that a specified number of this Courts judges are trained in civil law and represent Quebec. By virtue of the fact that these seats must be filled by candidates appointed from the three Quebec institutions named in s. 6 (the Barreau du Québec, the Quebec Court of Appeal, or the Superior Court of Quebec), the candidates will necessarily have received formal training in the civil law. The combination of this training and affiliation with one of the named Quebec institutions serves to protect Quebecs civil law tradition and inspire Quebecs confidence in this Court. To that extent, I agree with the majority. Respectfully, however, I do not agree that s. 6 was intended to ensure that œQuebecs . . . social values are represented on the Court? (para. 18). Parliament made a deliberate choice to include only objective criteria in ss. 5 and 6. Importing social values " 140 years later " is unsupported by the text and history of the Act.

[146] As noted, the objective of s. 6 is to protect Quebecs civil law tradition and inspire Quebecs confidence in this Court. Section 6 recognizes the uniqueness of Quebec and its important place in our country, and was key to gaining Quebecs support for the formation of the Supreme Court of Canada. Crucially, however, there is no evidence that this support would have been withheld if the issue of both current and past advocates of the Quebec bar qualifying for appointment, as well as current and past judges of the Quebec superior courts, had been debated at the time. Indeed, as I interpret s. 4 of the 1875 Act, both current and former judges have always been eligible. To the extent there may have been a question mark about former members of the bar, the 1886 statutory revision made it clear that they too were eligible.

[147] To suggest that Quebec wanted to render ineligible former advocates of at least 10 years standing at the Quebec bar is to rewrite history. There is nothing in the historical debates that suggests any such thing. Indeed, it defies logic and

common sense to think that Quebec would have had some reason to oppose the appointment to this Court of Quebec judges who had been members of the Quebec bar for at least 10 years on the day of their appointment to that court.[12] Court of Quebec judges apply the civil law on a daily basis. Why such persons, otherwise eligible for appointment to this court by virtue of their 10 years standing at the bar, would suddenly become unacceptable to the people of Quebec on the day of their elevation to the bench escapes me. Likewise, though the federal courts did not exist at the time, to suggest that Quebec would have resisted the appointment to this Court of a federal court judge occupying a seat on that court reserved for Quebec[13] is, in my view, equally untenable. These judges have been trained in the civil law and continue to hear federal law cases involving Quebec that require a working knowledge of the civil law.

[148] My colleagues maintain it is Parliament's choice to draw lines? that may be under-inclusive when measured against the [objectives of s. 6]? and thus might not achieve perfection? (paras. 57-58). Parliament, they say, chose certain objective criteria and it is not for this Court to question the wisdom of those criteria. I agree. But, when interpreting a statute to determine what the relevant criteria are " i.e. what Parliament intended them to be " absurd results are to be avoided. (See, for example, *Rizzo and Rizzo Shoes Ltd. (Re)*, 1998 Can LII 837 (SCC), [1998] 1 S.C.R. 27, at para. 27, and *Morgentaler v. The Queen*, 1975 Can LII 8 (SCC), [1976] 1 S.C.R. 616, at p. 676.) In my respectful view, that principle should be applied in interpreting s. 6 " and when it is, it necessarily leads to a rejection of the currency requirement.

## (2) The Currency Requirement Does Not Further the Legislative Objective of Section 6

[149] In addition to rendering ineligible candidates who might otherwise be worthy appointments to this Court, the currency requirement does nothing to promote the confidence of Quebec in this Court. In Quebec, there are approximately 16,000 current members of the Quebec bar with at least 10 years standing.[14] Surely it cannot be suggested that the appointment of any one of these 16,000 advocates would promote the confidence of Quebec in this Court.

[150] This becomes all the more apparent when one realizes that a person can maintain his or her Quebec bar membership by simply paying annual fees and completing a set number of hours of continuing legal education " currently, 30 hours over a two-year period.[15] Notably, there is no requirement that this continuing legal education have anything to do with the civil law, nor does it actually have to be completed in Quebec. Indeed, a person does not have to live in Quebec, or actually practice law in Quebec, in order to maintain his or her bar membership. In sum, a person could have only the most tenuous link to the practice of civil law in Quebec, and yet be a current member of that bar of 10 years standing.

[151] This is the reality " and it illustrates how implausible it is that anyone would view current membership at the Quebec bar as the sine qua non that assures Quebec's confidence in appointments to this Court. Likewise, it is equally implausible that being a past member of the Quebec bar could singlehandedly undermine this confidence.

[152] My colleagues have chosen not to address the scope of the currency requirement under s. 6, i.e. whether one day's renewed membership at the Quebec bar is sufficient to qualify as an advocate or whether something more is needed " six months, two years, five years, or perhaps even a continuous 10-year period immediately preceding the appointment.

[153] In my view, currency means exactly that. A former Quebec superior court judge or advocate of 10 years standing at the Quebec bar could rejoin that bar for a day and thereby regain his or her eligibility for appointment to this Court. In my view, this exposes the hollowness of the currency requirement. Surely nothing is accomplished by what is essentially an administrative act. Any interpretation of s. 6 that requires a former advocate of at least 10 years standing at the Quebec bar, or a former judge of the Quebec Court of Appeal or Superior Court, to rejoin the Quebec bar for a day in order to be eligible for appointment to this Court makes no practical sense. Respectfully, I find it difficult to believe that the people of Quebec would somehow have more confidence in this candidate on Friday than they had on Thursday.

### III. Conclusion

[154] For these reasons, I would answer Question 1 in the affirmative. Both current and former members of the Quebec bar of at least 10 years standing, and current and former judges of the Quebec superior courts, are eligible for appointment to a Quebec seat on this Court. In view of my response to Question 1, I find it unnecessary to answer Question 2.

Judgment accordingly.

Solicitor for the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Attorney General of Quebec: Bernard, Roy and Associs, Montral; Attorney General of Quebec, Montral.

Solicitor for the interveners Robert Dcary, Alice Desjardins and Gilles Ltourneau: Sbastien Grammond, Ottawa.

Solicitors for the intervener Rocco Galati: Rocco Galati Law Firm Professional Corporation, Toronto.

Solicitor for the intervener the Canadian Association of Provincial Court Judges: Sbastien Grammond, Ottawa.

Solicitors for the intervener the Constitutional Rights Centre Inc.: Slansky Law Professional Corporation, Toronto.

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[1] The text of s. 41(d) states:

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; . . .

[2] The text of s. 42(1)(d) states:

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;

[3] This view is supported by, among others, Patrick J. Monahan and Byron Shaw, *Constitutional Law* (4th ed. 2013), at p. 205; Peter Oliver, *œCanada, Quebec, and Constitutional Amendment?* (1999), 49 U.T.L.J. 519, at p. 579; W. R. Lederman, *œConstitutional Procedure and the Reform of the Supreme Court of Canada?* (1985), 26 C. de D. 195, at p. 196; Stephen A. Scott, *œPussycat, Pussycat or Patriation and the New Constitutional Amendment Processes?* (1982), 20 U.W.O.L. Rev. 247, at p. 273.

[4] Justice Nadon was appointed to the Federal Court Trial Division in 1993. He was appointed to fill one of the 10 seats on that court reserved for the Province of Quebec. He was later elevated to the Federal Court Appeal Division in 2001 where he occupied a seat on that court reserved for the Province of Quebec.

[5] At that time, the Act required two of the Courts six judges to be appointed from Quebec (The Supreme and Exchequer Court Act, S.C. 1875, c. 11, s. 4). In 1949, when the size of the Court was increased to nine judges, the number of Quebec appointees was increased to three (An Act to amend the Supreme Court Act, S.C. 1949, c. 37, s. 1).

[6] The present tense words *œwho is?* and *œwho are?*, used in s. 4 of the 1875 Act in reference to barristers and advocates, were removed, making it clear that both current and former barristers and advocates were eligible. As a result of the 1886 revision, s. 4(2) read: *œAny person may be appointed a judge of the court who is or has been a judge of a superior court of any of the Provinces of Canada,*

or a barrister or advocate of at least ten years standing at the bar of any of the said provinces?.

[7] It should be noted that ad hoc judges from the federal courts, whether from Quebec or otherwise, can replace an absent Quebec judge on this Court. Section 30(2) only prevents this where two or more Quebec judges are missing in a Quebec appeal.

[8] Dean, University of Ottawa, Faculty of Law, Civil Law Section.

[9] See I. Bushnell, *The Federal Court of Canada: A History, 1875-1992* (1997), at pp. 95-96.

[10] For example, replacing the reference to the «Exchequer Court» in s. 30(1) with «Federal Court» when that court was created in 1971 (Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 64), and later adding «the Federal Court of Appeal» in 2002 (S.C. 2002, c. 8, s. 175).

[11] The number of judges on this Court was increased to nine in 1949. However, the statutory quorum has remained at five. Thus, resort to s. 30 would only be necessary if five of this Court's nine judges were unavailable.

[12] «The Court of Quebec is a court of first instance that has jurisdiction in civil, criminal and penal matters as well as in matters relating to young persons. It also has jurisdiction over administrative matters and appeals where provided for by law. The Court of Quebec is made up of a maximum of 270 judges, appointed by the Government of Quebec for life» (Justice Quebec (online : <http://www.justice.gouv.qc.ca/english/publications/generale/systeme-a.htm>)).

[13] Of the 37 seats on the Federal Court, 10 are reserved for Quebec judges (Federal Courts Act, R.S.C. 1985, c. F-7, s. 5.4). Of the 13 seats on the Federal Court of Appeal, 5 are reserved for Quebec judges (ibid.).

[14] Canadian Association of Provincial Court Judges factum, at para 26.

[15] Règlement sur la formation continue obligatoire des avocats, R.R.Q., c. B-1, r. 12, s. 2; see also Barreau du Québec (online:

<https://www.barreau.qc.ca/en/avocats/formation-continue/obligatoire/index.html>).

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