File No. 35586

SUPREME COURT OF CANADA

IN THE MATTER OF A REFERENCE CONCERNING THE APPOINTMENT OF SUPREME COURT JUDGES

BETWEEN	**THE ATTORNEY GENERAL OF CANADA**	APPELLANT
AND	**THE ATTORNEYS GENERAL OF QUEBEC AND ONTARIO**	
AND	**ROCCO GALATI**	
AND	**CONSTITUTIONAL RIGHTS CENTRE INC.**	
AND	**THE HONOURABLE ROBERT DÉCARY, ALICE DESJARDINS AND GILLES LÉTOURNEAU**	
AND	**CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES**	INTERVENERS

Factum of the Intervener, Canadian Association of Provincial Court Judges

(*Rules of the Supreme Court of Canada*, s. 42)

SÉBASTIEN GRAMMOND, AD.E.
57 Louis-Pasteur Pvt., room 203
Ottawa, Ontario K1N 6N5

(613) 562-5902 (tel.)
(613) 562-5121 (fax)
sebastien.grammond@uottawa.ca

Attorney for the Intervener
Canadian Association of Provincial Court Judges

Henri A. Lafortune Inc.
Tél. : 450 442-4080
Téléc. : 450 442-2040
lafortune@factum.ca

2005, rue Limoges
Longueuil (Québec) J4G 1C4
www.halafortune.ca
S-3726-13

ATTORNEY GENERAL OF CANADA
(René LeBlanc and Christine Mohr)
284 Wellington St., room SAT-6050
Ottawa, Ontario K1A 0H8

(613) 957-4657 (tel.)
(613) 952-6006 (fax)
rene.leblanc@justice.gc.ca

Attorneys for the Appellant

ATTORNEY GENERAL OF CANADA
(Christopher Rupar)
50 O'Connor St., Suite 50, bur. 557
Ottawa, Ontario K1P 6L2

(613) 670-6290 (tel.)
(613) 954-1920 (fax)
christopher.rupar@justice.gc.ca

Agent for the Appellant

BERNARD, ROY & ASSOCIÉS
(André Fauteux)
8.00 – 1 Notre Dame St. East
Montreal, Quebec H2Y 1B6

(514) 393-2336 ext. 51492 (tel.)
(514) 873-7074 (fax)
andre.fauteux@justice.gouv.qc.ca

Attorneys for the Attorney General of Quebec

NOËL & ASSOCIÉS
(Pierre Landry)
111 Champlain St.
Gatineau, Quebec J8X 3R1

(819) 771-7393 (tel.)
(819) 771-5397 (fax)
p.landry@noelassocies.com

Agents for the Attorney General of Quebec

ATTORNEY GENERAL OF ONTARIO
(Joshua Hunter)
720 Bay St., 4th floor
Toronto, Ontario M7A 2S9

(416) 326-3840 (tel.)
(416) 326-4015 (fax)
joshua.hunter@ontario.ca

Attorneys for the Attorney General of Ontario

BURKE-ROBERTSON
(Robert E. Houston, Q.C.)
441 MacLaren St., room 200
Ottawa, Ontario K2P 2H3

(613) 236-9665 (tel.)
(613) 235-4430 (fax)
rhouston@burkerobertson.com

Agents for the Attorney General of Ontario

ROCCO GALATI LAW FIRM PROFESSIONAL CORPORATION
(Rocco Galati)
1062 College St., Lower Level
Toronto, Ontario M6H 1A9

(416) 530-9684 (tel.)
(416) 530-8129 (fax)
rocco@idirect.com

Attorneys for the intervener Rocco Galati

GOWLING LAFLEUR HENDERSON LLP
(Guy Régimbald)
160 Elgin St., 26th floor
Ottawa, Ontario K1P 1C3

(613) 786-0197 (tel.)
(613) 563-9869 (fax)
guy.regimbald@gowlings.com

Agent for the intervener Rocco Galati

SLANSKY LAW PROFESSIONAL CORPORATION
(Paul Slansky)
1062 College St.
Toronto, Ontario M6H 1A9

(416) 536-1220 (tel.)
(416) 536-8842 (fax)
paul.slansky@bellnet.ca

Attorneys for the intervener Constitutional Rights Centre inc.

GOWLING LAFLEUR HENDERSON LLP
(Matthew Estabrooks)
160 Elgin St., 26th floor
Ottawa, Ontario K1P 1C3

(613) 233-1781 (tel.)
(613) 563-9869 (fax)
matthew.estabrooks@gowlings.com

Agent for the intervener Constitutional Rights Centre inc.

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I Facts and Position of the Intervener

1 The applicant is a federation of associations of provincial and territorial court judges in each province and territory of Canada, as well as judges of the municipal courts of Montreal, Laval and Quebec City (hereinafter, the "provincial court judges"). According to its constitution, the applicant has "a primary responsibility to protect and maintain the principle of judicial independence for the benefit of all Canadians." Its goals and purposes include "[t]o promote, defend and safeguard the dignity of, respect for and the authority of Courts and Judges and their individual and institutional judicial independence;" "[t]o achieve a better public understanding of the role of the Judiciary in the administration of justice and, in so doing, to initiate or support public education and public relations programs;" and "[t]o discuss and study existing law and recommend to the appropriate authorities such amendments thereto as may be considered proper [...]."

2 The first question of the reference reads 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*?

3 The intervener submits that the first question of the reference should be answered in the affirmative. The intervener takes no position regarding the second question.

II Argument

4 While the immediate context that prompted the federal government to refer that question to this Court involved a judge of the Federal Court of Appeal, the answer given to that question may also have the effect of rendering provincial court judges ineligible for appointment to the Supreme Court of Canada, either with respect to the three "Quebec seats" mentioned in section 6, or with respect to all seats, depending on the reasoning adopted.

Part II – Argument

5 At Confederation, provincially-appointed judges comprised a variety of officials exercising judicial duties, including lay justices of the peace or police magistrates. Beginning in the 1960s, most provinces undertook major reforms of their provincial courts, which are now professional and independent. Provincial court judges must now have legal training and experience, and they are selected through a rigorous process. While today's provincial courts do not have an inherent jurisdiction, in every other respect they exercise their duties in a similar manner to the superior courts. In many areas, such as criminal law or family law, provincial courts and superior courts have concurrent jurisdiction. A long-time observer of Canada's judiciary, political scientist Peter Russell, summarizes this evolution:

> By the end of the 1970s in all the provinces Provincial Courts replaced Magistrates Courts. The Provincial Courts were staffed by a legally trained judiciary whose professional qualifications soon came to equal those of the federally appointed section 96 judiciary. The Provincial Court judiciary also came to enjoy security of tenure and judicial independence on a par with the federally appointed provincial judiciary. This upgrading of the professional qualifications and terms of office of Provincial Court judges was accompanied by a significant expansion of their jurisdiction.[1]

6 The appointment of several provincial court judges to courts of appeal shows that provincial court judges are no less competent or meritorious than superior court judges. The current Chief Justice of the Court of Appeal of Manitoba was directly appointed to the Court of Appeal from the provincial court. The same is true of two current judges of the Quebec Court of Appeal as well as one judge of the courts of appeal of each of Ontario, Alberta and British Columbia. Moreover, one current member of the Supreme Court of Canada began her judicial career as a provincial court judge.

7 The intervener submits that sections 5 and 6 of the *Supreme Court Act* should be interpreted in light of the current realities of provincial courts and provincial court judges. Given the equal merit and competence of provincial court judges, any interpretation which results in their

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[1] Peter H. Russell, "Introduction: How We Got Here" in Peter H. Russell (ed.), *Canada's Trial Courts: Two Tiers or One?* (Toronto: University of Toronto Press, 2007) at 9, Book of authorities of Intervener, Canadian Association of Provincial Court Judges, hereinafter "B.A.I.", **Tab 11**.

accidental exclusion from the pool of candidates eligible for appointment to the Supreme Court should be avoided.

8 In short, the intervener's arguments are as follows:

a) Section 5 of the *Supreme Court Act* establishes threshold eligibility requirements that are met by present or past membership in a provincial bar for a duration of ten years or more, or by being a present or past superior court judge;

b) Section 6 particularizes those requirements for the three Quebec seats, by indicating that the bar mentioned in section 5 is the Quebec Bar and that the superior courts mentioned in section 5 are the Quebec Superior Court and Court of Appeal, but it does not otherwise set forth additional or different requirements;

c) Given their competence, experience and selection process, there is no valid justification for making provincial court judges ineligible for appointment to the Supreme Court;

d) Sections 5 and 6 of the *Supreme Court Act* must be interpreted in light of similar provisions found in the *Judges Act* and the *Federal Courts Act*, which have always been understood to make provincial court judges eligible for federal judicial appointments, as past members of the bar.

A. Sections 5 and 6 of the *Supreme Court Act*

9 As is the case of any other statutory provision, the interpretation of sections 5 and 6 of the *Supreme Court Act* must take into account their text, context and purpose. In identifying the purpose, it is important to pay attention not only to the ideal goals that one may ascribe to the legislation, but more importantly to the machinery that Parliament put in place to achieve its objectives. As Professor Côté notes: "Finally, even if Parliament's goals are well known, the

means to fulfil them must still be examined. And the primary guidance on such means is the drafter's choice of words."[2]

10 Thus, in order to give a proper interpretation to sections 5 and 6, it is necessary to understand the logic of the appointment process that Parliament put in place. Perhaps the best way to grasp this logic is to contrast those provisions with the appointment processes of other courts.

11 For example, in the United Kingdom, the judges of the Supreme Court must have been lawyers for at least 15 years or judges for at least two years, but they are nominated by a commission which is expressly directed to make a selection based on merit and the representation of the legal systems of the various parts of the United Kingdom. The executive has but a very limited power to reject the nomination made by the commission.[3] Likewise, judges of the Ontario Court of Justice are selected among lawyers of at least ten years' experience, but there is an advisory committee that draws, for each appointment, a short list of at least two candidates, based on criteria such as "professional excellence, community awareness and personal characteristics of candidates and recognition of the desirability of reflecting the diversity of Ontario society."[4] Again, the executive must normally make an appointment among the list submitted by the committee. In those examples, criteria based on the number of years of legal practice set a threshold eligibility requirement for all candidates. But not every person fulfilling those criteria may be appointed: an independent process is tasked with making an assessment of each candidate and selecting the best one or best ones, based on criteria which include merit and diversity. The judicial appointment process is thus insulated, to a certain extent, from political considerations, as decisions concerning merit are not primarily made by political actors.

12 In contrast, other jurisdictions are content with establishing threshold eligibility requirements and leave it to political actors to select the person best suited among the pool of eligible candidates.

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[2] Pierre-André Côté with Mathieu Devinat and Stéphane Beaulac, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011) at 422; Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005) at 157-158, B.A.I., **Tab 5**.

[3] *Constitutional Reform Act 2005* (U.K.), c. 4, ss. 25-31.

[4] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 43.

For example, in the United States, there is simply no constitutional or statutory requirement for eligibility to the federal courts. In practice, the President defers to a committee of the American Bar Association which has set a guideline to the effect that a nominee should have at least twelve years of experience as a practicing lawyer.[5]

13 Federal judicial appointments in Canada obey the same logic. A threshold eligibility requirement of ten years' membership in the bar (or, as we will see later, a combination of membership in the bar and the performance of judicial duties for a total duration of ten years) ensures that candidates have the basic legal knowledge, skills and experience to become a judge. However, the selection among the pool of eligible candidates remains the prerogative of the executive. In recent decades, "judicial appointments advisory committees" have been set up to further narrow the pool of candidates, but those committees lack any statutory footing and leave political actors with a large measure of discretion.

14 Professor Jacob Ziegel aptly summarizes the situation with respect to the Supreme Court:

> The *Supreme Court Act* does not prescribe how members of the court are to be selected: it deals only with minimum qualifications, mandatory retirement age, and the requirement that three of the nine judges must come from Québec.[6]

15 Hence, the criteria found in section 5 of the *Supreme Court Act* must be considered as threshold eligibility requirements. They are not meant to identify the person best suited to hold office on the country's highest court. They are merely an initial filter that screens out persons who do not have basic qualifications. As such, they should not be interpreted too rigorously or technically, as that would risk excluding candidates who might in fact be qualified. In a system in which legislation sets out only threshold eligibility requirements, the task of selecting the best candidate falls primarily with the executive. Likewise, it falls upon the government to ensure the proper combination of expertise among the judges of the Court, as well as to address issues such as

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[5] See American Bar Association, *Standing Committee on the Federal Judiciary: What it is and How it Works*, on line: http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/federal_judiciary09.authcheckdam.pdf, B.A.I., **Tab 2**.

[6] Jacob S. Ziegel, "Appointments to the Supreme Court of Canada" (1994) 5 Constitutional Forum 10, B.A.I., **Tab 13**.

gender balance or regional representation. Therefore, one should not attempt to give a narrow interpretation to the eligibility requirements in order to remedy the perceived shortcomings of the current appointment process, nor because of dissatisfaction with the choices made by the executive. Once the threshold eligibility requirements are met, the choice made by the executive cannot be reviewed in a court of law.

16 In the *Constitution Act, 1867*, membership in a provincial bar was made the only prerequisite for a federal judicial appointment.[7] At that time, neither the constitution nor federal legislation required membership for a specific duration, and there was a controversy as to whether preconfederative requirements had survived.[8] When the Supreme Court was created in 1875, Parliament required that a person have been a member of the bar for ten years in order to be appointed to that court. In 1912, such a requirement was extended to all superior court judges.[9] Hence, the basic requirement for all federal judicial appointments today is ten years' membership in a provincial bar.[10]

17 Parliament also stipulated that persons who were or had been superior court judges could also be appointed to the Supreme Court. When the legislation was first enacted in 1875, it was possible to become a superior court judge with less than ten years' practice as a lawyer, so a superior court judge might not have been a "barrister or advocate of ten years standing" before being appointed to the bench. Likewise, the reference to persons who "have been judges" is more easily understood in the context of the late 19th or early 20th century, when it was not uncommon for judges to step down to assume political office and to return to the bench later.[11] Hence, the specific mention of present or past superior court judges, which may appear redundant today,

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7 *Constitution Act, 1867*, R.S.C. 1985, app. II, no. 5, ss. 97 and 98.

8 Luc Huppé, *Histoire des institutions judiciaires du Canada* (Montreal: Wilson & Lafleur, 2007) at 458-462, B.A.I., **Tab 8**.

9 *An Act to amend the Judges Act*, S.C. 1912, c. 29, s. 9.

10 *Judges Act*, R.S.C. 1985, c. J-1, s. 3; *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 5.3.

11 See, for example, the biographies of William Badgley, Charles Joseph Doherty, Louis-Amable Jetté and Philippe-Auguste Choquette, in Ignace-J. Deslauriers, *Les cours de justice et la magistrature du Québec*, vol. 1 (Quebec City: Department of Justice, 1991), B.A.I., **Tab 6**.

demonstrates Parliament's intent to include all persons who could possibly be qualified, even though they might have had an atypical career path.

18 The requirement of ten years' membership in a provincial bar has always been understood as being met through "past membership" in the bar, i.e., where a person who had been a member of the bar for at least ten years was subsequently appointed to the bench, that person was eligible for a further appointment. An illustration is found in the marginal note to section 4, in the Revised Statutes of 1886. It reads: "Judges from bar of Quebec/*Juges tirés du barreau de Québec.*" Yet, the provision refers not only to members of the bar, but also to judges. This suggests that in the language of the time, a judge was considered to be "from the bar."

19 Indeed, in 1867 and in 1875, the promotion of judges from one level of court to the other was already well known. It was certainly not the intention of the Fathers of Confederation to exclude sitting judges from the possibility of being promoted to a different court. Thus, when sections 97 and 98 of the *Constitution Act, 1867* require that judges "be selected from the Bar," they do not set out a strict requirement of membership in the bar at the time of appointment, but rather require that the person appointed have been admitted to the bar some time before appointment to the bench. If it were otherwise, it would be constitutionally impermissible to appoint a superior court judge to the court of appeal, which is absurd. Likewise, when section 5 of the *Supreme Court Act* requires ten years of bar membership, it means that a person appointed to the Supreme Court must have been called to the bar at least ten years before being appointed. It does not require bar membership at the time of appointment.

20 Section 6 does not impose eligibility requirements in addition to those set forth by section 5. Nor does it replace the requirements of section 5 by a different set of requirements for the three Quebec seats. Section 6 cannot be read in isolation from section 5, because both sections were initially part of the same sentence and were separated by a statutory revision that does not change the substance of the law, and because that would lead to the absurd result that a young lawyer would be eligible to be appointed to the Supreme Court immediately upon being called to the bar. Rather, section 6 must be seen as a qualification or precision to section 5, in the sense that,

with respect to at least three members of the Court, the requirements set forth in section 5 must be assessed in relation to the institutions of a specific province, Quebec.

21 The obvious rationale or purpose for that specific requirement is the fact that the Quebec legal system is based on the civil law tradition. Moreover, federal legislation in Quebec must be applied in light of the civil law tradition, including the *Civil Code of Québec*.[12] Because the Supreme Court has a national jurisdiction, it is necessary that at least some of its members be conversant in the civil legal tradition. The *Supreme Court Act* accomplishes this objective by applying the same threshold eligibility requirements for all judges, although with respect to the three Quebec judges section 6 particularizes those requirements to ensure that they are met through training in the civil law tradition as opposed to the common law tradition.

22 Nothing in the language employed in sections 5 and 6, in the legislative history of those provisions or in the debates concerning their adoption suggests that Parliament intended to require a higher degree of qualification for Quebec judges than for other judges. It simply required the same level of training in a different legal system. As one author puts it: "This legislative requirement [...] aims at ensuring a Supreme Court bench with judges trained in Quebec civil law."[13]

23 Some authors have attempted to build a justification for a difference between a heightened requirement of "current knowledge" of the civil law in section 6 and a lower requirement of "past knowledge" of the common law in section 5. Far from identifying any plausible purpose of section 6, this is simply an entirely unpersuasive restatement of the formalistic interpretation preferred by those authors. Such a reading ignores the fact that the eligibility requirements are set forth in section 5, not section 6, and that both sections were initially enacted together as a single sentence, which contradicts the idea that there would be different eligibility requirements for Quebec judges. Most importantly, the suggestion to the effect that a literal reading of section

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[12] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 8.1.

[13] Eugénie Brouillet and Yves Tanguay, "The Legitimacy of Constitutional Arbitration in a Multinational Federative System: The Case of the Supreme Court of Canada", in Nadia Verrelli (ed.), *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montreal and Kingston: McGill-Queen's University Press, 2013) 125 at 136, B.A.I. **Tab 4**.

6 imposes a requirement of "current knowledge" is belied by the situation of the 290 judges of the Court of Québec, who would be excluded by that interpretation, despite their incontrovertible "current knowledge" of Quebec law, which they apply on a daily basis. A literal and isolated reading of section 6 produces haphazard results, rather than setting a supposedly heightened standard.

24 Section 6 simply means that that, for the three judges it covers, the provincial bar of which the candidate must have been a member is that of Quebec, and the provincial superior court to which section 5 refers is either the Quebec Superior Court or Court of Appeal.

B. No Rationale for the Exclusion of Provincial Court Judges

25 There is no principled basis for interpreting sections 5 and 6 of the *Supreme Court Act* in a manner that would exclude provincial court judges.

26 As mentioned above, the purpose of section 5 is to establish minimum threshold requirements aimed at ensuring that judges possess the basic legal training and experience required for the proper discharge of their duties. A very large number of persons meet those requirements. For example, in Quebec alone, more than 16,000 lawyers have ten years or more of practice. Not every eligible candidate would be a good Supreme Court judge. The selection of suitable candidates among the pool of eligible candidates is the task of the executive. Hence, the main concern in the interpretation of section 5 should be the inclusion of all potentially qualified candidates.

27 In several provinces, provincial court judges must have ten years of practice as a lawyer prior to appointment. Thus, the very fact of their appointment shows that they meet the minimum threshold established by section 5. In provinces where one can be appointed to the provincial court after less than ten years of practice, section 5 operates so as to require that the person have been called to the bar at least ten years before their appointment to the Supreme Court. In such a case, it is obvious that years of experience as a provincial court judge are an equal, if not better qualification than years of practice as a lawyer.

Part II – Argument

28 Indeed, in most provinces, provincial court judges are appointed after a rigorous selection process based on the assessment of their knowledge, skills and judicial temperament. Practicing lawyers do not undergo such an assessment. As a result, it can be safely asserted that provincial court judges are better qualified for appointment to the Supreme Court than the average lawyer with ten years of practice.

29 It has often been asserted that the Supreme Court should become more representative of the diversity of the Canadian population. Provincial courts are more diverse than federally-appointed superior and appeal courts. In fact, the legislative scheme for the selection of provincial court judges in certain provinces includes a specific direction to ensure a better representation of diversity.[14] In particular, there have been calls for the appointment of an Aboriginal judge to the Supreme Court.[15] As one Aboriginal scholar notes, the ineligibility of provincial court judges would make such an appointment more difficult, because "we note that many of the present Aboriginal judges in Canada sit in provincial courts, which is attractive to them because it, primarily, is the court with which Aboriginal people have to deal."[16] One Aboriginal person whose name is often mentioned as a potential Supreme Court judge is currently a provincial court judge.[17]

30 Simply put, the idea that a lawyer eligible for appointment to the Supreme Court under section 5 would lose that eligibility upon becoming a provincial court judge is absurd. Once a person becomes eligible, she remains eligible.

31 Such an interpretation would lead to the following absurd results:

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[14] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 43(9)(3.); *Provincial Court Act*, C.C.S.M., c. C275, s. 3.1(3)(a)(ii).

[15] See, for example, Resolution 01-05A of the Canadian Bar Association: http://www.cba.org/resolutions/pdf/05-01-A.pdf.

[16] James C. Hopkins and Albert C. Peeling, "Aboriginal Judicial Appointments to the Supreme Court of Canada", paper prepared for the Indigenous Bar Association, 6 April 2004, on line: http://www.law.arizona.edu/faculty/FacultyPubs/Documents/Hopkins/IBA_SupremeCourt.pdf, B.A.I., **Tab 7**.

[17] See Dwight G. Newman, "Book Review, *Appointing Judges in an Age of Judicial Power*" (2006) 85 Can. Bar Rev. 433 at 441, B.A.I., **Tab 10**.

a) that a provincial court judge would not be eligible for appointment to the Supreme Court, but would become so eligible upon resigning his or her functions and resuming membership in the bar;

b) that a provincial court judge could be appointed to a court of appeal but not to the Supreme Court;

c) that, for example, the Chief Justice of a provincial court could not be appointed directly to the Supreme Court, but could be appointed to the province's court of appeal for a short period and thence to the Supreme Court.

32 There is no reason to conclude otherwise when section 6 is involved. As mentioned above, the purpose of section 6 relates to knowledge of Quebec civil law and the civil law tradition and does not purport to set eligibility requirements above those found in section 5. Excluding judges of the Court of Québec from the pool of candidates eligible to be appointed to the Supreme Court is irrational, when every member of the Quebec bar would be included in that pool. Judges of the Court of Québec are highly qualified jurists, who have all been members of the Quebec bar for at least ten years. They have all been trained in the civil law tradition and they apply Quebec laws on a daily basis in a wide variety of fields. It would be absurd to interpret section 6 in a way that renders judges of the Court of Québec ineligible for appointment to the Supreme Court.

C. The *Judges Act* and the *Federal Courts Act*: *in pari materia*

33 Federal judicial appointments are regulated by three statutes: the *Supreme Court Act*, the *Judges Act*[18] and the *Federal Courts Act*[19]. These statutes are *in pari materia*: they regulate substantially the same subject.[20] They establish a coherent scheme under which the main

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[18] R.S.C. 1985, c. J-1.

[19] R.S.C. 1985, c. F-7.

[20] *Felipa v. Canada (Citizenship and Immigration)*, [2012] 1 F.C.R. 3 (C.A.) at 34-35, B.A.I., paras. 64-66, B.A.I., **Tab 1**.

qualification for becoming a federally-appointed judge is to have been called to the bar at least ten years prior to appointment.

34 As Sullivan notes, "Statutes that are analogous to one another are presumed to reflect an intention to deal with the matters in question in an analogous fashion."[21] Côté also opines that "[t]he expectation is that the same problem receives the same solution in all the statutes that refer to it."[22] This presumption operates regardless of the sequence of adoption of the statutes concerned.[23]

35 Moreover, the manner in which a statute is interpreted and applied by the government may be a relevant interpretive guide,[24] especially where the statute has rarely or never been interpreted by the courts. One of the rationales behind this principle is the fact that courts are loathe to adopt an interpretation that would have the effect of invalidating past government conduct.

36 Since the *Judges Act* was amended in 1912 to require ten years of bar membership for appointment to provincial superior (or county) courts,[25] appointments to the Supreme Court, to the Exchequer Court and to provincial superior courts were regulated by very similar provisions. The only difference was that the *Judges Act* referred only to barristers of ten years standing at the bar and not to persons who were or had been judges of superior courts. From 1912 to 1946, the relevant section of the *Judges Act* read as follows:

3. No person shall be eligible to be appointed a judge of a superior court, or of a circuit, county or district court, in any province unless, in addition to any other requirements prescribed by law, he has been admitted to the bar of one of the provinces for	**3.** Personne ne doit être nommé juge d'une cour supérieure, ni d'une cour de circuit, de comté ou de district, dans une province, à moins que, en sus des autres exigences prescrites par la loi, il n'ait été admis au barreau de l'une des provinces au moins

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21 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis, 2008) at 416, B.A.I., **Tab 12**.

22 Pierre-André Côté with Mathieu Devinat and Stéphane Beaulac, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011) at 371, B.A.I., **Tab 5**.

23 Sullivan, *supra*, at 412, B.A.I., **Tab 12**.

24 Pierre-André Côté with Mathieu Devinat and Stéphane Beaulac, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011) at 584-588, B.A.I., **Tab 5**.

25 *An Act to amend the Judges Act*, S.C. 1912, c. 29, s. 9.

at least ten years before the date of appointment.	dix ans avant la date de sa nomination.

37 From 1946 to 1977, the provision read as follows:

3. No person shall be eligible to be appointed a judge of a superior, circuit or county court in any province unless, in addition to any other requirements prescribed by law, he is a barrister or advocate of at least ten years standing at the bar of any province.	**3.** Nul ne peut être nommé juge d'une cour supérieure, d'une cour de circuit ou d'une cour de comté dans une province, à moins d'être un avocat inscrit au barreau d'une province pendant au moins dix ans, en sus d'autres conditions prescrites par la loi.

38 The words employed in that last version are identical to those of section 5 of the *Supreme Court Act* ("a barrister or advocate of at least ten years standing / *un avocat inscrit [...] pendant au moins dix ans*").

39 From 1912 to 1977, the federal government appointed several provincial court judges to provincial superior or county courts. Such appointments include:

a) British Columbia: Patricia Proudfoot (County Ct. 1974, Sup. Ct. 1977, C.A. 1989);

b) Manitoba:[26] Wallace Michael Darichuk (Prov. Ct. 1963; County Ct 1977; Q.B. 1984); Armand Dureault (County Ct. 1974); George Hepworth Lockwood (County Ct. 1973; Q.B. 1984);

c) Quebec:[27] Albert Malouf (Prov. Ct. 1968; Sup. Ct. 1972; C.A. 1981); Aimé Marchand (Chief Judge of the Magistrate's Court, 1922, Sup. Ct., 1927); Gérald Boisvert (Prov. Ct. 1972; Sup. Ct. 1976); Orville Frenette (Prov. Ct. 1965, Sup. Ct. 1978); Victor Melançon (Prov. Ct. 1970, Sup. Ct. 1977); Noël Barbès (Mag. Ct. 1962; Sup. Ct. 1965); Paul-Étienne Bernier (Prov. Ct. 1970; Sup. Ct. 1973); Yves Leduc (Mag. Ct. 1962; Sup. Ct. 1965); Jacques Boucher (Mag. Ct. 1950; Sup. Ct. 1961); Léopold Larouche (Mag. Ct. 1949; Sup. Ct. 1962); Louis Paradis (Sess. Ct. 1968; Sup. Ct. 1975); Peter V. Shorteno

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[26] Manitoba Historical Society, *Memorable Manitobans: The Judges of Manitoba*, on line: http://www.mhs.mb.ca/docs/people/manitobajudges.shtml, B.A.I., **Tab 9**.

[27] Ignace-J. Deslauriers, *Les cours de justice et la magistrature du Québec*, vol. 1 (Quebec City: Department of Justice, 1991), B.A.I., **Tab 6**.

(Sess. Ct. 1959; Sup. Ct. 1965); Édouard Tellier (Sess. Ct. 1943; Sup. Ct. 1950); Evender Veilleux (Sess. Ct. 1962; Sup. Ct. 1963);

d) New Brunswick: Earl Thomas Caughey (Prov. Ct. 1963; County Ct 1971; Q.B. 1979).

40 These appointments would have been illegal if the requirement of being a "barrister or advocate of at least ten years standing" had to be assessed at the time of appointment, so that the person appointed had to be a member of the bar at that moment. Rather, this longstanding practice shows that the correct interpretation of that phrase refers to present *or past membership* in the bar for a period of at least ten years. (In fact, that meaning is more clearly rendered by the provision in force from 1912 to 1946.) Thus, a provincial court judge who was a member of the bar for at least ten years before being elevated to the bench is a "barrister or advocate of at least ten years standing" for the purposes of section 3 of the *Judges Act*. That interpretation may also be applied to section 5 of the *Supreme Court Act*, which employs the same vocabulary. Moreover, there is no reason to limit that reasoning to provincial court judges. A judge of the Federal Courts may also be considered as a "barrister or advocate of at least ten years standing." Thus, provincial court judges and Federal Court judges are eligible for appointment to the Supreme Court.

41 In 1977[28] and 1996,[29] respectively, the *Judges Act* and the *Federal Court Act* were amended to render eligible provincial court judges who had not been lawyers for ten years prior to their appointment to the provincial court. In certain provinces, a lawyer may be appointed to the provincial court after less than ten years of practice. Where a person had been appointed to the provincial court before ten years of practice, it could have been argued that the person was not a "barrister or advocate of at least ten years standing," even where more than ten years had elapsed after the person's call to the bar. To clarify the eligibility of those judges, Parliament provided

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[28] *An Act to amend the Judges Act and other Acts in respect of judicial matters*, S.C. 1976-77, c. 25, s. 1.

that a person could also be appointed to a superior court or to the Federal Courts if that person has been a lawyer and a judge for an aggregate of at least ten years. In doing so, Parliament recognized that performing judicial duties is as good a qualification as being a lawyer for appointment to a superior or Federal court. This is entirely consistent with the manner in which the *Judges Act* was applied until then: becoming a judge does not disqualify a person from further judicial appointment.

42 A consideration of the elevation of judges from superior courts to courts of appeal also sheds light on the correct interpretation of section 3 of the *Judges Act* and, by analogy, of section 5 of the *Supreme Court Act*. Most court of appeal judges are selected from the superior court of their province. However, a superior court judge is not, strictly speaking, a "barrister or advocate." Thus, for appointments of superior court judges to courts of appeal to be valid, at least prior to the 1977 amendment to the *Judges Act*, the requirement to the effect that the appointee must be a "barrister or advocate" must be taken to include past membership in the bar. As mentioned above, the same is true of sections 97 and 98 of the *Constitution Act, 1867*.

43 Finally, the absence of any challenge, judicial or otherwise, to the appointment of Justices Le Dain, Iacobucci and Rothstein to the Supreme Court proves that there has always been a consensus to the effect that section 5 allows for the appointment of "past lawyers of ten years standing" to the Supreme Court. As section 6 must be read together with section 5, the same result obtains with respect to the three Quebec seats.

44 This century and a half of consistent government practice should be given considerable weight in the interpretation of the *Supreme Court Act*. By their own nature, statutory provisions governing judicial appointments are seldom interpreted by the courts. Their meaning is refined through government practice. As long as that practice can be supported by the language of the Act, an

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[29] *An Act to amend the Federal Court Act, the Judges Act and the Tax Court of Canada Act*, S.C. 1996, c. 22, s. 1. This amendment was apparently adopted to regularize the appointment of Mr. Justice Campbell to the Federal Court. Justice Campbell was called to the British Columbia bar in 1971 and was appointed to the British Columbia Provincial Court in 1974. He was appointed to the Federal Court on December 8, 1995. See: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Campbell. The amendment was made retroactive to November 28, 1995.

interpretation that is consistent with that practice should be preferred to an interpretation that would make that practice retroactively illegal.

45 The interpretation put forward by other parties in this reference, to the effect that references to "members of the bar" in the provisions governing federal judicial appointments include only current members of the bar and exclude judges, would lead to the following results:

a) Since Confederation, all appointments of superior court judges to courts of appeal would have been contrary to sections 97 and 98 of the *Constitution Act, 1867*;

b) From 1912 to 1977, all appointments of provincial court judges to superior courts or courts of appeal would have been contrary to the *Judges Act*;

c) The appointment of three Federal Court of Appeal justices to the Supreme Court would have been contrary to the *Supreme Court Act*.

46 Such an interpretation would lead to severe consequences. It should be adopted only if no other interpretation can be supported by the language of the Act. However, as we have shown above, the contrary interpretation, whereby past members of the bar may be appointed to the Supreme Court, is more compatible with the statutory language, with the history of the provisions and with the purpose of the statutory scheme.

47 Therefore, sections 5 and 6 of the *Supreme Court Act* allow for the appointment of "a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec," regardless of that person's subsequent judicial appointment to the Court of Québec or to the Federal Courts, and the first question of the reference should be answered in the affirmative.

III Conclusions

48 The intervener asks this Court to answer the first question of the reference in the affirmative. The intervener takes no position regarding the second question.

Part III – Conclusions

49 The intervener does not ask for costs and asks that costs not be granted against it.

Ottawa, Ontario, December 30, 2013

SÉBASTIEN GRAMMOND, AD.E.
Attorney for the Intervener,
Canadian Association of Provincial Court Judges

IV Authorities

V Statutory Provisions Cited

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

5. Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.	**5.** Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.
6. Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.	**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.

Judges Act, R.S.C. 1985, c. J-1:

3. Peuvent seuls être nommés juges d'une juridiction supérieure d'une province s'ils remplissent par ailleurs les conditions légales : *a*) les avocats inscrits au barreau d'une province depuis au moins dix ans; *b*) les personnes ayant été membres du barreau d'une province et ayant exercé à temps plein des fonctions de nature judiciaire à l'égard d'un poste occupé en vertu d'une loi fédérale ou provinciale après avoir été inscrites au barreau, et ce pour une durée totale d'au moins dix ans.	**3.** No person is eligible to be appointed a judge of a superior court in any province unless, in addition to any other requirements prescribed by law, that person (*a*) is a barrister or advocate of at least ten years standing at the bar of any province; or (*b*) has, for an aggregate of at least ten years, (i) been a barrister or advocate at the bar of any province, and (ii) after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held pursuant to a law of Canada or a province.

Federal Courts Act, R.S.C. 1985, c. F-7:

5.3 Les juges de la Cour d'appel fédérale et de la Cour fédérale sont choisis parmi : *a*) les juges, actuels ou anciens, d'une cour	**5.3** A person may be appointed a judge of the Federal Court of Appeal or the Federal Court if the person

supérieure, de comté ou de district; *b*) les avocats inscrits pendant ou depuis au moins dix ans au barreau d'une province; *c*) les personnes ayant été membres du barreau d'une province et ayant exercé à temps plein des fonctions de nature judiciaire à l'égard d'un poste occupé en vertu d'une loi fédérale ou provinciale après avoir été inscrites au barreau, et ce pour une durée totale d'au moins dix ans.	(*a*) is or has been a judge of a superior, county or district court in Canada; (*b*) is or has been a barrister or advocate of at least 10 years standing at the bar of any province; or (*c*) has, for at least 10 years, (i) been a barrister or advocate at the bar of any province, and (ii) after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held under a law of Canada or a province.

Constitutional reform Act 2005 (U.K.), c. 4

25 QUALIFICATION FOR APPOINTMENT

(1) A person is not qualified to be appointed a judge of the Supreme Court unless he has (at any time)-

(a) held high judicial office for a period of at least 2 years, or

(b) been a qualifying practitioner for a period of at least 15 years.

(2) A person is a qualifying practitioner for the purposes of this section at any time when-

(a) he has a Senior Courts qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990 (c. 41),

(b) he is an advocate in Scotland or a solicitor entitled to appear in the Court of Session and the High Court of Justiciary, or

(c) he is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

26 SELECTION OF MEMBERS OF THE COURT

(1) This section applies to a recommendation for an appointment to one of the following offices-

(a) judge of the Supreme Court;

(b) President of the Court;

(c) Deputy President of the Court.

(2) A recommendation may be made only by the Prime Minister.

(3) The Prime Minister-

(a) must recommend any person whose name is notified to him under section 29;

(b) may not recommend any other person.

(4) A person who is not a judge of the Court must be recommended for appointment as a judge if his name is notified to the Prime Minister for an appointment as President or Deputy President.

(5) If there is a vacancy in one of the offices mentioned in subsection (1), or it appears to him that there will soon be such a vacancy, the Lord Chancellor must convene a selection commission for the selection of a person to be recommended.

(6) Schedule 8 is about selection commissions.

(7) Subsection (5) is subject to Part 3 of that Schedule.

(8) Sections 27 to 31 apply where a selection commission is convened under this section.

27 SELECTION PROCESS

(1) The commission must-

(a) determine the selection process to be applied,

(b) apply the selection process, and

(c) make a selection accordingly.

(2) As part of the selection process the commission must consult each of the following-

(a) such of the senior judges as are not members of the commission and are not willing to be considered for selection;

(b) the Lord Chancellor;

(c) the First Minister in Scotland;

(d) the Assembly First Secretary in Wales;

(e) the Secretary of State for Northern Ireland.

(3) If for any part of the United Kingdom no judge of the courts of that part is to be consulted under subsection (2)(a), the commission must consult as part of the selection process the most senior judge of the courts of that part who is not a member of the commission and is not willing to be considered for selection.

(4) Subsections (5) to (10) apply to any selection under this section or section 31.

(5) Selection must be on merit.

(6) A person may be selected only if he meets the requirements of section 25.

(7) A person may not be selected if he is a member of the commission.

(8) In making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.

(9) The commission must have regard to any guidance given by the Lord Chancellor as to matters to be taken into account (subject to any other provision of this Act) in making a selection.

(10) Any selection must be of one person only.

28 REPORT

(1) After complying with section 27 the commission must submit a report to the Lord Chancellor.

(2) The report must-

(a) state who has been selected;

(b) state the senior judges consulted under section 27(2)(a) and any judge consulted under section 27(3);

(c) contain any other information required by the Lord Chancellor.

(3) The report must be in a form approved by the Lord Chancellor.

(4) After submitting the report the commission must provide any further information the Lord Chancellor may require.

(5) When he receives the report the Lord Chancellor must consult each of the following-

(a) the senior judges consulted under section 27(2)(a);

(b) any judge consulted under section 27(3);

(c) the First Minister in Scotland;

(d) the Assembly First Secretary in Wales;

(e) the Secretary of State for Northern Ireland.

29 THE LORD CHANCELLOR'S OPTIONS

(1) This section refers to the following stages-

Stage 1:	where a person has been selected under section 27
Stage 2:	where a person has been selected following a rejection or reconsideration at stage 1
Stage 3:	where a person has been selected following a rejection or reconsideration at stage 2.

(2) At stage 1 the Lord Chancellor must do one of the following-

(a) notify the selection;

(b) reject the selection;

(c) require the commission to reconsider the selection.

(3) At stage 2 the Lord Chancellor must do one of the following-

(a) notify the selection;

(b) reject the selection, but only if it was made following a reconsideration at stage 1;

(c) require the commission to reconsider the selection, but only if it was made following a rejection at stage 1.

(4) At stage 3 the Lord Chancellor must notify the selection, unless subsection (5) applies and he makes a notification under it.

(5) If a person whose selection the Lord Chancellor required to be reconsidered at stage 1 or 2 was not selected again at the next stage, the Lord Chancellor may at stage 3 notify that person's name to the Prime Minister.

(6) In this Part references to the Lord Chancellor notifying a selection are references to his notifying to the Prime Minister the name of the person selected.

30 EXERCISE OF POWERS TO REJECT OR REQUIRE RECONSIDERATION

(1) The power of the Lord Chancellor under section 29 to reject a selection at stage 1 or 2 is exercisable only on the grounds that, in the Lord Chancellor's opinion, the person selected is not suitable for the office concerned.

(2) The power of the Lord Chancellor under section 29 to require the commission to reconsider a selection at stage 1 or 2 is exercisable only on the grounds that, in the Lord Chancellor's opinion-

(a) there is not enough evidence that the person is suitable for the office concerned,

(b) there is evidence that the person is not the best candidate on merit, or

(c) there is not enough evidence that if the person were appointed the judges of the Court would between them have knowledge of, and experience of practice in, the law of each part of the United Kingdom.

(3) The Lord Chancellor must give the commission reasons in writing for rejecting or requiring reconsideration of a selection.

31 SELECTION FOLLOWING REJECTION OR REQUIREMENT TO RECONSIDER

(1) If under section 29 the Lord Chancellor rejects or requires reconsideration of a selection at stage 1 or 2, the commission must select a person in accordance with this section.

(2) If the Lord Chancellor rejects a selection, the commission-

(a) may not select the person rejected, and

(b) where the rejection is following reconsideration of a selection, may not select the person (if different) whose selection it reconsidered.

(3) If the Lord Chancellor requires a selection to be reconsidered, the commission-

(a) may select the same person or a different person, but

(b) where the requirement is following a rejection, may not select the person rejected.

(4) The commission must inform the Lord Chancellor of the person selected following a rejection or requirement to reconsider.