File No. 36231

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

ATTORNEY GENERAL OF QUEBEC

APPELLANT
(Main Party)

ROCCO GALATI

CONSTITUTIONAL RIGHTS CENTRE INC.

APPELLANT
(Intervener)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Intervener)

- and -

CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

GRAND COUNCIL OF CREE (Eeyou Istchee)

CREE NATION GOVERNMENT

ASSOCIATION OF THE TAX COURT OF CANADA JUDGES

ATTORNEY GENERAL OF ONTARIO

INTERVENER
(Intervener)

RESPONDENT'S FACTUM

(Rule 42 of the *Rules of the Supreme Court of Canada*)

William F. Pentney, c.r.
Attorney General of Canada
SAT-6060
284 Wellington Street
Ottawa, Ontario K1A 0H8

By : Me Bernard Letarte
Me Alexander Pless
Tel.: 613 946-2776
Fax: 613 952-6006
bletarte@justice.gc.ca
apless@justice.gc.ca

Counsel for Respondent

Christopher M. Rupar
Attorney General of Canada
Room 557
500-50, O'Connor Street
Ottawa, Ontario K1A 0H8

Tel.: 613 670-6290
Fax: 613 954-1920
christopher.rupar@justice.gc.ca

Agent of Respondent

Jean-Yves Bernard, Ad. E.
Francis Demers
Bernard, Roy & Associés
Suite 8.00
1 Notre-Dame Street East
Montréal, Québec
H2Y 1B6

Tel.: 514 393-2336 poste 51467
Fax : 514 873-7074
jean-yves.bernard@justice.gouv.qc.ca
francis.demers@justice.gouv.qc.ca

Counsel for Appellant
Attorney General of Quebec

Pierre Landry
Noël et Associés
111 Champlain Street
Gatineau, Québec
J8X 3R1

Tel.: 819 771-7393 poste 14
Fax: 819 771-5397
p.landry@noelassocies.com

Agent for Appellant
Attorney General of Quebec

Rocco Galati
Rocco Galati Law Firm Professional Corporation
Lower Level
1062 College Street
Toronto, Ontario
M6H 1A9

Tel.: 416 530-9684
Fax: 416 530-8129
rocco@idirect.com

Appellant

Robert E. Houston
Burke-Robertson Barrister & Solicitors LLP
Suite 200
441 MacLaren Street
Ottawa, Ontario
K2P 2H3

Tel.: 613 236-9665
Fax: 613 235-4430
rhouston@burkerobertson.com

Agent for Appellant
Rocco Galati

Paul Slansky
Slansky Law Professional Corporation
1062 College Street
Toronto, Ontario
M6H 1A9

Tel.: 416 536-1220
Fax: 416 536-8842
paul.slansky@bellnet.ca

Counsel for Appellant
Constitutional Rights Centre Inc.

Robert E. Houston, Q.C.
Burke-Robertson Barrister & Solicitors LLP
Suite 200
441 MacLaren Street
Ottawa, Ontario
K2P 2H3

Tel.: 613 236-9665
Fax: 613 235-4430
rhouston@burkerobertson.com

Agent for Appellant
Constitutional Rights Centre Inc.

Sébastien Grammond, Ad. E.
Mélisa Thibault
Dentons Canada LLP
Suite 203
57 Louis-Pasteur Street
Ottawa, Ontario
K1N 6N5

Tel.: 613 562-5902
Fax: 613 562-5121
sebastien.grammond@uottawa.ca

Counsel for Intervener
Canadian Association of Provincial Court Judges

James O'Reilly, Ad. E.
Patricia Ochman
O'Reilly et associés
Suite 1007
1155 University Street
Montréal, Québec
H3B 3A7

Tel.: 514 871-8117
Fax: 514 871-9177
james.oreilly@orassocies.ca
pochman@orassocies.ca

Counsel of Interveners
Grand Council of Cree (Eeyou Istchee)
and
Cree Nation Government

Guy Régimbald
François Baril
Gowling Lafleur Henderson LLP
26th Floor
160 Elgin Street
Ottawa, Ontario
K1P 1C3

Tel.: 613 786-0197
Fax: 613 563-9869
guy.regimbald@gowlings.com

Counsel for Intervener
Association of the Tax Court of Canada Judges

Guy Régimbald
Gowling Lafleur Henderson LLP
26th Floor
160 Elgin Street
Ottawa, Ontario
K1P 1C3

Tel.: 613 786-0197
Fax: 613 563-9869
guy.regimbald@gowlings.com

Agent for Interveners
Grand Council of Cree (Eeyou Istchee)
and
Cree Nation Government

Patrick J. Monahan
Padraic Ryan
Attorney General of Ontario
11th Floor
720 Bay Street
Toronto, Ontario
M7A 2S9

Tel.: 416 326-2640
Fax: 416 326-4018
patrick.monahan@ontario.ca

Counsel for Intervener
Attorney General of Ontario

Robert E. Houston Q.C.
Burke-Robertson Barrister
& Solicitors LLP
Suite 200
441 MacLaren Street
Ottawa, Ontario
K2P 2H3

Tel.: 613 236-9665
Fax: 613 235-4430
rhouston@burkerobertson.com

Agent for Intervener
Attorney General of Ontario

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PART I – CONCISE OVERVIEW OF POSITION AND STATEMENT OF FACTS

I. OVERVIEW

1. The central question in this appeal is whether a judge of the Federal Court of Appeal who was formerly a member of the Barreau du Québec may be appointed to the Québec Court of Appeal pursuant to section 98 of the *Constitution Act, 1867* ("the CA 1867"). As the Quebec Court of Appeal concluded, this question must be answered in the affirmative. Section 98 allows current and former members of the Barreau du Québec, including all those who have become judges, to be appointed to the superior courts of Québec.

2. Section 98 of the official English version of the CA 1867 provides that "[t]he Judges of the Courts of Québec shall be selected from the Bar of that Province". This provision circumscribes the Governor General's power of appointment under section 96 of the CA 1867 to ensure that persons appointed to Québec's superior courts have knowledge of the applicable law in the province of Québec, which is guaranteed by admission to the Barreau.

3. When interpreted in its context and in accordance with its purpose, the phrase "from the Bar of that Province" used in section 98 applies to current and former members of the Barreau du Québec alike. Limiting the pool defined by this provision to current members of the Barreau would be an affront to common sense, as appears from the practice followed since 1867 and set out in the *Judges Act*. As the Court of Appeal notes, many of the judges appointed to the Québec Superior Court and the Québec Court of Appeal over the last 145 years were not members of the Barreau at the time of their appointment because they were already judges. If section 98 had to be taken as requiring membership in the Barreau at the time of the appointment, all these appointments would be unconstitutional. Such cannot be the case, and Québec agrees.

4. However, Québec proposes that only certain former members of the Barreau du Québec — judges of courts of justice established by Québec — qualify under section 98. This narrow interpretation has no basis in the language of section 98, since it adds a condition that does not appear in that provision. Nor is this interpretation justified by the purpose of section 98, which is to guarantee that the judges of Québec's superior courts have knowledge of the law of the province so as to preserve the civil law tradition in Québec. What is more, such an interpretation would allow

Québec to unilaterally restrict the Governor General's power to appoint judges to Québec's superior courts.

5. The opinion in the *Reference re Supreme Court Act, ss. 5 and 6*, which was rendered in a different legislative and historical context, does not support Québec's position. While the language and the purpose of section 6 of the *Supreme Court Act* (SCA) exclude former members of the Barreau du Québec and judges of courts not mentioned in the SCA, nothing in the language of the Constitution or in the relevant historical context allows section 98 to be interpreted in the same way.

6. Unlike the pool of eligible candidates contemplated in section 6 of the SCA, the pool under section 98 is defined solely by the phrase "from the Bar of that Province". Section 98 does not state that judges from certain courts are eligible to be appointed to Québec's superior courts. It therefore cannot be concluded that the Framers of the Constitution intended to allow the appointment of certain judges but not others. Moreover, the CA 1867 does not contain any provisions comparable to section 5 of the SCA that could support the inference that the Framers intended to exclude former members of the Barreau du Québec from the scope of section 98.

7. Finally, the purpose of section 6 of the SCA is different from that of section 98 of the CA 1867. Section 6 reflects an historical compromise that arose in 1875, when the Court was established as the general court of appeal for Canada. Section 6 of the SCA was designed to ensure this new court's legitimacy, in the eyes of Québec, as the national court of final resort despite the majority of its judges being common law jurists. Section 98 was not enacted in such a context. Rather, its purpose was to maintain, at the time of Confederation, a basic requirement guaranteeing that Québec's superior court judges have knowledge of the law of the province, an established principle in Québec since 1849. Provided that a judge of the Federal Court of Appeal was previously a member of the Barreau du Québec, his or her appointment to the Québec Court of Appeal complies with section 98.

II. STATEMENT OF FACTS

a. Background

8. Justice Robert M. Mainville was called to the Québec bar on March 31, 1977.[1] He practised law in Québec for more than 32 years before being appointed as a judge of the Federal Court on June 19, 2009.[2]

9. That appointment was made pursuant to paragraph 5.3(*b*) of the *Federal Courts Act* (FCA),[3] which provides that a person may be appointed a judge of the Federal Court of Appeal or the Federal Court if the person is or has been a barrister or advocate of at least 10 years standing at the bar of any province. Justice Mainville filled one of the Federal Court positions reserved for Québec. Section 5.4 of the FCA[4] provides as follows:

> **5.4** At least five of the judges of the Federal Court of Appeal and at least 10 of the judges of the Federal Court must be persons who have been judges of the Court of Appeal or of the Superior Court of the Province of Quebec, or have been members of the bar of that Province.
>
> **5.4** Au moins cinq juges de la Cour d'appel fédérale et dix juges de la Cour fédérale doivent avoir été juges de la Cour d'appel ou de la Cour supérieure du Québec ou membres du barreau de cette province.

10. Upon his appointment, Justice Mainville ceased to be a member of the Barreau because the *Act respecting the Barreau du Québec* limits membership to persons who are entitled to practise the profession of advocate.[5] According to the version of the *Code of ethics of advocates* in force when Justice Mainville was appointed, a person exercising judicial functions on a full-time basis cannot at the same time practise the profession of advocate.[6] On June 18, 2010, Justice Mainville was appointed as a judge of the Federal Court of Appeal[7] in one of the positions on that Court reserved for Quebecers.

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1 Certificate of Sylvie Champagne, Secretary of the Barreau, June 26, 2014.
2 *Canada Gazette*, Part I, July 4, 2009, p 1959, Respondent Book of Authorities hereinafter "**RBA**", **vol. I**, **tab 47**. Regarding his career in general, see: http://courdappelduquebec.ca/en/about-the-court/composition/the-honourable-robert-m-mainville/ (consulted on March 18, 2015).
3 *Federal Courts Act*, RSC 1985, c F-7, s 5.3(*b*), **RBA**, **vol. I**, **tab 35**.
4 *Ibid*, s 5.4, **RBA**, **vol. I**, **tab 35**.
5 *Act respecting the Barreau du Québec*, RSQ, c B-1, 2014, s 122(1)(*b*), **RBA**, **vol. I**, **tab 33**.
6 *Code of ethics of advocates*, c B-1, r 3, s 4.01.01(*a*).
7 *Canada Gazette*, Part I, July 10, 2010, p 1885, **RBA**, **vol. I**, **tab 48**.

11. On June 13, 2014, the Governor General appointed Justice Mainville as a puisne judge of the Court of Appeal in accordance with sections 96 and 98 of the *Constitution Act, 1867* (the CA 1867)[8] and section 3 of the *Judges Act*, which supplements those provisions:

***Constitution Act, 1867*[9]**

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.	96. Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.
98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province[10].	98. Les juges des cours de Québec seront choisis au sein du barreau de cette province.[11]

Judges Act

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	**3.** Peuvent seuls être nommés juges d'une juridiction supérieure d'une province s'ils remplissent par ailleurs les conditions légales :
(*a*) is a barrister or advocate of at least ten years standing at the bar of any province; or	*a*) les avocats inscrits au barreau d'une province depuis au moins dix ans;
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	*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.

8 PC 2014-800. See also *Canada Gazette*, Part I, July 12, 2014, p 1874, **RBA**, **vol. I**, **tab 49**.

9 There is no official French version of the *Constitution Act, 1867*.

10 *Constitution Act, 1867* (UK), 30 & 31 Vict. c 3, **RBA, vol. I, tab 12**.

11 The translation proposed under section 55 of the *Constitution Act, 1982*, *ibid*, was never enacted. Enactment N^{oo}1: *British North America Act, 1867*, 30-31 Vict. c 3 (UK), *Final Report of the French Constitutional Drafting Committee responsible for providing the Minister of Justice of Canada with a draft official French version of certain constitution enactments*, online: http://canada.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/index.html (consulted on March 18, 2015).

> 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.[12]

12. This was the second time that a judge of the Federal Court of Appeal had been appointed to a provincial court of appeal. In July 2000, Justice Joseph T. Robertson of the Federal Court of Appeal was appointed to the New Brunswick Court of Appeal[13] in accordance with sections 96 and 97 of the CA 1867 and section 3 of the *Judges Act*. Section 97 of the CA 1867 reads as follows:

> 97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.
>
> 97. Jusqu'à ce que les lois relatives à la propriété et aux droits civils dans Ontario, la Nouvelle-Écosse et le Nouveau-Brunswick, et à la procédure dans les cours de ces provinces, soient rendues uniformes, les juges des cours de ces provinces qui seront nommés par le gouverneur-général devront être choisis parmi les membres des barreaux respectifs de ces provinces.

13. Moreover, judges of the Québec Superior Court have been appointed to represent Québec on or in the Federal Court of Appeal. Such was the case with Justice James K. Hugessen,[14] Justice Alice Desjardins[15] and Justice Johanne Trudel.[16]

b. The reference by the Québec government

14. On July 24, 2014, the Québec government asked the Court of Appeal for its opinion on the following two questions pursuant to the *Court of Appeal Reference Act*:[17]

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12 *Judges Act*, RSC, 1985, c J-1, s 3, **RBA**, **vol. I**, **tab 36**.

13 *Canada Gazette*, Part I, August 19, 2000, p 2628, **RBA**, **vol. I**, **tab 50**.

14 *Canada Gazette*, Part I, February 19, 1972, p 473, **RBA**, **vol. I**, **tab 55**; *Canada Gazette*, Part I, August 20, 1983, p 7514, **RBA**, **vol. I**, **tab 56**.

15 *Canada Gazette*, Part I, January 16, 1982, p 393, **RBA**, **vol. I**, **tab 53**; *Canada Gazette*, Part I, July 18, 1987, p 2257, **RBA**, **vol. I**, **tab 54**.

16 *Canada Gazette*, Part I, July 31, 1993, p 2375, **RBA**, **vol. I**, **tab 51**; *Canada Gazette*, Part I, May 12, 1997, p 1213, **RBA**, **vol. I**, **tab 52**.

17 *Court of Appeal Reference Act*, CQLR c R-23, s 1, **RBA**, **vol. I**, **tab 37**.

[TRANSLATION]
Question 1: Which Québec courts are covered by section 98 of the *Constitution Act, 1867*?

Question 2: What conditions for appointing judges to Québec courts are required under section 98 of the *Constitution Act, 1867* and does that section allow the appointment of persons who are members of federal courts?[18]

c. Opinion of the Court of Appeal (December 23, 2014)

15. Regarding the first question, the Court agreed with the arguments of the Attorney General of Québec and the Attorney General of Canada to the effect that section 98 of the CA 1867 should be interpreted in light of section 96 of that same Act, which applies only to superior courts. Ruling on the first question, the Court of Appeal found that the phrase "Courts of Québec" appearing in section 98 necessarily means the Québec Superior Court and the Québec Court of Appeal.

16. As for the second question, on the one hand, the Court had before it the position of the Attorney General of Québec, according to which section 98 allows the appointment of current members of the Barreau and only some of its former members, namely, [TRANSLATION] "those who have an ongoing, concrete and tangible link with the Québec legal community". According to Québec, only former members of the Barreau who have become judges of a court described in section 1 of the *Courts of Justice Act* have such a link. In support of its interpretation, Québec relied on the *Reference re Supreme Court Act, ss. 5 and 6* (*Reference re Supreme Court Act*)[19] and argued that section 98 had to be interpreted in light of section 6 of the SCA, as in its view, both provisions serve the same purpose.

17. On the other hand, the Attorney General of Canada submitted that section 98 permitted any current or former member of the Barreau du Québec to be appointed because this provision makes no distinction between categories of members or former members of the Barreau and is simply a basic requirement designed to ensure that superior court judges have knowledge of Québec law, which admission to the Barreau guarantees. The Attorney General of Canada further argued that the *Reference re Supreme Court Act* was not determinative of the issue, given the significant differences in the language and purposes of the provisions in question in each case. The Attorney

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18 OIC 729-2014, 2014 GOQ II, 2999, **RBA**, **vol. I**, **tab 13**.

19 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 ("*Reference re Supreme Court Act*"), **RBA**, **vol. III**, **tab 89**.

General of Canada also submitted that if the court accepted the requirement that judges have a tangible and concrete link with the Québec legal community, judges of federal courts appointed pursuant to section 5.4 of the FCA would meet that requirement just as any other judge having jurisdiction in the province of Québec would.

18. On that basis, the Court of Appeal considered the ambit of the *Reference re Supreme Court Act* and concluded that the Court's opinion in that case was not directly relevant, let alone determinative, with regard to the resolution of this question. According to the Court, there is a fundamental distinction between the historic compromise that allowed the Supreme Court to be established in 1875 and the compromise that was the cornerstone of section 98 of the CA 1867. While section 6 of the SCA reflects a compromise ultimately aimed at giving the Supreme Court legitimacy in Québec in 1875, the purpose of section 98, enacted in 1867, was to allow the civil law tradition to continue to flourish in Québec.[20]

19. More specifically, the Court of Appeal explained that section 98 reflects the situation that had prevailed since the 1849 reform of Québec courts guaranteeing that superior court judges in Québec all have received training, approved by the Barreau, in the local law. The Court of Appeal noted that the concerns that arose in 1875 with regard to the creation of the Supreme Court did not apply with regard to the superior courts at the time of Confederation because the legitimacy of these courts was assured, owing to the reform in 1849, and that section 98 was simply intended to [TRANSLATION] "continue a practice that was well established prior to Confederation".[21]

20. The Court therefore concluded that section 98 set only one basic requirement for a person to be appointed by the Governor General, namely, that the person had been a member of the Barreau du Québec before his or her appointment. This includes former members of the Barreau who have become judges. The Court noted that this finding was dictated by an understanding that, in practice and for decades, had guided countless judicial appointments over the last 147 years. It stated that reading a contemporaneity requirement into section 98 where no one had seen one since 1867 would quite simply violate common sense.[22]

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20 *Renvoi sur l'article 98 de la Loi constitutionnelle de 1867*, 2014 QCCA 2365 ("Opinion of the Court of Appeal") at paras 41, 47, 56.

21 *Ibid* at para 52.

22 *Ibid* at para 59.

21. According to the Court, it was appropriate to consider how Parliament had interpreted sections 97 and 98 when it enacted the *Judges Act*. The Court noted that its interpretation of section 98 was consistent with the requirements contained in the *Judges Act* since 1912, which allow former members of a bar who have become a provincial or federal court judge to be appointed provided that they have at least 10 years of cumulative experience.[23]

PART II – CONCISE STATEMENT OF ISSUES

22. The issues are set out in the Québec government's Order in Council No. 729-2014, dated July 24, 2014:

[TRANSLATION]

Question 1: Which Québec courts are covered by section 98 of the *Constitution Act, 1867*?

Answer of the Attorney General of Canada:

The courts of Québec referred to in section 98 of the Constitution Act, 1867 are the superior courts of Québec whose judges are appointed by the Governor General in accordance with section 96 of the Constitution Act, 1867, namely, the Québec Court of Appeal and the Québec Superior Court.

[TRANSLATION]

Question 2: What conditions for appointing judges to Québec courts are required under section 98 of the *Constitution Act, 1867* and does that section allow the appointment of persons who are members of federal courts?

Answer of the Attorney General of Canada:

Section 98 requires that judges appointed by the Governor General to courts of Québec must have been admitted to the Barreau du Québec prior to their appointment. It is the only condition required under section 98. Any person who has been admitted to the Barreau du Québec, including a judge of a federal court, is therefore eligible for appointment to the Québec Superior Court or the Québec Court of Appeal in accordance with section 98 of the Constitution Act, 1867.

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[23] *Ibid* at para 66.

PART III – CONCISE STATEMENT OF ARGUMENT

A. Principles of interpretation applicable to constitutional matters

23. As this Court stated in the *Reference re Senate Reform*, the Constitution implements a structure of government and must be interpreted by reference to the constitutional text itself, its historical context, and previous judicial interpretations of constitutional meaning.[24] Generally, constitutional provisions must be interpreted in a broad, purposive and progressive manner[25] without, however, ignoring the written text or exceeding its natural limits, as the Court has recognized the primacy of our written Constitution.[26]

24. First of all, the interpretative process must begin with an examination of the language of the constitutional provision in issue.[27] This examination must necessarily consider the interaction of the provision in issue with the other provisions of the Constitution that are associated with it. A provision must not be interpreted in isolation; rather, it must be interpreted in its context.[28] In the present case, such an analysis first requires an examination of section 98 in light of the other Judicature provisions in Part VII of the CA 1867, namely, sections 96 to 101 of the CA 1867.

25. The historical context surrounding the enactment of a provision must also be considered, as it provides important clues to identifying the purpose of that provision.[29] As Justice McLachlin (as she then was) stated in the *Reference re Prov. Electoral Boundaries (Sask.)*, the past plays a critical but non-exclusive role in interpreting the Constitution.[30] This is especially true in a context where the provision in issue has not been extensively analyzed by the courts. In the present case, the historical context surrounding the organization of the judicial system at the time of

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24 *Reference re Senate Reform*, 2014 SCC 32 at para 25, **RBA**, **vol. III**, **tab 90**; see also *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32, **RBA**, **vol. III**, **tab 92**.

25 *Reference re Senate Reform*, *supra* note 24 at para 25, **RBA**, **vol. III**, **tab 90**.

26 *Reference re Secession of Quebec*, *supra* note 24 at para 53, **RBA**, **vol. III**, **tab 92**; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel*, 6th ed (Cowansville, Que.: Éditions Yvon Blais, 2014) at 202, para IV.63, **RBA**, **vol. III**, **tab 113**.

27 *British Columbia (A.G.) v Canada (A.G.)*, [1994] 2 SCR 41 at 88, **RBA**, **vol. II**, **tab 67**.

28 *Reference re Secession of Quebec*, *supra* note 24 at para 50, **RBA**, **vol. III**, **tab 92**; *R. v Ferguson*, [2008] 1 SCR 96 at para 63, **RBA**, **vol. II**, **tab 81**; *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391 at para 80, **RBA**, **vol. II**, **tab 73**; *2747-3174 Québec Inc. v Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at paras 206-208, **RBA**, **vol. II**, **tab 57**; *Cloutier v The Queen*, [1979] 2 SCR 709 at p 719, **RBA**, **vol. II**, **tab 66**; *Greenshield v The Queen*, 1958 SCR 216 at 225, **RBA**, **vol. II**, **tab 72**; Brun et al., *supra* note 26 at 205, para IV.72, **RBA**, **vol. III**, **tab 113**.

29 *Reference re Employment Insurance Act (Can.)*, *ss 22 and 23*, 2005 SCC 56, [2005] 2 SCR 669 at 692, **RBA**, **vol. II**, **tab 88**; *Reference re Senate Reform*, *supra* note 2 at para 25, **RBA**, **vol. III**, **tab 90**. See also Peter W. Hogg, *Constitutional Law of Canada*, 5th ed Supp (Scarborough, Ont.: Thomson/Carswell, 2007) (loose-leaf), vol II, sections 60.1(c) and (f), **RBA**, **vol. III**, **tab 121**.

30 *Reference re Prov. Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 180, **RBA**, **vol. III**, **tab 95**.

Confederation shows that section 98 was intended to preserve a requirement that has existed since 1849, namely, knowledge of the law applicable in Québec.

26. The principle that constitutional law should be relatively stable and predictable is also important here.[31] As such, the manner in which sections 97 and 98 have been applied over the last 147 years must be considered.[32] It appears that these sections have always been interpreted as allowing the appointment of people who were not practising members of the bar when they were appointed to the judiciary. This is essentially borne out by the *Judges Act*,[33] enacted more than a hundred years ago, and by the practice since 1867 of appointing persons who already perform judicial functions.[34]

27. Finally, it is important to avoid interpretations that lead to absurd results because of inconsistency with the purpose of the provision or because of the unreasonable consequences that the interpretation would yield.[35] This principle, stated by the courts on multiple occasions with regard to statutory interpretation,[36] is even more important in constitutional matters because the Constitution cannot be amended as easily as an ordinary statute can.[37]

B. QUESTION 1 : Which Québec courts are covered by section 98 of the *Constitution Act, 1867*?

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31 *Reference re Secession of Quebec*, *supra* note 24 at para 53, **RBA**, **vol. III**, **tab 92**.

32 *Citizens Insurance Company of Canada v Parsons* (1881), 7 App. Cas. 96 at 116, **RBA**, **vol. II**, **tab 65**. C*anadian Pioneer Management Ltd. v Labour Relations Board of Saskatchewan et al.*, [1980] 1 SCR 433 at 465, **RBA**, **vol. II**, **tab 64**; *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 at paras 23-24, **RBA**, **vol. II**, **tab 59**.

33 *An Act to amend the Judges Act*, SC 1912, c 29, s 9, **RBA**, **vol. I**, **tab 24**; *An Act respecting Judges of Dominion and Provincial Courts*, SC 1946, c 56, s 3, **RBA**, **vol. I**, **tab 15**; *An Act to amend the Judges Act and other Acts in respect of judicial matters*, SC 1976-1977, c 25, s 1, **RBA**, **vol. I**, **tab 26**; *An Act to Amend the Federal Court Act, the Judges Act and the Tax Court of Canada Act*, SC 1996, c 22, s 1, **RBA**, **vol. I**, **tab 25**; *Judges Act*, *supra* note 12, s 3, **RBA**, **vol. I**, **tab 36**.

34 Table of origins of judges of Quebec superior courts from 1949 to 2014, Record of the AGQ (appellant), vol II, Tab 5. Appointment of Joseph T. Robertson: *Canada Gazette*, Part I, August 19, 2000, **RBA, vol I, tab 50**; Biography of Justice Joseph T. Robertson, online: https://www.gnb.ca/cour/03COA1/Bios/robertson-e.asp (consulted on April 1, 2015), **RBA**, **vol. III**, **tab 102**. Offer of appointment made to Henry Black, judge of the Vice-Admiralty Court: "September Meeting, 1873. Death of Hon. Henry Black, Confession and Execution of Sir Walter Raleigh", in *Proceedings of the Massachusetts Historical Society*, vol 13 (1873–1875) at 81, **RBA**, **vol. IV**, **tab 137**; "Lettre d'Henry Black au premier ministre du Canada de l'époque Louis-Hippolyte Lafontaine de 1849 dans laquelle il refuse un poste dans la réorganisation des Cours", (Bibliothèque et archives nationales du Québec – Centre d'archives de Québec, Fonds Louis-Hippolyte Lafontaine, 1831-1905, P-127), **RBA**, **vol. IV**, **tab 125**.

35 *Dubois v The Queen*, [1985] 2 SCR 350 at paras 34-36 **RBA**, **vol. II**, **tab 70**; *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at para 28, **RBA**, **vol. III**, **tab 94**.

36 *Rizzo & Rizzo Shoes*, [1998] 1 SCR 27 at para 27, **RBA**, **vol. III**, **tab 96**; *Morgentaler v The Queen*, [1976] 1 SCR 616 at 676, **RBA**, **vol. II**, **tab 79**.

37 *Hunter v Southam*, [1984] 2 SCR 145 at para 16, **RBA**, **vol. II**, **tab 74**.

28. Like the Attorney General of Québec, the Attorney General of Canada submits that the courts covered by section 98 are the Québec Superior Court and the Québec Court of Appeal. This section does not cover courts whose judges are appointed by a province pursuant to subsection 92(14) of the CA 1867.

29. Although one might think that, when read in isolation, section 98 covers all Québec courts, this literal interpretation must be rejected because a plain reading of the other provisions in Part VII of the CA 1867 clearly does not support it. Moreover, such an interpretation ignores the case law of the Court and is inconsistent with the relevant historical context.

30. At the time of Confederation, the founding provinces already had a justice system based on the English model, with superior courts and inferior courts.[38] In Québec, the judges of these courts were appointed by Her Majesty or by the Governor General of the Province of Canada, in accordance with the conditions set out in various statutes regarding these courts.[39]

31. In 1867, while maintaining the existing judicial system, the Framers decided to give the provinces, not Parliament, legislative jurisdiction over the administration of justice. This jurisdiction, set out in subsection 92(14) of the CA 1867, includes the power to make laws respecting the constitution, maintenance and organization of courts of civil and of criminal jurisdiction, and to establish the rules of procedure for civil courts.

32. This is a wide power, "but subject to subtraction of ss. 96 to 100 in favour of the federal authority", to quote Justice Dickson in *Re Residential Tenancies Act, 1979*.[40] Indeed, under these provisions in Part VII of the CA 1867, the Framers granted the Governor General the power to appoint superior court judges and gave Parliament the power to fix and provide their salaries, allowances and pensions. It is in Part VII that we find section 98.

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38 *Séminaire de Chicoutimi v La Cité de Chicoutimi*, [1973] SCR 681 at 688, **RBA**, **vol. III**, **tab 97**; *International Paper Co. c. Cour de magistrat* (1937), 62 B.R. 268 at 273-74, **RBA**, **vol. II**, **tab 63**. Expert Report of Philip Girard at paras 13-16, Respondent Record hereinafter "**RR**", **vol. I, p 73-75.**

39 *An Act to establish a Court having jurisdiction in Appeals and Criminal Matters for Lower-Canada*, S Prov C 1849 (12 Vict), c 37, s 2, **RBA**, **vol. I**, **tab 6**; *An Act to amend the Laws relative to the Courts of Original Civil Jurisdiction in Lower Canada*, S Prov C 1849 (12 Vict), c 38, ss 3, 4, 43, 44, 46, **RBA**, **vol. I**, **tab 5**; Edmond Lareau, *Histoire du Droit Canadien depuis les origines de la colonie jusqu'à nos jours. Tome II : domination Anglaise* (Montréal: Périard, 1889) at 407, **RR, vol. VI, p 95**; *An ordinance to suspend in part certain acts therein mentioned and to establish and incorporate a Trinity House in the city of Montreal*, Acts and Ordinances of Lower Canada 1839 (2 Vict), c 19, s 3, **RR, vol. IV, p 2**; *An Act to provide for the summary trial of small causes in Lower Canada*, Acts and Ordinances of Lower Canada 1832 (7 Vict), c 18-19, s 1, **RR, vol. III, p 189**; *Act of Union, 1840* (UK), 3-4 Vict, c 35, s 45, **RBA**, **vol. I**, **tab 4**.

40 *Re Residential Tenancies Act, 1979*, [1981] 1 SCR 714 at 728, **RBA**, **vol. III**, **tab 93**.

33. It is therefore apparent from the architecture of the Constitution that section 98 is designed to circumscribe the Governor General's appointing power under section 96.[41] When section 98 is interpreted in its context and in relation to the other provisions in Part VII, it must be concluded that this section applies only to courts in the province of Québec whose judges are appointed by the Governor General, namely, the Superior Court and the Court of Appeal.

34. In addition to being dictated by the architecture of the CA 1867, this interpretation is the only one that is consistent with the state of the law. There are no cases or authors supporting the proposition that sections 97 and 98 also apply to inferior courts whose judges are appointed by a province.

35. On the contrary, in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, the Court stated that "ss. 96-100 do not apply to provincially appointed inferior courts".[42] This statement, made without reservation in the context of a discussion of judicial independence, reflects the general understanding on this point. In his treatise on constitutional law, Professor Hogg explained the principle in the following terms:

> The provisions of the Constitution Act, 1867 which have just been described (ss. 96, 97, 98 and 100) apply only to the higher courts, or, more precisely, to "the superior, district and county courts in each province". They do not apply to the courts below the level of the district and county courts. Some "inferior" courts existed at the time of confederation, and many more have been created since then under the provincial power over the administration of justice (s. 92(14)). For these courts, the Constitution is silent as to the qualifications of the presiding judges (or magistrates or justices of the peace): there is no constitutional requirement that the judges be members of the bar. Nor is there any constitutional requirement of federal appointment: the province makes the appointments and fixes and pays the salaries of the appointees.[43]

36. In fact, sections 96 *et seq.* have never been understood as applying to provincially appointed judges. In 1938, in the *Reference re Adoption Act*, the Court stated that it was indisputable that sections 96 and 97 of the CA 1867 contemplate the existence of provincial courts and judges other than those within the ambit of section 96, and that it would be a non-natural reading of those

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41 *Conférence des juges de paix magistrats du Québec c Québec (Procureur général)*, 2014 QCCA 1654 at para 48, **RBA**, **vol. II**, **tab 69**.

42 *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3 at para 85, **RBA**, **vol. III**, **tab 91**.

43 Hogg, *supra* note 29, vol 1, section 7.1(b), pp 7-7, 7-8, **RBA**, **vol. III**, **tab 121**; Peter H. Russell, "Introduction: How We Got Here", *Canada's Trial Courts: Two Tiers or One?* (Toronto: University of Toronto Press, 2007) at 7, **RBA**, **vol. IV**, **tab 133**.

sections to construe them as applying to courts of inferior jurisdiction, such as magistrates and justices of the peace.[44]

37. That reference dealt with section 97 of the CA 1867, since the issue in that case was the appointment of judges in the province of Ontario. However, given that section 98 is the Québec counterpart of section 97, there is no reason to conclude that the same reasoning would not have held true if the case had arisen in Québec and had involved section 98.

38. The difference between the language of section 97 and that of section 98 can be explained, on the one hand, by the unrealized plan to make the laws in the other three founding provinces uniform and, on the other, by the fact that in those other provinces, there were courts that were different from those of Québec. Section 96 provides that the Governor General shall appoint the judges of the superior, district, and county courts in each province, "except those of the courts of probate in Nova Scotia and New Brunswick". Taking into account the courts covered by section 96, it was necessary to make sure that section 97 had no effect on the eligibility requirements for judges of probate courts in Nova Scotia and New Brunswick (which are excluded from section 96).[45] Such courts did not exist in Québec.

39. In short, there is no basis for concluding that the provisions in Part VII were intended to govern the provinces' power to appoint judges to inferior courts.

40. Furthermore, such an interpretation would mean that a certain number of provincial statutes allowing non-jurists to be appointed as judges are unconstitutional. In 1867, many judges of inferior courts in Québec, Ontario, New Brunswick and Nova Scotia were not members of the legal profession.[46] In Québec, commissioners and wardens of the Trinity House did not need to be lawyers, and justices of the peace were not allowed to be members of the bar. Only "Recorders" had to be lawyers to be appointed to that position.[47] After Confederation, these inferior courts continued to exist for a certain time, others were created,[48] and Québec continued to appoint non-jurists to some of these courts, as was the case before Confederation. For example,

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44 *Reference Re Authority to Perform Functions Vested by Adoption Act, The Children of Unmarried Parents Act, The Deserted Wives' and Children's Maintenance Act of Ontario*, [1938] SCR 398 at 404, **RBA**, **vol. II**, **tab 87**. See also: *Canadian International Paper Co.*, *supra* note 38, **RBA**, **vol. II**, **tab 63**.

45 Regarding courts of probate, see the Expert Report of Philip Girard at para 15, **RR, vol. I, p 73-74.**

46 Expert Report of Philip Girard at paras 14, 16**, RR, vol. I, p 73-75.**

47 Expert Report of Philip Girard at paras 8-11, **RR, vol. I, p 70-72.**

48 *Constitution Act, 1867*, *supra* note 10, s 129, **RBA**, **vol. I**, **tab 12**; *An Act respecting District Magistrates in this Province*, SQ 1869 (32 Vict), c 23, **RR, vol. II, p 107 and ff.**

justices of the peace continued to be non-jurists until 1908, and commissioners were not required to be lawyers until 1941.[49]

41. It is evident from the foregoing that section 98 clearly does not govern the situation of inferior courts.

42. Changing the ambit of section 98 now, 147 years after Confederation, would run counter to the principle of stability and predictability in constitutional law, particularly since broadening the scope of section 98 today so that it applies to inferior courts would mean that Québec would be the only province that would see its legislative jurisdiction under subsection 92(14) of the CA 1867 limited.

C. QUESTION 2: What conditions for appointing judges to Québec courts are required under section 98 of the *Constitution Act, 1867* and does that section allow the appointment of persons who are members of federal courts?

43. The only appointment condition established by section 98 of the CA 1867 is to have been admitted to the Barreau du Québec at some point. In other words, the expression "from the Bar of that province", which is used in this provision, includes both current and former members of the Barreau du Québec, including judges of the federal courts appointed under section 5.4 of the *Federal Courts Act*. The purpose of section 98 is to ensure that the person appointed is from the Québec's legal community and therefore has knowledge of the law applicable in the province, thus making this person able to contribute to upholding the Québec's civilist tradition.

44. This interpretation, which was accepted by the Québec Court of Appeal, is the only interpretation that is consistent with the wording of section 98, the purpose of this provision as established by the historical context and practice since Confederation, as reflected in the *Judges Act*.

1. The ordinary meaning of section 98

i. Section 98 permits the appointment of current and former members of the Barreau du Québec

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[49] *The Revised Statutes of the Province of Quebec*, 1888, vol I, Title VI, c III, Sect III, s 2485, **RBA**, **vol. I**, **tab 46**; *An Act respecting the Court of the Sessions of the Peace*, SQ 1908, c 42, s 2485a, **RBA**, **vol. I**, **tab 27**; *An Act respecting the courts of justice of the province*, RSQ 1941, c 15, s 147, **RBA**, **vol. I**, **tab 19**.

45. As mentioned previously, the wording of a provision is the starting point of any exercise in interpretation. Here, the sentence "[t]he Judges of the Courts of Québec shall be selected from the Bar of that Province" could mean that judges must be chosen from current members of the Québec bar, which implies membership in a professional order at the time of appointment. But the sentence can also have a broader meaning, namely that judges must come from the Québec bar, without, however, requiring that they be members of this bar at the time of their appointment.

46. The latter interpretation fits naturally with the ordinary use of the term "from" to designate the origin of a person. That subsequent to their call to the bar members of the Barreau du Québec cease to be members because they accepted a judicial appointment deemed to be incompatible with membership does not change their origin. They still come from the Barreau.

47. When a text can be interpreted in a number of ways, the interpretation that is most consistent with its purpose should be chosen and interpretations leading to absurd consequences should be rejected.[50]

48. Interpreting section 98 as including only the current members of the Barreau would lead to absurd consequences, which the Framers cannot have wanted. This interpretation would, among other things, make it impossible for former Barreau members who in the course of their career became judges, to be named to the Québec Superior Court and the Québec Court of Appeal, even though such appointments have been common practice for decades and are allowed under the *Judges Act*.[51] For example, according to this restrictive interpretation, a judge from the Québec Superior Court could not be appointed to the Québec Court of Appeal since, as a judge, he or she would not be a member of the Barreau at the time of the appointment. For the same reason, a judge from the Court of Québec could not be appointed to the Québec Superior Court or the Québec Court of Appeal.

49. Here, it must be noted that Mr. Galati's "elevation theory" is wrong in law since the Québec Superior Court and the Québec Court of Appeal are not divisions of the same court but are

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50 *Dubois v The Queen*, *supra* note 35, **RBA**, **vol. II**, **tab 70**; *Re B.C. Motor Vehicle Act*, *supra* note 35, **RBA**, **vol. III**, **tab 94**; *R. v Middleton*, 2009 SCC 21 at para 40; *Rizzo & Rizzo Shoes Ltd. (Re)*, *supra* note 36, **RBA**, **vol. III**, **tab 96**; *Morgentaler* v *The Queen*, *supra* note 36, **RBA**, **vol. II**, **tab 79**; Pierre André Côté, in collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011), at 473-74, **RBA**, **vol. III**, **tab 115**.

51 See notes 33 and 34.

separate courts. Consequently, appointments to either of these courts must respect the requirements of section 98 of the CA 1867.

50. The argument that section 98 does not include former members of the Barreau is therefore untenable and would have the effect of excluding many highly qualified candidates from the federal judiciary in Québec.

51. It seems clear that the Framers did not want to exclude judges when it enacted section 98 of the CA 1867 since at that time, advocates appointed as judges could remain on the Roll of the Order after being appointed.[52] In 1867, the sole restriction applied to Circuit Court judges, since they were required to cease practising as advocates after being appointed.[53] In fact, the status of members of the judiciary within the Barreau du Québec changed over the years (non-practicing advocates, honorary advocates).[54] Only since 1967 has the *Bar Act* prevented judges from remaining members of the Barreau du Québec after being appointed.[55] As of April 1, 2015, it appears that section 139 of the *Code of Professional Conduct of Lawyers* allows judges of federal courts to remain members of the Barreau.[56]

52. In Ontario, it is still possible for a person appointed as judge to keep his or her licence, regardless of which court he or she sits on, but the licence is suspended so long as the person is a member of the judiciary.[57]

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52 *An Act respecting the Bar of Lower Canada*, S Prov C 1866 (29-30 Vict), c 27, ss 1, 24, 31, 33(4), **RBA**, **vol. I**, **tab 2**, and *By-laws of the General Council of the Bar of the Province of Quebec*, s 29, in *Law respecting the bar of Lower-Canada: with the by-laws of the General Council and of the sections of the districts of Montreal, Quebec, Three Rivers and St. Francis* (Montréal: Imprimerie du Journal Le Pays, 1867), **RBA**, **vol. I**, **tab 41**; Expert Report of Philip Girard at paras 59-60, **RR, vol. I, p 96-97**. For the other provinces, see: Expert Report of Philip Girard at paras 54-55, 60, **RR, vol. I, p 93-94, 97.**

53 *An Act to amend the Laws relative to the Courts*, *supra* note 39, s 44, **RBA**, **vol. I**, **tab 5**.

54 *An Act respecting the Bar of the Province of Quebec*, SQ 1886 (49-50 Vict), c 34, s 60, **RBA**, **vol. I**, **tab 1**, and *Règlements du Conseil général du Barreau de la province de Québec* [By-Laws of the General Council of the Bar of the Province of Quebec] (adopted by said Council on September 16, 1886), ss 5, 10, **RBA**, **vol. I**, **tab 40**; *An Act concerning the Bar of Quebec*, SQ 1953-54 (2-3 Eliz II), c 59, s 89.1, **RBA**, **vol. I**, **tab 34**; *Bar Act*, RSQ 1964, c 247, s 89, **RBA**, **vol. I**, **tab 22**.

55 *Bar Act*, SQ 1966-67 (15-16 Eliz II), c 77, s 76(3), **RBA**, **vol. I**, **tab 21**. See also Jules Deschênes, "Examen critique de l'organisation du Barreau" (1968) 28 R du B 417 at 450-53, **RBA**, **vol. III**, **tab 120**.

56 *Gazette officielle du Québec*, March 11, 2015, vol 147, no 10, *Code of Professional Conduct of Lawyers* (chapter B-1, s 4), s 139, **RBA**, **vol. I**, **tab 14**.

57 *Law Society Act*, RSO 1990, c L-8, ss 1(4), 31(1)(*a*), **RBA**, **vol. I**, **tab 32**. See also: *Legal Profession Act*, RSY 2002, c 134, s 17, **RBA**, **vol. I**, **tab 30**; *Rules of the Law Society of Manitoba*, ss 2-72, 2-73, **RBA**, **vol. I**, **tab 44**.

53. According to the Attorney General of Canada, the pool of eligible candidates provided by section 98, enacted in 1867, cannot be contingent on a later decision of the Québec legislature to allow or not allow judges to remain members of the Barreau after being appointed. As indicated by the Court of Appeal, the status a bar confers on someone may vary from one era to the next and from one province to the next. The only common and objective denominator for all provinces is admission to the bar.[58]

54. The Attorney General of Québec agrees that section 98 cannot be interpreted as including only current members of the Barreau. She suggests, however, that only some former members of Barreau — those who have become judges on the courts established by Québec—can be appointed to Québec's superior courts.

55. However, this results-driven interpretation does not withstand analysis. Section 98 cannot be interpreted as including only some former Barreau members, as this interpretation has no basis in the wording of section 98 or in its purpose. The *Reference re Supreme Court Act* does not support Québec's position in this respect.

ii. The wording of section 98 does not permit the inclusion of only certain former members

56. If one accepts that the terms "from the Bar of that Province" include former members of the Québec bar, nothing in the wording of the Constitution justifies distinguishing between former members so as to exclude judges of the federal courts: *Ubi lex non distinguit nec nos distinguere debemus* — where the law does not distinguish, we ought not to distinguish.[59]

57. Québec's argument that only some former members are eligible for appointment under section 98 amounts to adding to the wording of this provision a condition that is not there. In fact, section 98 merely sets out a general requirement, and no known principle of interpretation permits adding the type of specific exception proposed by Québec.

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58 Opinion of the Court of Appeal at para 61.

59 *National Bank v Soucisse et al.*, [1981] 2 SCR 339 at 348, **RBA**, **vol. II**, **tab 60**; *Vachon v Canada Employment and Immigration Commission*, [1985] 2 SCR 417 at paras 38-39, **RBA**, **vol. III**, **tab 98**.

58. On the contrary, it is trite law that when interpreting a provision, the courts cannot read conditions into this provision that are not provided by its wording.[60] As indicated by Professor Côté, ". . . as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislature wanted to say: 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do'".[61] This principle is equally applicable in constitutional matters.[62]

59. Québec's submissions sidestep the textual obstacles to its preferred interpretation. In addition, the requirement of a [TRANSLATION] "contemporaneous link with Québec's legal institutions" as a basis for circumscribing the section 98 pool is an arbitrary one. There is no reason to conclude that only former members of the Barreau who are now judges sitting on the bench of courts established by Québec are able to preserve Québec's civilist tradition. Québec relies on the *Reference re Supreme Court Act* to justify its narrow interpretation, but the Court's opinion in this matter is of no assistance to it.

iii. The wording of section 98 of the CA 1867 is different from the wording of section 6 of the SCA

60. There are important differences between the wording of section 98 of the CA 1867 and that of section 6 of the SCA examined in the *Reference re Supreme Court Act*. These differences in wording require different interpretations.

61. Sections 5 and 6 of the *Supreme Court Act* read as follows:

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

60 *R. v McIntosh*, [1995] 1 SCR 686 at paras 20-26, **RBA**, **vol. II**, **tab 83**; *Barrette v Crabtree Estate*, [1993] 1 SCR 1027 at 1048-49, 1051-52, **RBA**, **vol. II**, **tab 61**.

61 Côté, *supra* note 50 at 293-94, **RBA**, **vol. III**, **tab 115**; see also *Markevich v Canada*, [2003] 1 SCR 94 at para 15, **RBA**, **vol. II**, **tab 77**; *Friesen v Canada*, [1995] 3 SCR 103 at para 27, **RBA**, **vol. II**, **tab 71**.

62 *Reference Re Sections 26, 27 and 28 of the Constitution Act, 1867*, [1991] 4 W.W.R. 97 (B.C.C.A.) at 115-16, paras 55-56, **RBA**, **vol. II**, **tab 86**.

Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.[63]	d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.

62. In the *Reference re Supreme Court Act*, the Court concluded that former members of the Barreau who had become judges of the federal courts did not qualify under section 6 of the SCA. Underlying the Court's conclusion is the fact that some judges are mentioned in section 6 while others are not. According to the Court, the judges who are not mentioned are excluded because "the mention of one or more things of a particular class excludes, by implication, all other members of the class".[64]

63. The Court also relies on the wording of section 5, which specifically states that former members of the bar of a province are eligible, and concludes that the absence of a similar formulation in section 6 excludes former members of the Québec bar.[65]

64. According to the Court, the statutory context confirms this interpretation of section 6. Specifically, it points that when an *ad hoc* judge from Québec is required, the replacement can only be a judge of the Superior Court of Québec or the Québec Court of Appeal.[66]

65. These particularities in the wording, which preclude the appointment of judges of the federal courts to the Supreme Court of Canada under section 6 of the SCA, do not exist in the context at hand.

66. Contrary to section 6 of the SCA, the pool of eligible candidates under section 98 is defined solely by the expression "from the bar of that Province". Section 98 does not stipulate that the judges of certain courts are eligible. It can therefore not be said that the Framers wanted to allow the appointment of certain judges and prohibit that of others. Indeed, it is worth noting that the Framers chose not to use the wording of the 1849 statutes, which state expressly that the judges of certain courts were eligible for appointment to the Québec Superior Court and the Québec Court of Queen's Bench, or to use the requirement of ten years' practice.[67] Contrary to what

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63 *Supreme Court Act*, RSC 1985, c S-26, ss 5-6, **RBA**, **vol. I**, **tab 29**.

64 *Reference re Supreme Court Act, supra* note 19 at para 42, **RBA**, **vol. III**, **tab 89**.

65 *Ibid* at para 41, **RBA**, **vol. III**, **tab 89**.

66 *Ibid* at para 65, **RBA**, **vol. III**, **tab 89**.

67 *An Act to amend the Laws relative to the Courts*, *supra* note 39, s 4, **RBA**, **vol. I**, **tab 5**; *An Act to establish a Court having jurisdiction in Appeals*, *supra* note 39, s 2, **RBA**, **vol. I**, **tab 6**; *Act respecting the Court of Queen's Bench*, S Prov C 1861, c 77, s 2, **RR, vol. II, p 5**; *Act respecting the Superior Court*, S Prov C 1861, c 78, s 7, **RR, vol. II,**

Québec claims, there is no such requirement in section 98 as there is in these statutes and section 6 of the SCA.

67. Furthermore, the CA 1867 does not include any provision comparable to section 5 of the SCA that could suggest that it intended to exclude former members of the Barreau from the scope of section 98.

68. Consequently, the Court's reasoning in the *Reference re Supreme Court Act* simply does not apply in the present matter. The wording of the provisions at issue in that case is too different from the wording of section 98 of the CA 1867.[68]

69. In short, contrary to section 6 of the SCA, the wording of section 98 does not impose the exclusion of former members of the Barreau, any more than it does the exclusion of a class of former members of the Barreau. Under this provision, judges of the federal courts who are former members of the Barreau can therefore be appointed to the Québec Superior Court and to the Québec Court of Appeal.

70. This interpretation is also consistent with the purpose of section 98, as appears from the following.

2. The purpose of section 98 of the CA 1867

71. The purpose of section 98 is to ensure that the judges appointed to Québec's superior courts by the Governor General have knowledge of Québec law, recognized by the Barreau, so as to preserve the civil law tradition in Québec. In other words, the intention was to prevent the appointment of persons who did not have civil law training. Similarly, the purpose of section 97 is to ensure that the judges of the superior courts of the other provinces have knowledge of the law applicable in these provinces. Sections 97 and 98 establish a basic requirement for being appointed as judge to a province's superior court. Professor Hogg had the following to say in this respect:

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p 87. See also Luc Huppé, *Histoire des institutions judiciaires du Canada* (Montréal: Wilson Lafleur, 2007) at 351-52, 457-58, **RBA**, **vol. III**, **tab 122**.

[68] *Reference Re Supreme Court Act, supra* note 19 at para 58, **RBA**, **vol. III**, **tab 89**; Michael Plaxton and Carissima Mathen, "Purposive Interpretation, Quebec, and the *Supreme Court Act*" (2013) 22 Const Forum 15 at 20-22, **RBA**, **vol. IV**, **tab 128**.

> Associated with s. 96 are several other sections whose purpose is more obvious. Sections 97 and 98 require that the federally-appointed judges of the superior, district and county courts in each province be appointed from the bar of the province. This ensures that the judges be lawyers and that they be versed in the local law.[69]

72. This purpose is clearly reflected in the historical context at the time of the enactment of the CA 1867. As noted by the Court of Appeal, the historical context takes on particular importance given the almost total absence of case law or doctrine on this provision.[70] This context was quite different from that of 1875, when the Supreme Court was established. As will be discussed later, the historical compromise that led to the enactment of section 6 of the CSA does not assist in defining the purpose of section 98.

i. Québec's courts in 1867

73. At the time of Confederation, Québec's judicature was made up inferior and superior courts.[71]

74. During this period, there were five courts of superior jurisdiction: the Court of Queen's Bench, the Court of Review, the Superior Court, the Circuit Court[72] and the Vice Admiralty Court.[73] The Court of Queen's Bench (appeal division), established in 1849, is the predecessor of the Québec Court of Appeal.[74] The Superior Court and the Circuit Court shared original jurisdiction over civil matters. Both courts were presided over by judges of the Superior Court.[75] In 1864, the legislature established the Court of Review. Composed of three judges from the Superior Court, it had jurisdiction to review all final judgments of the Superior and Circuit Courts.[76]

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69 Hogg, *supra* note 29, vol I, section 7.1(b), **RBA**, **vol. III**, **tab 121**.

70 Opinion of the Court of Appeal at para 38.

71 *Séminaire de Chicoutimi v La Cité de Chicoutimi*, *supra* note 38, **RBA**, **vol. III**, **tab 97**; Expert Report of Philip Girard at paras 1-12, **RR, vol. I, p 67-72**.

72 *Séminaire de Chicoutimi* v *La Cité de Chicoutimi*, *supra* note 38, **RBA**, **vol. III**, **tab 97**; Expert Report of Philip Girard at paras 1-5, **RR, vol. I, p 67-69**.

73 Expert Report of Philip Girard at para 6, **RR, vol. I, p 69-70**.

74 *An Act to establish a Court having jurisdiction in Appeals*, *supra* note 39, **RBA**, **vol. I**, **tab 6**. *An Act to amend the Courts of Justice Act and certain other legislative provisions relating to the administration of justice and to registry offices*, SQ 1974, c 11, ss 1, 2, **RBA**, **vol. I**, **tab 23**. Expert Report of Philip Girard at para 3, **RR, vol I, p 68**. See also: Yves-Marie Morissette, "Aspects historiques et analytiques de l'appel en matière civile" (2014) 59: 3 McGill LJ 481 at 510-11, **RR, vol. VII, p 146-147**.

75 Expert Report of Philip Girard at para 4, **RR, vol I, p 69**.

76 Expert Report of Philip Girard at para 5, **RR, vol I, p 69.**

75. The Superior Court and the Court of Queen's Bench were established during the 1849 reform of the Lower Canada courts. The judges of these courts had to come from the courts replaced in 1849 or from certain other courts, or be advocates with at least ten years' standing with the bar of Lower Canada.[77]

76. As mentioned previously, the requirement of membership in the Barreau existed to ensure that superior court judges were familiar with the law in force in the province, including the civil law. The purpose was to prevent these courts being composed of foreign judges with no civil law training, as had been the case with several judges in Québec prior to 1849.[78] In this sense, the 1849 echoed the 76th of *The Ninety-Two Resolutions of the Legislative Assembly of Lower Canada* of 1834:

> 76. Resolved, That this partial and abusive practice of bestowing the great majority of official places in the province on those only who are least connected with its permanent interests, and with the mass of its inhabitants, has been most especially remarkable in the judicial department, the judges for the three great districts having, with the exception of one only in each, been systematically chosen from that class of persons, who, being born out of the country, are the least versed in its laws, and in the language and usages of the majority of its inhabitants; that the result of their intermeddling in the politics of the country, of their connexion with the Members of the Colonial Administration, and of their prejudices in favour of institutions foreign to and at variance with those of the country, is that the majority of the said judges have introduced great irregularity into the general system of our jurisprudence, by neglecting to ground their decisions on its recognized principles . . .[79]

ii. Confederation

77. At the time of Confederation, there was no question of fundamentally changing the legal system in place in the founding provinces.[80] Indeed, section 129 of the CA 1867 indicates that the Framers wished to preserve the judicature as it existed in each province in 1867, "as if the Union

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77 *An Act to amend the Laws relative to the Courts*, *supra* note 39, s 4, **RBA**, **vol. I**, **tab 5**; *An Act to establish a Court having jurisdiction in Appeals*, *supra* note 39, s 2, **RBA**, **vol. I**, **tab 6**.

78 Evelyn Kolish, *Nationalismes et conflits de droits : le débat du droit privé au Québec 1760-1840* (Montréal: Hurtubise HMH, 1994) at 109, **RBA**, **vol. IV**, **tab 124**. See generally 107-22, 143-56.

79 Resolution No 76, reproduced in French in Morin, J.Y. and Woehrling, J., *Les constitutions du Canada et du Québec du régime français à nos jours* (Montréal: Thémis, 1992) at 675, **RBA**, **vol. IV**, **tab 131** [English translation taken from http://english.republiquelibre.org/The_Ninety-wo_Resolutions_of_the_Legislative_Assembly_of_Lower_Canada].

80 Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson Ltd, 1997) at 47, **RBA**, **vol. IV**, **tab 134**, cited in the Opinion of the Court of Appeal at para 51.

had not been made".[81] The purpose was therefore not to create new courts from scratch, as was the case of the Supreme Court in 1875.

78. Despite the maintenance of the *status quo* of the Canadian judicature, the Framers nonetheless had to draft provisions to implement the decision to grant the Governor General the power to appoint the provinces' superior court judges. There seems to have been little debate on this issue,[82] and everyone seemed to agree that each province's superior court judges should come from the respective bar of that province:

> There is much also said to have been discussed, the Judiciary and the existence of a Federal Court of Apellate [*sic*] Jurisdiction . . . The Superior Court Judges for all, it is said, would probably be appointed by the Federal Executive, but from the Bars of the respective Provinces.[83]

79. For Québec, what counted at the time was to ensure that superior court judges, whose appointment now fell under federal authority, would continue to be obliged to have knowledge of the law in force in the province in order to ensure the continuity of the Québec's civilist tradition. It was this requirement that the Framers clearly intended to guarantee when they enacted section 98, as illustrated in Sir Hector-Louis Langevin's 1865 speech:

> . . . It may be remarked, in passing, that in the proposed Constitution there is an article which provides that the judges of the courts of Lower Canada shall be appointed from the members of the bar of that section. This exception was only made in favor of Lower Canada, and it is a substantial guarantee for those who fear the proposed system.[84]

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81 *Constitution Act, 1867*, s 129, **RBA, vol. I, tab 12**.

82 Opinion of the Court of Appeal at paras 50-51; Gilles Pépin, *Les tribunaux administratifs et la constitution : étude des articles 96 à 101 de l'A.A.N.B* (Montréal: Thémis, 1969) at 81-84, **RBA**, **vol. IV**, **tab 127**; Joseph Pope, ed, *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell, 1895) at 31-32, 81-82, 104-5, 112, **RBA**, **vol. IV**, **tab 129**; G. P. Browne, ed, *Documents on the Confederation of British North America*, (Toronto: McClelland and Stewart Limited, 1969) at 46-47, **RBA**, **vol. III**, **tab 112**.

83 Charles Annand Esq., "Correspondence: The Colonial Convention", *The [Halifax] Morning Chronicle* (10 September 1864) 2: Archived, Canadian Confederation Documents at http://www.collectionscanada.gc.ca/confederation/023001-7133e.html (consulted on March 18, 2015), **RBA**, **vol. III**, **tab 100**.

84 Canada, Legislative Assembly, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada* (Québec, Que: Hunter, Rose and Co., 1865) at 388, **RBA**, **vol. III**, **tab 114**.

80. There was concern in fact that the federal government use its authority under section 96 to appoint persons with no ties to the province and with no knowledge of local law, as had been the case in Québec up to the early 1840s.[85] It was therefore decided that if the "central government" was to appoint the superior court judges, it would choose them "from the Bar of that Province".

81. The same guarantee with respect to knowledge of local law was contemplated for the other provinces in section 97 of the CA 1867.[86] The fact that section 97 was originally a temporary provision does not affect its scope. It continues to be applicable today and provides the same guarantee as section 98 with respect to knowledge of local law. Indeed, it would be difficult, today, to imagine the other provinces not benefitting from this guarantee.

82. The Framers wished to preserve the pre-Confederation gains for the new union in this respect. As indicated by the Court of Appeal, the historical context suggests that section 98 of the CA 1867 was intended to continue a practice that was well-established prior to Confederation,[87] that of the superior court judges having bar-approved knowledge of local law.

83. However, contrary to what Québec alleges, the Framers did not consider it appropriate to constitutionalize all the conditions for appointing judges that existed prior to Confederation. If they had wished to do so, they would have simply continued to use the terms of the 1849 legislation establishing Québec's superior courts. One cannot read requirements into section 98 that are not there.

84. Consequently, section 98, like section 97, constitutionalized only a basic requirement that limits federal authority and gave Parliament the freedom to contemplate or amend the other conditions for appointing federal judges, which it did with the enactment of the *Judges Act* of 1912.[88] In other words, sections 97 and 98 contain only the minimum requirements governing the Governor General's authority to appoint the provinces' superior court judges.

iii. The purpose of section 6 of the SCA is different from that of section 98 of the CA 1867

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85 Kolish, *Nationalismes et conflits*, *supra* note 78, **RBA, vol. IV, tab 124**; Pépin, *supra* note 82 at 87, **RBA**, **vol. IV**, **tab 127**.

86 Annand, *supra* note 83, **RBA**, **vol. III**, **tab 100**; Pope, *supra* note 82 at 45, 104-5, 130, 232, **RBA**, **vol. IV**, **tab 129**.

87 Opinion of the Court of Appeal at para 52.

88 *An Act to amend the Judges Act*, *supra* note 33, **RBA**, **vol. I**, **tab 24**.

85. Contrary to what Québec claims, *Reference re Supreme Court Act*, which concerns the appointment requirements for judges to the Supreme Court, does not tell us anything on the purpose of section 98, which applies only to Québec's superior courts. Specifically, section 6 of the SCA, the interpretation of which is at the heart of this *Reference*, was enacted in a historical context that was quite different from the one prevailing at the time of the enactment of section 98. As concluded by the Court of Appeal, any argument suggesting that section 98 reflects the same historical compromise as that leading to section 6 must be rejected.

86. As appears from *Reference re Supreme Court Act*, "[t]he purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Québec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Québec 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".[89]

87. In this respect, it should be noted that in institutional terms, Québec's superior courts, in contrast to the Supreme Court, are entirely constituted from judges from Québec, and for this reason, the concerns for Québec's interests being represented as in the case of the Supreme Court are not an issue when it comes to the Québec Court of Appeal or the Québec Superior Court. As such, the Québec Court of Appeal and the Québec Superior Court are Québec institutions, and allowing them to be composed of former Barreau members with a diversity of professional experience does not make them any less Québécois. Section 6 of the SCA reflects both the historical context prevailing at the time and the historical compromise that led to the creation of the Supreme Court of Canada,[90] a quite different institution from the Québec Superior Court and the Québec Court of Appeal.

88. At that time, almost ten years after Confederation, Parliament wanted to implement its plan to create a general court of appeal for Canada as it was permitted to do under section 101 of the CA 1867. To realize this plan, however, Parliament had to convince Québecers to participate. The historical analysis undertaken in the *Reference re Supreme Court Act* reveals that Québec was

89 *Reference re Supreme Court Act, supra* note 19 at para 49, **RBA**, **vol. III**, **tab 89**.
90 *Ibid* at para 48, **RBA**, **vol. III**, **tab 89**.

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 Québec civil law.[91]

89. The bill creating the Supreme Court was therefore passed only after amendments were made responding specifically to Québec's concerns. More particularly, it was decided to provide Québec with the assurance that two of the six judges would be taken from among the Judges of the Superior Court or Court of Queen's Bench, or the Barristers or Advocates of the Province of Québec.[92]

90. It is this historical compromise that is reflected in section 6. Beyond recognizing civil law, this provision was ultimately intended to lend legitimacy to the Court in Québec by appointing at least some of its judges from Québec's civil law institutions.[93]

91. It appears from the above that the purpose of section 6 is distinct from that of section 98 of the CA 1867, given that the historical compromise leading to section 6 was not the same as that leading to section 98. As noted by the Court of Appeal, the concerns underlying section 6 did not exist ten years earlier, in 1865 or 1867.[94] At the time of Confederation, the legitimacy of new courts in Québec did not have to be ensured as the superior courts already existed, and their legitimacy had been established since the 1849 reform.[95] It was simply a matter of upholding the guarantee given to these courts, namely that the judges be versed in the law applicable in the province.[96]

92. Since the parallel drawn with the *Reference re Supreme Court Act* must be rejected, there is nothing to support Québec's restrictive interpretation that section 98 refers only to former members of the Barreau who have become judges of courts established by Québec.

3. The interpretation of section 98 reflected in the *Judges Act* supports the position of the AGC

91 *Ibid* at para 50, **RBA**, **vol. III**, **tab 89**.
92 *Ibid* at paras 51-54, **RBA**, **vol. III**, **tab 89**.
93 *Ibid* at para 56, **RBA**, **vol. III**, **tab 89**.
94 Opinion of the Court of Appeal at paras 41, 43, 52.
95 *Ibid* at para 51.
96 *Ibid* at para 52.

93. The *Judges Act* shows that Parliament never interpreted sections 97 and 98 as preventing the appointment to the superior courts of persons who were no longer members of the bar of their province upon appointment.

94. While not determinative, Parliament's interpretation of a provision of the Constitution must be considered where interpretation is required. In this case, the Québec Court of Appeal referred in that regard to *Citizens Insurance Company of Canada v. Parsons*[97] and *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*, in which Justice Beetz wrote that "federal legislation may properly be considered as an aid to constitutional interpretation."[98] Moreover, when there are two competing interpretations, the courts will think twice before rejecting one which has been implemented on a regular basis.[99]

95. The *Act to amend the Judges Act* was enacted in 1912, when there was no legislation contemplating eligibility for appointment of judges as a result of the repeal of the pre-Confederation legislation on the subject.[100] Section 9 of the Act, which retained the requirement of ten years' experience as a lawyer provided for in certain pre-Confederation laws,[101] read as follows:

9. 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 at least ten years before the date of appointment.[102]	9. Nulle personne ne peut être nommée juge d'une cour supérieure, ou d'une cour de circuit, de comté ou district, dans aucune province, si, en sus des autres exigences prescrites par la loi, elle n'a pas été admise au barreau de l'une des provinces au moins dix ans avant la date de sa nomination.

96. Thus, it can be seen that, under this section, it does not matter that a person is a member of the bar of a province at the time of appointment, it is enough that he or she was admitted to the bar

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97 *Ibid* at para 66; *Parsons*, *supra* note 32, **RBA, vol. II, tab 65.**

98 Opinion of the Court of Appeal at para 66; *Canadian Pioneer Management*, *supra* note 32, **RBA**, **vol. II**, **tab 64**.

99 Côté, *supra* note 50 at 572-75, 577-79, 584-89, **RBA**, **vol. III**, **tab 115**.

100 *An Act respecting the Revised Statutes of Canada*, SC 1886 (49 Vict), c 4, s 1 and Appendix No 1, **RBA**, **vol. I**, **tab 3**; Huppé, *supra* note 67 at 458-60, **RBA, vol. III, tab 122**.

101 *An Act to establish a Court having jurisdiction in Appeals*, *supra* note 39, s 2, **RBA**, **vol. I**, **tab 6**. *An Act to amend the Laws relative to the Courts*, *supra* note 39, s 4, **RBA**, **vol. I**, **tab 5**.

102 *An Act to amend the Judges Act*, *supra* note 33, **RBA**, **vol. I**, **tab 24**.

of one of the provinces at least ten years before the date of appointment. That therefore includes a person admitted to the bar of a province who subsequently became a judge.

97. In 1946, the requirement that a person had to have been admitted to the bar "for at least ten years before the date of appointment" was reworded to require that the person be a "barrister or advocate of at least ten years standing at the bar of any province."[103] While there is no indication that the intention there was to amend this provision substantively, the new wording could be interpreted as excluding persons who had left the bar to perform a judicial function before acquiring ten years of experience as a bar member.[104]

98. Thus, in 1976, the Act was amended again so that the requirement of ten years could be met by the total, cumulative number of years as a bar member and as a "magistrate as defined in section 2 of the *Criminal Code*". The term "magistrate" was defined as "a provincial court judge in the provinces of Ontario, Québec, New Brunswick and British Columbia."[105]

99. In 1996, Parliament eliminated all doubts regarding the eligibility of persons exercising powers and performing duties and functions of a judicial nature on a full-time basis by clarifying that such persons could meet the professional experience requirements.[106] Section 3 of the *Judges Act* now reads as follows:

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	**3.** Peuvent seuls être nommés juges d'une juridiction supérieure d'une province s'ils remplissent par ailleurs les conditions légales :
(*a*) is a barrister or advocate of at least ten years standing at the bar of any province; or	*a*) les avocats inscrits au barreau d'une province depuis au moins dix ans;
b) has, for an aggregate of at least ten years,	*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

103 *An Act respecting Judges of Dominion and Provincial courts*, *supra* note 33, s 3, **RBA**, **vol. I**, **tab 15**.

104 *House of Commons Debates*, Standing Committee, May 17, 1977 at 11-11, **RBA**, **vol. III**, **tab 118**. See also *Debates of the Senate*, 2nd Reading, June 6, 1977 at 825, **RBA**, **vol. III**, **tab 119**.

105 *Criminal Code*, RSC 1970, c C-34, s 2(*a*), **RBA**, **vol. I**, **tab 8**; *Criminal Law Amendment Act, 1972*, SC 1972, c 13, s 2, **RBA**, **vol. I**, **tab 17**; *Criminal Law Amendment Act, 1975*, SC 1974-75-76, c 93, s 2, **RBA**, **vol. I**, **tab 18**.

106 *An Act to Amend the Federal Court Act*, *supra* note 33, s 1, **RBA**, **vol. I**, **tab 25**.

> (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.[107]
>
> après avoir été inscrites au barreau, et ce pour une durée totale d'au moins dix ans.

100. It is apparent from the foregoing that Parliament has always considered that a member of a bar of any province who then become a judge could be appointed under sections 97 and 98 of the CA 1867, even if he or she was no longer at the bar of any province at the time of appointment.

101. While Parliament's vision as reflected in the provisions of the *Judges Act* is not determinative of the interpretation to be given to section 98 of the CA 1867, it is an additional important element that must be taken into consideration. Such an interpretation, which has existed for more than 100 years, promotes the certainty and predictability of our constitutional law.[108] To conclude otherwise would mean that we would have to accept that there have been a number of appointments of provincial judges to the superior courts of Québec over the last 100 years that have been contrary to section 98. For example, 4 of the 20 judges currently sitting on the Québec Court of Appeal were appointed from the Court of Québec to the Superior Court or to the Court of Appeal.[109]

4. The test proposed by Québec is highly problematic and must be set aside

102. Québec argued before the Québec Court of Appeal that section 98 only applied to former members of the Barreau having "an ongoing, tangible and concrete connection" with the Québec legal community. According to Québec, the only former members qualifying as such were the judges of the courts listed in section 1 of the *Courts of Justice Act* (CJA).[110]

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107 *Judges Act*, *supra* note 12, **RBA**, **vol. I**, **tab 36**.

108 *Reference re Secession of Quebec*, *supra* note 24 at para 53, **RBA**, **vol. III**, **tab 92**; *Parsons*, *supra* note 32, **RBA**, **vol. II**, **tab 65**; *Canadian Pioneer Management*, *supra* note 32, **RBA**, **vol. II**, **tab 64**.

109 The Honourable François Doyon, the Honourable Guy Gagnon, the Honourable Claude C. Gagnon and the Honourable Martin Vauclair: Composition of the Quebec Court of Appeal, online: http://courdappelduquebec.ca/en/about-the-court/composition/ (consulted on March 29, 2015), **RBA**, **vol. III**, **tab 103**.

110 *Courts of Justice Act*, CQLR, c T-16, s 1, **RBA**, **vol. I**, **tab 38**.

103. Today, Québec is arguing that a new test ought to be applied: a contemporaneous link with Québec's legal institutions. Without explicit reference to section 1 of the CJA, Québec continues to maintain that the only former members eligible for federal judicial appointments are judges of the Québec courts of justice. This is the same as claiming that the pool of section 98 eligible candidates is limited by section 1 of the CJA.

104. As mentioned previously, this restrictive interpretation of section 98 must be rejected as it creates distinctions where the Framers of the Constitution do not and it is not needed to give effect to the purpose of section 98.

105. Moreover, such an interpretation is problematic for several reasons.

106. First, the choice of section 1 of the CJA as a limitation on the pool of section 98 is arbitrary. Québec could just as easily have proposed as a pool former members of the Barreau who became judges in the courts referred to in sections 22 and 24 of the *Code of Civil Procedure*, which lists all courts which have jurisdiction in civil matters in Québec, including federal courts.[111]

107. In that regard, it is difficult to understand how the Attorney General of Québec can claim that Québec judges on federal courts do not have a close enough connection to Québec to be appointed to the Québec Court of Appeal even though they were appointed to represent Québec pursuant to section 5.4 of the FCA and the National Assembly of Québec itself formally recognizes in section 24 of the *Code of Civil Procedure* that the federal courts have jurisdiction in civil matters in Québec.

108. Québec's claim amounts to saying that the only courts able to preserve the civil law tradition and having the confidence of Québecers are those created by Québec, an untenable proposition in a federal system like ours where both the provincial legislatures and Parliament can establish courts having jurisdiction in Québec.

109. Second, to use the notion of a contemporary link with Québec's legal institutions and section 1 of the CJA to limit the scope of section 98 is equivalent to vesting in the Québec legislature the power to determine the extent of the pool of eligible candidates to an appointment to the superior

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111 *Code of Civil Procedure*, CQLR, c C-25, ss 22, 24, **RBA**, **vol. I**, **tab 11**.

courts of Québec, when sections 96 and 98 of the CA 1867 confer the power of appointment of these judges on the Governor General. In other words, this would allow Québec to unilaterally limit the power of the Governor General to appoint federal judges in Québec. However, there is nothing in the Constitution which warrants such a conclusion.[112] The scope of section 98 cannot manifestly depend on the mere willingness of the Québec legislature.

110. Third, the requirement that Québec adds to section 98, namely, a contemporaneous link with Québec institutions, fails to take into account that many members of the Barreau work outside Québec or Canada and do not have this contemporaneous link with Québec's legal institutions: e.g., a member of the Barreau who has been practising American law in the United States for many years, or one who teaches the law of trusts in a common law province. Thus, there is an inherent inconsistency in the requirement proposed by Québec. This requirement is intended to guarantee a certain attachment to the province, but it includes a category of persons — members of the Barreau — that by no means guarantees such an attachment.

111. Québec is arguing for the recognition of an objective test, but the contemporaneous link test it is proposing is nothing of the kind. This test would require a review of each candidate's professional track record to verify whether, considering his or her unique circumstances, he or she has such a link. Consequently, such a test would encourage a multiplicity of legal challenges in connection with judicial appointments, along with the consequences this would have. Suffice it to say that Justice Mainville was appointed to the Québec Court of Appeal in June 2014 and, as of the date hereof, has yet to sit as a judge of that court owing to the contestation of his appointment.

112. The interpretation of the Constitution must nurture the recognition of predictable and objective standards with respect to the appointment of judges. The Court should, therefore, obviously refuse to endorse a test whose application would be highly problematic, when not required either by the wording or by the purpose of section 98.

113. Furthermore, with the [TRANSLATION] "contemporaneous link with Québec's institutions" requirement, Québec is attempting to impose on the Governor General a restriction on the

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112 *Re The Chief Justice of Alberta* (1922), 64 SCR 135 at 160, **RBA**, **vol. II**, **tab 85**.

appointment of judges which Québec did not even see fit to impose on itself in the CJA.[113] Québec legislation allows "pertinent" experience to be taken into account, which may even include experience acquired outside of the practice of the profession of advocate.[114]

114. Québec's approach also disregards the institutional differences between the Supreme Court and superior courts. The Supreme Court is the highest legal institution in Canada. Six of its judges come from common law provinces. As the Court noted in the *Reference re Supreme Court Act*, the seats reserved for Québec are intended not only to ensure civil law expertise and the representation of Québec's values on the Court, but also to maintain Québecers' confidence in this institution.[115]

115. This problem of Québec's representation does not arise with Québec's superior courts. By definition, they are Québec courts composed of civil law jurists. The Québec Superior Court, which includes 144 judges, and the Québec Court of Appeal, which includes 20 judges, are composed of individuals with legal expertise in a variety of fields: criminal law, family law, public law, commercial law, bankruptcy and insolvency, labour law, civil law, aboriginal law, etc. The legitimacy of judicial institutions with a jurisdiction *rationae materiae* as vast as that of the Superior Court and the Court of Appeal is enhanced by the diversity of the professional experience of their judges.

116. Overall, the restrictive interpretation proposed by Québec runs counter to the philosophy currently prevailing in Québec, Canada and the United Kingdom with respect to appointments of judges. This philosophy seeks to broaden, rather than restrict, the pool of potential judicial candidates and facilitate the eligibility of candidates with varied experience. As Justice Bastarache held in his report on the process for appointing judges in Québec, [TRANSLATION]

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113 *Courts of Justice Act*, *supra* note 110, s 87, **RBA**, **vol. I**, **tab 38**; Quebec, Legislative Assembly, *Journal des Débats*, 29th Leg, 2nd Sess, No 56 (11 June 1971) at 2424, 2427-28, **RBA**, **vol. III**, **tab 101**.

114 *Regulation respecting the selection procedure of candidates for the office of judge of the Court of Québec, municipal court judge and presiding justice of the peace*, CQLR, c T-16, r 4.1, ss 17, 25 and Schedule A, **RBA**, **vol. I**, **tab 42**. See also: *Regulation respecting the procedure for the selection of persons apt for appointment as judges*, RRQ, c T-16, r 5, s 5(*f*), repealed since 2012, **RBA**, **vol. I**, **tab 43**.

115 *Reference re Supreme Court Act*, *supra* note 19 at paras 18, 49, 56, **RBA**, **vol. III**, **tab 89**.

"increasing diversity in the composition of the judiciary is a factor that reinforces the public's trust in the administration of justice."[116]

5. Judges of the Federal Courts appointed under section 5.4 of the FCA have strong ties with Québec and are able to ensure the development of the civil law tradition in Québec

117. Even if the pool of section 98 was limited to certain former members of the Barreau only, former members of the Barreau who have become judges of the federal courts should clearly be part of that pool owing to the strong institutional ties between the federal courts and Québec.

118. Indeed, the federal courts are superior courts of record[117] that have jurisdiction in civil matters in Québec. The Québec National Assembly clearly recognizes this in article 24 of the *Code of Civil Procedure*.[118]

> 24. The courts under the legislative authority of the Parliament of Canada which have jurisdiction in civil matters in Québec are the Supreme Court of Canada and the Federal Court of Canada.

119. Federal courts sit throughout the year in Québec to resolve disputes involving Québec litigants and the federal Crown, or disputes between Québec litigants. They have on-site offices in Québec and Montréal and sit elsewhere in the province when circumstances warrant.

120. Furthermore, 15 of their judges must come from Québec, and they are required to reside in the National Capital Region, part of which is in Québec.[119]

121. While the primary mission of the federal courts is to interpret and apply federal law in accordance with section 101 of the *Constitution Act, 1867*, federal law is not foreign to Québec. It is as much a part of the substantive law governing Québec society as the civil law is.

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116 The Honourable Michel Bastarache, *Rapport de la Commission d'enquête sur le processus de nomination des juges de la Cour du Québec, des cours municipales et des membres du Tribunal administratif du Québec* (Québec Que.: Publications du Québec, 2011) at 279, **RBA**, **vol. III**, **tab 109**.

117 *Federal Courts Act*, *supra* note 3, ss 3, 4, **RBA**, **vol. I**, **tab 35**; *Commonwealth of Puerto Rico v Hernandez*, [1975] 1 SCR 228 at 232, **RBA**, **vol. II**, **tab 68**.

118 *Code of Civil Procedure*, *supra* note 111, s 24, **RBA**, **vol. I**, **tab 11**; *Code of Civil Procedure*, CQLR, c C-25.01, s 8, **RBA**, **vol. I**, **tab 10**.

119 *Federal Courts Act*, *supra* note 3, ss 5.4, 7, **RBA**, **vol. I**, **tab 35**; *National Capital Act*, RSC 1985, c N-4, s 2 and Schedule, **RBA**, **vol. I**, **tab 28**.

122. Québec is not simply a civil law province.[120] Each day, the life of Quebecers is governed by federal law in many ways, whether it be marriage and divorce, bankruptcy and insolvency, employment insurance, income tax, or criminal law, to name but a few. The ties of lawyers and judges working in these areas to Québec's legal community are no less tangible and concrete. They are part of it.

123. Moreover, as part of their mission to administer the laws of Canada, the federal courts are regularly called upon to apply the principles of civil law as federal law does not exist in a vacuum.[121]

124. In matters of Crown liability, when a cause of action has arisen in Québec, it is Québec's rules of civil liability that apply. Section 3(*a*) of the *Crown Liability and Proceedings Act* also adopts the civil law formulation and specifically provides that in Québec, the Crown is liable for the damage caused by the fault of a servant of the Crown.[122]

125. In this area, the Federal Court has concurrent original jurisdiction with the provincial superior courts under section 17 of the FCA.[123] Accordingly, the Québec Superior Court and the Federal Court are likely to hear the exact same type of cases in these matters, and an action in civil liability originating in Québec may be brought in the Federal Court just as well as in the Superior Court.[124]

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120 *Laurentide Motels Ltd. v Beauport (City)*, [1989] 1 SCR 705 at 737-40, **RBA**, **vol. II**, **tab 76**; Barreau du Québec, "Devenir Avocat : Formation universitaire", online [in French only]: http://www.barreau.qc.ca/fr/devenir-avocat/universite/index.html (consulted on March 29, 2015), **RBA**, **vol. III**, **tab 104**; Barreau du Québec, "Domaines de pratiques du droit en 2013-1014" in *Barreau-mètre 2015, la profession en chiffres* at 27, online [in French only]: http://www.barreau.qc.ca/pdf/publications/barreau-metre-2015.pdf (consulted March 29, 2015), **RBA**, **vol. III**, **tab 105**; John E. Brierley and Roderick A. Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law*, (Toronto: Edmond Montgomery, 1993) at 53, 61, **RBA**, **vol. III**, **tab 111**; The Honourable J.J. Michel Robert, Chief Justice of Quebec, "Address" in *Which Judge for Which Society? Proceedings of the 2008 Judges' Conference* at 21-23, **RBA**, **vol. IV**, **tab 132**.

121 *ITO – Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752 at 780-82, **RBA**, **vol. II**, **tab 75**.

122 *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 3(*a*), **RBA**, **vol. I**, **tab 31**. See for example: *Canadian Food Inspection Agency v Professional Institute of the Public Service of Canada*, 2010 SCC 66 at paras 23-28, **RBA**, **vol. II**, **tab 58**.

123 *Federal Courts Act*, *supra* note 3, s 17, **RBA**, **vol. I**, **tab 35**. See also: T. A. Cromwell, "Aspects of Constitutional Judicial Review in Canada" (1995), 46 SC L Rev 1027 at 1030, **RBA**, **vol. III**, **tab 117**, cited in *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at 659-60.

124 See for example: *Nkunzimana v Canada*, 2014 FC 736, **RBA**, **vol. VI**, **tab 186**; *Trotman v Canada*, 2014 FC 164, **RBA**, **vol. VIII**, **tab 204**; *Barkley v Canada*, 2014 FC 39 (CanLII), **RBA**, **vol. IV**, **tab 143**; *Ingredia SA v Canada*, 2009 FC 389, **RBA**, **vol. VI**, **tab 177**; *The Queen v Nisker*, 2008 FCA 37, **RBA**, **vol. VI**, **tab 181**; *Aubin v Canada*, 2005 CF 812, **RBA**, **vol. IV**, **tab 142**; *Grenier v Canada (Attorney General)* (2004), 262 FTR 94, **RBA**, **vol. VI**, **tab 171**; *Canada v Monit International Inc* (2005), 329 NR 60, **RBA**, **vol. V**, **tab 162**; *Boughaleb v Canada*, 2000

126. In addition, where the Federal Court has jurisdiction to rule on a contractual dispute between the federal Crown and a citizen of Québec,[125] it is Québec's civil law that will apply. Of course, public law complements the legal rules applicable to contracts entered into by the Crown, but it is Québec civil law that forms the basis of those rules.[126]

127. Indeed, in all disputes arising in Québec and requiring the application of private law, the federal courts must apply the civil law as provided for in section 8.1 of the *Interpretation Act*, which formalizes the bijural nature of federal law:

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.[127]
>
> 8.1 Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

128. Thus, for example, in tax litigation requiring the interpretation of private law, it is the civil law that must be interpreted and applied in accordance with this provision when cases arise in Québec.[128] This happens frequently because tax law is based on the general law and, more

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CanLII 16237, **RBA**, **vol. V**, **tab 149**; *Hamel v Canada*, [1999] 3 FCR 335, 175 DLR (4th) 323, **RBA**, **vol. VI**, **tab 174**.

125 *R v McNamara Construction (Western) Ltd*, [1977] 2 SCR 654, **RBA**, **vol. II**, **tab 78**.

126 See for example: *Planification-Organisation-Publications Systèmes (POPS) Ltée v 9054-8181 Québec Inc.*, 2014 FCA 185, **RBA**, **vol. VI**, **tab 187**; *9171-7702 Québec Inc. v Canada*, 2013 FC 832, **RBA**, **vol. IV**, **tab 141**; *Canada (Revenu national) c Groupe EC Inc*, 2007 CF 1083, **RBA**, **vol. V**, **tab 158**; *Tulli v Simcor Inc* (2005), 286 FTR 35, **RBA**, **vol. VIII**, **tab 205**; *National Bank of Canada v Lepire* (2006), 267 FTR 138, **RBA**, **vol. IV**, **tab 144**; *Poulin v Canada (Minister of National Revenue)* (2003), 228 DLR (4th) 675, **RBA**, **vol. VII**, **tab 189**; *Groupe AXOR Ingénierie - Construction Inc. v Canada* (2003), 241 FTR 211, **RBA**, **vol. VI**, **tab 173**; *Transport Navimex Canada Inc. v Canada* (2000), 255 NR 124, **RBA**, **vol. VIII**, **tab 201**; *Entreprises A.B. Rimouski Inc. c Canada* (1996), 40 BLR (2d) 189, **RBA**, **vol. V**, **tab 167**; *Canada (Attorney General) v Charbonneau*, 207 NR 299, **RBA**, **vol. V**, **tab 155**; *Sauvé v Minister of National Revenue* (1995), 192 NR 224 (FCA), **RBA**, **vol. VII**, **tab 193**.

127 *Federal Law — Civil Law Harmonization Act, No. 1*, SC 2001, c 4, Preamble, **RBA**, **vol. I**, **tab 20**.

128 See for example: *Sokolowski Romar v Canada*, 2013 FCA 10, **RBA**, **vol. VII**, **tab 195**; *Canadian Broadcasting Corporation v Montréal (City)*, 2012 FCA 184, **RBA**, **vol. VII**, **tab 194**; *Studios St-Antoine Inc v Canada (Canadian Heritage)*, 2011 FC 1521, **RBA**, **vol. VII**, **tab 197**; *Gauthier Estate v Canada*, 2010 FCA 228, **RBA**, **vol. VI**, **tab 170**; *Polymere Epoxy-Pro Inc. v Frare & Gallant Ltée*, 2009 FC 912, **RBA**, **vol. VII**, **tab 188**; *Bouchard v Canada (Attorney General)*, 2009 FCA 321, **RBA**, **vol. V**, **tab 148**; *Grimard v Canada*, 2009 FCA 47, **RBA**, **vol. VI**, **tab 172**; *Widrig v Regroupement Mamit Innuat Inc*, 2007 FC 1224, **RBA**, **vol. VIII**, **tab 207**; *La Survivance v Canada* (2006),

specifically, contract law and property law, which are governed by the civil law in Québec.[129] In fact, federal courts will have to apply Québec civil law in all litigation arising in Québec where the dispute's resolution requires the use of private law concepts.[130]

129. Regarding prescription, section 39 of the FCA provides that, except as expressly provided by any other Act, the rules that apply to any proceedings in federal courts are the rules in force in the province where the cause of action arose.[131] When the dispute arises in Québec, it is therefore the rules on prescription in the Civil Code that usually apply.[132]

130. Even in procedural matters, the Québec *Code of Civil Procedure* applies in certain disputes before the federal courts. Section 56 of the FCA specifically refers to provincial law with respect to writs of execution and, more generally, section 4 of the *Federal Courts Rules* indicates that the Court may provide for any procedural matter not provided for in the Rules by reference to the practice

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60 DTC 6288, **RBA**, **vol. VIII**, **tab 198**; *Canada v Caisse populaire du Bon Conseil* (2005), 59 DTC 5268, **RBA**, **vol. V**, **tab 160**; *9041-6868 Québec Inc v Canada (Minister of National Revenue)* (2005), 350 NR 201, **RBA**, **vol. IV**, **tab 159**; *9049-4907 Québec Inc, Re* (2004), 281 FTR, **RBA**, **vol. IV**, **tab 140**; *Hewlett Packard (Canada) Ltd v Canada* (2004), 324 NR 201, **RBA**, **vol. VI**, **tab 175**; *Wolf v Canada*, 2002 FCA 96, **RBA**, **vol. VIII**, **tab 208**; *Transport H. Cordeau Inc. v Canada* (1999), 53 DTC 6288, **RBA**, **vol. VIII**, **tab 200**; *La Capitale, Compagnie d'Assurance Générale v Canada* (1998), 42 DTC 6215, **RBA**, **vol. VI**, **tab 180**; *Belliard v Quebec (Deputy Minister of Revenue)* (1997), 225 N.R. 347, **RBA**, **vol. V**, **tab 147**; *Vaillancourt v Quebec (Deputy Minister of National Revenue)*, [1991] 3 FC 663 (FCA), **RBA**, **vol. VIII**, **tab 206**.

129 *Canada v 9101-2310 Québec Inc*, 2013 FCA 241, **RBA**, **vol. V**, **tab 159**; *Will-Kare Paving & Contracting ltd. v Canada*, [2000] 1 SCR 915, **RBA**, **vol. III**, **tab 99**; *Canada v Lagueux et Frères Inc*, [1974] 2 FC 97 at para 26, **RBA**, **vol. II**, **tab 62**; *Perron v Minister of National Revenue* (1960), 60 DTC 554, **RBA**, **vol. II**, **tab 80**.

130 See for example: *Caisse Desjardins de St-Hubert v Canada (Attorney General)* 2014 FC 779, **RBA**, **vol. V**, **tab 151**; *London Life Insurance Company v Canada*, 2014 FCA 106, **RBA**, **vol. VI**, **tab 184**; *Timm v Canada*, 2014 FCA 8, **RBA**, **vol. VIII**, **tab 199**; *Dufour v Canada (Citizenship and Immigration)*, 2013 FC 340l, **RBA**, **vol. V**, **tab 166**; *Rivas Ponce v Canada (Citizenship and Immigration)*, 2011 FC 1343, **RBA**, **vol. VII**, **tab 191**; *Rodriguez v Canada (Citizenship and Immigration)*, 2011 FC 946, **RBA**, **vol. VII**, **tab 192**; *Kenne v Canada (Citizenship and Immigration)*, 2010 FC 1079, **RBA**, **vol. VI**, **tab 179**; *John v Canada (Citizenship and Immigration)*, 2010 FC 85, **RBA**, **vol. VI**, **tab 178**; *Canada (Attorney General) v Denfield Livestock Sales Limited*, 2010 FCA 36, **RBA**, **vol. V**, **tab 156**; *St-Fort v Canada*, 2009 FCA 188, **RBA**, **vol. VII**, **tab 196**; *C.R.I. Environnement Inc v Canada*, 2008 FCA 103, **RBA**, **vol. V**, **tab 150**; *Lachapelle, (Re)*, 2007 CF 1161, **RBA**, **vol. VI**, **tab 182**; *Re Déziel*, 2006 FC 1481, **RBA**, **vol. VII**, **tab 190**; *Fieldturf (IP) Inc v Installations Sportives Defargo Inc*, 2006 FC 1043, **RBA**, **vol. VI**, **tab 168**; *Canada v Caisse populaire du Bon Conseil* (2005), 59 DTC 5268, **RBA**, **vol. V**, **tab 160**; *2524-2595 Québec Inc, Re* (2004), 261 FTR 302, **RBA**, **vol. IV**, **tab 138**; *Canada (MNR) v Corriveau Estate* (2003), 57 DTC 55156, **RBA**, **vol. V**, **tab 153**; *Canada (Attorney General) v National Bank of Canada* (2002), 56 DTC 7477, **RBA**, **vol. V**, **tab 154**; *Canada c Transport H. Cordeau* (2002), 56 DTC 7127, **RBA**, **vol. V**, **tab 163**; *LaFarge Canada Inc v The Queen* (2001), 201 FTR 247, **RBA**, **vol. VI**, **tab 183**; *Canada (Attorney General) v St-Hilaire*, 2001 FCA 63, **RBA**, **vol. V**, **tab 157**; *Tremblay v Boivin-Tremblay* (1999), 254 NR 284 (FCA), **RBA**, **vol. VIII**, **tab 202**; *Royal Bank of Canada v Canada* (1997), 51 DTC 5435, **RBA**, **vol. IV**, **tab 145**; *Lovell v Canada* (1993), 155 NR 98 (FCA), **RBA**, **vol. VI**, **tab 185**.

131 *Federal Courts Rules*, *supra* note 3, s 39, **RBA**, **vol. I**, **tab 35**.

132 See for example: *Cyr v Canada*, 2005 FC 259, **RBA**, **vol. V**, **tab 165**.

of the superior court of the province to which the subject-matter of the proceeding most closely relates.[133]

131. Thus, it is easy to understand why section 5.4 of the *Federal Courts Act* requires that "at least five of the judges of the Federal Court of Appeal and at least 10 of the judges of the Federal Court must be persons who have been judges of the Court of Appeal or of the Superior Court of the Province of Québec, or have been members of the bar of that Province."[134] These judges represent Québec and apply the civil law within national institutions having jurisdiction in civil matters in Québec. For example, in 2013 and 2014 alone, Justice Mainville sat approximately ten times on cases in which the Court was called upon to apply civil law principles.[135]

132. Therefore, the federal courts not only have close ties to Québec's legal community, but are also part of it.

133. Furthermore, it would be unrealistic to arrive at a different conclusion when one considers the careers of the great legal minds of Québec who have been judges of the federal courts, including:

- The Honourable Gilles Létourneau, Justice of the Federal Court of Appeal from 1992 to 2012, a law professor at the Université Laval, Associate Secretary General of the Government of Québec, Vice-Chair and Chair of the Law Reform Commission of Canada and 2013 recipient of the Barreau du Québec Medal, the highest honour awarded by the order, which "allows the organization to spotlight the noteworthy contributions of individuals who have contributed to the advancement of the law and the legal profession and thus to the development of Québec society."[136]

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133 *Federal Courts Rules*, *supra* note 3, s 56, **RBA**, **vol. I**, **tab 35**; *Federal Courts Rules*, SOR/98-106, s 4, **RBA**, **vol. I**, **tab 45**. See for example: *Corp. Steckmar/Steckmar Corp., Re* (2004), 58 DTC 6340, **RBA**, **vol. V**, **tab 164**; *Forest v Hancor Inc*, [1996] 1 FCR 725 (FCA), 37 CBR (3d) 117, **RBA**, **vol. VI**, **tab 169**.

134 *Federal Courts Rules*, *supra* note 3, s 5.4, **RBA**, **vol. I**, **tab 35**.

135 *Planification-Organisation-Publications Systèmes (POPS) Ltée v 9054-8181 Québec Inc*., 2014 FCA 185, **RBA**, **vol. VI**, **tab 187**; *London Life Insurance Company v Canada*, 2014 FCA 106, **RBA**, **vol. VI**, **tab 184**; *Canada (Citizenship and Immigration) v Kandola*, 2014 FCA 85, **RBA**, **vol. V**, **tab 152**; *Canada v Lemire*, 2013 FCA 242, **RBA**, **vol. V**, **tab 161**; *Canada v 9101-2310 Québec Inc*., 2013 FCA 241, **RBA**, **vol. V**, **tab 159**; *Industries Perron Inc. v Canada*, 2013 FCA 176, **RBA**, **vol. VI**, **tab 176**; *Tremblay v Orio Canada Inc*., 2013 FCA 225, **RBA**, **vol. VIII**, **tab 203**; *Bell Helicopter Textron Canada Limitée v Eurocopter, société par actions simplifiée*, 2013 FCA 219, **RBA**, **vol. IV**, **tab 146**; *Sokolowski Romar v Canada*, 2013 FCA 10, **RBA**, **vol. VII**, **tab 195**.

136 Barreau du Québec, Press Release (15 April 2013), online [in French only]: http://www.barreau.qc.ca/fr/actualites-medias/communiques/2013/04/15-medaille (consulted on March 18, 2015), **RBA**, **vol. III**, **tab 108**; Barreau du

- The Honourable Robert Décary, cited by the Attorney General of Québec as being an authority in civil law,[137] and Justice of the Federal Court of Appeal from 1990 to 2009, agent for Québec in the Supreme Court for many years, author of the continuing education courses of the Barreau du Québec on the Supreme Court of Canada rules, member of the advisory committee on police organization in Québec and of the committee on the functioning of Québec courts established by the Barreau.[138] He also succeeded Justice Louis LeBel, of the Supreme Court of Canada, as president of the jury committee of the Concours juridique of the Fondation du Barreau du Québec, when sitting in the Federal Court of Appeal.[139]

- The Honourable Alice Desjardins, Justice of the Federal Court of Appeal from 1987 to 2009, professor at the Université de Montréal from 1961 to 1972 and the first woman to hold a full-time teaching position in a law faculty in Canada, and Québec Superior Court judge from 1981 to 1987.[140] In 2012, she also received an honorary doctorate from the Université de Montréal.[141]

- The Honourable James K. Hugessen, Justice of the Federal Court of Appeal from 1983 to 1998 and Justice of the Federal Court from 1998 to 2008, Québec Superior Court judge from 1972 to 1983, and assistant professor at McGill University from 1962 to 1974;[142]

- The Honourable Louis Marceau, Justice of the Federal Court of Appeal from 1983 to 2000, Justice of the Federal Court from 1975 to 1983, professor and dean of the faculty of law of the Université Laval in Québec, first Québec public protector (ombudsman) and important contributor to the reform project of the *Civil Code of Québec*.[143]

Québec, "Barreau du Québec Medal", online: http://www.barreau.qc.ca/en/barreau/reconnaissance/medaille/index.html (consulted on March 18, 2015), **RBA**, **vol. III**, **tab 107**.

137 AGQ's Factum, para 88.

138 François Bélanger, *Les cours de justice et magistrature du Québec : Cour suprême, Cour d'appel, Cour supérieure, Cour fédérale, Cour canadienne* d'impôt, new ed (Québec, Que.: Gouvernement du Québec, 1999) at 347-48, **RBA**, **vol. III**, **tab 110**.

139 Journal du Barreau, "Les lauréats du concours juridique 2005," July 2006, vol 38, no 7, p 13, **RBA**, **vol. III**, **tab 123**.

140 Bélanger, *supra* note 138 at 348-49, **RBA**, **vol. III**, **tab 110**.

141 Université de Montréal, Press Release (15 October 2012), online [in French only]: http://www.nouvelles.umontreal.ca/campus/prix-et-distinctions/20121015-ludem-honore-une-pionniere-du-droit-lhonorable-alice-desjardins.html (consulted on March 18, 2015), **RBA**, **vol. IV**, **tab 135**.

142 Bélanger, *supra* note 138 at 349, **RBA**, **vol. III**, **tab 110**; McGill University, Press Release (4 November 2009), online: http://www.mcgill.ca/channels/news/federal-court-judge-honoured-service-law-faculty-111903 (consulted on March 29, 2015, **RBA**, **vol. IV**, **tab 136**.

143 Bélanger, *supra* note 138 at 350-51, **RBA**, **vol. III**, **tab 110**, and "History [of the Protecteur du Citoyen]", online: http://www.protecteurducitoyen.qc.ca/en/about-us/history/index.html (consulted on March 18, 2015), **RBA**, **vol. IV**, **tab 130**; Paul-André Crépeau, "Une certaine conception de la recodification" in S. Lortie, N. Kasirer and J.-G. Belley

- The Honourable Louis Pratte, Justice of the Federal Court from 1971 to 1973 and Justice of the Federal Court of Appeal from 1973 to 1998, and civil law professor at the Université Laval from 1963 to 1971.[144]

134. In light of the foregoing, it is unreasonable to conclude that former members of the Barreau du Québec who have become judges of the federal courts do not have ties to Québec and are unable to foster the development of the civil law tradition once appointed to the Québec Court of Appeal.

135. The conclusion that judges of the federal courts who are former members of the Barreau du Québec are able to foster the development of the civil law tradition in Québec does not run against this Court's opinion in the *Reference re Supreme Court Act*. On the contrary, in that case, the Court recognized the civil law expertise of judges of the federal courts and stated that it was owing to section 6 of the SCA that they could not be appointed to the Supreme Court:

> 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.[145]

136. In the absence of a provision similar to section 6 of the SCA, there is no basis for accepting, in this context, an interpretation of section 98 that excludes judges of the federal courts. The Court also recognized in the *Reference re Supreme Court Act* that the criterion used by Parliament in section 6 was not the only one that would have made it possible to achieve the objective sought.[146]

137. In the end, the interpretation of the Attorney General of Canada that section 98 authorizes the appointment to the superior courts of Québec of former members of the Barreau, including those

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eds, *Du Code civil du Québec : contribution à l'histoire immédiate d'une recodification réussie,* (Montréal: Éditions Thémis, 2005) at 34, 136, **RBA**, **vol. III**, **tab 116**.

144 Bélanger, *supra* note 138 at 352, **RBA**, **vol. III**, **tab 110**.

145 *Reference re Supreme Court Act*, *supra* note 19 at para 60, **RBA**, **vol. III**, **tab 89**.

146 *Ibid* at para 58, **RBA**, **vol. III**, **tab 89**.

who have become judges of the federal courts, is the only interpretation consistent with the wording and purpose of this provision, which is to ensure among the judges of these courts the knowledge of Québec law. It is not necessary to further limit the scope of section 98 to give effect to its purpose.

138. For these reasons, the opinion of the Court of Appeal is well-founded and the appeal should be dismissed.

PART IV – SUBMISSIONS CONCERNING COSTS

139. The Attorney General of Canada submits that no costs should be awarded in this appeal.

PART V – ORDER SOUGHT

140. For these reasons, the respondent is requesting that this honourable Court:

DISMISS THE appeal;

WITHOUT COSTS.

Ottawa, this 2nd day of April 2015

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Bernard Letarte/Alexander Pless
Department of Justice – Canada
Counsel for Respondent

PART VI –ALPHABETICAL TABLE OF AUTHORITIES

Cases Cited **Paragraph(s)**

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Other References ***(cont'd)*** **Paragraph(s)**

Other References ***(cont'd)*** **Paragraph(s)**

PART VII – EXCERPTS FROM STATUTES, REGULATIONS AND RULES

Constitution Act, 1867

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

. . .

13. Property and Civil Rights in the Province.

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

94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

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

92. La législature de chaque province a compétence exclusive pour légiférer en toute matière comprise dans les domaines suivants :

[…]

13. La propriété et les droits civils dans la province.

14. L'administration de la justice dans la province, y compris la constitution, la prise en charge financière et matérielle et l'organisation des tribunaux provinciaux de compétence tant civile que criminelle, ainsi que la procédure civile devant ces tribunaux.

94. Nonobstant toute autre disposition de la présente loi, le Parlement du Canada peut prendre des mesures d'uniformisation totale ou partielle du droit relatif à la propriété et aux droits civils en Ontario, en Nouvelle-Écosse et au Nouveau-Brunswick, ainsi que de la procédure devant tout ou partie des tribunaux de ces trois provinces. En outre, nonobstant toute autre disposition de la présente loi, le Parlement, à compter de l'adoption d'une loi d'uniformisation, acquiert le pouvoir entier de légiférer en toute matière dont il est traité dans cette loi d'uniformisation, laquelle n'a toutefois effet dans une province que si sa législature lui donne elle-même force de loi.

96. Le gouverneur général nomme les juges des cours supérieures, de district et de comté de chaque province, à l'exception de ceux des cours des successions en Nouvelle-Écosse et au Nouveau-Brunswick.

of Probate in Nova Scotia and New Brunswick.

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

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

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

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

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

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

97. Jusqu'à uniformisation du droit relatif à la propriété et aux droits civils en Ontario, en Nouvelle-Écosse et au Nouveau-Brunswick, ainsi que de la procédure devant les tribunaux de ces provinces, les juges des cours de ces provinces qui sont nommés par le gouverneur général sont choisis au sein des barreaux respectifs de celles-ci.

98. Les juges des cours du Québec sont choisis au sein du barreau de cette province.

99. (1) Sous réserve du paragraphe (2), les juges des cours supérieures occupent leur charge à titre inamovible, sauf révocation par le gouverneur général sur adresse du Sénat et de la Chambre des communes.

(2) La limite d'âge pour le maintien en fonctions des juges des cours supérieures, qu'ils soient nommés avant ou après la date d'entrée en vigueur du présent article, est de soixante-quinze ans. S'ils ont déjà cet âge à cette date, ils sont dès lors mis à la retraite.

100. Le Parlement du Canada fixe et assure le traitement, les indemnités et la pension des juges des cours supérieures, de district et de comté -- à l'exception de ceux des juges des cours des successions en Nouvelle-Écosse et au Nouveau-Brunswick --, ainsi que ceux des juges des cours de l'Amirauté dans les cas où leurs fonctions sont rétribuées.

101. Nonobstant toute autre disposition de la présente loi, le Parlement du Canada peut prévoir la constitution, la prise en charge financière et matérielle et l'organisation d'une cour générale d'appel pour l'ensemble du pays, ainsi que la création de tribunaux additionnels propres à améliorer l'application des lois du Canada.

Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

129. Sauf toute disposition contraire prescrite par la présente loi, — toutes les lois en force en Canada, dans la Nouvelle-Écosse ou le Nouveau-Brunswick, lors de l'union, — tous les tribunaux de juridiction civile et criminelle, — toutes les commissions, pouvoirs et autorités ayant force légale, — et tous les officiers judiciaires, administratifs et ministériels, en existence dans ces provinces à l'époque de l'union, continueront d'exister dans les provinces d'Ontario, de Québec, de la Nouvelle-Écosse et du Nouveau-Brunswick respectivement, comme si l'union n'avait pas eu lieu; mais ils pourront, néanmoins (sauf les cas prévus par des lois du parlement de la Grande-Bretagne ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande), être révoqués, abolis ou modifiés par le parlement du Canada, ou par la législature de la province respective, conformément à l'autorité du parlement ou de cette législature en vertu de la présente loi.

Supreme Court Act

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

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**.**

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

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.

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.

30. (1) 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) 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

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

30. (1) Dans les cas où, par suite de vacance, d'absence ou d'empêchement attribuable à la maladie, aux congés ou à l'exercice d'autres fonctions assignées par loi ou décret, ou encore de l'inhabilité à siéger d'un ou plusieurs juges, le quorum n'est pas atteint pour tenir ou poursuivre les travaux de la Cour, le juge en chef ou, en son absence, le doyen des juges puînés peut demander par écrit que soit détaché, pour assister aux séances de la Cour à titre de juge suppléant et pendant le temps nécessaire :

a) soit un juge de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt;

b) soit, si les juges de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt sont absents d'Ottawa ou dans l'incapacité de siéger, un juge d'une cour supérieure provinciale désigné par écrit, sur demande formelle à lui adressée, par le juge en chef ou, en son absence, le juge en chef suppléant ou le doyen des juges puînés de ce tribunal provincial.

(2) Lorsque au moins deux des juges pouvant siéger ne remplissent pas les conditions fixées à l'article 6, le juge suppléant choisi pour l'audition d'un

judge of the Court of Appeal or a judge of the Superior Court of that Province designated in accordance with subsection (1).

appel d'un jugement rendu dans la province de Québec doit être un juge de la Cour d'appel ou un juge de la Cour supérieure de cette province, désigné conformément au paragraphe (1).

Loi sur les juges

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.

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.

Federal Courts Act

5.3 A person may be appointed a judge of the Federal Court of Appeal or the Federal Court if the person

(*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,

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 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.

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.

5.4 At least five of the judges of the Federal Court of Appeal and at least 10 of the judges of the Federal Court must be persons who have been judges of the Court of Appeal or of the Superior Court of the Province of Quebec, or have been members of the bar of that Province.

5.4 Au moins cinq juges de la Cour d'appel fédérale et dix juges de la Cour fédérale doivent avoir été juges de la Cour d'appel ou de la Cour supérieure du Québec ou membres du barreau de cette province.

Courts of Justice Act

1.The Courts of Québec, in civil, criminal and mixed matters, are:

The Court of Appeal;

The Superior Court;

The Court of Québec;

The Municipal Courts.

1. Les tribunaux du Québec en matières civiles, criminelles ou mixtes, sont :

La Cour d'appel;

La Cour supérieure;

La Cour du Québec;

Les Cours municipales.

Code of Civil Procedure

24. The courts under the legislative authority of the Parliament of Canada which have jurisdiction in civil matters in Québec are the Supreme Court of Canada and the Federal Court of Canada.

The jurisdiction of these courts and the procedure to be followed therein are set out in the laws of the Parliament of Canada.

24. Les tribunaux qui relèvent du Parlement du Canada et ont compétence en matière civile au Québec sont la Cour suprême du Canada et la Cour fédérale du Canada.

La compétence de ces tribunaux et la procédure qui doit y être suivie sont déterminées par les lois du Parlement du Canada.