COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-024618-142

DATE: December 23, 2014

CORAM: THE HONOURABLE **NICOLE DUVAL HESLER, C.J.Q.**
FRANCE THIBAULT, J.A.
YVES-MARIE MORISSETTE, J.A.
ALLAN R. HILTON, J.A.
JEAN BOUCHARD, J.A.

REFERENCE RE SECTION 98 OF THE *CONSTITUTION ACT, 1867*

ATTORNEY GENERAL OF QUEBEC
PETITIONER
v.

ATTORNEY GENERAL OF CANADA
and
THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES
and
THE GRAND COUNCIL OF CREE (Eeyou Istchee)
THE GOVERNMENT OF THE CREE NATION
and
CONSTITUTIONAL RIGHTS CENTRE
and
ROCCO GALATI
INTERVENERS -

OPINION OF THE COURT

I

SUMMARY

[1] Pursuant to the *Court of Appeal Reference Act*[1] the Government of Quebec solicits the opinion of the Court on two constitutional questions relating to the interpretation of s. 98 of the *Constitution Act, 1867*.

[2] The context in which these questions arise is as that on June 13, 2014, the Governor General of Canada appointed the Honourable Robert Mainville to the Quebec Court of Appeal, with effect as of July 1, 2014. When so appointed, Mr. Justice Mainville had been a sitting judge of the Federal Court of Appeal since June 18, 2010. Prior to that appointment, he had been a member of the Barreau du Québec, and then a judge of the Federal Court as of June 19, 2009.

[3] The precise questions the Government of Quebec has asked the Court to answer are as follows:

> 1. Which Quebec courts are covered by section 98 of the *Constitution Act, 1867*?
>
> 2. What conditions for appointing judges to Quebec 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?

II

RELEVANT CONSTITUTIONAL AND LEGISLATIVE TEXTS

[4] At the outset, it is useful to identify the most relevant extracts from the constitution as well as from the federal and provincial legislation that are under review in this reference. They are, in whole or in part, ss. 92, 94, 96, 97, 98 and 129 of the *Constitution Act, 1867*,[2] ss. 5 to 6.1 and 30 of the *Supreme Court Act*,[3] s. 3 of the *Judges Act*,[4] ss. 5.3 and 5.4 of the *Federal Courts Act*,[5] and, in respect of provincial legislation, s. 1 of the *Courts of Justice Act*[6] and art. 24 of the *Code of Civil Procedure*. For ease of reference, all of these statutory provisions are set out in Schedule I to this Opinion.

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1 CQLR, c. R-23.
2 30 & 31 Vict., c. 3.
3 R.S.C. 1985, c. S-26.
4 R.S.C. 1985, c. J-1.
5 R.S.C. 1985, c. F-7.
6 CQLR, c. T-16.

III

THE PARTIES' CONTENTIONS

[5] Before addressing the merits of the reference, a succinct summary of the parties' respective positions is warranted. The Attorney General of Quebec ("AGQ") and the Attorney General of Canada ("AGC") have joined issue and propose different answers to the reference questions. Two of the interveners, Rocco Galati, a member of the Law Society of Upper Canada, and the Constitutional Rights Centre ("CRC") an Ontario entity concerned with the defence of constitutional rights, take the same position as the AGQ, but they offer separate and in some respects different reasoning from that of the AGQ in the answers they propose to the questions referred to the Court. The interveners Canadian Association of Provincial Court Judges ("CAPCJ"), Grand Council of Cree (Eeyou Istchee) ("GCC") and Government of the Cree Nation ("GCN") endorse the position of the AGC, all the while each providing such nuances they deem appropriate. The clearest divergence of opinion can be seen in the proposed answer to the last part of the second reference question, hence the division into two parts of the summary that follows.

A. The parties proposing a negative answer to the last part of the second question.

1) The AGQ's position

[6] The AGQ argues in substance that, correctly interpreted, the power of appointment created by s. 98 of the *Constitution Act, 1867* requires the Governor General, when appointing a judge in Quebec pursuant to s. 96, to do so from amongst the current practising members "from the Bar", some of whom, it is known, perform quasi-judicial functions, or are former members of the Bar sitting on the courts listed in s. 1 of the *Courts of Justice Act*.

[7] The AGQ first pleads that the expression "Courts of Quebec" found in s. 98 of the *Constitution Act, 1867* must necessarily mean those courts to which the Governor General names judges pursuant to s. 96. The Attorneys General share this view, with which the Court unhesitatingly agrees. It is clear that s. 98 must be read with s. 96 in mind. The judges or magistrates who perform judicial functions pursuant to s. 92(14) of the *Constitution Act, 1867* on a court other than a "superior", "district" or "county" court are appointed by the provincial executive branch and do so on courts whose "Constitution, Maintenance and Organization" are matters of provincial legislative responsibility. This is the only proper way to read ss. 96 and 98, on the one hand, and s. 92(14), on the other hand, of the *Constitution Act, 1867*.

[8] As for the second question, the AGQ answers by submitting that pursuant to s. 98 of the *Constitution Act, 1867*, only a member of the Barreau du Québec or a court contemplated by s. 1 of the *Courts of Justice Act* can be named to the Court of Appeal of Quebec.

[9] That is so, she argues, because s. 98 of the *Constitution Act, 1867* creates a specific requirement: that of an ongoing, tangible and concrete link between the person so named, on the one hand, and, on the other hand, Quebec's civil law system, whose existence considerably predates Confederation. The AGQ further argues that public confidence in judicial institutions requires such an interpretation of s. 98 of the *Constitution Act, 1867*, since its finality is analogous to s. 6 of the *Supreme Court Act*, as the Supreme Court decided in *Reference re Supreme Court Act, ss. 5 and 6.*[7] Section 98 is in any event distinct from s. 97 of the *Constitution Act, 1867*, since the framers of the constitution, which includes ss. 94 and 97, foresaw that these two provisions would lapse once uniformity with respect to the laws in relation to property and civil rights in Ontario, Nova Scotia and New Brunswick had been achieved.[8]

[10] Section 98 of the *Constitution Act, 1867* thus reflects an historic compromise with respect to Quebec's civil law tradition, the guardianship of which falls to the Court of Appeal. Therefore, a literal interpretation of s. 98 must be resisted, since doing so would bring about the absurd result that anyone formerly a member of the Barreau and now holding judicial office on one of the courts contemplated by s. 1 of the *Courts of Justice Act* could not be appointed to the Court of Appeal. Since the creation of the Court of Queen's Bench in 1849, all of the judges who have later been appointed to what is now the Court of Appeal have been so named in accordance with this principle, save for Mr. Justice Mainville. Such is the proper interpretation of s. 3 of the *Judges Act* and it must prevail when, pursuant to s. 96 of the *Constitution Act, 1867*, the Governor General appoints a judge to a court of Quebec within the ambit of s. 98.

2) Mr. Galati's position

[11] Mr. Galati argues that the *Supreme Court Reference* decides the outcome of the appointment of Mr. Justice Mainville since s. 6 of the *Supreme Court Act* and s. 98 of the *Constitution Act, 1867* are indistinguishable. Judges of the Federal Courts are thus ineligible for appointments made pursuant to the latter provision.

[12] It follows that the first question adds nothing useful to the validity of the appointment of Mr. Justice Mainville. Nevertheless, should an answer be required, the only possible conclusion is that the term "Courts of Quebec" in s. 98 of the *Constitution Act, 1867* extends to the inferior courts contemplated by s. 92(14) and the superior courts referred to in s. 96. Moreover, any judge named by the Government of Quebec pursuant to s. 86 of the *Courts of Justice Act* or by the Governor General under s. 96

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7 [2014] 1 S.C.R. 433, 2014 SCC 21 [*Supreme Court Reference*].

8 In fact, no such uniformity was ever achieved.

must at the time of the initial appointment be a member of the Barreau du Québec. Thereafter, a promotion from the Superior Court to the Court of Appeal or from an inferior court to a superior court is different from the initial appointment, and nothing prevents such designation to office if the initial appointment was made in compliance with s. 98 of the *Constitution Act, 1867*. In effect, in the first instance, from a constitutional perspective, there are two divisions of a superior court. In the second, it is a matter of a promotion within a unitary judicial system. All that counts is the initial appointment that must be made in conformity with s. 98 of the *Constitution Act, 1867*.

3) The CRC's position

[13] Save for a few nuances, the CRC's submissions are largely the same as those of Mr. Galati. The *Supreme Court Reference* seals the fate of the second reference question, since the terms and purposes of s. 6 of the *Supreme Court Act* and s. 98 of the *Constitution Act, 1867* are identical. A concrete and ongoing familiarity with Quebec values and Quebec's legal tradition are the basis of the public's confidence in its courts. Moreover, it is also important to note that s. 98 of the *Constitution Act, 1867* has never been used in the manner the Canadian government contends is possible, that is by sidestepping what are the identical requirements of these two constitutional provisions. Like Mr. Galati, the CRC is of the view that the term "Courts of Quebec" contemplates both inferior and superior courts, and that a promotion within the unitary judicial hierarchy is distinguishable from an appointment.

B. The parties proposing an affirmative answer to the last part of the second question

1. The AGC's position

[14] As for the first question, the AGC argues, in the footsteps of the AGQ, that the term "Courts of Quebec" in s. 98 of the *Constitution Act, 1867* refers only to those judges appointed pursuant to s. 96. Subsection 92(14) and s. 98 co-exist within the same constitutional instrument and must be interpreted in a manner that preserves the respective jurisdiction of the two levels of government. The case law is clear that ss. 96 and 98 are concerned only with superior courts: see *Re Residential Tenancies Act, 1979*[9] and *Re Provincial Court Judges Remuneration.*[10] In 1867 there were several inferior courts in Quebec, some of which included members who had no legal training. To conclude that the "Courts of Quebec" includes inferior courts could well open a debate as to the status of non-jurists who are members of administrative tribunals and who have inherited the jurisdiction previously exercised by the Court of Quebec, the Provincial Court and the Magistrates Court.

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9 [1981] 1 S.C.R. 714, p. 728 (Dickson J.) [*Re Residential Tenancies Act, 1979*].

10 [1997] 3 S.C.R. 3, para. 85.

[15] As for the second question, it should be answered by deciding that s. 98 of the *Constitution Act, 1867* has but one requirement, namely that someone named to a superior court in Quebec must be or have been a member of the Barreau du Québec. The AGC rejects the analogy with s. 6 of the *Supreme Court Act* and the interpretation of the *Supreme Court Reference* the preceding parties propose. The underlying consideration of s. 98 is sufficient knowledge of the laws of the province and the fact of having received legal training in civil law, which current or former membership in the Barreau confirms. Given the numerous fluctuations in the conditions of membership in the Barreau over the years, a requirement of current membership would give rise to absurd consequences. The requirement thus established is a minimal one, and Parliament, in the exercise of its power to legislate, and more specifically pursuant to s. 3 of the *Judges Act*, can provide for additional conditions that satisfy the requirements of s. 98 of the *Constitution Act, 1867* while at the same time limiting the available pool of potential candidates. A judge of a Federal Court named from Quebec pursuant to s. 3 of the *Judges Act* can thus be named to the Quebec Superior Court or the Quebec Court of Appeal while respecting the requirement of s. 98.

2) The CAPCJ's position

[16] The CAPCJ position closely adheres to that of the AGC, and it very much insists on the impact the Court's answers could have on the possibility or impossibility of its members acceding to openings on superior courts contemplated by ss. 96 and 98 of the *Constitution Act, 1867*.

[17] The CAPCJ proposes the same answer as the two Attorneys General to the first question.

[18] With respect to the second question, the CAPCJ argues that the framers' only concern, and thus requirement by using the words "from the Bar of that province", was to guarantee that the Quebec judiciary would be composed of jurists steeped in the civil law tradition. It left it to Parliament to determine the duration of membership in the Bar, which it did in the *Judges Act*, or to require actual membership, which Parliament abstained from doing in the *Judges Act*.

[19] From this perspective, and considering the textual differences between the *Supreme Court Act* and the *Judges Act*, the *Supreme Court Reference* decided nothing that is definitive in answer to the questions with which the Court is seized. Several institutional changes and modifications to conditions of membership in the Barreau have occurred since Confederation, and it is therefore appropriate to take account of them here. The CAPCJ invites the Court to dissipate the ongoing uncertainty that has existed since the *Supreme Court Reference* with respect to judges of inferior courts and judges of federal courts being eligible for appointment to the superior courts of Quebec. It concludes by contending that an interpretation of s. 98 of the *Constitution Act, 1867* that provides for the appointment of judges of inferior courts to the Quebec Superior Court and the Quebec Court of Appeal, but which precludes judges of federal courts who were

members of the Barreau, draws lexical distinctions where there are none: the text of s. 98 of the *Constitution Act, 1867* justifies no such distinctions based on the concepts of a unitary system and hierarchy that are nowhere to be found in the applicable texts.

3) The GCC and GCN position

[20] These two interveners filed a single factum. At the outset, they point out that in light of the similarity of ss. 97 and 98 of the *Constitution Act, 1867*, to conclude that the expression "from the Bar of that Province" in s. 98 requires membership at the time of appointment implies that the same would be true for the words "from the respective Bars of those Provinces" in s. 97. This, they say, would have serious consequences on the legitimacy of the appointment of a significant number of judges of superior and appeal courts in Canada as well as the validity of numerous judgments rendered throughout Canada since 1867.

[21] The GCC and the GCN contend, like the AGC and the CAPCJ, that the *Supreme Court Reference* does not in any way lead to such a conclusion.

[22] On the first question, they would answer in the manner proposed by the Attorneys General.

[23] On the second question, they have provided a comprehensive historical analysis that illustrates the differences between superior and inferior courts that existed prior to Confederation, all the while identifying the criteria then used for the selection of superior court judges. The practice of that era, the meaning of the expression "advocate of ten years standing" in statutes pre-dating and post-dating Confederation and the expressed intention in s. 129 of the *Constitution Act, 1867* all point towards showing that having 10 years of membership in the Bar before or at the time of an appointment to a superior court satisfies the criteria consistent with existing practices. As far as s. 98 itself is concerned, it provides a single criterion of actual or prior membership in the Bar, without specifying the duration of that membership.

[24] Based on this analysis, the GCC and the GCN conclude that as long as they have been members of the Barreau du Québec, the judges of the Supreme Court of Canada, the Federal Court of Appeal and the Federal Court qualify under s. 98 on the same basis as judges of the Court of Quebec or the Municipal Court.

IV

THE MERITS OF THE REFERENCE

[25] It is useful to begin with the Supreme Court's opinion in the *Supreme Court Reference* since, at least on the surface, the questions the Supreme Court analysed are analogous to those examined here. That being said, it is also necessary to consider s. 98 of the *Constitution Act, 1867* as such, as it was not amongst the constitutional

provisions on which the Court expressed an opinion. The relationship between s. 98 and s. 3 of the *Courts of Justice Act* also warrants attention. Before doing so, however, one point requires clarification: in the current state of affairs, the term "Courts of Quebec" in s. 98 of the *Constitution Act, 1867* necessarily means the Quebec Superior Court and the Quebec Court of Appeal. That is so for the reasons given by the AGQ and the AGC, with which the Court agrees.

A. The ambit of the *Supreme Court Reference*

[26] That reference also occurred in a precise context. By order-in-council dated October 3, 2013, Mr. Justice Marc Nadon, then a supernumerary judge of the Federal Court of Appeal, and a puisne judge of that court since 2001, was appointed to the Supreme Court of Canada. Mr. Justice Nadon had become a judge in 1993 by being appointed to what was then the Trial Division of the Federal Court. Prior to his appointment, he had been a member of the Barreau du Québec for more than 10 years. The legality of his appointment was challenged in the Federal Court by Rocco Galati, who is also an intervener in this reference. On October 22, 2013, the Governor General in Council submitted two questions to the Supreme Court to determine whether the appointment of Mr. Justice Nadon was made in conformity with s. 6 of the *Supreme Court Act*.

[27] Only the first question the Court answered is of interest in this reference. That is so because the second question dealt with whether Parliament could amend ss. 5 and 6 of the *Supreme Court Act*, or render their meaning more precise by a declaratory statute, an issue that does not arise in this reference. The first question was in the following terms:

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

[28] At first glance it may be tempting to take account of the similarity between the words "from the Bar of that Province" in s. 98 of the *Constitution Act, 1867* and those of "appointed ...from among the advocates of that Province" in s. 6 of the *Supreme Court Act*. As neither of these two provisions mentions the Federal Courts, and as they both identify a pool of potential candidates from the legal profession in almost identical terms, can the answer given by the majority judges to the first question be transposed here? If such is the case, a negative answer must be given to the second question and the first question becomes moot.

[29] Such a reading of the *Supreme Court Reference*, however, would camouflage the complexity of the issue to the point of substantially distorting its true ambit. Section 6 is included in a statute that, by reason of ss. 41 and 42 of the *Constitution Act, 1982*[11] has acquired the status of a constitutional text, more specifically as it relates to "the composition of the Supreme Court of Canada" (s. 41(d)). As a result, on this precise issue the provisions of the *Supreme Court Act* have to be interpreted in relation to each other in order to determine their true meaning. Thus, the words in the French version of the statute, "choisis ... parmi les avocats de celle-ci" in s. 6 of the *Supreme Court Act* must be read by taking account of the presence of the words "anciens ou actuels" in that version of the provision that precedes it, s. 5, which correspond to the words "is or has been" in the English version, which qualify the word "person". It follows that in the English version, from a strictly textual perspective, the terms "[a]ny person...who is or has been..." may extend both to "a judge of a superior court of a province" and "a barrister or advocate of that province". In other words, and for purely textual reasons[12], a problem of interpretation arises that requires clarification; its difficulty is made apparent by the fact that one member of the Court dissented.

[30] Be that as it may, the majority judges concluded their analysis of s. 5 with the following observation:

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

As there is no mention of former or current judges of the Federal Courts in s. 5, it follows from the foregoing that a correct reading of the provision would be:

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

And a perfect equivalent in the French version would be:

> Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats, *actuels ou anciens*, inscrits pendant au moins dix ans au barreau d'une province.

[31] To conclude on this point, the majority judges in the *Supreme Court Reference* considered s. 6 as a distinct norm that dealt with the particular case of the appointment of judges from Quebec. Moldaver, J., dissenting, saw it instead as an exception of limited application to the more general norm of s. 5, which applied only to judges

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[11] Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[12] On this point, see Michael Plaxton and Carissima Mathen, "Purposive Interpretation, Quebec and the Supreme Court Act" (2013), 22 :3 Constitutional Forum 15, p. 21.

appointed from Quebec. He felt, however, that the general norm maintained its precedence, in particular as it concerned the duration of membership in a Bar (10 years) and the words "is or has been" in s. 5. He added at paragraph 123, in speaking of s. 6, that:

> ... if it is not read in conjunction with s. 5, *any* member of the Quebec bar, including a newly minted member of one day's standing, would be eligible for a Quebec seat on this Court.

[32] Furthermore, there are other convincing textual elements that support the majority's interpretation.

[33] The first of these comes from the frequently applied rules of interpretation of statutes that the majority judges described as follows:

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

As a corollary, since the enumeration in s. 6 of the *Supreme Court Act* does not mention judges of the Federal Court of Appeal, nor former members of the Barreau du Québec, the category of those who may be named to the Supreme Court pursuant to this section is consequentially circumscribed.

[34] A second element, also textual in nature, weighs heavily in the same direction. That element is s. 30 of the *Supreme Court Act*, and more particularly subsection (2). This provision guarantees that when there are less than the quorum of five judges as provided for in section 25, a judge is designated by priority from amongst the judges of the federal courts or the Tax Court of Canada, "... to attend the sittings of the Court at the time and for the period for which his attendance is required" as an *ad hoc* judge. On the other hand, unless two of the four judges of the Supreme Court are judges named pursuant to s. 6, the *ad hoc* judge whose presence satisfies the quorum must be selected from among the judges of the Superior Court or the Court of Appeal of Quebec for the hearing of any appeal from a judgment rendered in Quebec. In other words, in the circumstances this provision contemplates, the two judges who each satisfy s. 6 (for instance, a puisne judge of the Supreme Court named while a member of the Barreau du Québec, and an *ad* hoc judge designated from amongst the judges of the Quebec Court of Appeal or the Quebec Superior Court) cannot be reduced in number, despite the precedence otherwise given to judges of the Federal Courts and the Tax Court of Canada pursuant to s. 30(1)(b).

[35] Other factors that require consideration are those that relate to the historical evolution of the *Supreme Court Act* between 1875 and 1985 (which the majority judges examine at paragraphs 20 – 27 of their reasons) and the purpose of s. 6 as set out in its original iteration, as it appears from the parliamentary debates when the Supreme Court of Canada was created, which the majority judges discuss mainly at paragraphs 46 – 59 of their reasons. This opinion deals with that subject at paragraphs [44] and following below.

[36] The reference with which the Court is now seized concerns first and foremost the meaning of s. 98 of the *Constitution Act, 1867*. To answer the questions the Government of Quebec has posed, there is no precise legislative context comparable to that which guided the majority judges in the *Supreme Court Reference* in their interpretative analysis. As interesting as it may be, the opinion in that case is not directly relevant, and therefore not conclusive as to the answers to be given in this case. It certainly cannot be deduced, by an analogy amounting to extrapolation, that the opinion determined the meaning of s. 98 of the *Constitution Act, 1867* and that it dictates a negative answer to the question whether "that section allow(s) the appointment of persons who are members of federal courts".

B) The meaning of s. 98 of the *Constitution Act, 1867*

[37] Section 98 has remained unchanged since its coming into force, despite significant institutional changes in the Quebec judicial landscape since 1867 and despite the creation in 1875, pursuant to s. 101 of the *Constitution Act, 1867* of "a General Court of Appeal for Canada". As a constitutional provision, s. 98 must be interpreted accordingly, on which all of the parties heard by the Court agree.

[38] Very recently, in its opinion in answer to the *Reference re Senate Reform*,[13] the Supreme Court synthesized the principles that govern the interpretation of the constitution in the following terms:

> 25 The Constitution implements a structure of government and must be understood by reference to "the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning": *Secession Reference*, at para. 32; see generally H. Cyr, "L'absurdité du critère scriptural pour qualifier la constitution" (2012), 6 J.P.P.L. 293. The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Supreme Court Act Reference*, at para. 19. Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism,

[13] [2014] 1 S.C.R. 704, 2014 SCC 32 [*Reference re Senate Reform*].

> democracy, the protection of minorities, as well as constitutionalism and the rule of law: *Secession Reference; Provincial Court Judges Reference; New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.
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> 26 These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an "internal architecture", or "basic constitutional structure": *Secession Reference*, at para. 50; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57; see also *Supreme Court Act Reference*, at para. 82. The notion of architecture expresses the principle that "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole": *Secession Reference*, at para. 50; see also the discussion on this Court's approach to constitutional interpretation in M. D. Walters, "Written Constitutions and Unwritten Constitutionalism", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008), 245, at pp. 264-65. In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.

Although s. 96 of the *Constitution Act, 1867* has been the subject of much comment, the same is not true for s. 98. It can be said of the latter provision, without exaggeration, that since 1867 it has never been a source of controversy, and although consistently applied since then, it has gone largely unnoticed. Also, the second reference question arises for the first time in close to 150 years and it is obvious that there are two factors that explain this: the opinion in answer to the *Supreme Court Reference* and the appointment to the Quebec Court of Appeal of a sitting judge of the Federal Court of Appeal. The second of these factors occurs for the first time since Confederation itself, for during this time no judge has been appointed to a superior court in Quebec after having served as a judge of the Exchequer Court or one of the Federal Courts.

[39] The historic context therefore takes on particular importance, since in the almost total absence of case law or learned commentary, we can only shed light on the purpose of s. 98 of the *Constitution Act, 1867* from that context. In this connection, the AGQ is right to emphasize that in matters of constitutional interpretation, a provision that embodies an historic compromise must be interpreted in a manner to preserve the compromise rather than to neutralize its effects.[14]

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[14] *Supreme Court Reference*, supra note 7, para. 48.

[40] Completing the division of powers with respect to the administration of justice (ss. 92(14) and 101 of the *Constitution Act, 1867*) and the power of appointment of superior court judges (s. 96), ss. 97 and 98 circumscribe the federal power by identifying in general terms those candidate susceptible of being appointed as judges of superior courts. The AGQ contends that ss. 97 and 98 must be distinguished one from the other since s. 97 was only a transitional provision. Thus, s. 98, contrary to s. 97, "constitue [...] un élément fondamental du compromis relatif à la protection du droit civil." On this basis, it argues that the Court should conclude that s. 98 embraces a normative content that differs from s. 97. On the contrary, it does no such thing; the argument is flawed from a historical perspective.

[41] Indeed, there is an important fundamental distinction between, on the one hand, the historic compromise of 1867 that was meant to permit the civil law tradition to flourish in Quebec, and, on the other hand, that which permitted the eventual creation of a general court of appeal for Canada in 1875. Such a distinction, however, is not to be found between ss. 97 and 98.

1) The civil law tradition and s. 92(13)

[42] Let us begin with the status of the civil law tradition in Quebec at the time of Confederation. This tradition had already been implanted; the *Quebec Act* of 1774[15] had begun to entrench it, as numerous scholars have shown.[16] Somewhat less than 100 years later, s. 92(13) of the *Constitution Act, 1867* formally constitutionalized the protection of Quebec civil law in the form we know today. Between 1774 and 1867, the *Constitution Act, 1791*[17] and the *Act of Union of 1840*[18] served as a kind of bridge confirming that civil law remained the foundation of the private law of Lower Canada. The comments in this respect of L'Heureux-Dubé, J. in her concurring opinion in *Laurentide Motels v. Beauport (City)* are worth repeating:

> 64 The *Quebec Act of 1774* sealed the fate of the two major legal systems that would govern the law applicable in Quebec: French civil law as it stood before 1760 with its subsequent amendments in Quebec for everything relating to property and civil rights, and the common law as it stood in England at that time, and as subsequently amended, for what related to public law. Section VIII stated:

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15 14 Geo. III, c. 83, s. VIII (U.K.)

16 See: Luc Huppé, *Histoire des institutions judiciaires du Canada*, Montréal, Wilson & Lafleur, 2007, p. 153 et seq.; Jacques-Yvan Morin & José Woehrling, *Les constitutions du Canada et du Québec : du Régime français à nos jours*, Tome premier – Études, Montréal, Éditions Thémis, 1994, p. 42 et seq.; André Tremblay, *Les compétences législatives au Canada et les pouvoirs provinciaux en matière de Propriété et de Droits civils*, Ottawa, Éditions de l'Université d'Ottawa, 1967, p. 35 et seq.; Gérald-A. Beaudoin, *La constitution du Canada Canada : Institutions, Partage des pouvoirs, Charte canadienne des droits et libertés*, 3e éd., Montréal, Wilson & Lafleur, 2004, p. 7 to 9, 413 & 414; Bayard Reesor, *The Canadian Constitution in Historical Perspective*, Scarborough, Prentice-Hall Canada inc., 1992, p. 9 et seq.

17 31 Geo. III, c. 31 (U.K.).

18 3-4 Vict., c. 35 (U.K.).

> ... and that in all Matters of Controversy relative to
>
> Property and Civil Rights, Resort shall be had to the Laws of Canada, as the Rule for the Decision of the same ...until they shall be varied or altered by any Ordinances that shall, from Time to Time, be passed in the said Province.

65 Section 92(13) of the *Constitution Act*, 1867 incorporates this rule [...][19]

Writing along the same lines, Prof. André Tremblay adds that in all probability the proposed federation would never have seen the light of day without this provision:

> Il est décevant de constater le peu de commentaires disponibles sur les motifs qui amenèrent les hommes de 1867 à insérer la « propriété et les droits civils » dans les sujets relevant de la compétence des législatures. Toutefois, il est permis d'affirmer que la situation particulière du régime juridique du Bas-Canada a obligé les délégués aux conférences à inscrire ce sujet dans la liste des attributions législatives des provinces. En réalité, il n'en pouvait être autrement.
>
> [...] Nous avons vu, les différences existant entre les systèmes juridiques du Bas-Canada et des autres provinces étaient, de l'avis même de Macdonald, une des causes profondes de l'impossibilité de réaliser l'union législative; le maintien obligatoire de· ces différences conduisait donc à la fédération. Jamais le Bas-Canada n'aurait accepté un régime qui l'aurait dépossédé des avantages de l'Acte de Québec ou qui aurait rendu aléatoires les bénéfices de la codification de ses lois civiles.[20]

The pre-confederation debates often coincide with the views of this author, in particular those of Sir Étienne-Paschal Taché on February 3, 1865,[21] as well as Sir John A. Macdonald on February 6, 1865,[22] Sir Antoine-Aimé Dorion on February 16, 1865[23] and Joseph-Édouard Cauchon on March 2, 1865.[24]

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19 [1989] 1 S.C.R. 705, p. 737.

20 André Tremblay, *supra* note 16, p. 42 & 43. See also: Jacques-Yvan Morin & José Woehrling, *supra* note 16, p. 154

21 Canada, Legislative Assembly, *Parliamentary Debates on the subject of the Confederation of the British North American Provinces*, 3rd Session, 8th Provincial Parliament of Canada, Quebec, Hunter, Rose & Co, Parliamentary Printers, p. 9 [*1865 Debates*].

22 *Ibid*. p. 29.

23 *Ibid*. p. 263 & 264.

24 *Ibid*. p. 575 & 576.

[43] Section 92(13) entrenched the recognition of this "historic fundamental compromise" with respect to the protection of civil law.[25] This provision, however, did not only concern Quebec in the preservation of its legal tradition. It also took account of the preoccupations of the other colonies that intended to join the federation and who feared the assimilation of their private law and local customs. This historical fact is important as it explains the structure of Part VII of the *Constitution Act, 1867* devoted to the "Judicature", and it shows that ss. 97 and 98 constitute a means to ensure the preservation of local private law, a compromise rendered necessary in view of the potential of uniformisation of the private law of common law contemplated by s. 94 of the *Constitution Act, 1867*.

2) The Supreme Court and s. 6 of the Supreme Court Act

[44] We now turn to the historic compromise that contemplated the creation of a "General Court of Appeal for Canada", which is to say the Supreme Court of Canada. As we have observed at paragraph [41] above, this compromise is clearly distinct from that which was the cornerstone of s. 98 of the *Constitution Act, 1867*.

[45] When the *Supreme Court Reference* was argued, the AGC took the position that the purpose of s. 6 of the *Supreme Court Act* was "simply to ensure that three members [of the Court] are trained and experienced in Quebec civil law" and that "this purpose is satisfied by appointing either current or former Quebec advocates, both of whom would have civil law training and experience".[26] The majority judges rejected this view purporting to define the only purpose, for in their opinion, "a review of the legislative history reveals an additional and broader purpose".[27]

[46] What was this additional and broader purpose? To properly understand its nature and origin, it is preferable to quote at length from the reasons of the Supreme Court. Given both the length and importance of these extracts, they have been included *in extenso* in Schedule II of this opinion. Stated in a few words, the purpose consists of the following:

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

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[25] See: Bayard Reesor, *supra* note 16, p. 48: "The most visible provisions to protect French culture were the granting to provinces jurisdiction over property, civil rights, and education [...]".

[26] *Supreme Court Reference, supra* note 7, para. 46.

[27] *Ibid*, para. 47.

[47] And what is the origin of this purpose? The historic compromise of 1875 that allowed for the creation of the Court. We can see from the extracts quoted in Schedule II that the historic context considered in the *Supreme Court Reference* was only that of 1875 surrounding the creation of the Court as a federal and bi-juridical institution within which the three judges from Quebec would be relied upon to represent the civil law tradition. That is the context in which s. 6 was adopted, a compromise that reflected the origin of the institution. It is in this context that confidence in the institution and its legitimacy, a determining factor for the majority, is rooted. The majority judges deal with this issue extensively at paragraphs 20, 47-56 and 59 of their reasons. Given their length but also their importance, we have attached them *in extenso* in Schedule II to this opinion.

[48] In reading these extracts, we thus see the particular concern that led to the historic compromise at the origin of s. 6 of the *Supreme Court Act* (or the provisions the preceded it) as well as its underlying "additional and broader purpose".

3) Sections 97 & 98 of the *Constitution Act, 1867*

[49] We now consider the relationship between these two provisions of the constitution that specifically provide from which Bar may come those whom the Governor General can appoint to superior courts. The Governor General's power of appointment is found in s. 96 of the *Constitution Act, 1867*. This section has been characterized as anomalous by some authors[28] but its justification resides in the fact that the provincial courts which enjoy inherent jurisdiction decide issues relating to federal, provincial and constitutional law,[29] a feature that has no equivalent in a federal state such as, for example, the United States. As one might say, as did one author: "...some federal involvement in their establishment is appropriate".[30] The Supreme Court has already held that s. 92(14) as well as s. 96 of the *Constitution Act, 1867* are the result of a significant compromise and provide "a strong constitutional base for national unity through a unitary judicial system".[31]

[50] The issue of judicial appointments could well have been the subject of animated discussions when the debates leading to Confederation occurred, and above all from participants from Lower Canada. As the author Evelyn Kolish has emphasized, the superior courts in Lower Canada (or the courts of King's Bench of that era) had to deal

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28 Peter W. Hogg, *Constitutional Law in Canada*, looseleaf, Toronto, Carswell, 2007, p. 7-5. See also: Bora Laskin, "Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alley Case", (1955) Can. Bar Rev. 993, p. 996.

29 *Ibid.*, Peter W. Hogg; Jacques-Yvan Morin & José Woehrling, *supra* note 16, p. 337.

30 *Ibid.*, Peter W. Hogg.

31 *Re Residential Tenancies Act, 1979*, *supra* note 9, p. 728; *Trial Lawyers Association on British Columbia v. British Columbia*, 2014 SCC 59, para. 29 (McLachlin, C.J.): "Taken together, these sections have been held to provide a constitutional basis for a unified judicial presence throughout the country [...]."

with the presence of several judges of British origin until the mid-1830s,[32] a situation that would be denounced in 1834 by the 76th of the *92 résolutions de l'Assemblée legislative du Bas-Canada.* Representatives of Lower Canada could have feared that in granting a power as important as that of appointment to the Governor General, the practice of naming judges of foreign origin, or bereft of knowledge of local private law, would continue apace. With one exception,[33] however, such would not be the case. As for Sir Hector-Louis Langevin, then solicitor general, he alluded to s. 98 during the debates of February 21, 1865:

> [...] 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.[34]

[51] The absence of debates or discussions on the merits of the power of appointment of judges of superior courts is probably explained by a simple fact. Contrary to the Supreme Court, which had to be created from scratch, the institutions to which the judges would be named already existed and their legitimacy was accepted because the judges came from the local Bar. Prof. Russell has written on this subject:

> Actually, it is not surprising that the authors of Canada's Constitution had so little to say about the judicial power. Unlike the revolutionary constitutions of the United States and France, the Canadian Constitution did not purport to be a comprehensive plan for new and ideal system of government. The British North Americans, including their francophone members, did not see any need to spell out the features of the main institutions of government. The principal objective of the confederation project was to combine the legacy of British institutions with a federal system of government. Thus the judicial branch did not have to be created in 1867: its main components already existed. Superior courts of civil and criminal jurisdiction had been functioning in the founding colonies for many years prior to Confederation and there was a general court of appeal, the Judicial Committee of the Privy Council, in the imperial capital. The continuity of judicial institutions is manifest in section 129, which provide that "all Courts of civil and Criminal Jurisdiction... shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively as if the Union had not been made."[35]

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32 Evelyn Kolish, *Nationalismes et conflits de droits : le débat du droit privé au Québec 1760-1840*, Montréal, Hurtubise HMH, 1994, p. 109. See also: Louis Baudouin, "Méthode d'interprétation judiciaire du Code civil du Québec", (1950) R. du B. 397, p. 399.

33 See the speech of Sir Antoine-Aimé Dorion, *1865 Debates*, *supra* note 21, March 9, 1865, p. 860.

34 *Ibid*. February 21, 1865, p. 388.

35 Peter H. Russell, *The Judiciary in Canada: the Third Branch of Government*, Toronto, McGraw-Hill Ryerson Limited, 1997, p. 47.

In fact, the prevailing situation in Lower Canada was quite clear. Since the fundamental reform of the superior courts in 1849, the conditions of appointment of their judges, fixed by law, guaranteed that they would all had received training in civil law.[36] The effects of this reform would prove to be long-lasting, since pursuant to s. 129 of the *Constitution Act, 1867*, such laws remained in force after Confederation. They were only repealed in 1887 by a provincial statute.[37]

[52] It follows from the foregoing that s. 98 must be seen in a precise context that is quite different from that which surrounded the creation of the Supreme Court. The preoccupations that arose in 1875 did not have to be raised between 1865 and 1867; Quebec had no reason to fear the weakening of its civil law tradition resulting from judicial appointments in the same way as those that had been the target of sharp criticism in the *92 résolutions de l'Assemblée legislative du Bas-Canada*. Writing on the Supreme Court, Prof. Russell mentions with respect to several leading political personalities of the time that "[...] their hostility to the idea of a court composed predominately of jurists from the English common-law tradition being vested with appellate control over the French civil law of Lower Canada".[38] Nothing such as that appears to have happened in the case of appointments to superior courts created in 1849. It can also be deduced that s. 98 of the *Constitution Act, 1867* was intended to continue a practice that was well-established prior to Confederation.

[53] The author Luc Huppé contends that in limiting the criteria of appointment to the legal training and territorial connection of candidates, s. 98 of the *Constitution Act, 1867* amounted to a net retreat in light of the state of the law that existed prior to Confederation.[39] One can nevertheless see things from a different perspective. The very broad expression that is found in this provision ("from the Bar of the Province – parmi les members du barreau de cette province") showed the true intention of the framers: to ensure that the judges of superior courts would be: (1) legally trained and (2) trained in local law. Nothing in this compromised the practice already followed prior to 1849, which was implemented legislatively that year.

[54] Other authors share the latter view. Thus, Prof. Bayard Reesor has written that the purpose of ss. 97 and 98 was "to ensure that only lawyers who are familiar with a province's law will be appointed to the superior, district and county courts".[40] This opinion finds support from Prof. Hogg:

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36 See: *An Act to amend the Laws relative to the Courts of Original Civil Jurisdiction in Lower-Canada*, 1849, 12 Vict., c. 38; *An Act to establish a Court having jurisdiction in Appeals and Criminal Matters*, for Lower-Canada, 1849, 12 Vict., c. 37; *An Act respecting the Court of Queen's Bench*, R.S.L.C. 1861, c. 77, s. 2.

37 *An Act respecting the Revised Statutes of the Province of Quebec*, 1887, 50 Vict., c. 5.

38 Peter H. Russell *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, Ottawa: Information Canada, 1969, p. 7.

39 Luc Huppé, *supra* note 16, p. 457.

40 Bayard Reesor, *supra* note 16, p. 254.

> [...] Sections 97 and 98 require that 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.[41]

For his part, Prof. W.H. McConnell has stated that: "[...] it would be most inappropriate to appoint common-law lawyers from other provinces to the Bench in Quebec".[42] Again, nothing in relation to this provision supports the view that the framers intended to impose additional requirements for appointment such as that of contemporaniety found in s. 6 of the *Supreme Court Act*.

[55] In fact, the only fears that can be inferred from the pre-Confederation debates were related to the eventual effects that would occur as the result of a lack of knowledge of civil law. These can be seen in the following extract from the remarks of Joseph-Édouard Cauchon on March 2, 1865 in a speech concerning not the courts contemplated by ss. 97 and 98 of the *Constitution Act, 1867* but rather the creation of a future Supreme Court:

> [...] here is the point to which I wish to draw the attention of this House. Among all the things guaranteed to Lower Canada in the Constitution, and in fact to all the provinces, we find their own civil laws. Lower Canada has been so tenacious of its civil code, that it is laid down in the project before us that the Federal Parliament shall not even be able to suggest legislation by which it may be affected, as it will have the right to do for the other provinces. The reason is obvious – the civil laws of the other provinces are nearly similar; they breathe the same spirit and the same principles; they spring from the same source and the same ideas. But it is not so with regard to those of Lower Canada, with their origin from almost entirely Latin Sources; and we hold them as to a sacred legacy; we love them because they suit our customs, and we find under them protection for our property and our families. The Conference has understood and respected our ideas on this point.
>
> However, if a Court of Appeal should one day be placed over the judiciary tribunals of all the provinces, without excepting those of Lower Canada, the result would be that the same laws would be explained by men who would not understand them, and who would, involuntarily perhaps, graft English jurisprudence upon French code of laws. Such a spectacle presented in Canada after the conquest, and no one, I am sure, would wish to see a repetition of the scene.[43]

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41 Peter W. Hogg, *supra* note 28, p. 7-5.

42 W.H. McConnell, *Commentary on the British North America Act*, Toronto, MacMillan of Canada, 1977, p. 316 & 317.

43 *1865 Debates*, *supra* note 21, p. 575 & 576.

In reality, these comments constitute, at the same time, a seal of approval for those local jurists, advocates and judges who were then responsible for the administration of private law in Lower Canada.

[56] In conclusion on this point, any parallel between the historic compromise identified in the *Supreme Court Reference* and that which was the basis of s. 98 of the *Constitution Act, 1867* when invoked to establish a requirement of contemporaniety in s. 98 must be rejected. To be sure, the importance of s. 98 in safeguarding the civil law tradition in Quebec should not be minimized, but it is impossible to argue that this provision discloses the same historic compromise that underlies s. 6 of the *Supreme Court Act*. Thus, one should be careful not to substitute an essentialist concept of the civil law tradition to one that was simply based on pragmatism. It is the latter that appears to have animated the text of s. 98. To transpose the Supreme Court's majority opinion to the present context would mean, to use an actual example, that a judge who was appointed to the Quebec Superior Court in 1993 and later became the co-ordinating judge for the District of Hull (Gatineau) Pontiac and Labelle as of July of 1998, and then was named to the Federal Court of Appeal in April of 2007, could not now be appointed to the Superior Court or the Court of Appeal of Quebec.

[57] Since a judge of either of the two Federal Courts cannot be named to the Superior Court or the Court of Appeal of Quebec without having been a member of the Barreau du Québec, it is difficult to see what cognitive obstacle lies in the way of such a judge fully participating, whether on a trial or appellate court, in legal proceedings involving Quebec civil law.

4) The meaning of "from the Bar – parmi les members du Barreau"

[58] Once having put aside, for the preceding reasons, the notion of contemporaniety adopted by the majority judges in the *Supreme Court Reference*, it remains to consider the meaning of the expression the framers used in s. 98 of the *Constitution Act, 1867*.

[59] The text of ss. 97 and 98 of the *Constitution Act, 1867* appears to impose only one basic condition for someone to be appointed by the Governor General, namely that the person "shall be from" the Bar of the province where the appointment is made. This conclusion is appropriate here because in fact, for decades now there have been a very great number of judicial appointments. Not all of the judges of all of the Canadian superior courts, whether those of first instance or appeal, have been appointed directly from the Bar of their province, in fact, far from it. In numerous cases, appellate judges have first sat as trial judges. Many were named to a superior court after having served as judges of courts contemplated by s. 92(14) of the *Constitution Act, 1867*. Thus, to read a requirement of contemporaniety into s. 98 when no one has ever suggested such a requirement since 1867 would quite simply violate common sense.

[60] There is a double corollary of the requirement of membership in a Bar without that of contemporaniety. First, ss. 97 and 98 of the *Constitution Act, 1867* granted a

limited role[44] to the provinces to create the pool of candidates eligible for appointment by the federal government. Next, the Governor General (in reality, the federal cabinet) enjoys wide discretionary power in the appointment of judges named pursuant to s. 96 of the *Constitution Act,1867* that nevertheless must be exercised in harmony with the relevant constitutional and legal requirements.

[61] The AGC is right to argue that the status a Bar confers on someone should not become the criteria of s. 98. Such status is susceptible of variation from province to province. It may also vary from one era to another within the same province. This is what occurred in the 1960s when changes were made to the Barreau du Québec's internal structure relating to "non-practising advocates"[45] and "honorary advocates",[46] both of which had been open to members exercising full time judicial functions[47] but were abolished. Nevertheless, as the text of the constitution makes explicit mention of the bars of provinces, it is necessary to give it effect, which is satisfied by considering the admission to a Bar. This concept serves as a kind of common denominator for all of the provinces and has the advantage of being more objective[48] than the changes in status would be after admission to the Bar.

[62] Finally, it must be remembered that Parliament adopted the previously mentioned *Judges Act*,[49] and that s. 3 of this statute lists the conditions of appointment to the judiciary that are much stricter than those that s. 98 of the *Constitution Act, 1867* provides.

[63] Section 3(a) of the *Judges Act* concerns practising advocates or barristers while s. 3(b) concerns advocates or barristers who exercised powers and performed duties and functions of a judicial nature on a full-time basis after their admission to a Bar. Parliament thus treats years of service as a judge on the same basis as years of membership in a bar as an advocate or barrister. In addition, s. 3(b) contemplates judicial "promotions" from inferior provincial or federal courts or tribunals to a superior trial or appellate court. It goes without saying that s. 3 remains subject to the requirements of ss. 97 and 98 of the *Constitution Act, 1867*. A judge named to a province's superior trial or appellate court pursuant to s. 3(b) must therefore have a link to the Bar of the province from which the judge is named.

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44 By reason of establishing the conditions of admission to the legal profession: *Kreiger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65, para. 33 (Iacobucci and Major, JJ.); *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, paras. 41-42.

45 *An Act concerning the Bar of Quebec*, S.Q. 1953-54, c. 59, s. 89, para. 5: "Non-practising advocates are advocates who may remain on the roll, although disqualified from practising by reason of their occupations, positions or functions."

46 *The Bar Act*, R.S.Q. 1964, c. 247, s. 89, para. 5: "Honorary advocates are those who may be entered on the roll, although disqualified from practising the profession by reason of their occupations, positions or functions."

47 Jules Deschênes, "Examen critique de l'organisation du Barreau" (1968) 28 R. du B. 417, p. 450 & 451

48 In the sense the majority judges intended in the *Supreme Court Reference*, *supra* note 7, para. 58.

49 R.S.C. 1985, c. J-1.

[64] In addition, it can be seen that this provision was preceded by an amendment to the *Judges Act* in 1912.[50] There is thus a direct relationship with the pre-confederation provisions that governed judicial appointments in Lower Canada. In effect, certain statutes adopted in Lower Canada[51] in the decades preceding Confederation imposed conditions similar to those that are found today in s. 3 of the *Judges Act* in the sense that only advocates and certain judges could aspire to the exercise of judicial functions.[52] In other words, prior to Confederation, only jurists who had been practising advocates for 10 years or had been superior, district or county court judges could become judges of the Court of Queen's Bench. As of 1861, only judges of the Superior Court of Lower Canada could be appointed to the Court of Queen's Bench.[53] The framers of the *Constitution Act, 1867* did not expressly adopt these criteria but were content to mention "from the Bar – parmi les members du barreau".

[65] According to the AGC, the elements described in the preceding paragraphs demonstrate that the constitution does not require anything other than mere membership in a local Bar from a candidate for appointment to the federal judiciary. The AGC may or may not be right on this point. It may be that he is omitting another principle, that to the effect that the 1867 text does not represent an exhaustive expression of the constitution. Note must also be taken of s. 129 of the *Constitution Act, 1867* that assures the continuity of pre-confederative law after 1867. It will also be remembered that these pre-Confederation statutes were only repealed by the provincial legislature almost 10 years after Confederation on the occasion of the 1887 revision.[54] The next amendment would have to wait until 1912 when the *Judges Act* formally included the requirement of membership in a Bar.[55] The Minister of Justice of the day, Charles J. Doherty, said in the House of Commons:

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50 *An Act to amend the Judges Act*, 1912, 2 Geo. V, c. 29, s. 9.

51 *An Act to amend the Laws relative to the Courts of Original Civil Jurisdiction in Lower-Canada*, 1849, 12 Vict., c. 38: "IV. And be it enacted, that no person shall be appointed a Judge of the said Superior Court, unless he shall immediately before his appointnent be a Justice of one of the said several Courts of Queen's Bench, or a Circuit or District Judge, or an Advocate of at least ten years' standing at the Bar of Lower-Canada."; *An Act to establish a Court having jurisdiction in Appeals and Criminal Matters, for Lower-Canada*, 1849, 12 Vict., c. 37 : "II. [...] but no person shall be appointed to be such Chief Justice or Puisné Judge, unless at the time of his appointment he shall have been a Justice of one of the several Courts of Queen's Bench in Lower-Canada, or a Judge of the Superior Court, or a Circuit Judge, or shall be an Advocate of at least ten years' standing at the Bar of Lower-Canada [...]"; *An Act respecting the Court of Queen's Bench*, R.S.L.C. 1861, c. 77, s. 2.

52 See Luc Huppé, *supra* note 16, p. 457 & 458.

53 *An Act respecting the Court of Queen's Bench*, R.S.L.C. 1861, c. 77, s. 2.

54 *Act respecting the Revised Statutes of the Province of Quebec*, 1887, 50 Vict., c. 5; Luc Huppé, *supra* note 16, p. 458.

55 *House of Commons Debates*, No. 106 (12 March 1912), p. 6013 & 6014 (Hon. Charles J. Doherty). "The law in force in Ontario – I know it to be so in the province of Quebec – is a law enacted by the old parliament of Canada, which fixed the number of years that a man must have been at the bar before he could go on the bench. That requirement remains in force in the provinces still, and it is not in contradiction to what we are providing here."

> There was a provision with respect to Quebec and Ontario which was enacted in the law of the old province of Canada before confederation, and which remained in force. The British North America Act does not prescribe the period of time a man shall be a barrister before being appointed to the Bench, but it does provide that to be appointed a judge in any one of the four original provinces a man must be a member of the bar of such province. I understand that in some of the other provinces there is no prescribed time, and it has been very strongly urged upon me from some of the newer provinces that there ought to be some provision of that kind. It was represented to me, and the principle seemed to be sound, that we should adopt the same period of ten years which by law was applicable in Ontario and Quebec.[56]

Since 1912, Parliament has amended s. 3 on several occasions, the most relevant of those being in 1946,[57] 1976-77[58] and 1996.[59]

[66] In this case, the legislative history of s. 3 of the *Judges Act* and the relevant provisions of the pre-confederative laws of Lower Canada show a practice imported from England.[60] This practice has been followed in Canada for almost 175 years and consists of appointing judges to superior courts who are jurists with a substantial degree of skill in local law, whether acquired by the practice of law or by the exercise of judicial functions. We can therefore take account of the fact that s. 98 of the *Constitution Act, 1867* is a constitutional provision that has been made subject to legislative interpretation via s. 3 of the *Judges Act*. Beetz, J. has already written in his reasons in *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan* that "[...] federal legislation may properly be considered as an aid to constitutional interpretation."[61] He went on to cite the following comment from Sir Montague Smith in the judgment of the Privy Council in *Citizens Insurance Company of Canada v. Parsons*:

> The declarations of the dominion parliament are not, of course, conclusive upon the construction of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative power is doubtful, the interpretation put upon it by the dominion parliament in its actual legislation may properly be considered.[62]

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56 *Ibid*. p. 6012.
57 *An Act respecting Judges of Dominion and Provincial Courts*, S.C. 1946, c. 56, s. 3.
58 *An Act to amend the Judges Act and other Acts in respect of judicial matters*, S.C. 1976-77, c. 25, s. 1.
59 *An Act to amend the Federal Court Act, the Judges Act and the Tax Court of Canada Act*, S.C. 1996, c. 22, s. 2.
60 Peter H. Russell, *supra* note 35, p. 107 & 108.
61 [1980] 1 S.C.R. 433, p. 465.
62 (1881), 7 App. Cas. 96, p. 116.

The fact that s. 98 of the *Constitution Act, 1867* does not deal with legislative jurisdictions would seem to be of no importance, and the various versions of the *Judges Act* since 1912 provide useful tools of interpretation.

[67] For the purposes of this reference, it is not necessary to decide whether the long standing requirement of 10 years of membership in a Bar gives rise to a constitutional convention in light of its source, its constancy and its impact on both federal and provincial matters. That said, there is nothing in s. 3 of the *Judges Act* that is incompatible with s. 98 of the *Constitution Act, 1867*.

V

SYNTHESIS AND ANSWERS TO THE REFERENCE QUESTIONS

[68] The "Courts of Quebec" contemplated by s. 98 of the *Constitution Act, 1867* are the Superior Court and the Court of Appeal of Quebec. The Court is of the view that the *Supreme Court Reference* subsequent to the appointment of the Honourable Mr. Justice Marc Nadon to the Supreme Court does not lead inevitably to the conclusion that ss. 92(13) and (14) and ss. 96, 97 and 98 of the *Constitution Act, 1867* have the same effect on appointments to "Courts of Quebec" as do ss. 5 and 6 of the *Supreme Court Act* on appointments to the Supreme Court of Canada.

[69] In addition, s. 98 of the *Constitution Act, 1867*, correctly interpreted in light of its text, its purpose and its constitutional history before and after Confederation, means nothing more than this: belonging or having belonged to the Bar of the Province of Quebec qualifies a candidate for appointment to the judiciary in accordance with this provision. Finally, there is no incompatibility between this constitutional provision and s. 3 of the *Judges Act*.

[70] Consequently, the answers to the reference questions are as follows:

> 1. Which Quebec courts are covered by section 98 of the *Constitution Act, 1867*?
>
> The "Courts of Quebec" contemplated by s. 98 of the *Constitution Act, 1867* are those whose judges are appointed by the Governor General, that is, the Court of Appeal of Quebec and the Superior Court of Quebec.
>
> 2. What conditions for appointing judges to Quebec 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?

Section 98 of the Constitution Act, 1867 requires that a person appointed to one of the Courts of Quebec have previously been a member of the Barreau du Québec or be such a member when appointed. Therefore, a judge of the federal courts who was a member of the Barreau du Québec prior to becoming a judge may be appointed to the Court of Appeal of Quebec or the Superior Court of Quebec.

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SCHEDULE I

Constitution Act, 1867 [63]

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

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

[...]

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

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

94. Nonobstant toute disposition contraire énoncée dans la présente loi, — le parlement du Canada pourra adopter des mesures à l'effet de pourvoir à l'uniformité de toutes les lois ou de parties des lois relatives à la propriété et aux droits civils dans Ontario, la Nouvelle-Écosse et le Nouveau-Brunswick, et de la procédure dans tous les tribunaux ou aucun des tribunaux de ces trois provinces; et depuis et

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[63] The citation of the French version is consistent with the practice of the Supreme Court of Canada, which cites the French version of the constitution that dates from 1867 in its judgments, which was published the same year in the Statutes of Canada (30 & 31). See e.g.: *Séminaire de Chicoutimi* v. *La Cité de Chicoutimi*, [1973] S.C.R. 681, p. 686; *Re: Authority of Parliament in relation to the Upper House,* [1980] 1 S.C.R. 54, p. 70; *McEvoy* v. *Attorney General for New Brunswick et al.,* [1983] 1 S.C.R. 704, p. 719; *Reference re Manitoba Language Rights,* [1992] 1 S.C.R. 212, p. 220; *Reference re Senate Reform*, *supra* note 13, par. 50, 71, 84.

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.

après la passation de toute loi à cet effet, le pouvoir du parlement du Canada de décréter des lois relatives aux sujets énoncés dans telles lois, sera illimité, nonobstant toute chose au contraire dans la présente loi; mais toute loi du parlement du Canada pourvoyant à cette uniformité n'aura d'effet dans une province qu'après avoir été adoptée et décrétée par la législature de cette province.

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.

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.

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

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

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

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.	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.

***Supreme Court Act*[64]**

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.
5.1 For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province.	**5.1** Pour l'application de l'article 5, il demeure entendu que les juges peuvent être choisis parmi les personnes qui ont autrefois été inscrites comme avocat pendant au moins dix ans au barreau d'une province.

[64] It must be noted here that ss. 5.1 and 6.1 that are set out above were added to the *Supreme Court Act* pursuant to ss. 471 and 472 of the *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40, and that in its answers to the *Supreme Court Reference*, *supra* note 7, the majority of the Supreme Court of Canada concluded that s. 471 (and thus the new s. 5.1 was *intra vires* of Parliament, but that s.472 (and thus the new s. 6.1) was *ultra vires* of Parliament.

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

6. Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.

6.1 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.

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) 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,

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

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

(b) if the judges of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada are absent from Ottawa

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

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.

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

(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 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).

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

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

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.

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

5.3 Les juges de la Cour d'appel fédérale et de la Cour fédérale sont choisis parmi :

(a) is or has been a judge of a superior, county or district court in Canada;

a) les juges, actuels ou anciens, d'une cour supérieure, de comté ou de district;

(b) is or has been a barrister or advocate of at least 10 years standing at the bar of any province; or

b) les avocats inscrits pendant ou depuis au moins dix ans au barreau d'une province;

(c) has, for at least 10 years,

(i) been a barrister or advocate at the bar of any province, and

(ii) after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held under a law of Canada or a province.

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.

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

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

Superior Court of the Province of Quebec, or have been members of the bar of that Province.	province.

Courts of Justice Act

1. Les tribunaux du Québec en matières civiles, criminelles ou mixtes, sont :	**1.**The Courts of Québec, in civil, criminal and mixed matters, are:
La Cour d'appel;	The Court of Appeal;
La Cour supérieure;	The Superior Court;
La Cour du Québec;	The Court of Québec;
Les Cours municipales.	The Municipal Courts.

Code of Civil Procedure

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.	**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.
La compétence de ces tribunaux et la procédure qui doit y être suivie sont déterminées par les lois du Parlement du Canada.	The jurisdiction of these courts and the procedure to be followed therein are set out in the laws of the Parliament of Canada.

SCHEDULE II

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

[...]

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

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

[49] The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the *functioning* and the *legitimacy* of the Supreme Court as a general court of appeal for Canada. This broader purpose was succinctly described by Professor Russell in terms that are well supported by the historical record:

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

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

[50] At the time of Confederation, Quebec was reluctant to accede to the creation of a Supreme Court because of its concern that the Court would be incapable of adequately dealing with questions of the Quebec civil law (Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (1992), at pp. 4-5; Russell, at pp. 8-9). Various Members of Parliament for Quebec expressed concerns about a "Supreme Tribunal of Appeal" that would be

> composed of Judges, the great majority of whom would be unfamiliar with the civil laws of Quebec, which tribunal would be called upon to revise and would have the power to reverse the decisions of all their Quebec Courts . . . .

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

[51] The bill creating the Supreme Court was passed only after amendments were made responding specifically to Quebec's concerns. Most significantly, the amended bill that became the *Supreme Court Act* provided that two of the six judges "shall 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 Quebec": s. 4 of the 1875 Act.

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

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

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

[53] Toussaint Antoine Rodolphe Laflamme introduced the provision for a minimum number of Quebec judges. He described the requirement as a matter of

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

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

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

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

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

[56] Viewed in this light, the purpose of s. 6 is clearly different from the purpose of s. 5. Section 5 establishes a broad pool of eligible candidates; s. 6 is more restrictive. Its exclusion of candidates otherwise eligible under s. 5 was intended by Parliament as a means of attaining the twofold purpose of (i) ensuring civil law expertise and the representation of Quebec's legal traditions and social values on the Court, and (ii) enhancing the confidence of Quebec in the Court. Requiring the appointment of current members of civil law institutions

was intended to ensure not only that those judges were qualified to represent Quebec on the Court, but that they were perceived by Quebecers as being so qualified.

[...]

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