

Contains docs no.  
Contient les docs No. 21, 22, 23

Registry No.: T-1657-13

FEDERAL COURT

BETWEEN:

ROCCO GALATI,  
CONSTITUTIONAL RIGHTS CENTRE INC.,

Applicants

- and -

THE RIGHT HONOURABLE STEPHEN HARPER, HIS EXCELLENCY THE  
RIGHT HONOURABLE GOVERNOR GENERAL DAVID JOHNSTON,  
THE HONOURABLE MARC NADON, JUDGE OF THE FEDERAL COURT OF  
APPEAL, THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF  
JUSTICE

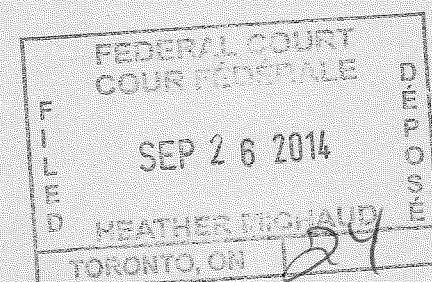
Respondents

APPLICANT'S MOTION RECORD  
(Pursuant to Rule 369)

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13. Affidavit of Applicant, Rocco Galati, Barrister and Solicitor
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ROCCO GALATI LAW FIRM  
PROFESSIONAL CORPORATION  
Rocco Galati, B.A., LL.B., LL.M.  
1062 College Street, Lower Level  
Toronto ON M6H 1A9  
TEL: 416-536-7811  
FAX: 416-536-6801

On his own behalf

Tab-1

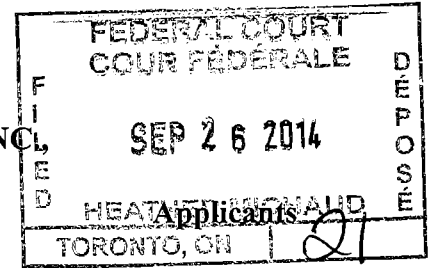


Registry No.: T-1657-13

BETWEEN:

FEDERAL COURT

ROCCO GALATI,  
 CONSTITUTIONAL RIGHTS CENTRE INC,



- and -

THE RIGHT HONOURABLE STEPHEN HARPER, HIS EXCELLENCY THE  
 RIGHT HONOURABLE GOVERNOR GENERAL DAVID JOHNSTON,  
 THE HONOURABLE MARC NADON, JUDGE OF THE FEDERAL COURT OF  
 APPEAL, THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF  
 JUSTICE

Respondents

## NOTICE OF MOTION

TAKE NOTICE THAT a motion will be brought by the Applicants, in writing,  
 pursuant to Rule 369 of the **Federal Courts Rules**.

THE MOTION is for:

- a) a declaration that where a private citizen brings a constitutional challenge to legislation and/or executive action, going to the “architecture of the Constitution”, from which he/she derives no personal benefit, *per se*, and is successful on that constitutional challenge, that he/she is entitled to solicitor-client costs of those proceedings, as to deny those costs constitutes a breach of the constitutional right to a fair and independent judiciary;
- b) that the Applicant be granted leave to issue a Notice of Discontinuance in the within application;
- c) that the Applicant be granted his solicitor-client costs of the within application, including the within motion; and
- d) such further order and/or direction as this Court deems just.

**THE GROUNDS FOR THE MOTION** are:

- a) Rule 369 of the **Federal Courts Rules**;
- b) s. 7 of the **Charter**;
- c) any further ground as counsel may advise and this Court accept.

**AND FURTHER TAKE NOTICE** that, the following documentary evidence will be presented:

- a) the Affidavits and materials already filed;
- b) the affidavit of the Applicant, Rocco Galati
- c) such further materials as counsel may advise and this Court permit.

DATED at Toronto this <sup>24<sup>th</sup></sup> day of September , 2014.




---

ROCCO GALATI LAW FIRM  
 PROFESSIONAL CORPORATION  
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 1062 College Street, Lower Level  
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TEL: 416-536-7811  
 FAX: 416-536-6801

On his own behalf

Registry No.: T-1657-13

**FEDERAL COURT**

**BETWEEN:**

**ROCCO GALATI,  
CONSTITUTIONAL RIGHTS CENTRE INC.,**

**Applicants**

**- and -**

**THE RIGHT HONOURABLE STEPHEN  
HARPER, HIS EXCELLENCY THE RIGHT  
HONOURABLE GOVERNOR GENERAL  
DAVID JOHNSTON,  
THE HONOURABLE MARC NADON, JUDGE  
OF THE FEDERAL COURT OF APPEAL, THE  
ATTORNEY GENERAL OF CANADA, THE  
MINISTER OF JUSTICE**

**Respondents**

---

**NOTICE OF MOTION**

---

**ROCCO GALATI LAW FIRM  
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Toronto ON M6H 1A9**

**TEL: 416-536-7811**

**FAX: 416-536-6801**

**On his own behalf**

Tab-2





FEDERAL COURT

ROCCO GALATI, and  
CONSTITUTIONAL RIGHTS CENTRE INC.,

Applicants

- and -

THE RIGHT HONOURABLE STEPHEN HARPER, HIS EXCELLENCY THE RIGHT  
HONOURABLE GOVERNOR GENERAL DAVID JOHNSTON,  
THE RIGHT HONOURABLE BEVERLEY MCLACHLIN, CHIEF JUSTICE OF CANADA,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, and THE MINISTER OF JUSTICE

Respondents

**NOTICE OF APPLICATION**  
(pursuant to ss. 18 – 18.1 Federal Courts Act, and  
ss. 24(1) and 52 of the Constitution Act, 1982)

**TO THE RESPONDENTS:**

**A PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the applicant. The relief claimed by the applicant appears on the following page.

**THIS APPLICATION** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at **Toronto, Ontario**.

**IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the **Federal Court Rules, 1998** and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** of being served with this notice of application.

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Copies of the **Federal Court Rules, 1998**, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

DATED at Toronto on this 7<sup>th</sup> day of October, 2013.

Issued by:

Address of  
Local office: \_\_\_\_\_

TO: Department of Justice  
Ontario Regional Office  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto ON M5X 1K6

180 Queen Street West 180, rue Queen Ouest  
Suite 200 bureau 200  
Toronto, Ontario Toronto, Ontario  
M5V 3L6 M5V 3L6



**ORIGINATING NOTICE OF APPLICATION  
PURSUANT TO S.18 AND 18.1 OF THE  
FEDERAL COURT ACT**

**TO THE RESPONDENTS:**

**YOU ARE HEREBY ADVISED** that the Applicants, Rocco Galati, and the Constitutional Rights Centre Inc., will be making an application to the Court, on a day and at a time and place to be set by the Court, for the purpose of obtaining, pursuant to s.18 and 18.1 of the *Federal Court Act*, R.S.C. 1985, c.F.-7 as amended, declaratory, prerogative and injunctive relief, from the decision, made October 3<sup>rd</sup>, 2013, to appoint and “swear in” (administering of oath) the Honourable Justice Marc Nadon, a Judge of the Federal Court of Appeal to the Supreme Court of Canada pursuant to the requirements of ss. 4(2) 6, 10 and 11 the *Supreme Court of Canada Act* and s. 41(d) and 42(d) of the *Constitution Act, 1982*.

The Applicants will be making application for **THE FOLLOWING RELIEF:**

- 1. A declaration that:
  - (a) a Judge of the Federal Court (of Appeal) cannot be nominated, confirmed, appointed, nor sworn in, pursuant to ss. 4(2), 6, 10, and 11 of the *Supreme Court Act* as one of the required three Quebec Justices of the Supreme Court of Canada;
  - (b) that s. 6 of the *Supreme Court Act*, when properly interpreted, in tow with s. 5 of the *Supreme Court Act*, allows only for the appointment from “among”;
    - (i) Court of Appeal and Superior Justices of Quebec; or
    - (ii) Advocates of Quebec with at least 10 years standing at the bar;
 With “from among” meaning sitting Justices currently on the Court, or advocates (for the past 10 years of more) just prior to nomination for appointment;

- 4 -

- (c) that the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act* as “Quebec” Judges to the Supreme Court of Canada, constitutes a change to “the composition” of the Supreme Court of Canada and would require a constitutional amendment, according to constitutional formula as understood and set out in ss. 41(d) and 42(d) of the *Constitution Act, 1982*;
- (d) that the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as “Quebec” judges to the Supreme Court of Canada, undermines and breaches the “Federalism”, “Constitutionalism”, and “Rule of Law” pillars, and underlying constitutional imperatives, as enunciated, *inter alia*, by the Supreme Court of Canada in the *Quebec Secession Reference*;
- (e) that the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as “Quebec” judges to the Supreme Court of Canada, further breaches the Applicant’s rights to a fair and independent judiciary as guaranteed by the underlying requirements of the Constitutional imperatives of the Rule of Law, Constitutionalism, and Federalism, as well as s. 7 of the *Charter* as set out, *inter alia*, by the Supreme Court of Canada in the *Judges’ Reference*;
- (f) that the Attorney General of Canada (Minister of Justice) rather than commissioning a private legal opinion, from former Supreme Court of Canada Justice Ian Binnie, on whether a Federal Court (of Appeal) judge could be appointed as one of the three Quebec Judges, as required by s. 6 of the *Supreme Court Act*, was duty-bound to bring a reference on the issue to the Supreme Court of Canada pursuant to s. 53 of the *Supreme Court Act*.

2. A permanent and interim order, in (the nature of) *prohibition*, pursuant to ss. 2 and 18-18.1 of the *Federal Courts Act*, and ss. 24(1) and/or s. 52 of the *Constitution Act, 1982*, to prohibit the appointment, the issuance of letters patent under the Great Seal, pursuant to s. 4(2) of the *Supreme Court Act*, or the “swearing in”, administering of the oath by the Chief Justice, or in case of her illness, by any other Judge present in Ottawa, pursuant to ss. 10-11 of the *Supreme Court Act*, of the Honourable Justice Marc Nadon by the Respondents, and from any of their designates, to the Supreme Court of Canada.
3. That, should letters patent under the Great Seal be issued, and the oath already administered, that such letters patent under the Great Seal, by way of:
  - (a) Quo Warranto;
  - (b) declaratory relief; and
  - (c) an order (in the nature of) *certiorari*;  
be declared invalid and quashed, *nunc pro tunc* to the day prior to the nomination of the Honourable Justice Marc Nadon to fill the vacant Supreme Court of Canada spot as one of the three (3) Quebec Judges required under s. 6 of the *Supreme Court Act*.
4. Such further relief and other grounds as counsel may advise and this Honourable Court permit.

**THAT THIS APPLICATION IS BASED ON THE FOLLOWING GROUNDS:**

## 1. That:

- (a) a Judge of the Federal Court (of Appeal) cannot be nominated, confirmed, appointed, nor sworn in, pursuant to ss. 4(2), 6, 10, and 11 of the *Supreme Court Act* as one of the required three Quebec Justices of the Supreme Court of Canada under s.6;
- (b) s. 6 of the *Supreme Court Act*; when properly interpreted in tow, with s. 5 of the *Supreme Court Act*, allows only for the appointment from “among”;
  - (i) Court of Appeal and Superior Justices of Quebec; or
  - (ii) Advocates of Quebec with at least 10 years standing at the bar;With “from among” meaning sitting Justices currently on the Court, or advocates (for the past 10 years of more) just prior to nomination for appointment;
- (c) the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act* as “Quebec” Judges to the Supreme Court of Canada, constitutes a change to “the composition” of the Supreme Court of Canada and would require a constitutional amendment, according to constitutional formula as understood and set out in ss. 41(d) and 42 (d) of the *Constitution Act, 1982*;
- (d) the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as “Quebec” judges to the Supreme Court of Canada, undermines and breaches the “Federalism”, “Constitutionalism”, and “Rule of Law” pillars, and underlying constitutional imperatives, as enunciated, *inter alia*, by the Supreme Court of Canada in the *Quebec Secession Reference*;

- (e) the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as “Quebec” judges to the Supreme Court of Canada, further breaches the Applicant’s rights to a fair and independent judiciary as guaranteed by the underlying requirements of the Constitutional imperatives of the Rule of Law, Constitutionalism, and Federalism, as well as s. 7 of the *Charter* as set out, *inter alia*, by the Supreme Court of Canada in the *Judges’ Reference*;
- (f) the Attorney General of Canada (Minister of Justice) rather than commissioning a private legal opinion, from former Supreme Court of Canada Justice Ian Binnie, on whether a Federal Court (of Appeal) judge could be appointed as one of the three Quebec Judges, as required by s. 6 of the *Supreme Court Act*, was duty-bound to bring a reference on the issue to the Supreme Court of Canada pursuant to s. 53 of the *Supreme Court Act*.

2. Such further relief and other grounds as counsel may advise and this Honourable Court permit.

**THE APPLICANT REQUESTS**, pursuant to *Rules* 317 and 318 of the *Federal Courts Rules*, that the Respondents send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Tribunal (Minister of Justice/Attorney General of Canada) to the applicant and to the Registry:

1. any other legal opinion commissioned and/or received by the Minister of Justice/Attorney General of Canada, The Right Honourable Stephen Harper, and/or any of their designates on the same, or other questions covered by former Supreme Court of Canada Justice Ian Binnie’s opinion, and/or any opinion whatsoever with respect to the appointment of Federal Court (of Appeal) judge to the Supreme Court of Canada.; and

//

2. any and all opinions and/or commentary provided by Professor Hogg and/or former Supreme Court of Canada Justice Louise Charron, or anyone else whatsoever with respect to the matters referred to in 1. above.

AND FURTHER TAKE NOTICE THAT the Applicants intend to seek an interim order, pursuant to, *inter alia*, *Metropolitan Stores* and *RJR MacDonald*, to stay the appointment and swearing in of the Honourable Justice Marc Nadon, to the Supreme Court of Canada, to be made returnable within 2-3 weeks from the Issuance and Service of the within originating Notice of Application, pending the expedited determination of the singular issue contained in the within application.

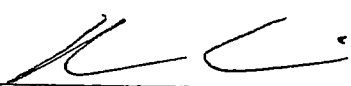
The address in Canada where documents may be served on the Applicants is:

ROCCO GALATI LAW FIRM  
PROFESSIONAL CORPORATION  
Rocco Galati, B.A., LL.B., LL.M.  
1062 College Street, Lower Level  
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TEL: (416) 530-9684  
FAX: (416) 530-8129  
Email: [rocco@idirect.com](mailto:rocco@idirect.com)

SLANSKY LAW  
PROFESSIONAL CORPORATION  
Paul Slansky, B.A., LL.B., J.D.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9  
TEL: (416) 536-1220  
FAX: (416) 536-8842  
Email: [paul.slansky@bellnet.ca](mailto:paul.slansky@bellnet.ca)

The Applicants propose that this application be heard in Toronto.

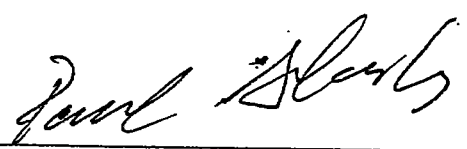
DATED at Toronto, this 7<sup>th</sup> day of October,

  
ROCCO GALATI, on his own behalf.

ROCCO GALATI LAW FIRM  
PROFESSIONAL CORPORATION  
Rocco Galati, B.A., LL.B., LL.M.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

TEL: (416) 530-9684  
FAX: (416) 530-8129

Email: [rocco@idirect.com](mailto:rocco@idirect.com)

  
PAUL SLANSKY, on behalf of the Constitutional Rights Centre Inc.

SLANSKY LAW PROFESSIONAL CORPORATION  
Paul Slansky, B.A., LL.B., JD  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

TEL: (416) 536-1220  
FAX: (416) 536-8842

Email: [paul.slansky@bellnet.ca](mailto:paul.slansky@bellnet.ca)

FEDERAL COURT

BETWEEN:

ROCCO GALATI,  
CONSTITUTIONAL RIGHTS CENTRE INC.,

Applicants

- and -

THE RIGHT HONOURABLE STEPHEN HARPER,  
HIS EXCELLENCY THE RIGHT HONOURABLE  
GOVERNOR GENERAL DAVID JOHNSTON,  
THE RIGHT HONOURABLE BEVERLEY  
MCLACHLIN, CHIEF JUSTICE OF CANADA,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, THE  
MINISTER OF JUSTICE

Respondents

---

ORIGINATING NOTICE OF APPLICATION  
PURSUANT TO S. 18 AND 18.1 OF THE  
FEDERAL COURT ACT

---

ROCCO GALATI LAW FIRM  
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TEL: (416) 530-9684  
FAX: (416) 530-8129

Email: [rocco@idirect.com](mailto:rocco@idirect.com)

Solicitor on his own behalf

SLANSKY LAW  
PROFESSIONAL  
CORPORATION  
Paul Slansky, B.A., LL.B., J.D.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

TEL: (416) 536-1220  
FAX: (416) 536-8842

Email: [paul.slansky@bellnet.ca](mailto:paul.slansky@bellnet.ca)

Solicitor for the Constitutional  
Rights Centre Inc.



**ROCCO GALATI LAW FIRM  
PROFESSIONAL CORPORATION**

1062 College Street, Lower Level  
Toronto, Canada M6H 1A9

14

Direct Line (416) 530-9684 Fax (416) 530-8129

October 7<sup>th</sup>, 2013

Prime Minister of Canada,  
The Right Honourable Stephen Harper  
Office of the Prime Minister  
80 Wellington Street  
Ottawa, ON K1A 0A2

The Right Honourable Beverley McLachlin,  
Chief Justice Of Canada  
Supreme Court Of Canada  
301 Wellington Street  
Ottawa, Ontario K1A 0J1

**Via Fax: 613-941-6900 AND MAIL**

**Via Fax: 613-996-9138 AND MAIL**

His Excellency The Right Honourable  
Governor General David Johnston  
Rideau Hall  
1 Sussex Drive  
Ottawa Ontario K1A 0A1

The Attorney General Of Canada, And The  
Minister Of Justice  
284 Wellington Street  
Ottawa, Ontario K1A 0H8

**Via Fax: 613-998-8760 AND MAIL**

**VIA FAX 613-992-4621 AND MAIL**  
990-7255

To whom it may concern:

**RE: GALATI et al. v. HARPER et al., Federal Court File No. :T-1657-13**


Please find attached a Notice of Application filed with the Federal Court of Canada for relief which is self-explanatory, namely declaratory and injunctive relief that no Judge of the Federal Court (of Appeal) is appointable as a Judge of the Supreme Court of Canada in compliance with s. 6 of the Supreme Court Act, without constitutional amendment.

The Applicants therefore respectfully submit that the Honourable Justice Nardon not be sworn in until the Applicants move for interim injunctive relief, on a regular motions Monday, returnable in Federal Court in the next 2-3 weeks.

It is respectfully submitted that the issue contained in this application is of serious consequences to not only the Applicants, but to the constitutional order of Canada as it pertains to our Highest Court.

Yours very truly,  
ROCCO GALATI LAW FIRM PROFESSIONAL CORPORATION  
Per:

Rocco Galati, B.A., LL.B, LL.M.

  
Paul Slansky, B.A., LL.B, J.D.



Tab-3



15

Federal Court



Cour fédérale

Date: 20131010

Docket: T-1657-13

Ottawa, Ontario, October 10, 2013

PRESENT: The Chief Justice

BETWEEN:

**ROCCO GALATI, AND CONSTITUTIONAL  
RIGHTS CENTRE INC.**

Applicants

and

**THE RIGHT HONOURABLE STEPHEN  
HARPER, HIS EXCELLENCY THE RIGHT  
HONOURABLE GOVERNOR GENERAL  
DAVID JOHNSTON, THE RIGHT  
HONOURABLE BEVERLEY MCLACHLIN,  
CHIEF JUSTICE OF CANADA, THE  
HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF  
APPEAL, THE ATTORNEY GENERAL OF  
CANADA, AND THE MINISTER OF JUSTICE**

Respondents

**ORDER**

UPON Rules 47 and 384 of the *Federal Courts Rules*;

**IT IS HEREBY ORDERED THAT:**

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1. This proceeding shall continue as a specially managed proceeding.
  
2. Pursuant to Rule 383, Justice Russel Zinn is assigned as Case Management Judge and Prothonotary Mireille Tabib will assist in the management of this matter.

"Paul S. Crampton"

Chief Justice

Federal Court



Cour fédérale

17

## Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur

**TO / DESTINATAIRE(S):**

1. Name / Nom : Mr. Rocco Galati

Facsimile / Télécopieur : 416-530-8129 Telephone / Téléphone :

 As requested / tel que demandé Left voice message / suite au message vocal

2. Name / Nom : Mr. Paul Slansky

Facsimile / Télécopieur : 416-536-8842 Telephone / Téléphone :

 As requested / tel que demandé Left voice message / suite au message vocal

3. Name / Nom :

Facsimile / Télécopieur : Telephone / Téléphone :

 As requested / tel que demandé Left voice message / suite au message vocal**FROM / EXPÉDITEUR :**

Benoit Perreault

Registry Assistant / Adjointe au Greffe

Telephone / Téléphone : (613) 995-7372

Facsimile / Télécopieur : (613) 952-3653

DATE : October 10, 2013

TIME / HEURE : 3:07 PM

Total number of pages (including this page) /  
Nombre de pages (incluant cette page) : 3**SUBJECT / OBJET :**

Court File No. / N° du dossier de la Cour: T-1657-13

Between / entre: ROCCO GALATI ET AL v.

THE RIGHT HONOURABLE STEPHEN HARPER ET AL

Enclosed is a true copy of the Order / Vous trouverez ci-joint une copie conforme

de l'ordonnance: Chief Justice Crampton dated / daté du October 10, 2013.

**COMMENTS / REMARQUES :**

*Pursuant to section 20 of the Official Languages Act all final decisions, orders and judgments, including any reasons given therefore, issued by the Court are issued in both official languages. In the event that such documents are issued in the first instance in only one of the official languages, a copy of the version in the other official language will be forwarded on request when it is available.*

*Conformément à l'article 20 de la Loi sur les langues officielles, les décisions, ordonnances et jugements définitifs avec les motifs y afférents, sont émis dans les deux langues officielles. Au cas où ces documents ne seraient émis, en premier lieu, que dans l'une des deux langues officielles, une copie de la version dans l'autre langue officielle sera transmise, sur demande, dès qu'elle sera disponible.*

Tab-4



Federal Court



Cour fédérale

18

Ottawa, ON  
K1A 0H9

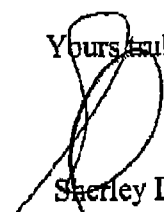
October 16, 2013

**BY FACSIMILE ONLY**Mr. Rocco Galati  
Fax: (416) 530-8129Mr. Paul Slansky  
Fax: (416) 536-8842Mr. Paul Evraire & Ms. Chistine Mohr  
Fax: (416) 973-3004 / (416) 952-4518Mr. Raynold Langlois  
Fax: (514) 845-6573**RE: Rocco Galati et al. v. The Right Honourable Stephen Harper et al.**  
Court File No: T-1657-13

This will serve as confirmation of the Oral Direction of the Court, the Honourable Mr. Justice Zinn, rendered on October 16, 2013:

**"A Case Management Conference will be held by telephone conference on Friday October 18, 2013 at 10:00 a.m. for a duration of one (1) hour to discuss the scheduling steps in this Application."**

Yours truly,

  
Sherley Désir  
Registry Officer

Enc.

Pursuant to section 20 of the *Official Languages Act* all final decisions, orders and judgments, including any reasons given therefore, issued by the Court are issued in both official languages. In the event that such documents are issued in the first instance in only one of the official languages, a copy of the version in the other official language will be forwarded on request when it is available.

Conformément à l'article 20 de la *Loi sur les langues officielles*, les décisions, ordonnances et jugements définitifs avec les motifs y afférents, sont émis dans les deux langues officielles. Au cas où ces documents ne seraient émis, en premier lieu, que dans l'une des deux langues officielles, une copie de la version dans l'autre langue officielle sera transmise, sur demande, dès qu'elle sera disponible.



Department of Justice Canada  
Ontario Regional Office

Ministère de la Justice Canada  
Bureau régional de l'Ontario

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## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b>  <b>Registrar</b>		<b>Name / Nom:</b>  Alison Engel-Yan Counsel	
<b>Address / Adresse:</b>  Federal Court of Appeal Canada 180 Queen Street West Suite 200 Toronto, Ontario M5V 3L6  <b>c.c. Rocco Galati Fax: (416) 530-8129</b>		<b>Address / Adresse:</b>  Ontario Regional Office The Exchange Tower 130 King St. West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
(416) 973-2154	(416) 954-9823	(416) 954-8982	416-973-1349
<b>Comments / Commentaires:</b>			
<b>Re: SERRANO LEMUS, Jose Maria et al</b> <b>Court File No.: A-510-12 &amp; A-272-12</b> <ul style="list-style-type: none"> <li>• Attached: Letter dated October 16, 2013</li> </ul>			
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
<b>Protected documents? / Documents protégés?</b> <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
<b>TRANSMISSION</b>			
<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
3	October 16, 2013	12:10 PM	

### NOTICE:

This message is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you have received this communication in error, please notify us immediately by telephone. Thank you.

Cette communication est exclusivement destinée à qui elle est adressée. Elle peut contenir de l'information privilégiée, confidentielle et ne pouvant être divulguée selon la loi applicable à l'espèce. Si vous avez reçu cette communication par erreur, veuillez nous en aviser immédiatement par téléphone. Merci.

**In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:**  
**Name / Nom: Holly Tang at /au: 416-954-6095**



Tab-5



Federal Court



Cour fédérale

Date: 20131025

Docket: T-1657-13

Ottawa, Ontario, October 25, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**ROCCO GALATI, AND  
CONSTITUTIONAL RIGHTS CENTRE INC.**

**Applicants**

and

**THE RIGHT HONOURABLE STEPHEN HARPER,  
HIS EXCELLENCY THE RIGHT HONOURABLE  
GOVERNOR GENERAL DAVID JOHNSTON,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, AND  
THE MINISTER OF JUSTICE**

**Respondents**

**ORDER**

UPON Case Management Conference held by teleconference on Thursday, October 24,  
2013;

AND UPON noting that by Order in Council P.C. 2013-1105, dated October 22, 2013,  
the Governor in Council referred two questions to the Supreme Court of Canada for  
consideration and determination, relating to sections 5 and 6 of the *Supreme Court Act* and the

declaratory provisions relating thereto contained in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2* [the Supreme Court Reference];

**AND UPON** noting that the Applicants filed a Notice of Discontinuance on October 21, 2013, discontinuing their application as against The Right Honourable Beverley McLachlin, Chief Justice of Canada;

**AND UPON** being advised by counsel for the Attorney General of Québec that he will serve and file a notice of appearance and intends to make submissions on the Constitutional issues set out in the Notice of Constitutional Question served and filed by the Applicants pursuant to section 57 of the *Federal Courts Act*;

**AND UPON** counsel for The Right Honourable Stephen Harper, His Excellency The Right Honourable Governor General David Johnston, The Attorney General of Canada, and The Minister of Justice [collectively the Crown] informing the Court that the Crown will be bringing a motion to stay this application pending the final disposition of the Reference [the Stay Motion];

**AND UPON** the Applicants informing the Court that they will be prepared to file all of their materials on the application, including their memoranda of fact and law on the date set by the Court, and undertaking not to cross-examine on any affidavit filed by the Crown or other party;

**AND UPON** hearing the oral submissions of counsel;

**IT IS HEREBY ORDERED THAT:**

1. Pursuant to Rules 364 and 366, the Crown shall serve and file its motion record on the Stay Motion, which motion record shall include a memorandum of fact and law, no later than Monday, October 28, 2013;
2. The Applicants, and any other party wishing to respond to the Stay Motion, shall serve and file its motion record, which motion record shall include a memorandum of fact and law, no later than Tuesday, November 12, 2013;
3. The Crown, is granted leave to serve and file a brief Reply Memorandum, on or before November 13, 2013;
4. The hearing of the Stay Motion shall take place in the English language and is hereby fixed for Friday, November 15, 2013, to commence at 9:00 a.m., before a Judge at the Federal Court, 180 Queen Street West, in the City of Toronto, Province of Ontario, for a duration not exceeding four (4) hours;
5. Unless the Crown's Stay Motion is allowed, the steps set out in paragraphs 6 to 13 shall apply in order to expedite the hearing of this application;
6. Pursuant to Rule 309, the Applicants shall serve and file their Record on the application no later than Monday, November 25, 2013;
7. Cross-examinations, if any, on affidavits filed by the Applicants shall be completed on or before Friday, November 29, 2013;
8. The transcript of cross-examinations, if any, shall be filed on or before Friday,

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December 6, 2013;

9. The Attorney General of Québec shall serve and file his Record no later than Monday, December 9, 2013;
10. The Crown shall file her Record no later than Monday, December 16, 2013;
11. Any Reply memoranda shall be served and filed no later than Thursday, December 19, 2013;
12. Pursuant to Rule 70(4), the Court grants all parties leave to file a memorandum of fact and law, exclusive of Part V and appendices, not exceeding 40 pages in length;
13. The hearing of the application for judicial review shall take place in the English and French languages, with an interpreter, commencing on a date to be fixed by the Office of the Chief Justice, at the Federal Court, 180 Queen Street West, in the City of Toronto, Province of Ontario, for a duration not exceeding two and one-half (2 ½) days;
14. The parties are to provide the Court with dates in January and February 2014 when they are not available for the hearing of this application; however the Court reserves the right to schedule the hearing date based on the availability of judicial resources; and
15. The style of cause is hereby amended by deleting as a Respondent, The Right Honourable Beverley McLachlin, Chief Justice of Canada.

"Russel W. Zinn"

---

Judge

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Federal Court



Cour fédérale

Date: 20131112

Docket: T-1657-13

Toronto, Ontario, November 12, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**ROCCO GALATI, AND  
CONSTITUTIONAL RIGHTS CENTRE INC.**

Applicants

and

**THE RIGHT HONOURABLE STEPHEN HARPER,  
HIS EXCELLENCY THE RIGHT HONOURABLE  
GOVERNOR GENERAL DAVID JOHNSTON,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, AND  
THE MINISTER OF JUSTICE**

Respondents

**ORDER**

UPON motion by the Attorney General of Canada filed October 28, 2013, for an order staying this application pending determination of the Reference by the Governor in Council concerning sections 5 and 6 of the *Supreme Court Act*, RSC 1985, c. S-26, as set out in Order in Council, PC 2013-1105, dated October 22, 2013;

AND UPON the consent of all parties to the said order issuing;

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AND UPON determining that it is in the interests of justice that the order requested issue;

IT IS HEREBY ORDERED THAT this application is stayed pending the release of the decision of the Supreme Court of Canada in the Reference by the Governor in Council concerning sections 5 and 6 of the *Supreme Court Act*, RSC 1985, c. S-26, as set out in Order in Council, PC 2013-1105, dated October 22, 2013, SCC File No. 35586.

"Russel W. Zinn"

Judge

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the \_\_\_\_\_

day of NOV 12 2013 A.D. 20 \_\_\_\_\_

Dated this \_\_\_\_\_ day of NOV 12 2013 20 \_\_\_\_\_

M. Sansone

MARY SANSONE  
REGISTRY OFFICER



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Federal Court



Cour fédérale

**Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur**

**TO / DESTINATAIRE(S) :****1. Name / Nom: ROCCO GALATI and PAUL SLANSKY**Facsimile / Télécopieur : 416 530-8129/  
416 536-8842

Telephone / Téléphone :

**Left voice message /****Name / Nom : PAUL EVRAIRE**

Facsimile / Télécopieur : 416 952-4518

Telephone / Téléphone :

**As requested / tel que demandé** **Left voice message / suite au message vocal****Name / Nom : RAYMOND LANGLOIS Facsimile : 514 845-6573****Name / Nom : Évelyne Riverin**

Telephone / Téléphone :

Facsimile : 514 873-7074

<b>FROM / EXPÉDITEUR : Mary Sansone</b>	<b>DATE : November 12, 2013</b>
Telephone / Téléphone : 416 954-9106	<b>TIME / HEURE :</b>
Facsimile / Télécopieur :	Total number of pages (including this page) / Nombre de pages (incluant cette page) : 3

**SUBJECT: T-1657-13****ROCCO GALATI v. THE RIGHT HONOURABLE STEPHEN HARPER et al****ORDER by JUSTICE ZINN dated NOVEMBER 12/13**

*Section 20 of the Official Languages Act all final decisions, orders and judgments, including any reasons given therefore, issued by the Court are issued in both official languages. In the event that such documents are issued in the first instance in only one of the official languages, a copy of the version in the other official language will be forwarded on request when it is available.*

*Conformément à l'article 20 de la Loi sur les langues officielles, les décisions, ordonnances rendues, sur demande, dès qu'elle sera disponible*

**N.B.:** If you do not receive all pages being transmitted, please call the sender at the above telephone number. / Si vous ne recevez pas toutes les pages transmises, prière de communiquer avec l'expéditeur au numéro de téléphone ci-haut.

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Federal Court



Cour fédérale

Date: 20140324

Docket: T-1657-13

Ottawa, Ontario, March 24, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**ROCCO GALATI, AND  
CONSTITUTIONAL RIGHTS CENTRE INC.**

Applicants

and

**THE RIGHT HONOURABLE STEPHEN HARPER,  
HIS EXCELLENCY THE RIGHT HONOURABLE  
GOVERNOR GENERAL DAVID JOHNSTON,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, AND  
THE MINISTER OF JUSTICE**

Respondents

**DIRECTION**

**FURTHER** to the Court's Order dated November 12, 2013 and the release of the decision of the Supreme Court of Canada in the Reference (2014 SCC 21), the applicants are to advise the Court within seven (7) days of their intent in this matter.

"Russel W. Zinn"

Judge

**FEDERAL COURT****28****FAX TRANSMITTAL FORM****DATE:** March 24, 2014**FILE NO.:** T-1657-13**STYLE OF CAUSE:** Rocco Galati and others v. The Right Honourable Stephen Harper and others**SUBJECT OF FAX:** Direction of the Honourable Mr. Justice Zinn dated March 24, 2014

---

**TO:** Mr. Rocco Galati  
**OFFICE:** Rocco Galati Law Firm Professional Corporation, Toronto  
**FAX:** (416)530-8129

**TO:** Mr. Paul Slansky  
**OFFICE:** Slansky Law Professional Corporation, Toronto  
**FAX:** (416)536-8842

**TO:** Ms. Christine Mohr/Paul Evraire  
**OFFICE:** Dept. of Justice, Toronto  
**FAX:** (416)973-3004 / (416)952-4518

**TO:** Mr. Raynold Langlois  
**OFFICE:** Langlois Kronstrom Desjardins, Montreal  
**FAX:** (514)845-6573

**TO:** Mr. Jean-Yves Bernard  
**OFFICE:** Ministère de la justice, Montréal  
**FAX:** (514)873-7074

**2 pages including the cover page**

**FAXED BY:** Bob Lemoine (613)992-4238  
**FAX:** (613)952-3653

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29

Federal Court



Cour fédérale

Date: 20140401

Docket: T-1657-13

Ottawa, Ontario, April 1, 2014

**PRESENT: The Honourable Mr. Justice Zinn****BETWEEN:****ROCCO GALATI, AND  
CONSTITUTIONAL RIGHTS CENTRE INC.****Applicants****and****THE RIGHT HONOURABLE STEPHEN HARPER,  
HIS EXCELLENCY THE RIGHT HONOURABLE  
GOVERNOR GENERAL DAVID JOHNSTON,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, AND  
THE MINISTER OF JUSTICE****Respondents****DIRECTION**

The Court has received the letter from Mr. Sribavan of March 26, 2014, responding to the Court's Direction that the Applicants, of which Mr. Galati is but one, advise the Court by March 31<sup>st</sup> of their intention in this matter in light of the decision of the Supreme Court of Canada.

All Applicants shall respond to the Court's previous Direction in writing by end of business on Monday, April 7, 2014, failing which this application shall be dismissed, with costs.

\_\_\_\_\_  
"Russel W. Zinn"

Judge

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Federal Court



Cour fédérale

**Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur**

**TO / DESTINATAIRE(S) :**

1. Name / Nom : Mr. Rocco Galati

Address / Adresse :

Facsimile / Télécopieur : (416) 530-8129

Telephone / Téléphone :

2. Name / Nom : Mr. Paul Slansky

Address / Adresse :

Facsimile / Télécopieur : (416) 536-8842

Telephone / Téléphone :

3. Name / Nom : Ms. Christine Mohr / Mr. Paul Evraire

Address / Adresse :

Facsimile / Télécopieur : (416) 973-3004  
(416) 952-4518

Telephone / Téléphone :

4. Name / Nom : Mr. Raynold Langlois

Address / Adresse :

Facsimile / Télécopieur : (514) 845-6573

Telephone / Téléphone :

5. Name / Nom : Mr. Jean-Yves Bernard

Address / Adresse :

Facsimile / Télécopieur : (514) 873-7074

Telephone / Téléphone :

**FROM / EXPÉDITEUR : Valérie Jean-Gilles**

Telephone / Téléphone : 613-992-4238

Facsimile / Télécopieur : 613-952-3653

**DATE : April 1, 2014**

**TIME / HEURE : 11:43 AM**

Total number of pages (including this page) /  
Nombre de pages (incluant cette page) : 2

**SUBJECT / OBJET : T-1657-13**

**COMMENTS / REMARQUES : Please find attach a Direction from the Court (Zinn, J.) issued on today's date.**

Thank you,

N.B.: If you do not receive all pages being transmitted, please call the sender at the above telephone number. / Si vous ne recevez pas toutes les pages transmises, prière de communiquer avec l'expéditeur au numéro de téléphone ci-haut.

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Federal Court



Cour fédérale

31

## MEMORANDUM

Comments

**TO:** Paula Roy, SRO – Applications  
**FROM:** Justice Russel W. Zinn  
**DATE:** July 18, 2014  
**RE:** Rocco Galati et al v The Right Honourable Stephen Harper et al  
Docket T-1657-13

---

Please issue the following to all parties.

**DIRECTION**

If the issue of costs has not been resolved and agreed upon by all parties, a Case Management Conference will be held by teleconference on Friday, August 8, 2014, at 10:00 am for a period not to exceed 45 minutes. The parties are to be prepared to address the following matters: (1) can this matter be dealt with in writing or is an oral hearing required; (2) the scheduling of dates for the filing of written materials; and (3) if an oral hearing is to be held, scheduling a date for same.

“Russel W. Zinn”

Judge

Federal Court



Cour fédérale

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FACSIMILE TRANSMITTAL FORM

**To:**

Mr. Rocco Galati Fax: 416.530.8129
Mr. Paul J. Evraire, Q.C. 416.952.0298
Me Jean-Yves Bernard 514.873.7074
Me Raynold Langlois, Q.C. 514.845.6573

**From:**

Marc Cossette Registry Officer Tel.: (613) 992-4238 Fax: (613) 952-3653
--

**Date:** July 18, 2014 4:03 pm

**Subject:** Rocco Galati v. The Right Honourable Stephen Harper *et al.*  
Court File number: T-1657-13


**Total number of pages including this one** 2

**Comments:** BY FAX ONLY

Counsel,

Please find transmitted here a copy of the Direction of Mr. Justice Zinn rendered today in the above-referenced file.

Regards,



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## FEDERAL COURT

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FAX TRANSMITTAL FORM

DATE: August 5, 2014

FILE NO.: T-1657-13

STYLE OF CAUSE: Rocco Galati and others v. The Right Honourable Stephen Harper and otehrs

SUBJECT OF FAX: Confirming teleconference on Friday, August 8, 2014 at 10:00 a.m.

TO: Mr. Rocco Galati (Applicant)  
OFFICE: Rocco Galati Law Firm Professional Corporation, Toronto  
FAX: (416)530-8129

TO: Mr. Paul Slansky (for Applicant Constitutional Rights Centre Inc.)  
OFFICE: Paul Slansky Professional Corporation, Toronto  
FAX: (416)536-8842

TO: Mr. Paul Evraire (for Respondent the Right Honourable Stephen Harper et al)  
OFFICE: Dept. of Justice, Toronto  
FAX: (416)952-4518

TO: Ms. Chantal Chatelain (for Respondent the Hon. Mr. Justice Nadon)  
OFFICE: Langlois Kronstrom Desjardins, Montreal  
FAX: (514)845-6573

TO: Mr. Jean-Yves Bernard  
OFFICE: Ministère de la justice, Montreal  
FAX: (514)873-7074

Dear Sir/Madam:

Please be advised that the Honourable Mr. Justice Zinn has confirmed to the Registry that the case management teleconference referred to in the Court's direction dated July 18, 2014 will take place on Friday, August 8, 2014 at 10:00 a.m.

Please contact the Registry in Ottawa to confirm your participation in this teleconference (and to provide contact phone numbers) if you have not already done so.

Thank you.

1 page including the cover page

FAXED BY: Bob Lemoine (613)992-4238  
FAX: (613)952-3653

Tab-11



Federal Court



Cour fédérale

Date: 20140825

Docket: T-1657-13

Ottawa, Ontario, August 25, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ROCCO GALATI, AND  
CONSTITUTIONAL RIGHTS CENTRE INC.

Applicants

and

THE RIGHT HONOURABLE STEPHEN HARPER,  
HIS EXCELLENCY THE RIGHT HONOURABLE  
GOVERNOR GENERAL DAVID JOHNSTON,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, AND  
THE MINISTER OF JUSTICE

Respondents

ORDER

UPON the Supreme Court of Canada issuing Judgment in *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21;

AND UPON The Honourable Justice Gascon being sworn in to the Supreme Court of Canada;

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AND UPON case management conference held by teleconference on August 8, 2014;

AND UPON the parties agreeing that final disposition of this application does not require an oral hearing;

AND UPON the Court receiving copies of correspondence from counsel for the Respondents dated August 8, 2014 and a response from counsel for the Applicants dated August 12, 2014;

**IT IS HEREBY ORDERED THAT:**

1. The final disposition of this application, including costs, shall be conducted by way of written submissions from the parties;
2. The Applicants' materials shall be served and filed no later than September 26, 2014;
3. The Respondents' materials shall be served and filed no later than October 31, 2014; and
4. The Applicants' reply submissions shall be served and filed no later than November 7, 2014.

"Russel W. Zinn"

Judge

Federal Court



Cour fédérale

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## FACSIMILE TRANSMITTAL FORM

To:

Mr. Rocco Galati  
416.530.8129Mr. Paul Slansky  
416.536.8842Mr. Paul J. Evraire, Q.C.  
416.952.0298Me Jean-Yves Bernard  
514.873.7074Me Chantal Chatelain  
514.845.6573

From:

Marc Cossette  
Registry Officer  
Tel.: (613) 992-4238  
Fax: (613) 952-3653

Date:

August 25, 2014

4:28 pm

Subject:

Rocco Galati v. The Right Honourable Stephen Harper *et al.*  
Court File number: T-1657-13

Total number of pages including this one

3

Comments:

**BY FAX ONLY**

Counsel,

Please find transmitted here a copy of the Order of the Honourable Mr. Justice Zinn rendered today in the above-referenced file.

Regards,

A handwritten signature in cursive script, appearing to read 'Paul Slansky'.



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## Proceedings Queries

## Recorded entry(ies) for T-1657-13

[\(Close\)](#)

## Court number information

<b>Court Number :</b>	T-1657-13		
<b>Style of Cause :</b>	ROCCO GALATI ET AL v. THE RIGHT HONOURABLE STEPHEN HARPER ET AL		
<b>Proceeding Category :</b>	Applications	<b>Nature :</b>	S. 18.1 Application for Judicial Review
<b>Type of Action :</b>	Non-Action		

## 59 records found for T-1657-13

Doc	Date Filed	Office	Recorded Entry Summary
-	2014-08-25	Ottawa	Confirmation of successful transmission by fax on behalf of all parties with regard to the Order dated August 25, 2014. placed on file on 25-AUG-2014
20	2014-08-25	Ottawa	Order dated 25-AUG-2014 rendered by The Honourable Mr. Justice Zinn Matter considered without personal appearance The Court's decision is with regard to Letter from Applicant Respondent dated 08-AUG-2014 Result: " 1. The final disposition of this application, including costs, shall be conducted by way of written submissions from the parties; (...)" Filed on 25-AUG-2014 copies sent to parties entered in J. & O. Book, volume 1240 page(s) 497 - 498 Interlocutory Decision
-	2014-08-12	Ottawa	Letter from Applicants dated 12-AUG-2014 in response to the Respondent's 8-AUG-2014 letter. Applicants intend, on the motion for costs, to seek discontinuance of this application with costs to the Applicants. received on 12-AUG-2014
-	2014-08-08	Ottawa	Letter from Respondent, Mr. Evraire dated 08-AUG-2014 concerning a possible cross-motion for an Order dismissing the outstanding application for mootness. If so instructed, Respondent could file the cross-motion with the reply costs submissions due October 31, 2014. received on 08-AUG-2014
-	2014-08-08	Ottawa	Ottawa 08-AUG-2014 BEFORE The Honourable Mr. Justice Zinn Language: E Before the Court: Case Management Conference to discuss the issue of costs Result of Hearing: The parties agree that an oral hearing is not required, that the matter of costs will be addressed in writing. The following schedule is proposed: - Applicants' materials due to be filed September 26, 2014; - Respondent's materials due to be filed October 31, 2014; - Applicants' reply materials due to be filed November 7, 2014. An Order will follow. held by way of Conference Call Duration per day: 08-AUG-2014 from 09:59 to 10:08 Courtroom : Judge's Chambers - Ottawa Court Registrar: Danielle Lanteigne Total Duration: 9 min Appearances: Mr. Rocco Galati 416-530-9684 representing Applicant Mr. Paul Slansky 416-536-1220 representing Applicant Mr. Paul Evraire 416-973-4006 representing Respondent Comments: Digital Audio Recording System (DARS) not used at the Court's request. Minutes of Hearing entered in Vol. 911 page(s) 32 - 34 Abstract of Hearing placed on file

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-	2014-08-05	Ottawa	Letter sent by Registry on 05-AUG-2014 to all parties all parties confirming the case management teleconference to take place on Friday, August 8, 2014 at 10:00 a.m. and asking all parties who had not yet done so to confirm their participation and their contact numbers for the teleconference (sent by fax only) Copy placed on file.
-	2014-07-25	Ottawa	Letter from Respondent - The Honourable Marc Nadon dated 25-JUL-2014 Chantal Chatelain will be acting as co-counsel with Raynold Langlois (who is on leave) and requesting she be copied on all future correspondence received on 25-JUL-2014
-	2014-07-25	Ottawa	Memorandum to file from Danielle Parent - Ottawa dated 25-JUL-2014 received a call from counsel Chantal Chatelain from the office of Reynold Langlois. She will now have carriage of the matter. Letter is to follow. Also, will not be participating in teleconference concerning costs on August 8, 2014. placed on file.
-	2014-07-18	Ottawa	Confirmation of successful transmission by fax on behalf of all parties with regard to the Direction dated July 18, 2013. placed on file on 18-JUL-2014
-	2014-07-18	Ottawa	Written directions received from the Court: The Honourable Mr. Justice Zinn dated 18-JUL-2014 directing that If the issue of costs has not been resolved and agreed upon by all parties a Case Management Conference will be held by teleconference on Friday, August 8, 2014, at 10:00 a.m. for a period not to exceed 45 minutes. The parties are to be prepared to address the following matters: (1) can this matter be dealt with in writing or is an oral hearing required; (2) the scheduling of dates for the filing of written materials; and (3) if an oral hearing is to be held, scheduling a date for same. placed on file on 18-JUL-2014 Confirmed in writing to the party(ies)
-	2014-06-13	Toronto	Letter from Applicant dated 12-JUN-2014 further to Justice Zinn's direction... received on 13-JUN-2014
-	2014-04-15	Ottawa	Acknowledgment of Receipt received from all parties, via facsimile, with respect to Direction of the Court rendered 14-APR-2014 placed on file on 15-APR-2014
-	2014-04-14	Ottawa	Written directions received from the Court: The Honourable Mr. Justice Zinn dated 14-APR-2014 directing that "Having reviewed the recent correspondence from the parties, the stay of this application is continued pending the appointment to the Supreme Court of Canada of the person who will fill the vacancy originally proposed by the Government of Canada to be filled by Justice Nadon. Two weeks following that new appointment the Applicants, following consultation with the Respondents, are to advise the Court of their intention in regards to this litigation"; placed on file on 14-APR-2014 Confirmed in writing to the party(ies)
-	2014-04-09	Ottawa	Letter from Applicants dated 09-APR-2014 in reply to the Respondents' response dated April 8, 2014 (scanned to Zinn, J.) received on 09-APR-2014
-	2014-04-08	Toronto	Letter from Respondent dated 08-APR-2014 in respect of the letter from Mr. Galati, dated 7-apr.2014. received on 08-APR-2014
-	2014-04-08	Ottawa	Communication to the Court from the Registry dated 08-APR-2014 re: Transmitting the Applicants' letter dated April 6, 2014 to the Honourable Mr. Justice Zinn.
-	2014-04-07	Toronto	Letter from Applicant dated 06-APR-2014 in response to court's direction dated 1-APR-2014 for futher extension of stay for 90 days. with proof of service upon Respondent on 07-APR-2014

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			received on 07-APR-2014
-	2014-04-01	Ottawa	Confirmation of Transmittal receipt via facsimile received from all parties with respect to Direction of the Court dated April 1, 2014 placed on file on 01-APR-2014
-	2014-04-01	Ottawa	Written directions received from the Court: The Honourable Mr. Justice Zinn dated 01-APR-2014 directing that The Court has received the letter from Mr. Sribavan of March 26, 2014, responding to the Court's Direction that the Applicants, of which Mr. Galati is but one, advise the Court by March 31st of their intention in this matter in light of the decision of the Supreme Court of Canada. All Applicants shall respond to the Court's previous Direction in writing by end of business on Monday, April 7, 2014, failing which this application shall be dismissed, with costs. placed on file on 01-APR-2014 Confirmed in writing to the party(ies)
-	2014-03-28	Ottawa	Letter from Applicant dated 26-MAR-2014 "...Mr. Galati will be out of the country...be out of the office until April 24, 2014. Mr. Galati has not had an opportunity to review the matter and as such, he will nto be able to advise the Court of his intention in this matter..." (scanned and sent to Zinn, J.) received on 28-MAR-2014
-	2014-03-24	Ottawa	Confirmation of receipt by fax by all parties of the direction dated 24-MAR-2014 placed on file on 24-MAR-2014
-	2014-03-24	Ottawa	Written directions received from the Court: The Honourable Mr. Justice Zinn dated 24-MAR-2014 directing that "Further to the Court's Order dated November 12, 2013, and the release of the decision of the Supreme Court of Canada in the Reference (2014 SCC 21), the applicants are to advise the Court within seven (7) days of their intent in this matter" placed on file on 24-MAR-2014 Confirmed in writing to the party(ies)
-	2013-11-13	Toronto	Acknowledgment of Receipt received from Applicants and Respondents with respect to Doc 19 placed on file on 13-NOV-2013
19	2013-11-12	Toronto	Order dated 12-NOV-2013 rendered by The Honourable Mr. Justice Zinn Matter considered without personal appearance The Court's decision is with regard to Motion Doc. No. 12 Result: granted. This application is stayed pending the release of the decision of the SCC in the Reference by the Governor in Council concerning sections 5 and 6 of the Supreme Court Act, RSC 1985... Filed on 12-NOV-2013 copies sent to parties entered in J. & O. Book, volume 1210 page(s) 20 - 21 Interlocutory Decision
-	2013-11-12	Toronto	Communication to the Court from the Registry dated 12-NOV-2013 re: respondent letter dated November 12/13 sent to the court at Toronto
-	2013-11-12	Toronto	Letter from Respondent, Harper et al dated 12-NOV-2013 attach consent of the parties, to the terms of the respondent motion to stay received on 12-NOV-2013
18	2013-10-28	Toronto	Affidavit of service of Diane Dyke sworn on 28-OCT-2013 on behalf of Respondent - AGC confirming service of Motion Doc.15 upon Jean-Yves Bernard (Counsel for AGQ); Raynold Langlois, Q.C. by email on 28-OCT-2013 with Exhibits A-B filed on 28-OCT-2013
17	2013-10-28	Toronto	Affidavit of service of Gareth Olafson sworn on 28-OCT-2013 on behalf of Respondent - AGC confirming service of Motion Doc.15 and Book of Authorities upon Applicant by personal service on 28-OCT-2013 filed on 28-OCT-2013
			Affidavit of service of Gareth Olafson sworn on 28-OCT-2013 on behalf of Respondent - AGC confirming service of Motion Doc.15

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16	2013-10-28	Toronto	and Book of Authorities upon Applicant by personal service on 28-OCT-2013 filed on 28-OCT-2013
-	2013-10-28	Toronto	Book of Authorities consisting of 1 volume(s) on behalf of Respondent received on 28-OCT-2013
15	2013-10-28	Toronto	Motion Record containing the following original document(s): 12 13 14 Number of copies received: 3 on behalf of Respondent - AGC filed on 28-OCT-2013
14	2013-10-28	Toronto	Written Representations contained within a Motion Record on behalf of Respondent - AGC concerning Motion Doc. No. 12 filed on 28-OCT-2013
13	2013-10-28	Toronto	Affidavit of Andrew Law sworn on 28-OCT-2013 contained within a Motion Record on behalf of Respondent - AGC in support of Motion Doc. No. 12 with Exhibits A-I filed on 28-OCT-2013
12	2013-10-28	Toronto	Notice of Motion contained within a Motion Record on behalf of Respondent - AGC returnable at Special Sitting in Toronto on 15-NOV-2013 to begin at 09:00 for an Order staying the application; extending the time period under rule 318; costs filed on 28-OCT-2013
-	2013-10-28	Ottawa	Communication to the Court from the Registry dated 28-OCT-2013 re: Forwarded to Trial J.A. to fix hearing date for the Judicial Review.
-	2013-10-25	Ottawa	Acknowledgment of Receipt received from all parties with respect to the Order dated October 25, 2013 by email placed on file on 25-OCT-2013
11	2013-10-25	Ottawa	Order dated 25-OCT-2013 rendered by The Honourable Mr. Justice Zinn Matter considered with personal appearance The Court's decision is with regard to Case Management Conference Result: 1. Pursuant to Rules 364 and 366, the Crown shall serve and file its motion record on the Stay motion, which motion record shall include a memorandum of fact and law, no later than Monday, October 28, 2013; 2. The Applicants, and any other party wishing to respond to the Stay of Motion, shall serve and file its motion record, which motion record shall include a memorandum of fact and law, no later than Tuesday, November 2, 2013; 3. The Crown, is granted leave to serve and file a brief Reply Memorandum, on or before November 13, 2013; 4. The hearing of the Stay Motion shall take place in the English language and is hereby fixed for Friday, November 15, 2013, to commence at 9:00 a.m., before a Judge at the Federal Court, 180 Queen Street West, in the City of Toronto, Province of Ontario, for a duration not exceeding four (4) hours; 5. Unless the Crown's Stay of Motion is allowed, the steps set out in paragraphs 6 to 13 shall apply in order to expedite the hearing of this application; 6. Pursuant to Rule 309, the Applicants shall serve and file their Record on the application no later than Monday, November 25, 2013; 7. Cross-examinations, if any, on affidavits filed by the Applicants shall be completed on or before Friday, November 29, 2013; 8. The transcript of cross-examinations, if any, shall be filed on or before Friday, December 6, 2013; 9. The Attorney General of Quebec shall serve and file his record no later than Monday, December 9, 2013; 10. The Crown shall file her Record no later than Monday, December 16, 2013; 11. Any Reply memoranda shall be served and filed no later than Thursday, December 19, 2013; 12. Pursuant to Rule 70(4), the Court grants all parties leave to file a memorandum of fact and law, exclusive of Part V and appendices, not exceeding 40 pages in length; 13. The hearing of the application for judicial review shall take place in the

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			English and French languages, with an interpreter, commencing on a date to be fixed by the Office of the Chief Justice, at the Federal Court, 180 Queen Street West, in the City of Toronto, Province of Ontario, for a duration not exceeding two and one-half (2 1/2) days; 14. The parties are to provide the Court with dates in January and February 2014 when they are not available for the hearing of this application; however the Court reserves the right to schedule the hearing date based on the availability of judicial resources; and 15. The style of cause is hereby amended by deleting as a Respondent, The Right Honourable Beverley McLachlin, Chief Justice of Canada. Filed on 25-OCT-2013 entered in J. & O. Book, volume 1208 page(s) 361 - 364 Interlocutory Decision
-	2013-10-24	Ottawa	Ottawa 24-OCT-2013 BEFORE The Honourable Mr. Justice Zinn Language: E Before the Court: Case Management Conference Result of Hearing: The Court will issue an order. held by way of Conference Call Duration per day: 24-OCT-2013 from 05:30 to 06:20 Courtroom : Judge's Chambers - Ottawa Court Registrar: Benoit Labelle Total Duration: 50min Appearances: Mr. Rocco Galati (416) 530-9684 representing on his behalf Mr. Paul Slansky (416) 530-9864 representing the CRC Ms.Christine Mohr and Mr. Andrew Law (416) 973-4111 representing The Right Honourable Stephen Harper et al Mr. Raynold Langlois (514) 282-7825 representing The Honourable Mr. Justice Nadon Mr. Jean-Yves Bernard (514) 393-2336 representing AGQ Minutes of Hearing entered in Vol. 889 page(s) 221 - 225 Abstract of Hearing placed on file
-	2013-10-23	Ottawa	Response on behalf of the Applicants in respect to the Direction of the Court rendered October 23, 2013 received on 23-OCT-2013
-	2013-10-23	Ottawa	Oral directions received from the Court: The Honourable Mr. Justice Zinn dated 23-OCT-2013 directing that "In light of the Reference to the Supreme Court of Canada, attached, is the case management conference call scheduled for late Thursday, October 24, 2013 required. The Applicants are asked to immediately inform the Court whether this action will be discontinued." placed on file on 23-OCT-2013
10	2013-10-21	Toronto	Solicitor's certificate of service on behalf of Rocco Galati confirming service of Doc. 9 upon Respondent by telecopier on 21-OCT-2013 filed on 21-OCT-2013
9	2013-10-21	Toronto	Discontinuance against The Right Honourable Beverley McLachlin, Chief Justice on behalf of Applicant filed on 21-OCT-2013
-	2013-10-18	Ottawa	Ottawa 18-OCT-2013 BEFORE The Honourable Mr. Justice Zinn Language: E Before the Court: Case Management Conference Result of Hearing: Matter adjourned to Special Sitting in Ottawa on 24-OCT-2013 to begin at 05:30 held in chambers by way of Conference Call Duration per day: 18-OCT-2013 from 10:00 to 10:15 Courtroom : Judge's Chambers - Ottawa Court Registrar: Sherley Desir Total Duration: 15 min Appearances: Mr. Roco Galati (613) 530-9684 representing on his own behalf Mr. Paul Slansky (416) 536-8842 representing Constitutional Rights Centre Inc. Ms. Christine Mohr and Mr. Andrew Law (416) 973-4111 representing The Right Honourable Stephen Harper, His Excellency the Right Honourable Governor General David Johnston, the Attorney General of Canada, and the the Minister of Justice Mr. Raynold Langlois (514) 282-7825 representing the Honourable Mr. Justice Nadon Comments: The Case Management Conference is adjourned to Thursday October 24, 2013 at 5:30 p.m. Minutes of Hearing entered in Vol. 889 page(s) 18 - 22 Abstract of Hearing

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			placed on file
8	2013-10-16	Montréal	Notice of appearance on behalf of the Respondent, the Honourable Justice Marc Nadon with proof of service upon all parties on 15-OCT-2013 filed on 16-OCT-2013
-	2013-10-16	Ottawa	Letter from Mr. Raynold Langlois dated 16-OCT-2013 confirming receipt of the oral direction of the Court issued on October 16, 2013 and providing the number where he can be reached for the Case Management Conference. received on 16-OCT-2013
7	2013-10-16	Toronto	Solicitor's certificate of service on behalf of Rocco Galati confirming service of doc. 6 upon the Attorneys General of Canada, the Provinces and Territories by personal service and telecopier on 16-OCT-2013 filed on 16-OCT-2013
6	2013-10-16	Toronto	Notice of a constitutional question on behalf of Applicant filed on 16-OCT-2013
-	2013-10-16	Toronto	Oral directions received from the Court: The Honourable Mr. Justice Zinn dated 16-OCT-2013 directing that the Notice of a Constitutional Question be accepted for filing. placed on file on 16-OCT-2013
-	2013-10-16	Toronto	Memorandum to file from Jsmith dated 16-OCT-2013 Notice of Constitutional question, presented at Toronto, document placed before CMJ:Zinn, J for direction. placed on file.
-	2013-10-16	Ottawa	Successful transmission report received from facsimile with respect to the oral direction of the Court, Zinn J., issued on October 16, 2013. placed on file on 16-OCT-2013
-	2013-10-16	Ottawa	Oral directions received from the Court: The Honourable Mr. Justice Zinn dated 16-OCT-2013 directing that "A Case Management Conference will be held by telephone conference on Friday October 18, 2013 at 10:00 a.m. for one (1) hour to discuss the scheduling steps in this Application." placed on file on 16-OCT-2013 Confirmed in writing to the party(ies)
-	2013-10-11	Toronto	Copy of a Letter from Mr. Rocco Galati for the Applicant to Mr. Chris Paliare from Paliare Rolland Rosenber Rothstein LLP dated 11-OCT-2013 advising Mr. Paliare as indicated over the telephone that Mr. Galati was unaware that the Right Honourable Chief Justice had administered the oath too Justice Nadon and that as such, there is no current need to maintain the Right Honourable Chief Justice as Respondent in this application and will be filing a Notice of Discontinuance with respect to The Right Honourable Chief Justice, early next week. received on 11-OCT-2013
5	2013-10-11	Toronto	Affidavit of service of Issabelle Farquharson sworn on 11-OCT-2013 on behalf of Respondent confirming service of doc 4 upon Applicant & Co-Respondents by telecopier on 11-OCT-2013 with Exhibits A filed on 11-OCT-2013
4	2013-10-11	Toronto	Notice of appearance on behalf of the Respondents, Hon S Harper, Hon D Johnson, AG of Canada & Min of Justice filed on 11-OCT-2013
-	2013-10-11	Toronto	Letter from Applicant dated 11-OCT-2013 proposed timetable for the sets in this application received on 11-OCT-2013
-	2013-10-10	Ottawa	Proof of Transmission by Fax received from All parties with respect to Doc. #3 (Order from CJC dated October 10, 2013). placed on file on 10-OCT-2013
			Order dated 10-OCT-2013 rendered by Chief Justice Crampton Matter considered without personal appearance The Court's decision is with regard to Status Review Result: 1. This proceeding

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3	2013-10-10	Ottawa	shall continue as a specially managed proceeding. 2. Pursuant to Rule 383, Justice Russel Zinn is assigned as Case Management Judge and Prothonotary Mireille Tabib will assist in the management of this matter. Filed on 10-OCT-2013 certified copies sent to parties Transmittal Letters placed on file. entered in J. & O. Book, volume 1206 page(s) 487 - 488 Interlocutory Decision
2	2013-10-08	Toronto	Service copy of Doc. No. 1 with proof of service upon The Respondent's; the Attorney General of Canada & Minister of Justice on 08-OCT-2013 filed on 08-OCT-2013
1	2013-10-07	Toronto	Notice of application and 2 copies with regard to Judicial Review (s.18) returnable (but no hearing date indicated at this time) filed on 07-OCT-2013 Certified copy(ies)/copy(ies) transmitted to Director of the Regional Office of the Department of Justice Tariff fee of \$50.00 received: yes

The last database update occurred on 2014-09-17 12:50

Top of page



Tab-13

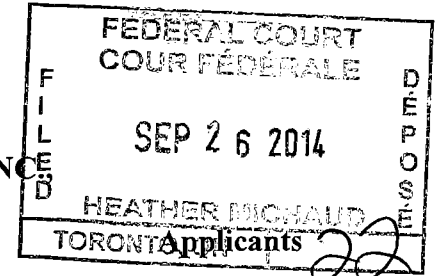


Registry No.: T-1657-13

BETWEEN:

FEDERAL COURT

ROCCO GALATI,  
CONSTITUTIONAL RIGHTS CENTRE INC



- and -

THE RIGHT HONOURABLE STEPHEN HARPER, HIS EXCELLENCY THE  
RIGHT HONOURABLE GOVERNOR GENERAL DAVID JOHNSTON,  
THE HONOURABLE MARC NADON, JUDGE OF THE FEDERAL COURT OF  
APPEAL, THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF  
JUSTICE

Respondents

**AFFIDAVIT**

I, Rocco Galati, of the City of Toronto, in the Province of Ontario, MAKE  
OATH AND SAY:

1. On or before October 3<sup>rd</sup>, 2013 The Right Honourable Stephen Harper purportedly nominated The Honourable Justice Marc Nadon, a sitting Justice of the Federal Court of Appeal, to the Supreme Court of Canada as a “Quebec” Judge pursuant to s. 6 of the *Supreme Court Act*.
2. At some time, unknown to the Applicants, Governor-in-Council purported to issue letters patent, under the Great Seal, appointing The Honourable Justice Nadon, pursuant to s. 4(2) of the *Supreme Court Act*, to the Supreme Court of Canada as a “Quebec” Judge pursuant to s. 6 of the *Supreme Court Act*.
3. On Thursday October 3<sup>rd</sup>, 2013, The Right Honourable Beverley McLachlin, Chief Justice of Canada, announced that The Honourable Justice Nadon would be “sworn in... on a date to be announced”. No such date, to the Applicants’ knowledge, was announced.
4. On or about Monday October 7<sup>th</sup>, at an unknown time, The Honourable Justice Nadon had his purported oath, pursuant to ss. 10-11 of the *Supreme Court Act*,

administered by the Right Honourable Beverley McLachlin, Chief Justice of Canada, in Ottawa. Subsequent to this, on October 7<sup>th</sup>, 2013 the announcement was press released by the Supreme Court of Canada from Ottawa. At the same time of the press release, the notice of application, in the within application, which had been prepared and drafted over the weekend of October 5-6<sup>th</sup> by the Applicants, and finalized by the morning of October 7<sup>th</sup>, was being issued in the Federal Court Registry in Toronto. I personally issued the Notice as I know that a process server would have difficulty “talking it over” the Registry counter. Upon my return to the office, not knowing he had been “sworn in”, I wrote the Respondents asking he not be sworn in.

5. Following receipt of my letter and attached Notice of Application herein, on October 8<sup>th</sup>, 2013, The Honourable Justice Nadon publicly indicated the following by way of press release:

“Mr. Justice Marc Nadon has decided, in light of the challenge to his appointment pending before the Federal Court, not to participate for the time being in matters before the Supreme Court of Canada.”

6. In reaction to the Applicant’s Federal Court application, Parliament enacted, as part of the *Economic Action Plan Act 2013, No. 2*, a “Declaratory Act” with respect to ss. 5-6 of the *Supreme Court Act*. The Applicant took the position that such *Act* constituted a “change to the composition of the Supreme Court of Canada” and thus required constitutional amendment, and was thus unconstitutional.
7. On October 18<sup>th</sup>, 2013 a case-management hearing was held before the Honourable Justice Zinn. This was further adjourned to October 24<sup>th</sup>, 2014. Pursuant to this hearing an order was issued.
8. On October 22<sup>nd</sup>, 2013, a Reference was filed at the Supreme Court of Canada with respect to the Declaratory Act and Justice Nadon’s eligibility to be appointed to the Supreme Court of Canada. On October 24<sup>th</sup>, 2013 a further teleconference was held with this Court and, on October 25<sup>th</sup>, 2013 an order issued, contained at *Tab 5* of the within motion record of which this my affidavit comprised a part.

9. The parties then agreed to stay the within application, and not oppose the Applicant's, Rocco Galati's motion to intervene before the Supreme Court of Canada. As a result this Court issued an order, on November 12<sup>th</sup>, 2013, staying the within application pending the decision of the Supreme Court of Canada.
10. On March 21<sup>st</sup>, 2014 the Supreme Court of Canada ruled against the Respondent. Attached, hereto, as "*Exhibit A*" is a copy of the Supreme Court of Canada's ruling.
11. In the decision, the Supreme Court of Canada, on the substantive issue(s) brought forth in the within Federal Court application, with respect to Justice Nadon's eligibility, and the constitutional stature of the Supreme Court of Canada, ruled in the Applicant's favour. Also to be noted is that one of the relief sought in the within application for judicial review was that the Respondent ought to have brought a Reference to the Supreme Court of Canada, in the first place, rather than trying to do an "end-run" around the within application with its "Declaratory Act".
12. I attach, as "*Exhibit B*", my bill of costs (dockets requested by the Respondent), on a solicitor-client basis. I was called to the bar in March 1989. I have taught at the student clinic at the University of Toronto. I am a published author (including in law). I hold an LL.M. I have been a named member of *Canada's Who's Who* since 2011. I was named one of the "top 25 influential lawyers" by *Canadian Lawyer Magazine* in August, 2014. My private practice has always and primarily been restricted to proceedings against the Crown. The \$800.00 per hour is below what is charged by counsel of my years of call at the bar and expertise. I further confirm and attest to the fact that the time spent and docketed, as well as the disbursements incurred, were spent and incurred for the within application.
13. I further confirm and attest to the fact that I did not derive any personal benefit or relief, *per se*, from either the within application nor Reference to the Supreme Court of Canada as an Intervener.

SWORN BEFORE me at the City of )  
Toronto, in the Province of Ontario )  
this 2<sup>A</sup> day of September, 2014. )

  
\_\_\_\_\_  
Rocco Galati, B.A., LL.B., LL.M.

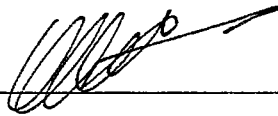
  
\_\_\_\_\_  
A Commissioner for Taking Affidavits

Exhibit-A



This is Exhibit A referred to in the  
affidavit of ROCCO GALATI  
sworn before me, this 24<sup>th</sup>  
day of SEPTEMBER 2014.



.....  
A COMMISSIONER, ETC.

*Case Name:*

**Reference re Supreme Court Act, ss. 5 and 6**

**IN THE MATTER OF a Reference by the Governor in Council  
concerning sections 5 and 6 of the Supreme Court Act, R.S.C.  
1985, c. S-26, as set out in Order in Council P.C. 2013-1105  
dated October 22, 2013**

[2014] S.C.J. No. 21

[2014] A.C.S. no 21

2014 SCC 21

[2014] 1 S.C.R. 433

[2014] 1 R.C.S. 433

368 D.L.R. (4th) 577

2014 CarswellNat 640

455 N.R. 202

306 C.R.R. (2d) 22

2014EXP-934

J.E. 2014-505

EYB 2014-234848

File No.: 35586

Supreme Court of Canada

Heard: January 15, 2014;  
Judgment: March 21, 2014.

**Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver,  
Karakatsanis and Wagner JJ.**

(154 paras.)



**Reference From:**

## REFERENCE BY GOVERNOR IN COUNCIL

*Civil litigation -- Civil procedure -- References and inquiries -- Constitutional references -- Reference concerning ss. 5 and 6 of Supreme Court Act to determine 1) whether person who was at any time an advocate of at least 10 years standing at Barreau du Québec qualified for appointment as being "from among the advocates of that Province" and 2) whether Parliament could enact legislation to make such a person eligible for appointment to one of three Québec seats on Supreme Court of Canada -- Person who was, at any time, advocate of at least 10 years standing at Barreau du Québec could not be appointed as member from Québec; Parliament could not unilaterally enact legislation modifying eligibility requirements for appointments to Québec seats -- Eligibility requirements set out in s. 6 related to composition of the Court and were, therefore, constitutionally protected -- Since s. 6.1 substantively changed eligibility requirements, Parliament sought to amend Constitution of Canada on matter that required unanimity of Parliament and provincial legislatures.*

*Constitutional law -- Canadian constitution -- Constitution Acts -- Canada Act, 1982 -- Constitution Act, 1982 -- Procedure for amending constitution -- Reference concerning ss. 5 and 6 of Supreme Court Act to determine 1) whether person who was at any time an advocate of at least 10 years standing at Barreau du Québec qualified for appointment as being "from among the advocates of that Province" and 2) whether Parliament could enact legislation to make such a person eligible for appointment to one of three Québec seats on Supreme Court of Canada -- Person who was, at any time, advocate of at least 10 years standing at Barreau du Québec could not be appointed as member from Québec; Parliament could not unilaterally enact legislation modifying eligibility requirements for appointments to Québec seats -- Eligibility requirements set out in s. 6 related to composition of the Court and were, therefore, constitutionally protected -- Since s. 6.1 substantively changed eligibility requirements, Parliament sought to amend Constitution of Canada on matter that required unanimity of Parliament and provincial legislatures -- Constitution Act, 1982, ss. 41(d), 42(1)(d).*

*Constitutional law -- Constitutional validity of legislation -- Level of government -- Federal government -- Interpretive and constructive doctrines -- Reference concerning ss. 5 and 6 of Supreme Court Act to determine 1) whether person who was at any time an advocate of at least 10 years standing at Barreau du Québec qualified for appointment as being "from among the advocates of that Province" and 2) whether Parliament could enact legislation to make such a person eligible for appointment to one of three Québec seats on Supreme Court of Canada -- Person who was, at any time, advocate of at least 10 years standing at Barreau du Québec could not be appointed as member from Québec; Parliament could not unilaterally enact legislation modifying eligibility requirements for appointments to Québec seats -- Eligibility requirements set out in s. 6 related to composition of the Court and were, therefore, constitutionally protected -- Since s. 6.1 substantively changed eligibility requirements, Parliament sought to amend Constitution of Canada on matter that required unanimity of Parliament and provincial legislatures -- Supreme Court Act, ss. 5.1, 6.1 -- Constitution Act, 1982, ss. 41(d), 42(1)(d).*

*Legal profession -- Judges -- Appointment, qualifications and tenure -- Constitutional issues -- Reference concerning ss. 5 and 6 of Supreme Court Act to determine 1) whether person who was at any time an advocate of at least 10 years standing at Barreau du Québec qualified for appointment as being "from among the advocates of that Province" and 2) whether Parliament could enact legislation to make such a person eligible for appointment to one of three Québec seats on Supreme Court of Canada -- Person who was, at any time, advocate of at least 10 years standing at Barreau du Québec could not be appointed as member from Québec; Parliament could not unilaterally enact legislation modifying eligibility requirements for appointments to Québec seats -- Eligibility requirements set out in s. 6 related to composition of the Court and were, therefore, constitutionally protected -- Since s. 6.1 substantively changed eligibility requirements, Parliament sought to amend Constitution of Canada on matter that required unanimity of Parliament and provincial legislatures -- Supreme Court Act, ss. 5.1, 6.1.*

*Statutory interpretation -- Regulations and Orders in Council -- Validity -- Grounds for invalidating -- Conditions precedent -- Inconsistent with legislation other than enabling statute -- Reference concerning ss. 5 and 6 of Supreme Court Act to determine 1) whether person who was at any time an advocate of at least 10 years standing at Barreau du Québec qualified for appointment as being "from among the advocates of that Province" and 2) whether Parliament could enact legislation to make such a person eligible for appointment to one of three Québec seats on Supreme Court*

*of Canada -- Person who was, at any time, advocate of at least 10 years standing at Barreau du Québec could not be appointed as member from Québec; Parliament could not unilaterally enact legislation modifying eligibility requirements for appointments to Québec seats -- Eligibility requirements set out in s. 6 related to composition of the Court and were, therefore, constitutionally protected -- Since s. 6.1 substantively changed eligibility requirements, Parliament sought to amend Constitution of Canada on matter that required unanimity of Parliament and provincial legislatures -- Supreme Court Act, ss. 5.1, 6.1.*

Reference concerning ss. 5 and 6 of the Supreme Court Act (the "Act") to determine 1) whether a person who was at any time an advocate of at least 10 years standing at the Barreau du Québec qualified for appointment as being "from among the advocates of that Province" and 2) whether Parliament could enact legislation to make such a person eligible for appointment to one of three Québec seats on the Supreme Court of Canada (the "Court"). In October 2013, Justice Nadon, a supernumerary judge of the Federal Court of Appeal, was named a judge of the Court as one of the three judges appointed from Québec pursuant to s. 6 of the Act. Nadon was formerly, but not at the time of his appointment to the Court, a member of the Québec bar of more than 10 years. The Act provided that three of the nine judges of the Court had to be appointed "from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province". Because of this provision, the appointment was challenged by an application before the Federal Court of Canada. A Bill subsequently amended the Act by adding ss. 5.1 and 6.1. These provisions established that, for the purpose of s. 5 of the Act, a person could 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. The provisions also stated that, for the purpose of s. 6 of the Act, a judge was from among the advocates of the Province of Québec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province. Thus, the Governor General in Council asked the Court to determine whether a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec qualified for appointment under s. 6 of the Act as being "from among the advocates of that Province". If the answer to the first question was no, the Court was then required to determine whether Parliament could enact legislation to make such a person eligible for appointment to one of the three Québec seats on the Court.

HELD: A person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec could not be appointed to the Court as a member from Québec; Parliament could not unilaterally enact legislation modifying the eligibility requirements for appointments to the Québec seats on the Court. By specifying that three judges shall be selected from among the members of a specific list of institutions, s. 6 required that persons appointed to the three Québec seats must, in addition to meeting the general requirements of s. 5, be current members of these institutions. The plain meaning of s. 6 has remained consistent since the original version of that provision was enacted in 1875, and it has always excluded former advocates. This interpretation of s. 6 advanced its dual purpose of ensuring that the Court has civil law expertise and that Québec's legal traditions and social values were represented on the Court and that Québec's confidence in the Court be maintained. This interpretation was consistent with the broader scheme of the Act for the appointment of ad hoc judges. On a plain reading, s. 5 created four groups of people eligible for appointment: current and former judges of a superior court and current and former barristers or advocates of at least 10 years standing at the bar. But s. 6 imposed a requirement that persons appointed to the three Québec seats must, in addition to meeting the general requirements of s. 5, be current members of the listed Québec institutions. Thus, s. 6 narrowed eligibility to only two groups for Québec appointments: current judges of the Court of Appeal or Superior Court of Québec and current advocates of at least 10 years standing at the bar of Québec. Parliament could not enact legislation purporting to declare a binding interpretation of s. 6 and thereby permit the appointment of a former member of the bar to one of the Québec positions on the Court. The eligibility requirements set out in s. 6 related to the composition of the Court and were, therefore, constitutionally protected. Since s. 6.1 of the Act substantively changed the eligibility requirements for appointments to the Québec seats on the Court under s. 6, it sought to bring about an amendment to the Constitution of Canada on a matter requiring unanimity of Parliament and the provincial legislatures.

**Statutes, Regulations and Rules Cited:**

Act to amend the Criminal Code, S.C. 1932 33, c. 53, s. 17

Act to amend the Exchequer Court Act, S.C. 1912, c. 21, s. 1

Act to amend the Exchequer Court Act, S.C. 1920, c. 26, s. 1

Act to amend the Supreme Court Act, S.C. 1918, c. 7, s. 1

Act to amend the Supreme Court Act, S.C. 1926 27, c. 38, s. 1

Act to amend the Supreme Court Act, S.C. 1949 (2nd Sess.), c. 37, s. 1, s. 3  
Act to amend the Supreme Court Act and to make related amendments to the Federal Court Act, S.C. 1974-75-76, c. 18,  
Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,  
Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 101  
Constitution Act, 1982, Part V, s. 41(d), s. 42(1)(d), s. 52(1), s. 52(2)  
Courts Administration Service Act, S.C. 2002, c. 8, s. 175  
Economic Action Plan 2013 Act, No. 2, S.C. 2013, c. 40, s. 471, s. 472  
Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 64  
Federal Courts Act, R.S.C. 1985, c. F-7, s. 5.4  
Legislation Revision and Consolidation Act, R.S.C. 1985, c. S 20, s. 6  
Rglement sur la formation continue obligatoire des avocats, R.R.Q., c. B 1, r. 12, s. 2  
Statute of Westminster, 1931 (reprinted in R.S.C. 1985, App. II, No. 27),  
Supreme and Exchequer Court Act, S.C. 1875, c. 11, s. 4  
Supreme and Exchequer Courts Act, R.S.C. 1886, c. 135, s. 4(2), s. 4(3)  
Supreme Court Act, R.S.C. 1906, c. 139, s. 5, s. 6  
Supreme Court Act, R.S.C. 1927, c. 35, s. 4, s. 5, s. 6  
Supreme Court Act, R.S.C. 1985, c. S-26, s. 4(1), s. 5, s. 5.1, s. 6, s. 6.1, s. 25, s. 29, s. 30, s. 53

#### **Subsequent History:**

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

#### **Court Catchwords:**

*Courts -- Supreme Court of Canada -- Judges -- Eligibility requirements for appointment to Supreme Court of Canada -- Requirement that three judges be appointed to Court from among judges of Court of Appeal or of Superior Court of Quebec or from among advocates of at least 10 years standing at Barreau du Québec -- Whether Federal Court of Appeal judge formerly member of Barreau du Québec for more than 10 years eligible for appointment to Supreme Court of Canada -- Supreme Court Act, R.S.C. 1985, c. S-26, ss. 5, 6. Constitutional law -- Constitutional amendment -- Composition of Supreme Court of Canada -- Whether Parliament acting alone can enact legislation permitting appointment of former member of Quebec bar to Quebec position on Court -- Constitution Act, 1982, s. 41(d); Supreme Court Act, R.S.C. 1985, c. S-26, ss. 5.1, 6.1.*

#### **Court Summary:**

The Honourable Marc Nadon, a supernumerary judge of the Federal Court of Appeal and formerly a member of the Quebec bar for more than 10 years, was named a judge of the Supreme Court of Canada for the province of Quebec, pursuant to s. 6 of the *Supreme Court Act* (the "Act"). Section 6 specifies that at least three of the nine judges appointed to the Court "shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province".

After the appointment of Justice Nadon was challenged before the Federal Court of Canada, the Governor in Council referred the following questions to this Court under s. 53 of the Act:

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

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

Clauses 471 and 472 of the bill entitled *Economic Action Plan 2013 Act, No. 2*, received Royal Assent and became ss. 5.1 and 6.1 of the Act. Sections 5.1 and 6.1 seek to make it clear that a former member of the bar may be appointed to the Court under s. 5 and that a former member of the Quebec bar is eligible for appointment under s. 6.

*Held* (Moldaver J. dissenting): Question 1 is answered in the negative. Question 2 is answered in the negative with respect to the three seats reserved for Quebec and the declaratory provision set out in clause 472. It is answered in the affirmative with respect to clause 471.

#### *Question 1*

*Per* McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.:

A judge of the Federal Court or Federal Court of Appeal is ineligible for appointment to the Supreme Court of Canada under s. 6 of the Act. Section 5 of the Act sets out the general eligibility requirements for appointment to the Supreme Court by creating four groups of people who are eligible for appointment: (1) current judges of a superior court of a province, including courts of appeal; (2) former judges of such a court; (3) current barristers or advocates of at least 10 years standing at the bar of a province; and (4) former barristers or advocates of at least 10 years standing. However, s. 6 narrows the pool of eligible candidates from the four groups of people who are eligible under s. 5 to two groups who are eligible under s. 6. In addition to meeting the general requirements of s. 5, persons appointed to the three Quebec seats under s. 6 must be current members of the Barreau du Québec, the Quebec Court of Appeal or the Superior Court of Quebec.

The plain meaning of s. 6 has remained consistent since the original version of that provision was enacted in 1875, and it has always excluded former advocates. 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. Reading ss. 5 and 6 together, the requirement of at least 10 years standing at the bar applies to appointments from Quebec.

This textual analysis is consistent with the underlying purpose of s. 6 and reflects the historical compromise that led to the creation of the Supreme Court as a general court of appeal for Canada and as a federal and bijural institution. Section 6 seeks (i) to ensure civil law expertise and the representation of Quebec's legal traditions and social values on the Court, and (ii) to enhance the confidence of Quebec in the Court. This interpretation is also consistent with the broader scheme of the Act for the appointment of *ad hoc* judges, which excludes judges of the federal courts as *ad hoc* judges for Quebec cases.

*Per* Moldaver J. (dissenting):

The eligibility criteria in s. 5 apply to all appointees, including those chosen from Quebec institutions to fill a Quebec seat. It follows that both current *and former* members of the Quebec bar of at least 10 years standing, and current *and former* judges of the Quebec superior courts, are eligible for appointment to a Quebec seat on this Court. Therefore, I answer Question 1 in the affirmative.

Sections 5 and 6 are inextricably linked. Section 5 sets out the threshold eligibility requirements to be appointed a judge of this Court. Under s. 5, both current and former members of a provincial bar of at least 10 years standing, and current and former judges of a superior court of a province, are eligible. Section 6 builds on s. 5 by requiring that for three of the seats on this Court, the candidates who meet the criteria of s. 5 must be chosen from three Quebec institutions (the Barreau du Québec, the Quebec Court of Appeal, and the Superior Court of Quebec). Section 6 does not impose any additional requirements.

To suggest that Quebec wanted to render ineligible former advocates of at least 10 years standing at the Quebec bar is to rewrite history. The object of s. 6 is, and always has been, to ensure that a specified number of this Court's judges are trained in civil law and represent Quebec. By virtue of the fact that these seats must be filled by persons appointed from the three Quebec institutions named in s. 6, appointees will necessarily have received formal training in the civil law. The combination of this training and affiliation with one of the named Quebec institutions serves to protect Quebec's

civil law tradition and inspire Quebec's confidence in this Court. Imposing the additional requirement of current membership at the Quebec bar does nothing to promote the underlying object of s. 6 and leads to absurd results.

The currency requirement is not supported by the text of s. 6, its context, or its legislative history. The words "from among" found in s. 6 convey no temporal meaning. They take their meaning from the surrounding context and cannot, on their own, support the contention that a person must be a *current* member of the bar or bench to be eligible for a Quebec seat. The words "from among" do not alter the group to which s. 6 refers -- the group described in s. 5. Indeed, having regard to their historical context, the words "from among" *support* the view that ss. 5 and 6 are inextricably linked.

An absurdity results if s. 6 is not read in conjunction with s. 5, such that a newly-minted member of one day's standing at the Quebec bar would be eligible for a Quebec seat on this Court. Manifestly, s. 6 must be linked to the 10-year eligibility requirement for members of the bar specified in s. 5. Choosing from s. 5 only those aspects of it that are convenient (i.e. the 10 year requirement) -- and jettisoning those that are not (i.e. the fact that both *current and former* advocates of 10 years standing qualify under s. 5) -- is a principle of statutory interpretation heretofore unknown.

The currency requirement finds no support in the scheme of the Act. Section 30 of the Act, which deals with the appointment of *ad hoc* judges, is a historic anomaly and does not assist in the interpretation of the eligibility requirements set out in ss. 5 and 6.

Any interpretation of s. 6 that requires a *former* advocate of at least 10 years standing at the Quebec bar, or a *former* judge of the Quebec Court of Appeal or Superior Court, to rejoin the Quebec bar for a day in order to be eligible for appointment to this Court makes no practical sense. It is difficult to believe that the people of Quebec would somehow have more confidence in this candidate on Friday than they had on Thursday.

#### *Question 2*

*Per McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.:*

The unilateral power of Parliament to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada", found in s. 101 of the *Constitution Act, 1867*, has been overtaken by the Supreme Court's evolution in the structure of the Constitution, as recognized in Part V of the *Constitution Act, 1982*. The Court's constitutional status initially arose from the Court's historical evolution into an institution whose continued existence and functioning engaged the interests of both Parliament and the provinces. The Court's protection was then confirmed by the *Constitution Act, 1982*, which reflected the understanding that the Court's essential features formed part of the Constitution of Canada. As a result, Parliament is now required to maintain the essence of what enables the Supreme Court to perform its current role. While Parliament has the authority to enact amendments necessary for the continued maintenance of the Court, it cannot unilaterally modify the composition or other essential features of the Court.

Part V of the *Constitution Act, 1982* expressly makes changes to the Supreme Court and to its composition subject to constitutional amending procedures. Changes to the composition of the Court, including its abolition, can only be made under the procedure provided for in s. 41(d) and therefore require the unanimous consent of Parliament and the provincial legislatures. The notion of "composition" refers to ss. 4(1), 5 and 6 of the Act, which codify the composition of and eligibility requirements for appointment to the Supreme Court as they existed in 1982. Any substantive change in relation to those eligibility requirements is an amendment to the Constitution in relation to the composition of the Supreme Court and triggers the application of Part V. Changes to the other essential features of the Court can only be made under the procedure provided for in s. 42(1)(d), which requires the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces. The essential features of the Court protected under s. 42(1)(d) include, at the very least, the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence.

Section 6.1 of the Act (clause 472 of *Economic Action Plan 2013 Act, No. 2*) is *ultra vires* of Parliament acting alone, since it substantively changes the eligibility requirements for appointments to the Quebec seats on the Court under s. 6. The assertion that it is a declaratory provision does not alter its import. However, s. 5.1 (clause 471) does not alter the law as it existed in 1982 and is therefore validly enacted under s. 101 of the *Constitution Act, 1867*, although it is redundant.

*Per Moldaver J. (dissenting):*

As both current and past advocates of at least 10 years standing at the Quebec bar are eligible for appointment to the Quebec seats on this Court, the legislation that Question 2 refers to does nothing more than restate the law as it exists. Accordingly, it is unnecessary to answer Question 2.

#### Cases Cited

By McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.

**Referred to:** *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Sarvanis v. Canada*, 2002 SCC 28, [2002] 1 S.C.R. 921; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Re References by Governor-General in Council* (1910), 43 S.C.R. 536, aff'd [1912] A.C. 571; *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd.*, [1975] 2 S.C.R. 546; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609.

By Moldaver J. (dissenting)

*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616.

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*Act to amend the Criminal Code*, S.C. 1932-33, c. 53, s. 17.

*Act to amend the Exchequer Court Act*, S.C. 1912, c. 21, s. 1.

*Act to amend the Exchequer Court Act*, S.C. 1920, c. 26, s. 1.

*Act to amend the Supreme Court Act*, S.C. 1918, c. 7, s. 1.

*Act to amend the Supreme Court Act*, S.C. 1926-27, c. 38, s. 1.

*Act to amend the Supreme Court Act*, S.C. 1949 (2nd Sess.), c. 37, ss. 1, 3.

*Act to amend the Supreme Court Act and to make related amendments to the Federal Court Act*, S.C. 1974-75-76, c. 18.

*Canadian Charter of Rights and Freedoms*.

*Constitution Act, 1867*, s. 101.

*Constitution Act, 1982*, Part V, ss. 41(d), 42(1)(d), 52(1), (2).

*Courts Administration Service Act*, S.C. 2002, c. 8, s. 175.

*Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40, ss. 471, 472 (Bill C-4).

*Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), s. 64.

*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 5.4.

*Legislation Revision and Consolidation Act*, R.S.C. 1985, c. S-20, s. 6.

*Règlement sur la formation continue obligatoire des avocats*, R.R.Q., c. B-1, r. 12, s. 2.

*Statute of Westminster, 1931* (reprinted in R.S.C. 1985, App. II, No. 27).

*Supreme and Exchequer Court Act*, S.C. 1875, c. 11, s. 4.

*Supreme and Exchequer Courts Act*, R.S.C. 1886, c. 135, ss. 4(2), (3).

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

*Supreme Court Act*, R.S.C. 1927, c. 35, ss. 4, 5, 6.

*Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 4(1), 5, 5.1 [ad. 2013, c. 40, s. 471], 6, 6.1 [*idem*, s. 472], 25, 29, 30 [am. 2002, c. 8, s. 175], 53.

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**History and Disposition:**

REFERENCE by the Governor in Council concerning sections 5 and 6 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as set out in Order in Council P.C. 2013-1105 dated October 22, 2013. Question 1 is answered in the negative, Moldaver J. dissenting. Question 2 is answered in the negative with respect to the three seats reserved for Quebec and the declaratory provision set out in clause 472. It is answered in the affirmative with respect to clause 471.

**Counsel:**

- René LeBlanc and Christine Mohr, for the Attorney General of Canada.
- Patrick J. Monahan and Josh Hunter, for the intervener the Attorney General of Ontario.
- André Fauteux and Jean-François Beaupré, for the intervener the Attorney General of Quebec.

*Sébastien Grammond, Jeffrey Haylock and Nicolas M. Rouleau*, for the interveners Robert Décary, Alice Desjardins and Gilles Létourneau.

*Rocco Galati*, on his own behalf.

*Sébastien Grammond*, for the intervener the Canadian Association of Provincial Court Judges.

*Paul Slansky*, for the intervener the Constitutional Rights Centre Inc.

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The following is the opinion of

**McLACHLIN C.J. and LeBEL, ABELLA, CROMWELL, KARAKATSANIS and WAGNER JJ.:**--

### I. Introduction

1 The *Supreme Court Act* provides that three of the nine judges of the Supreme Court of Canada must be appointed "from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province": R.S.C. 1985, c. S-26, s. 6. This reference seeks our opinion on two aspects of the eligibility requirements for appointment to these three Quebec seats.

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

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

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

5 On the question of whether Parliament can enact legislation purporting to declare a binding interpretation of s. 6 and thereby permit the appointment of a former member of the bar to one of the Quebec positions on the Court, our view is that the answer is also no. The eligibility requirements set out in s. 6 relate to the composition of the Court and are, therefore, constitutionally protected. Under s. 41(d) of the *Constitution Act, 1982*, any amendment in relation to the composition of the Supreme Court of Canada may only be made by proclamation issued by the Governor General under the Great Seal of Canada authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province.

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

### II. The Reference Questions

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

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



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

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

III. Background

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

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

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

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

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

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

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

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

IV. Question 1

A. *The Issue*

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

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

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

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

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

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

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

#### B. General Principles of Interpretation

19 The *Supreme Court Act* was enacted in 1875 as an ordinary statute under the authority of s. 101 of the *Constitution Act, 1867* (S.C. 1875, c.11). However, as we explain below, Parliament's authority to amend the Act is now limited by the Constitution. Sections 5 and 6 of the *Supreme Court Act* reflect an essential feature of the Supreme Court of Canada -- its composition -- which is constitutionally protected under Part V of the *Constitution Act, 1982*. As such, they must be interpreted in a broad and purposive manner and understood in their proper linguistic, philosophic and historical context: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, at p. 136; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344.

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

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

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

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

least shall be taken from among the Judges of the Superior Court or Court of Queen's Bench, or the Barristers or Advocates of the Province of Quebec;

\* \* \*

4. [Qualités exigées du juge en chef et des juges.] Sa Majesté pourra nommer, par lettres patentes sous le grand sceau du Canada, -- comme juge en chef de cette cour, -- une personne étant ou ayant été juge de l'une des cours supérieures dans quelque'une des provinces formant la Puissance du Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelque'une de ces provinces, et, -- comme juges puînés de cette cour, -- cinq personnes étant ou ayant été respectivement juges de l'une de ces cours supérieures, ou étant avocats de pas moins de dix ans de pratique au barreau de quelque'une de ces provinces, dont deux au moins seront pris parmi les juges de la Cour Supérieure ou de la Cour du Banc de la Reine; ou parmi les procureurs ou avocats de la province de Québec;

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

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

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

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

\* \* \*

2. [Qui pourra être nommé juge.] Pourra être nommé juge de la cour quiconque sera ou aura été juge d'une cour supérieure dans quelque'une des provinces du Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelque'une de ces provinces.

3. [Juges tirés du barreau de Québec.] Au moins deux des juges de la cour seront pris parmi les juges de la cour du Banc de la Reine ou de la cour Supérieure, ou parmi les avocats de la province de Québec.

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

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

25 In 1927, one judge was added for a total of seven judges on the Court, but the number of Quebec judges remained two: S.C. 1926-27, c. 38, s. 1; R.S.C. 1927, c. 35, ss. 4 and 6. The Court was enlarged again in 1949, when the number of judges of the Court increased to nine and the ratio of Quebec judges was preserved by increasing their number to three: *An Act to amend the Supreme Court Act*, S.C. 1949 (2nd Sess.), c. 37, s.1.

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

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

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

\* \* \*

5. [Conditions de nomination] Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.

6. [Représentation du Québec] 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.

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

#### D. Section 5

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

29 The English version of s. 5 is unambiguous. The specification "is or has been" clearly applies to both judges of a superior court of a province *and* barristers or advocates of at least 10 years standing at the bar of a province. This is confirmed by the provision's legislative history. Under the 1875 Act, appointments were limited to persons "who are, or have been, respectively, Judges of one of the said Superior Courts, or who are Barristers or Advocates": s. 4. The 1875 Act excluded former advocates from appointment. It permitted the appointment of current or former judges and current, but not former, advocates. As part of statutory revisions of 1886, however, the specification "is or has been" was extended to both judges and advocates, thereby including former advocates as a fourth category of eligible candidates. As we have observed, the changes made under the 1886 statutory revision were intended to have substantive effect.

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

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

32 We reach the same conclusion by applying the shared meaning rule of bilingual interpretation, which requires that where the words of one version may raise an ambiguity, one should look to the other official language version to determine whether its meaning is plain and unequivocal: Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 99-116; Pierre-André Côté, in collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 347-49; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, at para. 28. The English version of the text is unambiguous in its inclusion of former advocates for appointment, while the French version is reasonably capable of two interpretations: one which excludes former advocates from appointment, and one which includes them. The meaning common to both versions is only found in the unambiguous English version, which is therefore the meaning we should adopt.

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

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

#### E. Section 6

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

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

37 We agree that ss. 5 and 6 must be read together. We also agree that the requirement of at least 10 years standing at the bar applies to appointments from Quebec. We disagree, however, with the Attorney General's ultimate conclusion that reading these provisions together in a complementary way permits the appointment of *former* advocates of at least 10 years standing to the Quebec seats on the Court. Section 6 does not displace the general requirements under s. 5 that apply to all appointments to the Supreme Court. Rather, it makes additional specifications in respect of the three judges from Quebec. One of these is that they must currently be a member of the Quebec bar.

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

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

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

40 The Attorney General of Canada argues that the plain meaning of s. 6 does not require current membership in the bar of Quebec. He submits that the phrase "from among" ("*parmi*" in French) does not contain a temporal element and, as a result, s. 6 imports s. 5's temporal specifications ("is or has been").

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

42 It is a principle of interpretation that the mention of one or more things of a particular class excludes, by implication, all other members of the class: Sullivan, at pp. 243-44. By enumerating the particular institutions in Quebec from which appointments shall be made, s. 6 excludes all other institutions. Similarly, by specifying that three judges

shall be appointed "from among" the judges and advocates (i.e. members) of the identified institutions, s. 6 impliedly excludes former members of those institutions and imposes a requirement of current membership.

43 The fact that ss. 5 and 6 originated in a single provision -- s. 4 of the 1875 Act -- does not undermine our interpretation, because the same textual observations could be made with respect to the original provision. Then, as now, the general requirements for appointment were phrased generally whereas the specification for Quebec judges was expressed more restrictively: "... two of whom at least 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 ...".

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

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

## (2) The Purpose of Section 6

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

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

48 Section 6 reflects the historical compromise that led to the creation of the Supreme Court. Just as the protection of minority language, religion and education rights were central considerations in the negotiations leading up to Confederation (*Reference re Secession of Quebec*, [1998] 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. (the "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.*). Téléphore 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.

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

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

59 We earlier concluded that a textual interpretation of s. 6 excludes former advocates from appointment to the Court. We come to the same conclusion on purposive grounds. The underlying purpose of the general eligibility provision, s. 5, is to articulate minimum general requirements for the appointment of all Supreme Court judges. In contrast, the underlying purpose of s. 6 is to enshrine the historical compromise that led to the creation of the Court by narrowing the eligibility for the Quebec seats. Its function is to limit the Governor in 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.

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

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

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



63 The broader scheme of the *Supreme Court Act* reinforces the conclusion reached through a textual and purposive analysis. In addition to addressing who is eligible to be appointed a judge of the Supreme Court of Canada, the Act addresses which judges of other courts are eligible to sit as *ad hoc* judges of the Court. Judges of the federal courts and the Tax Court of Canada, while eligible to sit as *ad hoc* judges generally, are not eligible to sit in Quebec appeals when the quorum of the Court does not include at least two judges appointed under s. 6. In other words, the provisions governing eligibility to sit as an *ad hoc* judge of the Court reflect the same distinction between general eligibility and eligibility for one of the Quebec seats. The point is not that these judges are excluded under s. 6 simply because they are excluded under s. 30(2) of the Act. Rather, the point is that the exclusion under s. 30(2) is part of the overall context that must be taken into account in interpreting ss. 5 and 6 of the Act.

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

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

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

67 It was argued that we should give no weight to the wording of s. 30 because it is an obsolete provision that has not been used since the second decade of the 20th century. We do not agree. The statutory history suggests that the exclusion of judges of the federal courts as *ad hoc* judges for Quebec cases was not a mere oversight. In the 1970s after the establishment of the Federal Court, s. 30(1) of the *Supreme Court Act* was revised to refer to the Federal Court (*Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), s. 64). Despite the fact that the very purpose of the revision was to incorporate references to the Federal Court into the Act, as was done in s. 30(1), Parliament did not amend the immediately adjacent provision, s. 30(2). There was similarly no amendment to s. 30(2) when, in 2002, s. 30(1) was amended to refer to the newly separate Federal Court of Appeal and the Tax Court of Canada (S.C. 2002, c. 8, s. 175). While certainly not conclusive, the repeated failure to include the Quebec appointees to the Federal Court and Federal Court of Appeal among the judges who may serve as *ad hoc* judges of this Court in place of s. 6 judges suggests that the exclusion was deliberate. This in turn is consistent with members of those same courts not being eligible for appointment under s. 6.

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

#### (4) Conclusion

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

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

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

## V. Question 2

### *A. The Issue*

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

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

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

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

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

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

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

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

77 At Confederation, there was no Supreme Court of Canada. Nor were the details of what would eventually become the Supreme Court expounded in the *Constitution Act, 1867*. It was assumed that the ultimate judicial authority for Canada would continue to be the Judicial Committee of the Privy Council in London. For example, George-Étienne Cartier, then the Attorney General for Canada East, expressed the view that "we shall always have our court of final appeal in Her Majesty's Privy Council", even if a general court of appeal for Canada were to be established domestically: Province of Canada, Legislative Assembly, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3rd Sess., 8th Parl., March 2, 1865, at p. 576.

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

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

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

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

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

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

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

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

Inherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 124). That impartial arbiter is the judiciary, charged with "control[ling] the limits of the respective sovereignties" (*Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733, at p. 741).

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

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

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

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

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

## (2) The Supreme Court and Patriation

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

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

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

The existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause. The judiciary became the "guardian of the constitution" (*Hunter*, at p. 155, *per* Dickson J.). As such, the Supreme Court of Canada is a foundational premise of the Constitution. With the adoption of the *Constitution Act, 1982*, "the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy": *Secession Reference*, at para. 72.

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

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

92 The textual origin of Part V was the "April Accord" of 1981 (*Constitutional Accord: Canadian Patriation Plan* (1981)), to which eight provinces, including Quebec, were parties. The explanatory notes to this Accord confirm that the intention was to limit Parliament's unilateral authority to reform the Supreme Court. That sentiment finds particular ex-

pression in the explanatory note for what became s. 41, which requires unanimity for amendments relating to five matters, including the composition of the Supreme Court: "This section recognizes that some matters are of such fundamental importance that amendments in relation to them should require the consent of all the provincial Legislatures and Parliaments" (p. 9 (note 9)). Pointedly, the explanatory note to s. 41(d) states: "This clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or Bench of Quebec and are, therefore, trained in the civil law" (p. 9 (note 9(d))). The intention of the provision was demonstrably to make it difficult to change the composition of the Court, and to ensure that Quebec's representation was given special constitutional protection.

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

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

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

C. *The Arguments of the Attorney General of Canada*

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

(1) The "Empty Vessels" Theory

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

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

99 Accepting this argument would have two practical consequences that the provinces could not have intended. First, it would mean that Parliament could unilaterally and fundamentally change the Court, including Quebec's histori-

cally guaranteed representation, through ordinary legislation. Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces. Second, it would mean that the Court would have less protection than at any other point in its history since the abolition of appeals to the Privy Council. This outcome illustrates the absurdity of denying Part V its plain meaning. The framers cannot have intended to diminish the constitutional protection accorded to the Court, while at the same time enhancing its constitutional role under the *Constitution Act, 1982*.

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

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

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

102 The Attorney General of Canada argues that the Meech Lake Accord and the Charlottetown Accord would have expressly entrenched the qualifications for appointment to the Court in the Constitution, and that the failure to adopt these constitutional amendments means that the qualifications for appointment to the Court are not entrenched.

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

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

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

105 Both the general eligibility requirements for appointment and the specific eligibility requirements for appointment from Quebec are aspects of the composition of the Court. It follows that any substantive change in relation to those eligibility requirements is an amendment to the Constitution in relation to the composition of the Supreme Court of Canada and triggers the application of Part V of the *Constitution Act, 1982*. Any change to the eligibility requirements for appointment to the three Quebec positions on the Court codified in s. 6 therefore requires the unanimous consent of Parliament and the 10 provinces.

106 Since s. 6.1 of the *Supreme Court Act* (cl. 472 of *Economic Action Plan 2013 Act, No. 2*) substantively changes the eligibility requirements for appointments to the Quebec seats on the Court under s. 6, it seeks to bring about an amendment to the Constitution of Canada on a matter requiring unanimity of Parliament and the provincial legislatures. The assertion that s. 6.1 is a declaratory provision does not alter its import. Section 6.1 is therefore *ultra vires* of Par-

liament acting alone. However, s. 5.1 (cl. 471) does not alter the law as it existed in 1982 and is therefore validly enacted under s. 101 of the *Constitution Act, 1867*, although it is redundant.

VI. Responses to the Reference Questions

107 We answer the reference questions as follows:

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

Answer: No.

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

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

The following is the opinion of

MOLDAVER J. (dissenting):--

VII. Introduction

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

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

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

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

111 The answer to Question 1 lies in the correct interpretation of ss. 5 and 6 of the Act. For reasons that follow, I would answer Question 1 in the affirmative. Under ss. 5 and 6 of the Act, both current and past advocates of at least 10 years standing at the Quebec bar are eligible for appointment to this Court. In view of my answer to Question 1, the legislation to which Question 2 refers is redundant. It does nothing more than restate the law as it exists. Accordingly, I find it unnecessary to answer Question 2.

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

113 With that in mind, although I need not address the constitutional issues in view of my response to Question 1, I choose to do so to this extent. The coexistence of two distinct legal systems in Canada -- the civil law system in Quebec and the common law system elsewhere -- is a unique and defining characteristic of our country. It is critical to both Quebec and Canada as a whole that persons with training in civil law form an integral part of this country's highest court. Indeed, a guarantee to that effect was central to the bargain struck between Parliament and Quebec when the Supreme Court was first created in 1875.<sup>2</sup>

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

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

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

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

#### VIII. Analysis

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

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

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

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

\* \* \*

5. [Conditions de nomination] Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.

6. [Représentation du Québec] 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.



119 Section 5 sets out the threshold eligibility requirements to be appointed a judge of this Court. Section 6 guarantees three Quebec seats on the Court by specifying that, for at least three of the judges, the bar mentioned in s. 5 is the Barreau du Québec and the superior courts mentioned in s. 5 are the Superior Court of Quebec and the Quebec Court of Appeal. Put another way, s. 6 builds on s. 5 by requiring that for three of the seats on this Court, the candidates who meet the criteria of s. 5 must be chosen from three Quebec institutions (the Barreau du Québec, the Quebec Court of Appeal, and the Superior Court of Quebec). Section 6 does not impose any additional requirements.

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

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

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

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

\* \* \*

5. [Conditions de nomination] Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.

6. [Représentation du Québec] 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.

122 First, the words "[a]ny person" in s. 5 are a clear indication that the eligibility requirements set out in that section apply to *all* appointees. Second, the words "the judges" in s. 6 refer explicitly to the description of *the* judges provided in s. 5. Manifestly, one must read s. 5 in order to understand *which* judges s. 6 is referring to and what their eligibility requirements are.

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

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

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

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

127 If Parliament *had* intended to distinguish Quebec appointees from other appointees by requiring that Quebec judges be current judges or current advocates, surely it would have said so in clear terms. It would not have masked this crucial distinction between Quebec candidates and non-Quebec candidates by using words as ambiguous and inconclusive as "from among". The addition of the word "current" before the words "judges" and "advocates" in s. 6 would have been a simple -- and obvious -- solution.

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

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

\* \* \*

4. Sa Majesté pourra nommer, par lettres patentes sous le grand sceau du Canada, -- comme juge en chef de cette cour, -- une personne étant ou ayant été juge de l'une des cours supérieures dans quelqu'une des provinces formant la Puissance du Canada, ou un avocat ayant pratiqué pendant au mois dix ans au barreau de quelqu'une de ces provinces, et, -- comme juges puînés de cette cour, -- cinq personnes étant ou ayant été respectivement juges de l'une de ces cours supérieures, ou étant avocats de pas moins de dix ans de pratique au barreau de quelqu'une de ces provinces, dont deux au moins seront pris parmi les juges de la Cour Supérieure ou de la Cour du Banc de la Reine, ou parmi les procureurs ou avocats de la province de Québec ; et les vacances survenant dans ces charges seront, au besoin, remplies de la même manière. Le juge en chef et les juges de la Cour Suprême seront respectivement le juge en chef et les juges de la Cour de l'Échiquier. Ils résideront en la cité d'Ottawa, ou dans un rayon de cinq milles de cette cité.

129 This provision uses the words "from among" in relation to Quebec superior court judges. And yet, the surrounding context, namely, the earlier use of the words "who are, or have been, respectively, Judges", makes it abundantly clear that eligibility for the Quebec seats extended to both current *and* former judges -- and nothing has ever changed in that regard. Nowhere in Hansard has it ever been suggested -- nor in any subsequent revisions has it ever been proclaimed -- that former judges of the Quebec superior courts are not eligible for appointment to this Court. What did change was that in 1886, *former* barristers and advocates of at least 10 years standing became eligible for appointment to this Court, along with current barristers and advocates (R.S.C. 1886, c. 135, s. 4(2)).

130 And once it is understood that current and former judges of the Quebec superior courts have always been included in the eligibility pool, it is a short step to realize that the 1886 amendments did not reduce the eligible groups for

Quebec judges to two -- rather, they increased the number of eligible groups in Quebec (and elsewhere in Canada) from three to four.<sup>6</sup> One can scour the Hansard debates of 1875 -- or at any point in time since then -- and find no mention that Parliament intended to narrow the four groups of eligible candidates under s. 5 to only two groups in the case of Quebec. In short, the four group/two group distinction has no foundation in fact or law.

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

B. *Section 30 of the Supreme Court Act*

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

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

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

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

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

\* \* \*

30. (1) [Nomination d'un juge suppléant] 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'incapacité à siéger d'un ou plusieurs juges, le quorum n'est pas atteint pour tenir ou poursuivre les travaux de la Cour, le juge en chef ou, en son absence, le doyen des juges puînés peut demander par écrit que soit détaché, pour assister aux séances de la Cour à titre de juge suppléant et pendant le temps nécessaire :

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

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

(2) [Appels du Québec] 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).

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

134 For the reasons that follow, I do not accept these submissions. Section 30 does not assist in the interpretation of the eligibility requirements set out in ss. 5 and 6 of the Act. In this regard, I am in essential agreement with the submissions of Dean Sébastien Grammond<sup>8</sup> on behalf of the interveners Robert Décary, Alice Desjardins and Gilles Létourneau.

135 As indicated, s. 30 is a historical anomaly. In order to explain why Quebec judges on the federal courts are not mentioned in s. 30(2), it is necessary to trace the legislative history of this provision. The provision was first enacted in 1918 (S.C. 1918, c. 7, s. 1). At the time, there were only six judges on the Court, and the statutory quorum was set at five. As a result, if two or more judges were unavailable for whatever reason, the quorum was not met and cases could not be heard. In 1918, the Court faced a crisis resulting from the absence of several judges. Parliament responded by introducing the concept of *ad hoc* judges into the Act. These *ad hoc* judges would temporarily fulfill the functions of a Supreme Court judge so that the quorum would be met and cases could be heard.

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

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

138 Parliament sought to avoid this result by specifying that only "the judge" of the Exchequer Court could be appointed an *ad hoc* judge -- a term that necessarily excluded the assistant judge. In response to Quebec's displeasure, Parliament accepted that if the loss of quorum was caused by the absence of two or more Quebec judges, and if it was a Quebec case, the *ad hoc* judge would be chosen from that province's superior courts.<sup>2</sup>

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

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

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

which all members of this Court agree), s. 30(2) cannot be used in support of a currency requirement in s. 6 for *permanent* judges.

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

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

C. *The Legislative Objectives*

(1) The Purpose of Sections 5 and 6

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

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

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

147 To suggest that Quebec wanted to render ineligible former advocates of at least 10 years standing at the Quebec bar is to rewrite history. There is nothing in the historical debates that suggests any such thing. Indeed, it defies logic and common sense to think that Quebec would have had some reason to oppose the appointment to this Court of Court of Québec judges who had been members of the Quebec bar for at least 10 years on the day of their appointment to that court.<sup>12</sup> Court of Québec judges apply the civil law *on a daily basis*. Why such persons, otherwise eligible for appointment to this court by virtue of their 10 years standing at the bar, would suddenly become unacceptable to the people of Quebec on the day of their elevation to the bench escapes me. Likewise, though the federal courts did not exist at the time, to suggest that Quebec would have resisted the appointment to this Court of a federal court judge occupying a seat on that court reserved for Quebec<sup>13</sup> is, in my view, equally untenable. These judges have been trained in the civil law and continue to hear federal law cases involving Quebec that require a working knowledge of the civil law.

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

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

149 In addition to rendering ineligible candidates who might otherwise be worthy appointments to this Court, the currency requirement does nothing to promote the confidence of Quebec in this Court. In Quebec, there are approxi-

mately 16,000 *current* members of the Quebec bar with at least 10 years standing.<sup>41</sup> Surely it cannot be suggested that the appointment of any one of these 16,000 advocates would promote the confidence of Quebec in this Court.

150 This becomes all the more apparent when one realizes that a person can maintain his or her Quebec bar membership by simply paying annual fees and completing a set number of hours of continuing legal education -- currently, 30 hours over a two-year period.<sup>42</sup> Notably, there is *no* requirement that this continuing legal education have anything to do with the civil law, nor does it actually have to be completed *in* Quebec. Indeed, a person does not have to live in Quebec, or *actually practice law in Quebec*, in order to maintain his or her bar membership. In sum, a person could have only the most tenuous link to the practice of civil law in Quebec, and yet be a current member of that bar of 10 years standing.

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

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

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

#### IX. Conclusion

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

*Judgment accordingly.*

#### Solicitors:

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

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

*Solicitors for the intervener the Attorney General of Quebec: Bernard, Roy & Associés, Montréal; Attorney General of Quebec, Montréal.*

*Solicitor for the interveners Robert Décary, Alice Desjardins and Gilles Létourneau: Sébastien Grammond, Ottawa.*

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

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

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

<sup>1</sup> The text of s. 41(d) states:

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province: . . .

(d) the composition of the Supreme Court of Canada; . . .

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

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1): . . .

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

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

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

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

6 The present tense words "who is" and "who are", used in s. 4 of the 1875 Act in reference to barristers and advocates, were removed, making it clear that both current and former barristers and advocates were eligible. As a result of the 1886 revision, s. 4(2) read: "Any person may be appointed a judge of the court who is or has been a judge of a superior court of any of the Provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces".

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

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

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

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

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

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

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

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

15 *Règlement sur la formation continue obligatoire des avocats*, R.R.Q., c. B-1, r. 12, s. 2; see also Barreau du Québec (online: <https://www.barreau.qc.ca/en/avocats/formation-continue/obligatoire/index.html>).

Exhibit-B





This is Exhibit ..... B ..... referred to in the  
affidavit of ..... ROLLO GALATI .....  
sworn before me, this ..... 24 .....  
day of ..... SEPTEMBER ..... 20..14 .....



.....  
A COMMISSIONER, ETC.

**STATEMENT OF ACCOUNT**  
**FOR: Challenge to the Appointment of Justice Marc Nadon to the Supreme Court  
of Canada at the Federal Court**  
**(October 7<sup>th</sup>, 2013- September 24<sup>th</sup>, 2014)**

<b>FOR PROFESSIONAL SERVICES RENDERED</b>	<b>HOURS</b>
TO: review media articles and consult colleague, October 3 <sup>rd</sup> - 4 <sup>th</sup> , 2013	.8
TO: review and research legal issue(s) for notice of application, October 5 <sup>th</sup> , 2013	8.7
TO: review and research legal issue(s) for notice of application, and draft notice of application for Federal Court, October 6 <sup>th</sup> , 2013	7.8
TO: issue notice at Federal Court Registry and write Respondents not to swear in Justice Nadon, October 7 <sup>th</sup> , 2013	1.6
TO: draft, serve and file Notice of Constitutional Question, October 9 <sup>th</sup> -11 <sup>th</sup> , 2013	.9
TO: prepare for and participate in teleconference with Federal Court, October 18 <sup>th</sup> , 2013	.8
TO: draft Notice of Discontinuance against Chief Justice of Canada, October 18 <sup>th</sup> , 2013	.2
TO: prepare for and participate in teleconference with Federal Court, October 24 <sup>th</sup> , 2013	1.0
TO: review, research, Attorney General's motion for stay (returnable November 15 <sup>th</sup> , 2013), including Book of Authorities, October 28 <sup>th</sup> , 2013	4.6
TO: review, research, Attorney General's motion for stay (returnable November 15 <sup>th</sup> , 2013), including Book of Authorities, October 29 <sup>th</sup> , 2013	3.0
TO: negotiate stay in Federal Court in exchange for consent on Supreme Court of Canada Reference, October 29 <sup>th</sup> -November 8 <sup>th</sup> , 2013	.8
TO: respond to Court direction, April 16 <sup>th</sup> , 2014	1.1
TO: prepare for and participate in teleconference with Federal Court, re: Court costs, August 14 <sup>th</sup> , 2014	.4
TO: review, research and prepare 369 Motion Record for costs, September 21 <sup>st</sup> , 2014	3.2
TO: review, research and prepare 369 Motion Record for costs, September 22 <sup>nd</sup> -24 <sup>th</sup> , 2014	3.6
TO: finalize Record for 369 Motion Record for costs, September 24 <sup>th</sup> , 2014	.8
TO: review all calls, letters, faxes, and emails, sent and received, between October 7 <sup>th</sup> , 2013 to September 24 <sup>th</sup> , 2014, not accounted for above, @ 0.1 hr each, from and to all parties and others, and the Court (47 letters, faxes and/or Court Directions; 22 phone calls; and 112+ emails (between October 8 <sup>th</sup> -November 12 <sup>th</sup> , 2014))	17.1

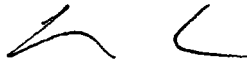
Total hours 56.4 x \$800.00		\$45,120.00
HST (@ 13%)		<u>\$5,865.60</u>
<b>TOTAL FEES &amp; HST</b>		<b><u>\$50,985.60</u></b>

Disbursements	
-Paid Federal Court Filing Fee	\$50.00
-Paid Faxes (294 @ \$2 per page)	\$588.00
<hr/> Total Disbursements	<hr/> \$638.00

HST	\$82.94	\$720.94
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<b>TOTAL FEES &amp; DISBURSEMENTS</b>		<b><u>\$51,706.54</u></b>
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THIS IS MY STATEMENT



\_\_\_\_\_  
 ROCCO GALATI LAW FIRM  
 PROFESSIONAL CORPORATION  
 E. & O. E.

Dated this 24<sup>th</sup> day of September, 2014

Registry No.: T-1657-13

**FEDERAL COURT**

BETWEEN:

**ROCCO GALATI,  
CONSTITUTIONAL RIGHTS CENTRE INC.,**

**Applicants**

**- and -**

**THE RIGHT HONOURABLE STEPHEN  
HARPER, HIS EXCELLENCY THE RIGHT  
HONOURABLE GOVERNOR GENERAL  
DAVID JOHNSTON,  
THE HONOURABLE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF  
APPEAL, THE ATTORNEY GENERAL OF  
CANADA, THE MINISTER OF JUSTICE**

**Respondents**

---

**AFFIDAVIT**

---

ROCCO GALATI LAW FIRM  
PROFESSIONAL CORPORATION  
Rocco Galati, B.A., LL.B., LL.M.  
1062 College Street, Lower Level  
Toronto ON M6H 1A9

TEL: 416-536-7811  
FAX: 416-536-6801

On his own behalf

Tab-14

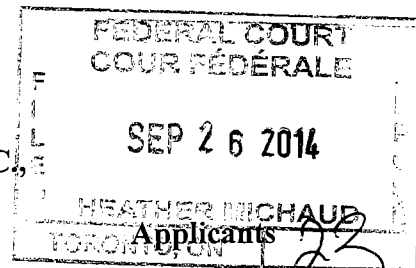


Registry No.: T-1657-13

BETWEEN:

FEDERAL COURT

ROCCO GALATI,  
CONSTITUTIONAL RIGHTS CENTRE INC,



- and -

THE RIGHT HONOURABLE STEPHEN HARPER, HIS EXCELLENCY THE  
RIGHT HONOURABLE GOVERNOR GENERAL DAVID JOHNSTON,  
THE HONOURABLE MARC NADON, JUDGE OF THE FEDERAL COURT OF  
APPEAL, THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF  
JUSTICE

Respondents

## MEMORANDUM OF FACT AND LAW

### PART I - THE FACTS

1. The Applicant relies on the facts set out in the Applicant's, Rocco Galati's, affidavit.

### PART II - THE ISSUES

2. Whether the Applicant should be granted his solicitor-client costs of the within application:
  - (a) as a constitutional right? and/or
  - (b) under the Court's general discretion?

### PART III - LAW AND ARGUMENT

#### A/ Solicitor-Client Costs a Constitutional Right

3. It is respectfully submitted that when and where:
- a) a private citizen brings a constitutional challenge to legislation or Executive action going to the “architecture of the Constitution”; and
  - b) where that citizen derives no personal benefit from such a challenge; and
  - c) where that citizen is successful in that challenge;
- then he/she has a constitutional right to his/her solicitor-client costs.
4. It is submitted that to deny solicitor-client costs, in the above-noted circumstances would amount to a denial to the constitutional right not only to a fair and independent judiciary, but also access to a fair and independent judiciary, as well as a breach of the unwritten constitutional imperatives to the Rule of Law and Constitutionalism.

- *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217  
 - *Mackin v. New Brunswick* [2002] 1 S.C.R. 405

5. It is further submitted that to do so, the Court itself would be denying those same rights, under s. 7 of the *Charter*, by vehicle of the common-law, which common-law is also subject to *Charter* scrutiny.

-*R. v. Salituro* [1991] 3 SCR 654  
 -*RWDSU v. Dolphin, Deliver Inc.*[1986] 2 SCR 573

6. It is submitted that the Applicants were successful, as contemplated by the jurisprudence,

- *Canada v. Oberlander* [2008] F.C.J No. 628

in that one of the procedural declarations and relief sought, was that the Respondents ought to have brought a Reference to the Supreme Court of Canada under s. 53 of the *Supreme Court of Canada Act*,

- *Notice of Application, Tab 2, p. 4, paragraph 1(f)*

which was eventually done, and that the substantive relief sought on the application, was granted by the Supreme Court of Canada in the *Reference*:

- *Ibid.*, @ *Tab 2, and Tab 13(B) (Reference Re Supreme Court Act, ss. 5-6)*

**B/ Solicitor-client Costs Absent Constitutional Considerations**

7. It is further submitted that, the Applicant, absent any constitutional considerations, is entitled to his solicitor-client costs, on the particular circumstances of this case, when due regard is given to:
- (a) the relief sought by the Applicant in the within case;
  - (b) the chronology of events which ensued;
    - *Affidavit of Rocco Galati*
  - (c) the complexity of the issue(s);
  - (d) the seismic, constitutional result with respect to the “constitutionalization” of the Supreme Court of Canada;
  - (e) the fact that the Applicant derives no personal benefit.
    - Singh v. MEI [1985] S.C.R. 177 (SCC)*
    - Ruby v. Canada [2002] S.C.J. No. 73 (SCC)*
    - B.C. v. Okanagan Indian Band[2003]3 SCR 371*
    - Little Sisters Book and Art Emporium v. Canada [2007] 1 SCR 38*
    - Hagwilget Indian Band v. Canada [2008] FCJ No. 723*
    - R. v. Caron[2011]SCC 5*
    - R. v. White [2010] SCC 59*
8. It is further submitted, as summarized by the Ontario Court of Appeal in *1465778 Ontario Inc. v. 1122077 Ontario Ltd., [2006] O.J. No. 4248 (C.A.)*, that solicitor-client costs are warranted in such cases for the reasons set out in the Court of Appeal:
- [28] As part of the recognition that costs serve a purpose beyond indemnification, the courts began to award costs in favour of litigants who were traditionally viewed as disentitled to costs. For example, costs have been awarded in cases where the litigant was self-represented (*Skidmore v. Blackmore*, 1995 CanLII 1537 (BC CA), [1995] B.C.J. No. 305, 2 B.C.L.R. (3d) 201 (C.A.) and *Fong v. Chan* 1999 CanLII 2052 (ON CA), (1999), 46 O.R. (3d) 330, [1999] O.J. No. 4600 (C.A.)); where the winning party was a law firm represented by one of its partners who was not charging fees (*Fellowes, McNeil, supra*); where counsel was salaried (*Solicitors Act, R.S.O. 1990, c. S.15, s. 36*); and where the responsibility for a party's legal fees was undertaken by a third party (*Lavigne v. Ontario Public Service Employees Union (No. 2)* 1987 CanLII 4184 (ON SC), (1987), 60 O.R. (2d) 486, [1987] O.J. No. 653 (H.C.J.)).



[29] *Costs have also been awarded to counsel acting pro bono in Charter or public interest cases such as Rogers v. Greater Sudbury (City) Administrator, Ontario Works 2001 CanLII 28087 (ON SC), (2001), 57 O.R. (3d) 467, [2001] O.J. No. 3346 (S.C.J.). In that case, Epstein J. awarded costs payable forthwith on an injunction application. She stated at para. 21: [page766]*

Through granting, when appropriate, cost awards payable forthwith during the course of what is frequently protracted litigation, the financial burden assumed by the lawyers doing pro bono work is reduced. Orders of this nature would allow more lawyers to accept this kind of retainer thereby increasing the opportunity for people, such as Ms. Rogers, to have access to justice. As well, applicants who may suffer irreparable harm as a result of the application of a law that is the subject of a legitimate Charter challenge have increased opportunity to seek interlocutory relief since counsel acting for them have a chance of being paid promptly for the often very expensive process of preparing for and arguing a motion for an interlocutory injunction.

[30] There have also been some recent instances, both in Ontario and in British Columbia, where costs orders have been made in favour of pro bono counsel in non-public interest cases. See for example, *MacKay Homes v. North Bay (City)*, [2005] O.J. No. 3263, 141 A.C.W.S. (3d) 376 (S.C.J.); *Spatone v. Banks*, [2002] O.J. No. 4647, 118 A.C.W.S. (3d) 335 (S.C.J.); and *Jacks v. Victoria Amateur Swimming Club*, [2005] B.C.J. No. 2086, 143 A.C.W.S. (3d) 47 (S.C.) In *Brockie v. Ontario (Human Rights Commission)*, 2004 CanLII 16323 (ON CA), [2004] O.J. No. 1285, 185 O.A.C. 366 (C.A.), this court reversed a decision of the Divisional Court that denied costs to pro bono counsel, holding that "[s]uch a policy would act as a severe penalty to lawyers acting in the public interest by making it possible for litigants of modest means to access the courts" [at para. 6].

*- 1465778 Ontario Inc. v. 1122077 Ontario Ltd., [2006] O.J. No. 4248 (C.A.)*

9. It is submitted that the Applicant is therefore entitled to his solicitor-client costs.

*C/ Applicant Entitled to Costs Regardless of Being Self-Represented Solicitor*

10. It is lastly submitted, and trite law, that a self-represented solicitor is not barred from obtaining costs just because he is self-represented,

*-Re Lavigne and Ontario Public Service Employees Union et al. (No. 2) (1987), 60 O.R. (2d) 486 (H.C.J.).*

*-Skidmore v. Blackmore (1995), 2 B.C.L.R. (3d) 201 (C.A.)*

*- Gunning Estate (Executor of) v. Abrams QL [1997] O.J. No. 4364*

*-Fong v. Chan (1999), 46 O.R. (3d) 330 (C.A.)*

*- 1465778 Ontario Inc. v. 1122077 Ontario Ltd., [2006] O.J. No. 4248 (C.A.)*

as summarized by the Ontario Court of Appeal:

28 As part of the recognition that costs serve a purpose beyond indemnification, the courts began to award costs in favour of litigants who were traditionally viewed as disentitled to costs. For example, costs have been awarded in cases where the litigant was self-represented (*Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.) and *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.)); where the winning party was a law firm represented by one of its partners who was not charging fees (*Fellowes, McNeil, supra*); where counsel was salaried (*Solicitors Act, R.S.O. 1990, c. S-15, s. 36*); and, where the responsibility for a party's legal fees was undertaken by a third party (*Re Lavigne and Ontario Public Service Employees Union et al. (No. 2) (1987), 60 O.R. (2d) 486 (H.C.J.)*).

*- 1465778 Ontario Inc. v. 1122077 Ontario Ltd., [2006] O.J. No. 4248 (C.A.), @ paragraph 28*


11. It is respectfully submitted that, while the Applicant fully realizes, and has been made aware of the old-age question: "Do you know what usually happens when a lawyer has himself for a client?", the Applicant respectfully submits that the answer is: "yeah, the Bill's still in the mail". It is thus submitted that for this, and moreover, the above-noted submissions, that in the particularly rare circumstances of this case, that the Applicant is entitled to his solicitor-client costs of the within application.

**PART IV - ORDER SOUGHT**

12. The Applicant respectfully requests the relief sought in the notice of motion herein, and/or any such further and other relief this Honourable Court deems just.

All of which is respectfully submitted

Date: September, <sup>24<sup>th</sup></sup> 2014.



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FAX: 416-536-6801

On his own behalf

Registry No.: T-1657-13  
FEDERAL COURT

**B E T W E E N:**

**ROCCO GALATI,  
CONSTITUTIONAL RIGHTS CENTRE INC.,**

**Applicants**

**- and -**

**THE RIGHT HONOURABLE STEPHEN  
HARPER, HIS EXCELLENCY THE RIGHT  
HONOURABLE GOVERNOR GENERAL  
DAVID JOHNSTON,  
THE HONOURABLE MARC NADON, JUDGE  
OF THE FEDERAL COURT OF APPEAL, THE  
ATTORNEY GENERAL OF CANADA, THE  
MINISTER OF JUSTICE**

**Respondents**

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**MEMORANDUM OF FACT AND LAW**

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BETWEEN:

ROCCO GALATI,  
CONSTITUTIONAL RIGHTS CENTRE INC.,

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- and -

THE RIGHT HONOURABLE STEPHEN  
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HONOURABLE GOVERNOR GENERAL  
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OF THE FEDERAL COURT OF APPEAL, THE  
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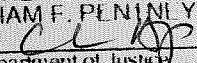
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APPLICANT'S MOTION RECORD

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SERVICE OF A TRUE COPY ADMITTED ON

SEP 26 2014 e 4:45pm

ON BEHALF OF THE  
DEPUTY ATTORNEY GENERAL OF CANADA  
WILLIAM F. PENNINGLY  
per.   
Department of Justice

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DUPLICATE  
DUPLICATA  
SEP 26 2014  
TORONTO

*Service admitted on behalf of  
the Constitutional Rights Centre Inc.  
on this 25<sup>th</sup> day of Sept. 2014  
Paul Slaniky*