Reference re Supreme Court Act, ss 5 and 6 — *Expanding the Constitution of Canada*

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On March 21, 2014, the Supreme Court of Canada (SCC) answered two questions pertaining to Federal Court Justice Marc Nadon's appointment to the Court.[1] First, "[c]an 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] It was a relatively straightforward question, though Moldaver J provides an interesting critique of the Court majority's logic. But perhaps the Court's answer to the second question is of greater long-term significance: "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*?"[3] The majority's answer to the second question effectively expanded Canada's Constitution by including some provisions of the *Supreme Court Act* in the Constitution of Canada, giving the *Constitution Act, 1982*'s amending formula a purpose and providing constitutional protection to fundamental aspects of the SCC. This case comment discusses the answers to both of these questions in detail.

Question 1 — Interpreting Sections 5 and 6 of the *Supreme Court Act* as They Exist

The SCC's six-member majority decided that s 6 of the *Supreme Court Act* required that the three Quebec judges chosen for the Court must either be currently sitting on the Court of Appeal or Superior Court of Quebec, or have been members of the Barreau du Québec for at least 10 years.[4] This is clearly the most valid textual interpretation, given the differences in wording between s 6 and s 5 (the general appointment provision). Section 6 states that "[a]t least three of the judges [of the SCC] 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] The Court's use of the phrase "from among" and references to three court members without suggesting that former as well as current group members can be appointed to the SCC contrasts with the general qualification provision contained in s 5: "Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province."[6]

Moldaver J dissented from the majority on this point, however, and his judgment does

contain some logic. Certainly, ss 5 and 6 are "inextricably linked," and the minimum eligibility requirements of s 5 apply equally to those appointed from Quebec.[7] Indeed, an absurdity results if s 6 is not read in conjunction with s 5, as the former does not contain the 10-year bar standing required by s 5.[8] These points do not, however, indicate that s 6's requirements cannot be *more* stringent than s 5's, but simply that they cannot be *less* so. Thus, Moldaver J's assertion that "choosing from section 5 only those aspects of it that are convenient" amounts to "cherry-picking" is an inaccurate assessment of how ss 5 and 6 work together.[9] In truth, all of s 5 applies to the appointment of individuals to the "Quebec seats" on the Court but, as is standard in legislative interpretation, where s 6 imposes stricter conditions specific to the appointment of persons to the "Quebec seats" on the Court, the specific provisions override the general provisions if there is a conflict between them. This is not "cherry-picking" but is simply the application of a general rule of legislative interpretation.

Further, given the relative ease with which an individual can maintain a membership in the Barreau du Québec, it is a fair point that the requirement that Quebec appointees be members of the Barreau for at least 10 years does not promote Quebecers' confidence in the SCC.[10] A basic principle of legislative interpretation, however, is that the legislation's wording should be interpreted in the context of its plain meaning, even if this meaning may be inconsistent with the Court's understanding, gleaned from the historical record or other sources, of the underlying legislative purpose of the legislation. Using language that does not further the underlying legislative purpose may be an act of poor drafting but it is not an appropriate role for the courts to revise the drafted text to fit their understanding of the legislative purpose. As Elmer Dreidger said in his seminal work, *Construction of Statutes*, "[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[11] In instances of conflict between principles of interpretation, the courts must harmonize the grammatical and ordinary sense of the provision with the intention of Parliament as best they can but they cannot subject the words to a meaning that is inconsistent with the "grammatical and ordinary sense" of the words.

As such, I disagree with Moldaver J that nothing in s 6 imposes a requirement on Quebec appointees to be current superior court justices or members of the Barreau du Québec.[12] A simple thought experiment illustrates this point. All lawyers were law students at one time, but they ceased to have this status once they received their LLBs, JDs, or BCLs. If a government decides to create, through legislation, an advisory committee on legal education and the legislation states that one-third of committee members are to be drawn from among "law students," lawyers would not be eligible to fill positions despite having been law students at one time. The point is that the phrase "from among" does indeed have a temporal dimension; to be from among a group, one must be a current member of that group unless the phrase "from among" is modified by the phrase "those who are or were previously" members of the group. Thus, I agree with the majority decision on question 1 of the reference , rather than with Moldaver J's dissent.

The legislative history of the *Supreme Court Act* supports this interpretation. As the SCC noted, the 1886 amendment to the Act changed lawyers' eligibility requirements. It replaced the statement that Supreme Court justices can be appointed from those "who **are** Barristers or Advocates of at least ten years' standing at the Bar" with the statement that a person can be appointed "who is or has been … a barrister or advocate of at least ten years' standing at the bar."[13] Having put their minds to changing the temporal dimension of eligibility for lawyers generally, if Parliament also wanted to allow persons who had been members of the Quebec bar to be eligible for appointment to one of the "Quebec seats", it could have easily added the words "those who are or have been" to subsection 4(3), now s 6 of the Act. They did not implement these changes despite making amendments to subsection 4(2) (which became s 5 of the Act), indicating that they intended to exclude former

members of the Quebec bar. *National Post* columnist Andrew Coyne suggests "[i]f that was Parliament's intent, you think it would have said so, not hidden it in the text for six future judges to discover." Rather, one might suggest that the eligibility criteria in s 6 were sufficiently well understood by previous governments and prime ministers that the question never arose between 1886 and 2013, which is why the issue was left to judges in 2014 to provide a conclusive interpretation of the provision.[14]

Question 2 — The *Supreme Court Act* as Part of the "Constitution of Canada:"

For the purposes of this discussion, though, the more interesting part of the SCC's decision is its answer to the second reference question. The important clause for the purpose of this question is s 472 of the *Economic Action Plan 2013 Act, No 2*, which added s 6.1 to the *Supreme Court Act*. Section 6.1 states that "[f]or 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." The majority decided, "[s]ince s 6.1 of the *Supreme Court Act* … 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."[15] To arrive at this conclusion, the Court had to declare for the first time that, at a minimum, ss 5 and 6 of the Act are part of the Constitution of Canada.

Understanding why this declaration is important to Canada's constitutional evolution requires a review of ss 38 to 49 (the amending formula) and s 52 of the *Constitution Act, 1982*. Paragraph 41(d) states that amendments to the Constitution of Canada "in relation to the composition of the Supreme Court of Canada" require resolutions by the Senate, the House of Commons, and the legislative assembly of each province. Paragraph 42(1)(d) states that amendments to the Constitution of Canada in relation to the SCC, subject to paragraph 41(d), require resolutions by the Senate, the House of Commons, and the legislative assemblies of at least two-thirds of the provinces that, together, have at least 50 percent of the population of the provinces.[16] Subsection 52(2) of the Act, however, states that "[t]he Constitution of Canada includes (*a*) the *Canada Act 1982* [the British statute which added the *Constitution Act, 1982* to the Constitution of Canada], including this Act; (*b*) the Acts and orders referred to in the schedule; and (*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*)."[17] As the majority noted in its judgment,

> [t]he Attorney General of Canada contends that the Supreme Court is not protected by Part V [the amending formula], 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 …. It follows from this, he argues, that Parliament retains the power to unilaterally make changes to the Court … until such time as the Court is expressly entrenched.[18]

It is significant that s 52 states that the Constitution of Canada "includes" the *Constitution Act, 1982* and a variety of other Acts listed in its schedule, rather than stating that the Constitution "consists of" those Acts. Canada's Constitution has evolved over time as new statutes have been added to the body of the Constitution; this is unlike the United States' constitution, which was written at a moment in time and consists of this text and explicit textual amendments that have been added to the original text thereafter. Indeed, as stated in *Reference re Secession of Quebec,* the SCC has gone so far as to declare that the Constitution embraces both written and unwritten rules.[19] Similarly, Professor Brian Slattery has described the Canadian Constitution as "organic" because "it emphasizes that the Constitution is the product of slow and continuing growth, molded in part by local Canadian influences and traditions."[20] Moreover, "our basic constitutional law is not limited to such enactments as the *Constitution Acts* of 1867 and 1982.

These enactments depend for their legitimacy on a more fundamental body of law, which may be called the common law of the Constitution. This law has undergone a long period of gestation and has drawn nourishment from a variety of sources, including local practices and traditions."[21] Thus, we cannot ascertain the entire body of the Constitution, and so the more general, open-ended term "includes" in s 52 of the *Constitution Act, 1982* accounts for future interpretations.

Constitutional scholars and others involved in negotiating amendments since 1982 have questioned whether the *Supreme Court Act*, or some provisions of it, should be understood as being part of the Constitution of Canada. The result would be that references to the SCC in the constitutional amending formula would have a purpose, but it has never been clear whether the Act was a part of the Constitution. On March 21, 2014, the SCC answered this question and, in doing so, expanded the Constitution. The majority of the Court decided, "[t]his contention [the federal government's contention that the references to the Supreme Court in the constitutional amending formula are empty vessels] is unsustainable. It would mean that the 1982 Act's framers would have entrenched the Court's *exclusion* from constitutional protection."[22] The majority also commented that

> [o]ur 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. … By setting out in Part V [the amending formula] 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… This reflects the political and social consensus at the time that the Supreme Court was an essential part of Canada's constitutional architecture.[23]

The majority stated that Parliament has the authority under s 101 of the *Constitution Act, 1867* to enact routine amendments necessary for the continued maintenance of the SCC, but only if those amendments do not change the Court's constitutionally protected features. "The unilateral power found in s 101 … 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 both maintain and protect the essence of what enables the Supreme Court to perform its current role."[24]

Conclusion — More Than Just a Decision About a Judicial Appointment

The SCC's majority judgment in the *Reference re Supreme Court Act* and, in particular, its answer to question 2, is important to our understanding of the SCC and our Constitution, far beyond it being a decision about whether the federal government's appointment of any particular individual is legally valid. In declaring for the first time that ss 5 and 6 of the *Supreme Court Act* are part of Canada's Constitution, the SCC secured some level of constitutional protection for itself, whereas previously the only substantive constitutional provision concerned empowering the federal government to establish a "General Court of Appeal for Canada" in section 101 of the *Constitution Act, 1867*.[25] As the SCC is the final arbiter of the meaning of our Constitution, ensuring its constitutional protection is extremely important. This decision, therefore, advances the underlying principle of constitutionalism and the rule of law, one originally articulated as a "fundamental and organizing principle of the Constitution" in the *Reference re Secession of Quebec*.[26]

This declaration also provides, for the first time, constitutional assurance that the provinces have a role in the process of altering fundamental aspects of the SCC. As one of the essential roles of the SCC is that of the final arbiter of the meaning of Canadian federalism, this declaration is not only appropriate but will have a valuable influence over the long term on our understanding of our constitutional structure and the federal nature of our country. Thus, this decision also makes an important contribution to reinforcing and advancing the fundamental principle of federalism, also identified in the *Reference re Secession of Quebec*.[27] As such, the SCC's answer to

the second reference question is likely to be considered an important milestone in the evolution of our constitutional jurisprudence; it is much more than a simple decision about the validity of a particular judicial appointment.

Notes

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1 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] SCJ No 21 [*Supreme Court Reference*].
2 *Ibid* at para 7.
3 *Ibid*.
4 *Supreme Court Reference*, *supra* note 1 at para 4.
5 *Supreme Court Act*, RSC 1985, c S-26, s 6 [*SCA*].
6 *SCA*, *ibid*, s 5.
7 *Supreme Court Reference*, *supra* note 1 at para 121.
8 *Ibid* at para 123.
9 *Ibid* at para 124.
10 *Ibid* at paras 149-51.
11 Elmer Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths Ltd, 1983), at 87.
12 *Supreme Court Reference*, *supra* note 1 at para 125.
13 *Ibid* at paras 21-22 [emphasis added].
14 Andrew Coyne, "Andrew Coyne on Marc Nadon: Flaky Supreme Court ruling meets dubious appointment", *National Post* (24 March, 2014), online: National Post <http://fullcomment.nationalpost.com/2014/03/24/andrew-coyne-on-marc-nadon-flaky-supreme-court-ruling-meets-dubious-appointment/>.
15 *Ibid* at para 106.
16 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 41(d), 42(1)(d) [*CA 1982*].
17 *CA 1982*, *Ibid*, s 52(2)
18 *Supreme Court Reference*, *supra* note 1 at para 97.
19 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32, 161 DLR (4th) 385 [*Quebec Secession Reference*].
20 Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1995) 34:1 Osgoode Hall LJ 101 at 108.
21 *Ibid* at 109.
22 *Supreme Court Reference*, *supra* note 1 at para 98.
23 *Ibid* at para 100.
24 *Ibid* at para 101.
25 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 101, reprinted in RSC 1985, App II, No 5.
26 *Quebec Secession Reference*, *supra* note 19 at para 32. See also paras 70-78.
27 *Ibid* at para 32.