HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 006 • 2nd SESSION • 41st PARLIAMENT

EVIDENCE

Thursday, November 21, 2013

Chair

Mr. Mike Wallace

Standing Committee on Justice and Human Rights

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● (0850)

[*English*]

The Chair (Mr. Mike Wallace (Burlington, CPC)): I call this meeting to order.

Welcome to meeting number six of the Standing Committee on Justice and Human Rights.

Pursuant to Standing Order 108(2), we are studying the subject matter under clauses 471 and 472 of BillC-4 a second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013, and other measures.

Our first witness today is our minister, the Hon. Peter MacKay, and with him from the Department of Justice is Laurie Wright, the Assistant Deputy Minister for Public Law.

We have the minister for about an hour.

Is there any opening comment you would like to make, Minister?

Hon. Peter MacKay (Minister of Justice and Attorney General of Canada): Yes. Thank you very much, colleagues, and Mr. Chair.

I'm pleased to be here with Laurie Wright to speak to you about the declaratory provisions to the Supreme Court Act proposed in division 19, part 3 of Bill C-4, and the Economic Action Plan 2013, No. 2.

Colleagues, these declaratory provisions have been introduced to clarify the most basic criteria for appointment to the Supreme Court and are the same regardless of the appointee's province or region, and to ensure that any future government can continue to draw from the ranks of the most talented and experienced jurists who currently sit on Canada's federal courts in filling vacancies on the highest court in the land, the Supreme Court of Canada.

[*Translation*]

Mr. Chair, esteemed colleagues, I am hopeful that public consideration of these provisions in Parliament will also help the public to better understand the work of the federal courts and remove any doubt as to the eligibility and suitability of its judges for appointment to the Supreme Court of Canada, including as members of the court for Quebec.

[*English*]

Colleagues, in the government's view, the eligibility of the federal court judges to fill any vacancy on the Supreme Court should not be in doubt. It is solidly supported by legal opinion prepared by respected former Supreme Court Justice Ian Binnie, which itself was supported by his former colleague, the Honourable Louise Charron, as well as by noted constitutional expert, Professor Peter Hogg.

However, as you are no doubt aware, Mr. Chair, colleagues, despite the weight of legal expert opinion, some have continued to question the eligibility of federal court judges for appointment to the Supreme Court, particularly as members of the Court for Quebec. In order to resolve this critical matter as soon as possible, the government is proceeding on two fronts.

As you know, the matter is referred to the Supreme Court of Canada to confirm, first, the meaning of the statute, and second, Parliament's authority to 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 to enact the declaratory provisions under consideration here today before you.

On the other front, the Economic Action Plan 2013, No. 2 was determined to be the most expeditious and most efficient way of introducing declaratory provisions and ensuring that they are enacted on time to guarantee that federal court judges can be considered in the process of filling upcoming Supreme Court vacancies, the first of which arises next April.

These declaratory provisions clarify—without making substantive changes to the existing law—that individuals with at least 10 years at any bar in Canada, including the Quebec bar, at any time during their career, are eligible to sit on the Supreme Court of Canada.

It's very straightforward language.

Mr. Chair, I would like to stop here for a moment and make the point that it may appear a bit technical, but it is of central importance to this committee's consideration of clauses 471 and 472 of Bill C-4. The provisions that these clauses introduce differ in quality and, consequently, in effect from the types of statutory amendments generally considered and debated by Parliament or by a committee such as this. These provisions are declaratory in nature and, as such, they do not amend the Supreme Court Act in the way that a standard statutory amendment would.

Typically, statutory amendments enact new provisions or change existing provisions in a way that makes the result different in substance from the provisions they would replace, modify, or amend. The nature of the proposed declaratory provisions is to explain the proper interpretation of the law from the time it came into force and effect.

Essentially, it is language that adds to the meaning in a way that will bring about greater understanding.

● (0855)

[*Translation*]

The Supreme Court of Canada recently explained the impact of declaratory provisions in its 2013 decision in *Régie des rentes du Québec v. Canada Bread Company Ltd*. The court stated in that case:

> The interpretation imposed by a declaratory provision stretches back in time to the date when the legislation it purports to interpret first came into force, with the effect that the legislation in question is deemed to have always included this provision.

[*English*]

In keeping with the purpose of a declaratory provision, clauses 471 and 472 confirm the basic requirement that judges must meet to be appointed to the Supreme Court of Canada. These provisions will make it clear that the current wording of these sections does, in fact, allow for judges of the Federal Court to fill Quebec vacancies on the Supreme Court of Canada, as long as at some point in their legal career they had been members of the Quebec bar for a minimum of 10 years. This ensures that current and former members of the Quebec bar are treated in the same way as current and former members of any other province. So it is to keep consistency and parity with all provincial bar associations.

I should explain, Mr. Chair, that the wording of these provisions has changed very slightly over the course of the past century as a function of legislative revision and consolidated exercises performed for all federal statues. However, there have been no substantive changes. We're talking about changes here after a considerable period of time for the purposes of clarification.

Successive pieces of legislation empowering Parliament have established that any changes that occur during these revision exercises are not intended to be substantive. The rule reflects an important principle. Given Parliament's role in enacting the laws of Canada, it should be inappropriate for mere housekeeping matters to change the law.

This principle is reflected as well in long-established rules of statutory interpretation that routine statutory revision and consolidation do not result in substantive legislative amendments.

That's what we're talking about here today. It is not a substantive change but a declaratory statement to clarify existing law.

[*Translation*]

Mr. Chair, I want to point out as well that the appointment of federal court judges to the Supreme Court of Canada is in no way novel. Mr. Justice Marshall Rothstein, a current and esteemed member of the court, was a member of the Manitoba Bar, appointed to the Federal Court, then to the Federal Court of Appeal and, ultimately, to the Supreme Court of Canada in 2006. Before him, Justices Frank Iacobucci and Gerald Le Dain, both members of the Ontario Bar, followed the same route to the Supreme Court.

● (0900)

[*English*]

It should be neither surprising nor unexpected that Supreme Court vacancies have in the past been filled from the ranks of Federal Court judges. This is not without precedent.

Experience in the Federal Court enhances rather than negates a long-time advocate's qualification to serve on the Supreme Court of Canada. I say that because the Supreme Court regularly hears appeals from decisions of the federal courts. In 2012 alone, the Supreme Court heard 10 appeals from decisions of the Federal Court of Appeal, as compared to 15 from the much larger Court of Appeal of Québec.

As I mentioned at the outset, Mr. Chair, it has been suggested in particular that judges of the Federal Court ought not to be appointed given the requirement under section 6 of the Supreme Court Act that three of the nine judges of the Supreme Court be appointed from Quebec.

The argument is that since Quebec is a civil law jurisdiction where the Quebec civil code applies, only those who practise law in Quebec at the time the appointment must be filled or who sit on a Quebec superior court are qualified. However, Mr. Chair, this argument is demonstrably without merit, not least because it reflects a fundamental misunderstanding of the nature of the work of the federal courts.

Let me explain. Judges of the Federal Court have jurisdiction over a wide and diverse area of law, and the principle of bijuralism means that they must regularly apply federal law in accordance with legal rules and principles in force in the province from which it arises.

For matters arising from Quebec this means that judges of courts, like the Federal Court of Appeal, must routinely interpret Quebec's civil code in deciding matters arising in complex and diverse areas such as tax law, copyright, and bankruptcy. That is why, like the Supreme Court Act, the Federal Court Act requires that there be a minimum number of judges on the Federal Court and the Federal Court of Appeal who have also been members of the bar from Quebec at any time. There are ten on the Federal Court and five on the Federal Court of Appeal. In essence, it's the same type of composition. There is mandatory membership on the Federal Court and the Federal Court of Appeal from Quebec.

The object of this statutory requirement is precisely the same as that of section 6 of the Supreme Court Act. It is to ensure that those courts have the requisite bijural capacity to deal with matters that arise from both civilian and the common law systems that define our system of administration of justice. To exclude the eminent Quebec jurists appointed to the Federal Court in satisfaction of such a requirement for consideration for appointment to the Supreme Court of Canada, and satisfaction of an essentially similar requirement, evidently makes no sense. Indeed, it could only serve, in my estimation, to weaken the guarantee provided by section 6 of the Supreme Court Act.

[*Translation*]

Moreover, as the Hon. Robert Décary, former justice of the Federal Court of Appeal, has recently and eloquently observed (in *La Presse* on October 25, 2013), to suggest that a judge of the federal courts trained in civil law does not have the level of expertise in civil law that section 6 is intended to protect is to ignore the practical reality of Canada's, and the world's, legal landscape. In his words, Quebec's civil law:

> …has made its mark in the world. It borrows from common law and it lends to common law.
>
> Which lawyer or judge in Quebec can claim today to live exclusively in the world of classic civil law? Divorce law is federal. Our administrative, criminal and penal law is Anglo-Saxon in inspiration. Commercial law is increasingly international. Human rights are global rights.

● (0905)

[*English*]

In addition, Mr. Chair, and to conclude, taking a restrictive interpretation of section 6 of the Supreme Court Act would exclude not only judges from the Federal Court but also many other candidates from appointment to the Supreme Court of Canada. For example, judges of *La Cour du Québec* would be excluded as they are neither judges of the Superior Court or the Court of Appeal, nor are they currently advocates. This restrictive interpretation would lead to an absurd result that has been noted by other constitutional experts. Later this morning, I understand, you'll hear from Professor Benoît Pelletier. In an interview on Radio-Canada on October 23, he stated:

[*Translation*]

> The interpretation that prevails, I believe, or should prevail, when one looks at the spirit of the provision is that you just need to have been a member of the bar for 10 years, but you do not have to still be one today.

[*English*]

Mr. Chair, by taking this legislative step and also by referring this question to the Supreme Court of Canada, our government is defending the eligibility of members of the bar in all provinces and territories to sit on the highest court of the land. Members of the Quebec bar should be, and are under law, treated the same as lawyers in other provinces and territories in Canada.

Our government looks forward to a prompt, conclusive resolution of these questions ensuring the continued eligibility for appointment to the Supreme Court of eminent jurists of Canada's federal courts. This could only help ensure that the Supreme Court will maintain the long tradition of independence and excellence that has made it the envy of both the developed and developing democracies.

Mr. Chair, I thank you for your indulgence.

I'd be pleased, of course, to answer your questions.

The Chair: Thank you very much, Minister.

Our first questioner from the New Democratic Party is Madam Boivin.

[*Translation*]

Ms. Françoise Boivin (Gatineau, NDP): Thank you for being here this morning, Mr. Minister. I am not as grateful to you for the situation we find ourselves in concerning an institution as important as the Supreme Court of Canada.

When Professor Dodek testified here this week, he raised quite an interesting point. He wondered how you could do these two things at the same time. I am sure you will tell me it is a matter of your authority to do so.

Bill C-4 has been tabled in the House of Commons. In your capacity as Attorney General of Canada and Minister of Justice, all government bills receive your seal of approval indicating that they are in compliance with the legislation, the regulations and the Constitution. I doubt that you let Bill C-4 through without having consulted all the people in your department and done all the usual checks.

At the same time, you are submitting a reference to the Supreme Court in which you ask about the government's jurisdiction.

[*English*]

That's the question you're asking the Supreme Court of Canada:

> 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*?

Back to Professor Dodek, how can you claim with Bill C-4 when it's filed in the House that it is in order, but at the same time ask the Supreme Court whether you are in order? I have a bit of a problem seeing some logic between the two.

Hon. Peter MacKay: Mr. Chair, colleagues, I would suggest to you that we're doing this with a clear intent to provide any future process with the ability to say there is absolute clarity here, that the province of Quebec and the Barreau du Québec are treated the same as any other province or provincial bar in the country. The intent is to have a clarification by the Supreme Court of Canada, which is the ultimate interpreter of this legislation. To make a declaratory provision in the Supreme Court Act will, in my view, close out any present or future misinterpretation. We have a challenge, which is what has been the impetus for these steps.

I would suggest to you, colleague, that we can do two things simultaneously without going outside the law. We can do this in a way that will provide clarity for future appointments. We know that there are future appointments coming. This is the nature of the Supreme Court. There will always be a turnover of judges.

So it is very much a matter of efficiency, expediency, and bringing about the greatest degree of clarity in the short term.

● (0910)

[*Translation*]

Ms. Françoise Boivin: Mr. Minister, this is no mundane matter we are talking about. This is the Supreme Court of Canada. Would it not have been more prudent to proceed differently?

Last August, after the first stage of the work of the committee reviewing the government's list, you said yourself that there could be a problem of interpretation. I really want to believe that there are solid legal opinions. You are a lawyer, I am a lawyer and we both know full well that, for three legal opinions that say one thing, another three may say something else. It is not easy to decide how to interpret this. In your interpretation, any lawyer who has been a member of the Quebec Bar for at least 10 years would be eligible. So I wonder why the legislation has the added mention of the Federal Court of Appeal and the Superior Court. The texts become quite useless.

That said, you yourself said that there was a potential problem of interpretation and the sections might perhaps have to be amended. I even accept that you have the right to do so, and, together with all the other experts, we will see whether it will be a constitutional change. If the government had the right to bring in an amendment, why did it not go that route instead of creating this absolutely awful mess that has engulfed everyone, especially the Supreme Court and the hon. Justice Nadon?

[*English*]

Hon. Peter MacKay: Well, I completely disagree with that characterization. As you know, this issue arose when an individual from Toronto, a private practitioner, decided to challenge this appointment. That's the origin of this. This wasn't something—

Ms. Françoise Boivin: But your comment was before his lawsuit, by the way, because your comment, Minister, if I remember correctly, was in August of this year. The lawsuit from the lawyer in Toronto was after the nomination of Judge Nadon, so you can't say that it was after. You made the assumption that maybe we should amend. I think I would have agreed with you wholeheartedly that it would have been the proper way to do it.

Hon. Peter MacKay: That is in fact the prudent way to proceed, and to take preemptive action by going out and getting a legal opinion, which we did, from Mr. Justice Ian Binnie, who I know you are familiar with, a very eminent jurist, and who, by the way, has had his opinion verified further by Madam Justice Louise Charron and a constitutional expert. So—

Ms. Françoise Boivin: But nobody from Quebec. You have nobody from Quebec, and the Government of Quebec doesn't agree with you. I'd be a bit scared, then.

Hon. Peter MacKay: I'm not scared in the least. Saying that the Government of Quebec might disagree with something the federal government is doing is saying that the sun will come up tomorrow. There's every possibility that they will agree.

Ms. Françoise Boivin: Not necessarily.

Hon. Peter MacKay: You're from the province of Quebec. We've seen this throughout our history, particularly when it's from a sovereigntist government—

Ms. Françoise Boivin: No, no. It was from the Liberal government before them, too, the same attitude, but anyway....

Hon. Peter MacKay: Well, in any event, this is the process that we have followed. We sought a legal opinion. We have sought a further opinion, of course, from the Supreme Court itself, and we have introduced a declaratory provision to bring crystal clarity to the legislation. It is not an unusual thing to do to bring in a declaratory provision.

Ms. Françoise Boivin: And in a budget act, Minister, a budget act, that's weird.

The Chair: Thank you, Minister.

Our next questioner is Monsieur Goguen, from the Conservative Party.

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): Thank you, Mr. Chair.

Thank you, Minister.

Thank you, Mrs. Wright, for testifying today.

Obviously, the appointment of a Supreme Court Justice does not happen every day, and we all recognize that it's important to have a rigorous, inclusive, and transparent process that leaves no doubt as to what the mechanisms are. Of course, your statements today and the testimony given will explain why the declaratory provisions that we've enacted in clauses 471 and 472 are so important.

I noticed in your opening remarks that you spoke of Mr. Justice Décary, and we know, of course, that Mr. Justice Décary spent 20 years at the Federal Court of Appeal, and that he wrote an important decision in St-Hilaire v. Canada, which of course confirms the place of the civil law in the federal courts. Former Justice Décary supports publicly that on our declaratory provisions, clauses 471 and 472 that are in front of us today, he is in full agreement with them.

Can you tell us about the place of civil law at the Federal Court and why these declaratory provisions are so important for the preservation of the civil law tradition at the Federal Court and also the Supreme Court, Mr. Minister?

● (0915)

[*Translation*]

Hon. Peter MacKay: Thank you for the question, Mr. Goguen. You are right: Justice Décary's decisions are clear. He said that the civil code is part of the legal system in Quebec.

[*English*]

He's very definitive in that particular decision. Our government recognizes that there is a crucial role of the civil law at every level of the court system, particularly at the Supreme Court itself, so these interpretative amendments that we're presenting are intended, as I've stated a few times, to clarify the existing law. They will ensure, in my view, the right of Quebec judges at the Federal Court level to sit on the Supreme Court and bring their expansive experience, which also involves dealing with the civil law, and which also involves, of course, being inclusive of the province of Quebec.

It's necessary, in my view, that we ensure there is a positive evolution and influence of *bijuridisme* at every court level. In fact, Mr. Justice Décary illustrates this: that growing the place of *bijuridisme* is already happening in our courts.

He affirms that. He wrote a letter, as you're probably aware and as you've alluded to, in *La Presse*, about these two declaratory provisions. He wrote, “I was a civil law practitioner when I was appointed and I have continued to be one.” So whether you're appointed to the Supreme Court of Canada or whether you're a federal jurist or an appeal court jurist, it doesn't somehow cease your attachment to the civil law, because the civil law is still under contemplation by both of those courts.

That principle that Justice Décary established in this case of

[*Translation*]

St-Hilaire v. Canada (Attorney General)

[*English*]

was very much recognized by Parliament in the Federal Law—Civil Law Harmonization Act No. 1, so I would suggest to you that your assertion is correct.

Mr. Robert Goguen: Thank you, Mr. Minister.

It is clear from your statements that bijuralism is a pillar of Supreme Court law and, of course, we are going to continue to go along with that very basic and fundamental principle.

Madame Boivin questioned sections 5 and 6. She said there was perhaps a dissonance between the French and English versions. Of course, very prudently we obtained Mr. Justice Binnie's opinion in this regard.

With regard to our provisions in clauses 471 and 472, have you spoken to legal experts to determine whether these interpretative amendments will preserve Quebec's civil law tradition, it being so important to us?

Hon. Peter MacKay: Yes, we have. We've sought outside expertise and opinion on this. We believe, as you've alluded to, that this will bring that necessary clarity to the law.

When you boil it right down, what we're doing is simply adding the expression “at any time”. What we try to do, and what we, I think, have accomplished, as all governments have sought to accomplish, is ensure that there is parity and clear interpretation in both the French and English texts of our law, of our statutes, of our administration.

We pursued this two-track approach of ensuring clarity in the legislation through this declaratory provision and at the same time sought a legal opinion and referred it to the Supreme Court itself. I believe all the bases are covered. I believe this was a prudent thing to do, and I believe this will serve to ensure greater consistency and confidence in Supreme Court appointments in the future, particularly vis-à-vis the province of Quebec.

The Chair: Thank you, Minister.

Thank you for those questions.

Our next questioner from the Liberal Party is Mr. Casey.

Mr. Sean Casey (Charlottetown, Lib.): Thank you, Mr. Chairman.

Mr. Minister, do you agree with the Minister of Finance when he says the purpose of a budget implementation act is to implement the provisions of the budget?

● (0920)

Hon. Peter MacKay: If that is what he has said, then that is what he meant.

Mr. Sean Casey: Can you tell me where in the budget we can find reference to the provisions of the amendment to the Supreme Court Act?

Hon. Peter MacKay: What I can tell you is I'm here to discuss a provision that brings clarity to the Supreme Court Act. I can speak to that. I can't speak to every provision of the budget. That isn't legislation that I've personally brought forward as Minister of Justice.

Mr. Sean Casey: So I'll take that as a no. You cannot point me to a provision in the budget that deals with amendments to the Supreme Court Act?

Hon. Peter MacKay: I can point you to the legislation that's before this committee for consideration.

Mr. Sean Casey: Is it in the budget?

Hon. Peter MacKay: This is a piece of legislation that is part of an omnibus bill that pertains to changes to the Judges Act, which is not uncommon, as you would know. Consistently we've seen omnibus legislation from all governments, including Liberal governments.

Mr. Sean Casey: In the search to try to find some connection to the budget, what we have here is a lawsuit instituted by an Ontario lawyer. We have a reference to the Supreme Court Act. We have the development of legislation. Can you give me an estimate of what all those things are going to cost and what impact they might have on the budget?

Hon. Peter MacKay: What I can tell you, Mr. Chair, colleagues, is the impact that we seek to achieve here is greater clarity for the interpretation of the Supreme Court Act. The legislation adds the words “at any time” and brings about parity with respect to the French and English interpretation of the legislation.

Mr. Sean Casey: In your opening remarks, Mr. Minister, you referenced a future government, and in response to Madame Boivin's first question you referenced a future process. I take it from that, that the goal of these amendments is to have an impact on future appointments.

Hon. Peter MacKay: Absolutely. Yes.

Mr. Sean Casey: If that is the case, then, would you be amenable, Mr. Minister, to a delay in the implementation of these provisions, a delay in the coming into force of these provisions so that, in effect, we are not asking the Supreme Court a question and then effectively legislating the answer?

My question for you is whether you would be amenable to delaying the impact of these provisions to allow the Supreme Court to speak unimpeded.

Hon. Peter MacKay: Not at all. Absolutely not.

Our intention is to clarify what we believe is the case and what we believe the Supreme Court will affirm.

Mr. Sean Casey: So as I understand what you just said to me, you are not in favour of delaying the implementation until the Supreme Court has spoken. You want to have Parliament amend the legislation to say that this is the state of the law, and then ask the Supreme Court what the state of the law is.

Do I have that right?

Hon. Peter MacKay: Well, Mr. Casey, you've been here a little while now, and you recognize that there is something called the supremacy of Parliament when it comes to the passing of laws.

So yes, that's exactly what I'm saying. We are telling the Supreme Court this is what the legislation means. We're putting in place a declaratory provision to bring about a greater understanding of the eligibility rules, and at the same time we have sought an opinion from the Supreme Court.

That's how it works, sir.

Mr. Sean Casey: So we're going to ask them and tell them at the same time.

Hon. Peter MacKay: You got it.

Mr. Sean Casey: Brilliant.

Can you tell me about the consultations you've had, in the course of bringing forth this legislation, with the Barreau du Québec?

Hon. Peter MacKay: I'm sorry, what's your question?

Mr. Sean Casey: Could you outline for us the consultations you've had with the Barreau du Québec in the course of bringing forward this legislation?

Hon. Peter MacKay: I've already told you that we've sought an opinion with respect to our belief of the proper interpretation of this legislation. Justice officials have...some of whom are members of the Barreau du Québec, and they have spoken with other lawyers from the province with respect to this assertion.

Madam Wright, you might want to speak to how the Justice lawyers have gone about consulting with the Barreau du Québec. What's the normal practice?

Ms. Laurie Wright (Assistant Deputy Minister, Public Law Sector, Department of Justice): In this particular case, I'm not aware that there were any consultations with the Barreau du Québec. It's not unusual for the government to consult in circumstances such as this, though.

● (0925)

Mr. Sean Casey: In the House, Mr. Minister, you indicated that the legislation was designed to allow long-serving members of every bar in the country to serve in the highest court of Canada. I believe you confirmed that here as well.

Hon. Peter MacKay: Ten years is a long time.

Mr. Sean Casey: Yes. We would agree on that.

Were there consultations with any bar societies in the course of developing this legislation?

Hon. Peter MacKay: As I said, this legislation was drafted in consultation with members of the bar who would be, in some cases, employees of the Department of Justice. We would look at precedent and previous legislation, I suppose, that led up to the original drafting of this bill.

The Chair: Thank you very much for your questions, Mr. Casey, and for those answers, Minister.

Our next questioner from the Conservative Party is Mr. Dechert.

Mr. Bob Dechert (Mississauga—Erindale, CPC): Thank you, Mr. Chair.

Thank you, Minister, for being here today.

You mentioned in your opening remarks the histories of Justices Rothstein and Iacobucci. I happen to know Justice Iacobucci. He was a law professor of mine, and dean of my law school. He was a very well-regarded member of the bar in Toronto, and then was appointed to Federal Court. He eventually made his way to the Supreme Court of Canada. He has one of the best and brightest minds in the legal profession in Canada. I can't imagine how one would ever want to interpret a law to prohibit somebody like that from being elevated to the Supreme Court of Canada.

When we last met, we heard from a law professor from the University of Ottawa who interpreted sections 5 and 6 of the Supreme Court Act to say that a Federal Court justice who had not practised for approximately 10 years would be ineligible for elevation to the Supreme Court of Canada. In answer to a question from one of my colleagues, she admitted that there was nothing logical about that interpretation, but nonetheless, that was her interpretation of the law.

What's your response to that? What would you say about how this provision, if interpreted the way that some people wish to interpret sections 5 and 6 of the Supreme Court Act, would limit the ability of the best and brightest minds from the Quebec bar from serving on the Federal Court and then going on to the Supreme Court?

Hon. Peter MacKay: That is the essence of the question here, Mr. Dechert. Thank you.

First, I agree with the interpretation of your former mentor and professor. What we want to do, I would suggest, as we would in any profession, is to have the broadest pool upon which to draw to get the best talent, the best jurists, the best legal minds, the best intellectual horsepower to serve on our highest court. To my mind, it would be ludicrous to exclude, in one province only, the expansive interpretation of that pool. It would not be giving Quebec the ability to compete on an equal footing in providing the best, the brightest, the most capable to serve in that capacity.

We know there are three positions reserved specifically for Quebec. They already hold a unique position when it comes to their inclusion. So why, in any world, would we want to limit, in some way, their ability to draw upon the best minds to serve in that capacity?

Keep in mind, we are talking about individuals who have not left the practice of law. If we are going to get specific, we're talking about an individual who served for 20 years as a practising member of the Barreau du Québec and then an additional 20 years as a jurist at the Federal Court. That includes the practice that very often touches upon the civil law, so they don't stop being Quebec practitioners by virtue of having joined the Federal Court. They continue to have reach into the practice of law, albeit as a jurist as opposed to an advocate.

What we're doing here is ensuring that Quebec is on an equal footing, and has equal ability to draw from the greatest pool of talent in the province when it comes to the Supreme Court of Canada.

Mr. Bob Dechert: Thank you, Minister.

You have mentioned that the Federal Court deals with civil law. Perhaps you would expand on that and give us your view on how the interpretation of civil law by the Federal Court might suffer if members of the Quebec bar who aspired to the Supreme Court of Canada might choose not to accept an appointment to the Federal Court.

● (0930)

Hon. Peter MacKay: You raise an interesting point, Mr. Dechert. If the challenge that's been presented by a Toronto criminal lawyer trying to block the ascendency of a Quebec lawyer/jurist were to succeed, this could have a very negative influence on how future talented lawyers would chart their career course. If they thought they would never be able to become a Supreme Court judge if they accepted an appointment at the Federal Court level, we would be depriving two courts of the greatest pool of talent.

I would suggest that what we are doing here is an attempt to keep the large talent pool open for the Supreme Court and also for the Federal Court. Federal Court jurists, both Court of Appeal and the Federal Court, currently draw on the talent available in the Quebec bar, currently have members who have practised law in the province of Quebec, and have successfully translated that into the Federal Court judicial system and brought with them the experience, knowledge, talent, and ability to understand and interpret the civil law.

Again, I say for emphasis, when you want the best minds, legal excellence, and merit to prevail, you want to draw it from the largest pool. I would suggest to you that the province of Quebec should be treated like every other province in that regard.

That's what this legislation ultimately attempts to do.

The Chair: Thank you, Minister.

Our next questioner, from the New Democratic Party, is Madam Péclet.

Ms. Ève Péclet (La Pointe-de-l'Île, NDP): Minister, bear with me here. Could you keep your answers as short and concise as possible? This is a matter of great importance, and I have lots of questions for you.

[*Translation*]

That said, you are indeed talking about judges of great intelligence and talent, but why not respect the wishes of Quebec? How is it that you chose someone who was not one of those recommended by the Government of Quebec?

Did you consult the minister, who said that this choice was not one of his recommendations. Did you consult the Government of Quebec before making the appointment? Did you just decide to ignore Quebec's requests?

[*English*]

Hon. Peter MacKay: We had, I think, a very capable and intelligent person giving us input and recommendations on this particular decision. She is seated right next to you. Quebec was very ably represented in this process of judicial recommendation. I'm talking about the member who is right there with you, and she gave input. I believe she is a practising member of the Barreau du Québec. I would suggest that as a government we've taken the decision to open this process up, as no other government has in the history of Canada when it comes to the consultation and inclusion of others. So to that extent Quebec had a voice on the selection committee, which is not the way it used to work. It used to be done in a much more secretive and exclusive fashion in the past.

[*Translation*]

The Chair: Ms. Boivin, you have the floor.

Ms. Françoise Boivin: Thank you for throwing that door wide open for me, Mr. Minister. I take from it that you are revealing confidential information. I hope you are not claiming that I recommended your candidate. If you are, I will have a few things to say on the subject. Yes, one committee member comes from Quebec. Be that as it may, it does not answer my colleague's question.

My colleague asked a question. Through its minister, the Government of Quebec stood up in public and said something no one knew, that the person you appointed was not on the list of people that Quebec had recommended. Could you please explain to the committee why you did not follow the recommendations of the Minister of Justice for Quebec, one of the people you consult as part of your process?

● (0935)

[*English*]

Hon. Peter MacKay: Madame Boivin, you've been a part of this process. That's no secret. You've commented publicly on the fact that you were a part of this process. So I don't think I'm making any disclosures that put your protection in question.

You would also know that this is the process that has been followed and that we as a government have in fact expanded the process to include the hearings, in which you were participants, in which the justice in question, Justice Nadon, presented himself here and sat in this very chair and answered questions from yourself and members of this committee.

So to that extent I would suggest our government has gone farther in terms of the consultation including—

Ms. Françoise Boivin: Minister, you are not answering about the recommendation of the Government of Quebec. Your nominee is not part of the four recommended by the Minister of Justice. That's what he said publicly. So the question was about this.

That being said, are you aware of anybody other than the nominees who came from the Federal Court that you mentioned—like Iacobucci and Rothstein, still on the court—are you aware of any of these justices who came to the Supreme Court, but to be in one of the three seats for Quebec?

Hon. Peter MacKay: With respect to the Federal Court?

Ms. Françoise Boivin: Yes.

Hon. Peter MacKay: Not in the province of Quebec, no.

Ms. Françoise Boivin: Excellent.

Do you consider—

Hon. Peter MacKay: By the way, just because the justice minister or even the premier of Quebec disagrees with me, that doesn't trouble me.

Ms. Françoise Boivin: No, no that's—

Hon. Peter MacKay: We followed the process. In fact we expanded the process.

Ms. Françoise Boivin: I kind of suspected that. That'll be interesting.

That being said, Minister, you talked about expertise outside in response to a question from Mr. Goguen or Mr. Dechert; I don't remember who. Which expertise outside? You mentioned it vaguely, but you didn't say we know about the Binnie report, we know about Charron and Professor Hogg. Who else?

Hon. Peter MacKay: Those are pretty expert minds.

Ms. Françoise Boivin: I simply want to know, I don't want to play games with you. I only want to know. Are there others that we should be aware of, or is that the extent of it?

Hon. Peter MacKay: Madam Boivin, you're playing alone if you're playing a game here.

I'm suggesting the greatest pool of talent from Quebec, and the expert minds that are available, in consideration of the broadest number of people who are eligible with tenures, having served on a court—the Federal Court and the Federal Court of Appeal in this instance. I'm suggesting that we want to be able to include the greatest number.

Ms. Françoise Boivin: I understand what you're doing. I'm saying other expertise that you went to.

The answer is no, I guess.

The Chair: Thank you very much. Thank you for those questions. Thank you for those answers.

Our next questioner from the Conservative Party is Mr. Seeback.

Mr. Kyle Seeback (Brampton West, CPC): Thank you, Chair.

Listening to the argument that was being put forward by my colleague, Madam Boivin, with respect to the comments or the opinion of the justice minister of Quebec, she seems to be suggesting that the federal government should surrender its jurisdiction on appointments to the Supreme Court of Canada based on the opinion of the justice minister of the province of Quebec.

What do you have to say about that?

Hon. Peter MacKay: That will not happen.

Mr. Kyle Seeback: Okay, that's a succinct answer.

From my review of the testimony this committee has heard—other than one constitutional professor who came here on Tuesday and suggested that the interpretation of section 6 was such that a person who had 30 years of Quebec bar experience, who spent a day on the Federal Court or the Federal Court of Appeal would be excluded from sitting on the Supreme Court or being appointed to the Supreme Court—do you know of any other opinions, other than that, which would suggest that is a correct interpretation, and one that she readily admitted was not logical?

Hon. Peter MacKay: Not only is it not logical, to go back to the very principle here, it would be exclusionary, only for the province of Quebec.

Madam Boivin makes a good point that while this, for the province of Quebec, may be without precedent, when it come to prior examples of judges having served on the Federal Court and then going to the Supreme Court of Canada, we have judges from outside Quebec, who we've mentioned, who have followed that ascendancy.

I would suggest—it's my opinion—that it would be discriminatory to suggest that judges from the Federal Court who come from the province of Quebec should be excluded from that, when you already have precedent that a judge from Ontario, a judge from Manitoba, has followed that track to the Supreme Court. To say that simply because the person is from Quebec and was on the Federal Court, they are not allowed to serve on the highest court in the land.... To me, that and the example provided by that professor who suggested that the one day that you served on the Federal Court suddenly becomes a barrier for a Quebec jurist, an eminent individual, to go to the Supreme Court of Canada, creates more than an anomaly. In my view, that creates a very prejudicial effect for lawyers from Quebec.

● (0940)

Mr. Kyle Seeback: She seemed to be suggesting that this was the original intent of Parliament when they enacted those sections.

Hon. Peter MacKay: I disagree with that interpretation, and that's why we're seeking clarity both through legislation and from the Supreme Court of Canada. This dual-track approach, I think, will leave no dispute and no misinterpretation in the future. And there will be future appointments, to come back to Mr. Casey's point.

Obviously, the law and the precedent will be there for future appointments, as is the case with most legislation.

Mr. Kyle Seeback: There's an old legal phrase that suggests that if you have the facts on your side, pound the facts. If you have the law on your side, pound the law. If you have neither the facts nor the law on your side, pound the table.

Some hon. members: Oh, oh!

Mr. Kyle Seeback: What we seem to be hearing a lot from the members on the opposite side are complaints about the process. It's a process question. As Mr. Casey was saying, it's in a BIA therefore it's terrible, and some of the same things from members of the NDP.

Do you think you've won the argument when you're effectively arguing about process?

Hon. Peter MacKay: Look, that may well be. The fact remains that we want to expedite the process and get the result, and the result means having a full complement of judges.

There are only nine judges. They have a tremendous workload. There are tremendously important cases, including a Senate reference that you're aware of, for which we want to have, and pardon this expression, but all of the horses in harness pulling and doing the work that we've asked of them. They're currently short-handed. The reason that we put this declaratory provision in the BIA was to do it as quickly as possible. As you know, our legislation is denoted with numbers. This is Bill C-4, meaning this was the fourth bill brought before Parliament in this session. It was the earliest opportunity that we could bring this matter before the House of Commons, and ultimately the Senate.

That was the path we chose. Could it have been done in a stand-alone way? Yes. It probably would have taken longer. This was a way to expedite this process, ultimately get what we think is a very straightforward decision, a similar decision from the court. Then this Supreme Court justice, this very eminently qualified individual, will take his place on the bench and they can get on with their very important work with all of the judges in place.

The Chair: Thank you very much.

That's your time, I'm sorry.

Mr. Seeback, thank you for those questions, and thank you for those answers, Minister.

Our final questioner on this—we'll go a little bit past the time because we started a few minutes late—is Madam Péclet, from the New Democratic Party, and I believe she's sharing her time with Mr. Jacob.

Ms. Ève Péclet: Thank you very much, Minister.

[*Translation*]

It is important to realize that the question is not about the competence of the judges on the Federal Court or the Federal Court of Appeal. As you have said, we know that Federal Court judges who were appointed under section 5 are sitting on the Supreme Court as we speak.

It is important to realize that six people can be appointed to the Supreme Court under section 5, while section 6 is a little different. Has an appointment of this kind been made under section 6? You are saying that, basically, section 6 is no longer needed and that all judges can be appointed under section 5.

Are the three judges from Quebec appointed under section 6 or section 5?

● (0945)

[*English*]

Hon. Peter MacKay: Both, *les deux*. It's always been my feeling, and this is my interpretation, and I guess my right, as the Minister of Justice, to read them inclusively, the two sections together, 5 and 6 together.

The Chair: Thank you.

Monsieur Jacob.

[*Translation*]

Mr. Pierre Jacob (Brome—Missisquoi, NDP): Thank you, Mr. Chair.

Mr. Minister, thank you for testifying before us.

As the Minister of Justice of Canada, could you tell us how you see the spirit and the letter of section 6 of the Supreme Court Act, which deals specifically with Quebec judges? Doesn't this section seek to maintain the distinctiveness of the Civil Code within the Supreme Court, as a number of experts have said?

[*English*]

Hon. Peter MacKay: Yes, section 6 deals specifically with the province of Quebec, but section 5, in my view, must be read together with section 6. So subsections 5.1 and 5.2—

[*Translation*]

Mr. Pierre Jacob: I am asking what your view of section 6 is.

[*English*]

Hon. Peter MacKay: My vision, sir, is to ensure that the province of Quebec is treated exactly the same as every other province and territory when it comes to their right to have members from the *barreau* or members of the bench join the highest court of Canada. Section 6, as you know, sets out a very special provision that provides for Quebec's inclusion. But it has to be read with section 5 because, again, for parity, for fairness, for clarity, we want Quebec to be treated identically, other than the special provision that reserves three places for Quebec judges on the Supreme Court of Canada. That is the special inclusion for Quebec, that three of the nine positions are reserved.

[*Translation*]

Three positions are reserved for the province of Quebec.

In terms of the skills of judges, it is important to use the same approach for all judges in Canada from all the provinces, including Quebec.

Mr. Pierre Jacob: Thank you, Mr. Minister.

Are you politicizing the Supreme Court of Canada by putting the answers you want to hear into Bill C-4? Are you aware that you are not complying with the separation of powers? The basis of our entire democratic system is now at stake.

Hon. Peter MacKay: Not at all. It is the law. The federal government has the prerogative to introduce bills. It is clear.

[*English*]

It is the right of the executive branch of government to present legislation. In this case, we're not presenting new legislation, we're simply seeking a declaratory provision that reinterprets or puts words in place that ensure that the original intent of the legislation is correct.

At the same time, it is of course always the prerogative of the government to seek an interpretation from the Supreme Court of Canada as we have done on other matters, including the Senate most recently. So we're following two paths for maximum clarity and expediency by bringing it forward in this forum.

The Chair: Mr. Jacob, you have time for one question.

[*Translation*]

Mr. Pierre Jacob: Go ahead, Ms. Péclet.

[*English*]

The Chair: Sorry.

Madame Péclet. Go ahead.

[*Translation*]

Ms. Ève Péclet: You are saying that it is the right of Parliament to introduce a bill and, at the same time, to ask the Supreme Court if the bill is constitutional and valid. If the Supreme Court overturns the government's decision on the grounds that the bill introduced by the government and passed by Parliament is not valid, are you going to listen to the Supreme Court and respect its decision?

Hon. Peter MacKay: I have confidence in our position. Thank you.

● (0950)

[*English*]

The Chair: Thank you for those questions.

Minister, thank you for joining us for this first hour this morning. We appreciate you answering all the questions.

We're going to suspend now for just a couple of minutes until we get our next panel in place.

● (0950)

(Pause)

● (0955)

The Chair: Colleagues, I'd like to call this meeting back to order.

I want to thank our next panel of guests for joining us. At the table we have Professor Pelletier, full professor in the Faculty of Law at the University of Ottawa. We also have Monsieur Thibeault, a professor and assistant dean and counsel to the civil law section at the University of Ottawa.

Mr. Cyr is here. He is a professor of public law in the Faculty of Political Science and Law at Université du Québec à Montréal.

Professor Pelletier, go ahead, please. You have 10 minutes.

[*Translation*]

Prof. Benoît Pelletier (Full Professor, Faculty of Law, University of Ottawa, As an Individual): Thank you, Mr. Chair.

Thank you for having me here today, hon. members.

I would first like to say that, from a legal and constitutional perspective, I am convinced that sections 5 and 6 of the Supreme Court Act must be read together, meaning that they must be read in connection to each other. Furthermore, I am convinced that we must look at both the English and the French versions of section 5 and section 6. Clearly, I am talking about the sections of the Supreme Court Act.

Grammatically, I note that section 5 talks about judges that must be appointed “parmi les avocats inscrits pendant au moins dix ans au barreau d'une province”. The word “inscrits” can be interpreted in two ways: either as referring to the lawyers currently standing at the bar of a province or referring to lawyers who have already stood at the bar of a province. In itself, the word “inscrits” as written can take on either of the two meanings. It can either refer to the current situation or the current form, or to the previous form or a past situation.

Furthermore, the French version of section 5 uses the word “pendant”. It says that judges must be appointed “parmi les avocats inscrits pendant au moins dix ans au barreau d'une province”. It does not say “depuis au moins dix ans”. If it had said “depuis au moins dix ans”, that would have meant that the judges are to be appointed from among the current members of the Quebec Bar.

Since the word used is “inscrits”, which, as I just said, can have two meanings, either a meaning in the present or one in the past, and since the word “pendant” is used, I feel that the legislator wanted to have, among the appointed judges, some who have previously been members of the bar of a province for 10 years, even though they are no longer members when appointed, and some who are still members of the bar of a province when they are appointed.

When we read sections 5 and 6 together, we get the following result in French. Three judges must be appointed from among the current or former judges of the Superior Court of Quebec or the Court of Appeal of Quebec or from among “les avocats inscrits pendant au moins dix ans au Barreau du Québec”. That takes into account the potential double meaning of the word “inscrits” and the potential meaning of the word “pendant” in our grammatical context.

In English, reading the sections 5 and 6 of the Supreme Court Act together gives the following result.

[*English*]

Three judges shall be appointed from among the people who are or have been a judge of the Superior Court of Quebec or of the Court of Appeal of Quebec and who are or have been advocates of at least ten years' standing in the Quebec bar.

● (1000)

[*Translation*]

So when we combine sections 5 and 6 and we try to bring the text together, that is what we get. That is what I just read. The English version is a lot more flexible. It suggests that someone who has previously been a member of the Quebec Bar for 10 years can be appointed to the Supreme Court, even though that person may no longer be a member of the bar at the time of the appointment.

The first part of my analysis was more literal or grammatical. In terms of the spirit of the provision, I think it is clear that the legislator never intended to deprive the Supreme Court of the talent, skills and knowledge of the judges from the Federal Court and the Federal Court of Appeal. Nor could the legislator have intended to deprive the Supreme Court of the knowledge, talent and skills of judges of the former Exchequer Court of Canada. Based on the spirit of the provision, I don't think the legislator wanted to exclude the members from what used to be the Exchequer Court of Canada, which then became the Federal Court and the Federal Court of Appeal.

Furthermore, I will say that, based on the spirit of the provision, it is important that at least three judges on the Supreme Court of Canada be trained in civil law. That is the reason behind having judges who have sat on the Quebec Superior Court or the Quebec Court of Appeal or who are members of the Quebec Bar. The idea is to have at least three civil law judges on the Supreme Court, because civil law cases sometimes come before the court. Right now, five judges on the Supreme Court can make a decision, including three civil law members, who are a majority on the court bench.

The Supreme Court of Canada, described as a general court of appeal under section 101 of the Constitution Act, 1867, hears civil law cases. It was therefore a good idea to have at least three judges with solid enough civil law training to hear civil law cases from Quebec. As a result, the court could rule in those cases with five judges, instead of nine judges, thereby giving the majority to the three judges trained in civil law.

Mr. Chair, I know our time is limited. Furthermore, there will be an exchange with the members of the committee in a few moments. I will end by saying that we cannot interpret these provisions as a requirement to appoint to the Supreme Court only people who have practised civil law or who still practise it. The idea is to appoint people who have been trained in civil law. Also, if we were to appoint only people who have practised civil law on an ongoing basis, we would not be able to appoint criminal lawyers, trade law or maritime law experts, or even constitutional experts, which would be terrible.

We must look for this civil law training, this connection with Quebec for at least 10 years as members of the Quebec Bar or as judges on the Quebec Superior Court or the Quebec Court of Appeal. However, interpreting those provisions as excluding the appointment to the Supreme Court of judges from the Federal Court or the Federal Court of Appeal goes much too far, in my view.

As I just said, that means that the provisions can be interpreted by the Supreme Court of Canada based on the reference it receives, and I think the additions that the Government of Canada intends to make to the Supreme Court Act are not necessary.

● (1005)

I think the Supreme Court of Canada can interpret sections 5 and 6 both grammatically and teleologically as allowing the appointment of judges from the Federal Court or the Federal Court of Appeal to the Supreme Court of Canada. I think this can be done in line with the purpose and spirit of the provision. These declaratory provisions are therefore not necessary. Are they desirable as additional safeguards? That is something we could discuss in a few moments.

[*English*]

The Chair: Our next witness is Professor Thibault.

[*Translation*]

You have 10 minutes.

Mr. Pierre Thibault (Assistant Dean and Counsel, Civil Law Section, University of Ottawa, As an Individual): Mr. Chair, hon. members, thank you for inviting me to give testimony before you today on clauses 471 and 472 of Bill C-4.

In order to stay on time, I will first look at the scope of the proposed amendments and then briefly talk about why sections 5 and 6 of the Supreme Court Act cannot be amended on a purely legislative basis.

Last October 22, the Minister of Justice of Canada introduced declaratory amendments to the Supreme Court Act. According to those amendments, a barrister or advocate with at least 10 years standing at a bar can be appointed to the Supreme Court of Canada. In terms of Quebec, barristers or advocates who have been members of the Barreau du Québec for more than 10 years can also be appointed to the Supreme Court. It should be noted that this is not a formal amendment to sections 5 and 6 of the Supreme Court Act, but rather a declaration by the Government of Canada and subsequently by the Parliament of Canada if Bill C-4 is passed. That is how those two sections will be interpreted.

As Professor Pierre-André Côté explains, the legislator sometimes passes declaratory legislation. This is what he says:

> No formal constitutional provisions prevent the legislature from at times interpreting its own legislation, although this is in principle the responsibility of the courts. Interpretive or declaratory acts serve "...to remove doubts existing as to common law, or the meaning or effect of any statute".

Furthermore, it is important to point out that a declaratory piece of legislation applies retroactively. In fact, the Supreme Court of Canada has recently ruled on the *Régie des rentes du Québec v. Canada Bread Company Ltd.* case. This was in 2013. Justice Wagner, who is from Quebec, wrote the following for the majority:

> It is settled law in Canada that it is within the prerogative of the legislature to enter the domain of the courts and offer a binding interpretation of its own law by enacting declaratory legislation...
>
> In enacting declaratory legislation, the legislature assumes the role of a court and dictates the interpretation of its own law...As a result, declaratory provisions operate less as legislation and more as jurisprudence. They are akin to binding precedents, such as the decision of a court...Such legislation may overrule a court decision in the same way that a decision of this Court would take precedence over a previous line of lower court judgments on a given question of law.
>
> It is also settled law that declaratory provisions have an immediate effect on pending cases, and are therefore an exception to the general rule that legislation is prospective. The interpretation imposed by a declaratory provision stretches back in time to the date when the legislation it purports to interpret first came into force, with the effect that the legislation in question is deemed to have always included this provision. Thus, the interpretation so declared is taken to have always been the law...

Chief Justice McLachlin points out the impact of declaratory provisions. She agrees with Justice Fish on this point, although she disagreed with him in this decision. She says:

> I agree with my colleague Wagner J. that the legislature has the power to enact declaratory provisions which have a retroactive effect, and that such provisions apply to all pending cases.

With respect to those who think differently, I feel that Parliament is fully entitled to pass declaratory provisions. In that regard, I think clauses 471 and 472 of Bill C-4 are perfectly valid.

The second issue I would like to address is the amendment to sections 5 and 6 of the Supreme Court Act, the amendment to section 6 in particular.

● (1010)

This section has been amended seven times since 1875, basically because of technicalities, with the exception of the 1949 amendment, which increased the number of judges from Quebec to three. In 1985, when the last amendment was made and when the legislation was revamped mostly with technical amendments, the words “Court of Appeal” replaced “Court of Queen's Bench”. Let me draw your attention to two unsuccessful attempts at making major amendments in 1987 and 1992.

With the advent of the Meech Lake accord in 1987, an amendment to the Constitution Act, 1867 was proposed to incorporate sections 5 and 6 of the Supreme Court Act by adding something about the territories and federal courts. Subsection (1) of the new section 101B stated:

> Any person may be appointed a judge of the Supreme Court of Canada who, after having been admitted to the bar of any province or territory, has, for a total of at least ten years, been a judge of any court in Canada or a member of the bar of any province or territory.

Subsection (2) stated:

> At least three judges of the Supreme Court of Canada shall be appointed from among persons who, after having been admitted to the bar of Quebec, have, for a total of at least ten years, been judges of any court of Quebec or of any court established by the Parliament of Canada, or members of the bar of Quebec.

This constitutional amendment was supposed to clarify the situation of federal court judges. It also meant that the legislator or the constitutional constituent did not intend to exclude territory and federal court justices from being appointed to the Supreme Court. Unfortunately, this provision never came into force, because the Meech Lake accord was not duly ratified by the legislative assemblies of Newfoundland and Manitoba within the required timeframe.

The same provision was reconsidered in the Charlottetown accord, to no avail. This time it was because of the October 1992 referendum when Canadians and Quebeckers said no.

However, those attempts at amending the Constitution enable us to draw two conclusions about section 6 of the Supreme Court Act.

First, it is not unreasonable to think that this is a constitutional provision. However, we must point out that the doctrine is divided. Professors Peter Hogg and Benoît Pelletier, my colleague, feel that the composition of the Supreme Court of Canada can be amended through legislation by the Parliament of Canada, basically because the Supreme Court Act is not mentioned in the schedule referred to in section 52 of the Constitution Act, 1982.

In their work entitled *Droit constitutionnel*, professors Brun, Tremblay and Brouillet feel that the composition of the Supreme Court, including the civil law component, is protected under the Constitution. That is also the opinion of Professor Monahan and of Warren Newman, a Government of Canada lawyer who has expressed his personal view in a scholarly article published a few years ago. Mr. Newman's conclusion was that the civil law component of the Supreme Court is protected and that an amendment to section 6 of the Supreme Court Act would require the consent of the 10 provincial legislative assemblies and of the Government of Canada.

● (1015)

As a result, I feel it is accurate to conclude that federal court judges could be appointed to the Supreme Court of Canada. In our view, that is an accurate interpretation, whether teleologically speaking, as my colleague Benoît Pelletier pointed out, or broadly speaking, as a constitutional provision must be interpreted.

I would be happy to answer any questions you may have in the next few minutes.

Thank you.

[*English*]

The Chair: Our next witness is Monsieur Cyr, professor, Faculty of Political Science and Law, Université du Québec à Montréal.

The floor is yours, sir.

[*Translation*]

Mr. Hugo Cyr (Professor of Public Law, Faculty of Political Science and Law, Université du Québec à Montréal, As an Individual): Thank you, honourable members.

My presentation will basically cover two types of issues. First, I will look at the interpretive issues. I will look at the meaning of the act before the bill being discussed is passed, as well as the possible meaning of the act should the bill be passed. I will then look at the constitutional issues that may arise from this proposal. I will cover two aspects. The first one is the possibility that the bill discussed here is an amendment to what section 41 of the Constitution Act, 1982, calls the composition of the Supreme Court. The second is the possibility that proposing the amendment to the Supreme Court Act in a budget bill undermines the constitutional principle of a democratic parliamentary system recognized by the Supreme Court in the New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) case.

In case I run out of time, I will provide you with my three recommendations before I start my analysis.

Conditional to my second and third recommendations, my first recommendation is to be more explicit in this provision in order to state more clearly the declaratory nature of those provisions. The main reason for this recommendation is that a declaratory piece of legislation or provision is possible, but it is not assumed. Courts require declaratory provisions to be very clear in order to be able to use them. For instance, it should say “this is declaratory provision”, or use the past and present tenses to say something along the lines “this was and still is the case”.

My second recommendation is the following. Since it is possible that the amendments proposed are covered by section 41 of the Constitution Act, 1982, which means that the consent of the provinces may be required, it would be wiser to obtain the consent of the provinces before proceeding. If section 41 does not apply to the provision, there is no issue. However, if it does and it is found to be unconstitutional, it would be a major risk to appoint a judge to the Supreme Court using unconstitutional procedures, and it is not really clear what the next step would be. It would not be possible to dismiss a judge, because it wouldn't be a question of misconduct.

Here is my third recommendation. Since the provisions are in the budget bill, there is a risk that the Supreme Court would have to look into the procedure used to adopt the declaratory provisions when it receives the reference of appointment for Justice Nadon. Since the Supreme Court might need to determine the constitutional validity of the procedure to include disparate provisions in the same act, and since the Supreme Court might find those provisions invalid, it would be wise to pass the provisions in question in a separate legislative instrument.

Let's turn to the interpretive issues right away. I will not spend a lot of time on section 5. I share the interpretation of Justice Binnie, who was my mentor. I was also his clerk in 1999. As a result, I have a lot of respect for his opinion. Furthermore, my opinion on section 6 is different from his.

I would simply like to point out something about section 5 that has not been discussed. There is this presumption in law that the legislator does not speak for nothing. As members of Parliament, you fully understand the essence of this principle. However, when you read section 5, you might get the impression that, to be appointed, a person must have either been a judge on the Superior Court or on the Court of Appeal, or a member of the bar of a province for 10 years.

● (1020)

It would seem redundant to say that you need to have been a Superior Court or Court of Appeal judge, if being a member of the bar for 10 years is a necessary criterion for being a member of the Superior Court and Court of Appeal. But the requirement of being a member of the bar for 10 years to be appointed to the Superior Court and the Federal Court appeared only in 1912, 40 years after the Supreme Court Act was adopted. It originally set out a 10-year requirement. That requirement was entirely logical. At the time, when we adopted the predecessor to section 5, which required 10 years at the bar, you could be a Superior Court judge who did not have 10 years of experience at the bar. So it was not redundant.

The title of section 6 is another aspect that has often been overlooked. Section 6 is not aimed at the representation of civil law judges. The official title of the provision is "Représentation du Québec". It is important to know that section 6 does not establish a maximum number of judges from Quebec. Instead, it qualifies section 5, meaning that to be qualified under section 6, titled "Représentation du Québec", you must first be qualified under section 5. Therefore, the maximum number of civil law judges isn't three. Let's keep in mind that the Supreme Court had five judges in the 2000s that came from the civil law tradition. Justice Arbour and Justice Bastarache, both graduates in the same class from the Université de Montréal, had civil law training and were not from Quebec.

In fact, section 6 covers representation in Quebec. The legal criterion that judges should consider for the qualification involves reviewing particular skills. For example, the individual studied civil law, but is he or she familiar enough with civil law to qualify? It's a very difficult criterion to meet. We are arriving at clear, fixed and objective rules. The clear, fixed and objective rule that was adopted here is that you need to be a member of the Quebec Bar, a member of the Superior Court of the province or a member of the Quebec Court of Appeal.

This doesn't mean that a Federal Court of Appeal justice from Quebec, for example, could be appointed to the Supreme Court; it is just that he could not be considered a judge under section 6.

Basically, no matter how section 6 is interpreted, a risk remains. There is a dispute, as the minister mentioned. Therefore, adopting a declaratory provision could solve that problem. A declaratory provision is different from an interpretive provision. An interpretive provision is only predictive, while a declaratory provision is retroactive, where there is no presumption that a provision is declaratory. That is why I suggest you clarify the declaratory nature of the provision.

During the question period, I can come back to the issues involved in the possibility for Parliament to unilaterally amend the composition of the court in the Supreme Court Act. I would be pleased to go into more detail about the constitutional issues that were raised to a lesser degree by my colleague, Adam Dodek, during his remarks. I think he raised constitutional issues that are more serious than he let on in his presentation.

● (1025)

Thank you.

The Chair: Thank you.

[*English*]

We'll now go to the questions and answers. Just to let the committee know, we'll likely get only one round in before this time is up, so you may want to share your time. I'll be a little bit flexible on the five minutes, and I'll be fair to every party.

The first questioner is Madame Boivin from the New Democratic Party.

[*Translation*]

Ms. Françoise Boivin: I would like to thank the three witnesses. This is extremely interesting. In fact, it only confirms for me that these are not easy issues.

I'm thinking back to when I was in the Faculty of Law at the University of Ottawa. I salute my alma mater. We have had some extraordinary testimonies in addition to Professor Cyr's. Well done.

Professor Cyr, you spoke about the importance of clarifying the nature of clauses 471 and 472. I'm not going to go back over the fact that they are included in the budget bill, which I have serious problems with. The text on the government's reference to the Supreme Court of Canada states:

…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*…

Do you think it's enough to give them this declaratory nature? I'm going to tell you why I'm concerned. I won't be telling you anything new by saying that we sometimes play little games in politics. As clearly as I know my own name, I know that Conservatives outnumber New Democrats in this room. So if it was adopted, could we be telling the Supreme Court on January 15, 2014, that the legislator has spoken and that we are therefore no longer interested in dealing with clauses 471 and 472?

Mr. Hugo Cyr: Thank you.

The minister's comments make me think that he intends to make these provisions declaratory provisions. I don't think the text is clear enough in that regard.

In this context, the Supreme Court might have to interpret the very nature of these provisions. It might have to determine whether the provisions are declaratory, interpretive or even, as a third possibility, whether they are provisions that retroactively amend the existing law.

If we don't clarify these points, the Supreme Court would obviously have interpretive work to do. However, if the provisions were very clear and there was no doubt that the provisions were declaratory, the court could at least determine that the provisions are declaratory and that the interpretation would bind us as long as other impediments, of a constitutional nature for example, do not render these provision invalid.

Ms. Françoise Boivin: The time we have doesn't let us take full advantage of your expertise, and that's too bad, because these are very important issues.

Last Tuesday, I asked the minister the following question, but I didn't really get an answer. According to Professor Dodek, it is problematic that clauses 471 and 472 were submitted to Parliament at the same time as a reference to the Supreme Court of Canada took place. Bill C-4 needs the Minister of Justice's agreement, and it needs to be established that it complies with Canada's constitutional laws and the Canadian Charter of Rights and Freedoms, in particular. At the same time, the minister checks with the Supreme Court to see whether these two provisions are compliance.

Do you think that constitutes a problem?

My question is for all three witnesses. Let's start with Professor Pelletier.

● (1030)

Prof. Benoît Pelletier: The answer is no. First, to come back to the main issue of the validity of declaratory provisions, I'll point out, as my colleague Pierre Thibault mentioned, that there has already been a discussion about the issue of whether the Supreme Court Act is constitutional or not. The discussion stems from the fact that the act is not mentioned in the schedule of the Constitution Act, 1982, while subsection 52(2) defines the Constitution of Canada for the purposes of applying constitutional amendment procedures and refers to the legislation and texts in the schedule of the Constitution Act, 1982, where the Supreme Court Act does not appear.

Some might say that the definition of the Constitution of Canada in subsection 52(2) of the Constitution Act, 1982, is not exhaustive, which is entirely true. That is where the debate begins. Some jurists think that the Supreme Court Act should be implicitly added to the definition of the Constitution of Canada. Others, like me, believe that it should not be and that it is not constitutional in nature.

In my opinion, already on the basis of grammatical and teleological analysis, the Supreme Court could find that the current provisions allow for the appointment of Federal Court of Federal Court of Appeal judges. Will it not perhaps want to respond to the issue of the validity of these provisions, given its finding on the interpretation of sections 5 and 6?

Having said that, the risk of the court declaring these provisions declaratory sooner or later seems very slim. I think these declaratory provisions are perfectly in line with the interpretation that should already be given to sections 5 and 6.

Ultimately, we could say that the federal bill is useless, and the risk of the Supreme Court declaring it invalid seems very slim to me, honestly. However, I understand the government's wanting to protect itself and ensure that it is not possibly interpreted in any way other than the interpretation proposed in its bill. I understand, although the risk is very slim.

Ms. Françoise Boivin: There is nothing worse than a constitutional expert and former politician to take so much time to answer a question. It's okay; the others may have an opportunity to answer later.

Mr. Pierre Thibault: I agree—

[*English*]

The Chair: We have to move on, I'm sorry.

Monsieur Goguen.

[*Translation*]

Mr. Robert Goguen: Thank you, Mr. Chair.

I'd like to thank the witnesses for coming here today to give us their interpretation of the issue.

Obviously, Supreme Court judges aren't appointed every day. There is a rigorous procedure that's meant to be inclusive. Consultations take place with the Quebec Bar, the Quebec attorney general, the Quebec justice system and all the courts. Despite all that, the question remains today.

I'd like to come back to Tuesday's evidence. My colleague, Mr. Seeback, asked one of the witnesses, Professor Mathen, a question. Based on her interpretation, someone who had been a member of the Quebec Bar for 30 years and had then been a Federal Court judge for a very short period of time would by that very fact be automatically disqualified and could not be appointed to the Supreme Court.

Is that not somewhat of an absurd interpretation, disqualifying someone of that calibre with that much experience?

Prof. Benoît Pelletier: Who is the question for, Mr. Goguen?

Mr. Robert Goguen: It's for everyone.

Mr. Pierre Thibault: I think that is an inappropriate interpretation. Some might call it absurd. I would even add that if we take the content of section 6 of the Supreme Court Act at face value, given that we're talking about Superior Court judges and Court of Appeal judges, that means that the chief justice of the Court of Quebec, the Honourable Élizabeth Corte, could not be appointed to the Supreme Court of Canada. I don't think that's an appropriate interpretation of section 6 of the Supreme Court Act.

Mr. Hugo Cyr: I disagree with my colleagues' interpretation. Any legislation that establishes an objective standard will provide somewhat curious results in the fringes. Stephen Hawking, one of the world's most brilliant men, did not have the right to vote until he was 18, like everyone else. However, one might say that he was able to do so from the age of 8. Any rule establishing a minimum threshold will in some marginal cases lead to unsatisfactory results.

If the teleological interpretation given is not that of being trained in civil law, there might be some problematic cases. A judge like Louise Arbour, who studied law at the Université de Montréal, and was a civil lawyer at heart and practised her whole life in Ontario, could not be a Supreme Court justice under section 6. The idea is not simply that the judge knows civil law. The provision is titled “Représentation du Québec”. Canada, like the United States, is one of the rare exceptions where the constitutional court, the Federal Court, does not fully and meaningfully consider the federal nature of the entity for which it must render decisions.

If we see the provision “Représentation du Québec” as targeting the objective of representation of one of the federated states in the federation, it is entirely logical to require that person to be somewhat attached to the federated state of Quebec. The presence in the Federal Court—

● (1035)

Mr. Robert Goguen: Isn't it strange to consider section 6 in isolation?

Mr. Hugo Cyr: I don't think—

Mr. Robert Goguen: I think the idea behind the interpretation was to consider one section in the context of the entire act.

Mr. Hugo Cyr: Exactly.

Mr. Robert Goguen: The purpose of the act is to select the most qualified people. Ten years at the bar is a minimum in order to exclude people who don't have the appropriate experience. How can a judge with 20 years of experience, who has been at the bar for 20 years, who has significant legal experience be excluded from the Supreme Court of Canada? How is that logical?

Mr. Hugo Cyr: With all due respect, it is the interpretation that considers the provisions in isolation. I'll tell you why. Section 5 is a minimum condition. Section 6 adds requirements for representatives from Quebec; just the requirements need to be added. Section 5 requires that a judge be a member of the bar of a province for at least 10 years and that judge could have been a judge of any court.

Mr. Robert Goguen: Do the other witnesses share that opinion?

Prof. Benoît Pelletier: No. The situation you are describing is this: a person could have been a member of the bar for 30 years, and become a judge of the Federal Court, the Federal Court of Appeal or the Court of Quebec, as my colleague Mr. Thibault correctly said, and that would exclude that person from being appointed to the Supreme Court. I think it's impossible that that is the legislator's intention. My answer to your question is that the hypothesis seems unacceptable to me.

[*English*]

The Chair: That's it? Okay, thank you.

Our next questioner is Mr. Casey, from the Liberal Party.

[*Translation*]

Mr. Sean Casey: Thank you, Mr. Chair.

My first question is for Mr. Pelletier.

You are a former minister of Intergovernmental Affairs of Quebec and the author of books on federalism. I would like your opinion on the role of Quebec, of the National Assembly and the ministers in that. Should they play a role in the appointment process? If so, what would that role be?

Prof. Benoît Pelletier: Mr. Casey, your question is a very important one. My answer is yes. I think it is even possible for Quebec to have a role in the appointment process of Supreme Court justices without getting the Constitution involved.

When I was minister, I proposed a scenario to the federal Minister of Justice at the time, Irwin Cotler. The scenario was to add Quebec to the current consultation process. We know that there is a whole consultation process and a committee before a judge is even appointed to the Supreme Court. I proposed that Quebec be involved in the current process, that it be able to submit names for the three nominations we're talking about here, that the federal government be able to submit names and that a committee would review them, obviously favouring the names appearing on both lists. I then said that the Government of Canada would continue the process and make the appointment it felt appropriate.

At least allow Quebec to have some say in the process. It seems to me that it would be a feasible, worthwhile progress and, I repeat, it would not require any constitutional amendments. Unfortunately, that didn't happen.

To answer your question about whether Quebec should be part of the process, my answer is yes. I'm not saying that Quebec should appoint judges. I'm talking about being a part of the appointment process for the three out of nine judges that are supposed to have received civil law training.

● (1040)

Mr. Sean Casey: Thank you.

Mr. Pierre Thibault: Allow me, if you will, to go a little further.

I would like to get back to the Meech Lake Accord, which provided that the Quebec government could submit three names when a position became vacant. The Prime Minister of Canada and the federal government would then have been required to choose from those three names. Obviously, we need a constitutional amendment in the prescribed form, but this was in the 1986 Meech Lake Accord.

Mr. Sean Casey: Thank you.

Professor Cyr, I want to ask you this question in English, because I want to read the testimony of Professor Dodek and invite you to respond to it.

Last Tuesday, he said this:

[*English*]

> It's also highly unusual for a government to, in effect, be challenging its own legislation.
>
> I believe this raises the question as to how the Attorney General of Canada, as the legal adviser to the Governor in Council, can both vouch for the legality of clauses 471 and 472 at the same time as he is questioning them in his advice to the Governor in Council directing the reference on the very same subject. The two simply cannot co-exist. Either the government believes that it is within its power to enact clauses 471 and 472, or it is uncertain and requires the advice of the Supreme Court.
>
> I believe that this odd state of affairs puts the members of this House in an untenable position. They are being asked to vote in favour of two provisions with the assurance by the government that such provisions are legal, indeed constitutional, while at the same time the government is questioning that very advice by directing a reference to the Supreme Court.

I presume you heard what the minister had to say. What is your reaction, sir?

[*Translation*]

Mr. Hugo Cyr: Simply and briefly put, because I know that time is running out, I agree with the statement made by my colleague, Mr. Dodek.

The minister is asked to solemnly state that he believes the provision to be valid. Afterwards, he asks a question as though he doubted its validity. I think it is difficult for someone to doubt and be certain at the same time.

Mr. Sean Casey: Mr. Thibault, I have a more general question for you.

The situation now is that there are only eight Supreme Court justices. I think that situation was predictable. According to you, what lessons should the government draw in this instance?

Mr. Pierre Thibault: I think that the government should perhaps undertake somewhat more consultation in future. This appointment to the Supreme Court was made, and is now being challenged. To my knowledge, this is the first time such an appointment is challenged. The appointments of Justices Rothstein, Iacobucci and Le Dain, who all sat on the Federal Court of Appeal, were not challenged in the least.

The government itself took the lead by asking for legal advice on the issue, and this advice supported its choice. The lesson to be drawn is that there has to be a little more consultation, and perhaps the provisions of the Supreme Court Act should be clarified. If that act is interpreted correctly, in my opinion, it does allow for the appointment of judges from the Federal Court or the Federal Court of Appeal.

● (1045)

Mr. Sean Casey: Thank you.

[*English*]

The Chair: Thank you very much. Thank you for the questions and those answers.

Our final questioner of this panel is Mr. Dechert from the Conservative Party. You have five minutes.

Mr. Bob Dechert: Thank you, Mr. Chair.

Thank you you to each of our witnesses for being here.

Professor Thibault, you and many other experts have told us today and in our previous session that the Federal Court is charged with applying civil law and principles to cases that it hears, especially those arising from the province of Quebec. I wonder if you could tell us, in your opinion, what the long-term impact on Supreme Court of Canada decisions would be if we eliminated from the pool of talent for the Supreme Court justices who had served on the Federal Court, applying civil law in the Federal Court and the Federal Court of Appeal on matters arising from Quebec.

What, over time, would be the impact of that kind of interpretation, which seems to be the interpretation the opposition wishes to take?

[*Translation*]

Mr. Pierre Thibault: I think we should not exclude judges from the Federal Court of Appeal, nor those of the Federal Court, from potential appointments to the Supreme Court of Canada. I also hope you will remember section 5.4 of the Federal Courts Act during your deliberations. It says the following:

> At least five of the judges of the Federal Court of Appeal and at least ten of the judges of the Federal Court must be persons who have been judges of the Court of Appeal or of the Superior Court of the Province of Quebec, or have been members of the Bar of that province.

These judges have practised law during at least 10 years and sit either on the Federal Court, or the Federal Court of Appeal. In my opinion, they are eligible for an appointment to the Supreme Court. I think the best candidates should be appointed to the Supreme Court of Canada. The fact that a person is appointed today to the Federal Court of Appeal after having been a member of the Quebec Bar for 20, 25 or 30 years does not mean that he or she would not be eligible for an appointment to the Supreme Court a year or two later. If that were the case, the Supreme Court would be depriving itself of talented persons.

[*English*]

Mr. Bob Dechert: I wonder if I could hear from Professor Pelletier on that issue as well.

Prof. Benoît Pelletier: I agree with my colleague that it makes no sense not to allow the judges from the Federal Court or the Federal Court of Appeal to be appointed to the Supreme Court of Canada. Don't forget that even today the federal government and its judges promote bijuralism, which is an approach of law that considers both common law and civil law, so it's not because someone comes from the Federal Court trail or path that this person is not sensitive to the civil law reality that is part of Canada.

Mr. Bob Dechert: Do you think potentially the interpretations of the Supreme Court of Canada could be impacted if you didn't have expertise from the Federal Court level from Quebec on the Supreme Court? I'm thinking, for example, of patent law cases, which are litigated before the Federal Court. Many of Canada's largest pharmaceutical companies are located in the province of Quebec, and I'm wondering if they might choose to litigate somewhere else than in the Federal Court, if they could, if they felt that once it got to the Supreme Court there wouldn't be that expertise on the Supreme Court.

Prof. Benoît Pelletier: There's an expertise that comes from the judges of the Federal Court of Appeal and the Federal Court, and there's an expertise that comes from any person who had a background in civil law or who has practised civil law for a couple of years and is familiar with civil law. This being said, there is one question that we will have to raise.

Is a judge considered from Quebec when that person resides outside Quebec? This is one of the political problems that surrounds this case, this issue.

● (1050)

Mr. Bob Dechert: You would agree that the Federal Court sits in many places, including in Quebec. Sometimes it sits in Quebec and sometimes it sits in other places. Is there any reason to exclude a Quebec member of the bar from the Federal Court on that account?

Prof. Benoît Pelletier: No, I agree with that.

All that I'm saying is that when you're in Quebec politics, you take for granted that Quebec has three judges. Even the federalists—the federal federalists and the provincial federalists—say that one of the good things in Canada's federation is that Quebec has three judges out of nine on the Supreme Court of Canada.

Here is one of the questions that I raise. Is a person a judge coming from Quebec if that person does not reside in Quebec or has not resided in Quebec for many years? That's one of the questions I wanted to raise.

Mr. Bob Dechert: Okay, thank you.

The Chair: Thank you very much, and my thanks to our witnesses. Professors, thank you for taking the time to come and be with us this morning and thank you for your input.

With that, I am going to take a two-minute suspension to allow our friends to leave and then we'll move to the third part of today's meeting.

● (1050)

(Pause)

● (1055)

The Chair: I call the meeting back to order.

Yes, Mr. Goguen.

Mr. Robert Goguen: I move that we go in camera.

The Chair: Mr. Goguen is moving that the committee go in camera.

There has been a motion to move in camera and it is not debatable, unfortunately or fortunately.

So I'll take a vote.

(Motion agreed to)

[*Proceedings continue in camera*]