Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20111003

Docket: A-37-10

Citation: 2011 FCA 272

CORAM: **SHARLOW J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

LUIS ALBERTO FELIPA

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on March 7, 2011.

Judgment delivered at Ottawa, Ontario, on October 3, 2011.

REASONS FOR JUDGMENT BY: SHARLOW AND DAWSON JJ.A.

DISSENTING REASONS BY: STRATAS J.A.

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REASONS FOR JUDGMENT

SHARLOW and DAWSON JJ.A.

[1] The principal question in this appeal is whether a former judge of a superior court who is over the age of 75 may be requested to act as a deputy judge of the Federal Court. The Chief Justice of the Federal Court concluded that the answer is yes, and on that basis made an order dismissing a motion of the appellant Luis Alberto Felipa that would preclude a particular deputy judge who is over the age of 75 from hearing his applications for judicial review. Mr. Felipa has appealed.

[2] For the reasons that follow, we would allow this appeal. According to the interpretation of the legislation adopted by the Chief Justice, a judge of a superior court could cease to hold office on his 75th birthday and then immediately be appointed as a deputy judge to exercise all of the

powers of a judge of the Federal Court. In our view, that result is so inconsistent with the legislative scheme that the statutory interpretation upon which it is based cannot stand.

Facts and procedural history

[3] The record on this motion contains little information about Mr. Felipa. It appears that he is a foreign national living in Canada, and is the sole caregiver and legal custodial parent of a child who is legally entitled to remain in Canada. Mr. Felipa is at risk of being removed from Canada.

[4] In two proceedings commenced in March of 2009 under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, Mr. Felipa sought leave to apply for judicial review of two decisions of a pre-removal risk assessment officer. One of the impugned decisions denied Mr. Felipa relief from removal on humanitarian and compassionate grounds or public policy considerations, while the second determined that he was not a person in need of protection. Leave was granted and the two applications for judicial review were set down for hearing in Toronto on August 18, 2009. Justice Tannenbaum, a deputy judge of the Federal Court, was assigned to hear both cases.

[5] The Chief Justice chooses the persons who are asked to act as a deputy judge of the Federal Court. As explained by the Chief Justice at paragraph 112 of his reasons (citing Order in Council P.C. 2003-1779), the Governor in Council "plays no role in the chief justice's decision to request that a specific eligible person act as a deputy judge. The approval of the Governor in

Council is granted by way of a generic order in council authorizing the chief justice to seek the assistance of up to 15 deputy judges".

[6] Justice Tannenbaum had been appointed a judge of the Quebec Superior Court in 1982. He retired from the Quebec Superior Court in 2007 upon becoming 75 years of age. He was subsequently asked to act as a deputy judge of the Federal Court. He agreed and was formally appointed as a deputy judge on May 12, 2008.

[7] Shortly before the date scheduled for the hearing of Mr. Felipa's applications for judicial review, counsel for Mr. Felipa became aware that Justice Tannenbaum had been assigned to hear Mr. Felipa's applications, and that he was over the age of 75. Counsel for Mr. Felipa immediately communicated with the Chief Justice and Justice Tannenbaum indicating his view that, as a matter of law, Mr. Felipa's applications could not be heard by a deputy judge over the age of 75. He asked for the assignment of a judge who was not over the age of 75, or for the hearing to be adjourned.

[8] The hearing was adjourned to determine how the matter could best proceed, given that Mr. Felipa's position had received some publicity and had resulted in a number of other similar requests. On August 31, 2009, according to agreed arrangements, Mr. Felipa filed a motion in both Federal Court files seeking a number of rulings to the effect that a person cannot act as a deputy judge of the Federal Court after attaining the age of 75. The Chief Justice heard the motion and dismissed it by an order dated January 26, 2010, for reasons reported as *Felipa* v. *Canada (Minister of Citizenship and Immigration)*, 2010 FC 89, [2011] 1 F.C.R. 365.

[9] Although Mr. Felipa's motion was dismissed, the Chief Justice considered that the motion was in the nature of public interest litigation. On that basis he awarded costs to Mr. Felipa, fixed in the amount of $6,000.00.

Mr. Felipa's right of appeal

[10] The parties and the Chief Justice agreed that his order dismissing Mr. Felipa's motion should be subject to appeal. However, a concern was raised that, pursuant to paragraph 72(2)(*e*) of the *Immigration and Refugee Protection Act*, no appeal lies from an interlocutory judgment in an application for judicial review made under subsection 72(1). Also, pursuant to paragraph 74(*d*), a judgment of the Federal Court disposing of an application for judicial review under subsection 72(1) cannot be appealed unless the judge certifies that a serious question of general importance is involved, and states the question.

[11] The Chief Justice concluded that his order is subject to appeal without a certified question because the order is a "separate, divisible judicial act", citing *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 421, 328 N.R. 201 at paragraph 48; and *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at paragraphs 60 and following. However, to remove all doubt and to facilitate an appeal of his order, the Chief Justice certified two questions pursuant to paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

[12] We agree with the Chief Justice, substantially for the reasons he gave, that Mr. Felipa has the right to appeal the order dismissing his motion. The cases upon which the Chief Justice relied were decided in different contexts, but in our view the principles established in those cases apply here to compel the conclusion that paragraph 72(2)(*e*) of the *Immigration and Refugee Protection Act* does not bar an appeal from the order determining Mr. Felipa's motion and that paragraph 74(*d*) of that Act does not require a certified question.

Mr. Felipa's motion and the decision of the Federal Court

[13] At the heart of Mr. Felipa's motion are subsection 99(2) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, and subsections 8(2) and 10(1.1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[14] Section 99 of the *Constitution Act, 1867* is found in Part VII, entitled "Judicature" and reads as follows (emphasis added):

99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.	**99.** (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.
(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.	(2) Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent article, cessera d'occuper sa charge lorsqu'il aura atteint l'âge de soixante-quinze ans, ou à l'entrée en vigueur du présent article si, à cette époque, il a déjà atteint ledit âge.

[15] Section 8 of the *Federal Courts Act* reads as follows (emphasis added):

8. (1) Subject to subsection (2), the judges of the Federal Court of Appeal and the Federal Court hold office during good behaviour, but are removable by the Governor General on address of the Senate and House of Commons.	**8.** (1) Sous réserve du paragraphe (2), les juges de la Cour d'appel fédérale et de la Cour fédérale occupent leur poste à titre inamovible, sous réserve de révocation par le gouverneur général sur adresse du Sénat et de la Chambre des communes.
(2) A judge of the Federal Court of Appeal or the Federal Court ceases to hold office on becoming 75 years old.	(2) La limite d'âge pour l'exercice de la charge de juge de la Cour d'appel fédérale et de la Cour fédérale est de soixante-quinze ans.

[16] Section 10 of the *Federal Courts Act* reads in relevant part as follows (emphasis added):

10. (1.1) Subject to subsection (3), any judge of a superior, county or district court in Canada, and any person who has held office as a judge of a superior, county or district court in Canada, may, at the request of the Chief Justice of the Federal Court made with the approval of the Governor in Council, act as a judge of the Federal Court, and while so acting has all the powers of a judge of that court and shall be referred to as a deputy judge of that court.	**10.** (1.1) Sous réserve du paragraphe (3), le gouverneur en conseil peut autoriser le juge en chef de la Cour fédérale à demander l'affectation à ce tribunal de juges choisis parmi les juges, actuels ou anciens, d'une cour supérieure, de comté ou de district. Les juges ainsi affectés ont qualité de juges suppléants et sont investis des pouvoirs des juges de la Cour fédérale.
(2) No request may be made under subsection (1) or (1.1) to a judge of a superior, county or district court in a province without the consent of the chief justice or chief judge of the court of which he or she is a member, or of the attorney general of the province.	(2) La demande visée aux paragraphes (1) et (1.1) nécessite le consentement du juge en chef du tribunal dont l'intéressé est membre ou du procureur général de sa province.
(3) The Governor in Council may approve the making of requests under subsection (1) or (1.1) in general terms	(3) L'autorisation donnée par le gouverneur en conseil en application des paragraphes (1) et (1.1) peut être

or for particular periods or purposes, and may limit the number of persons who may act under this section.	générale ou particulière et limiter le nombre de juges suppléants.
(4) A person who acts as a judge of a court under subsection (1) or (1.1) shall be paid a salary for the period that the judge acts, at the rate fixed by the *Judges Act* for a judge of the court other than the Chief Justice of the court, less any amount otherwise payable to him or her under that Act in respect of that period, and shall also be paid the travel allowances that a judge is entitled to be paid under the *Judges Act*.	(4) Les juges suppléants reçoivent le traitement fixé par la *Loi sur les juges* pour les juges du tribunal auquel ils sont affectés, autres que le juge en chef, diminué des montants qui leur sont par ailleurs payables aux termes de cette loi pendant leur suppléance. Ils ont également droit aux indemnités de déplacement prévues par cette même loi.

[17] Read literally, the phrase "any person who has held office as a judge" in subsection 10(1.1) of the *Federal Courts Act* is broad enough to include any person who was once a judge. However, Mr. Felipa argued in the Federal Court and in this Court that, based on subsection 99(2) of the *Constitution Act, 1867* or subsection 8(2) of the *Federal Courts Act* or both, the phrase "any person who has held office as a judge" necessarily excludes a person who is over the age of 75. The Chief Justice rejected that argument. He concluded, for reasons that are well and fully explained, that a person who is a former judge of a superior court over the age of 75 may be appointed a deputy judge of the Federal Court.

Standard of review

[18] The question of whether a former judge of a superior court who is over the age of 75 may be asked to act as a deputy judge of the Federal Court is a question of law, subject to review on the standard of correctness: *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraph 8.

The question to be asked

[19] The Chief Justice concluded that a deputy judge of the Federal Court does not "hold office" as a judge of the Federal Court, and therefore cannot "cease to hold office" under a mandatory retirement provision that requires a judge to "cease to hold office" upon attaining the age of 75. Two such provisions are subsection 8(2) of the *Federal Courts Act* and subsection 99(2) of the *Constitution Act, 1867*, which are reproduced here for ease of reference.

Constitution Act, 1867	*Loi constitutionnelle de 1867*
99. (2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.	**99.** (2) Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent article, cessera d'occuper sa charge lorsqu'il aura atteint l'âge de soixante-quinze ans, ou à l'entrée en vigueur du présent article si, à cette époque, il a déjà atteint ledit âge.
Federal Courts Act	*Loi sur les Cours fédérales*
8. (2) A judge of the Federal Court of Appeal or the Federal Court ceases to hold office on becoming 75 years old.	**8.** (2) La limite d'âge pour l'exercice de la charge de juge de la Cour d'appel fédérale et de la Cour fédérale est de soixante-quinze ans.

[20] It follows, according to the Chief Justice's reasoning, that neither subsection 8(2) of the *Federal Courts Act* nor subsection 99(2) of the *Constitution Act, 1867* bars a former judge who is over the age of 75 from acting as a deputy judge of the Federal Court. The Chief Justice also concluded that subsection 99(2) of the *Constitution Act, 1867* does not apply in any event to deputy judges of a court established by Parliament under section 101 of the *Constitution Act, 1867*.

[21] We do not consider it necessary to express an opinion on whether a deputy judge "holds office" as a judge because we do not consider it to be dispositive of Mr. Felipa's motion. We understand Mr. Felipa's motion to require a determination of who is eligible to act as a deputy judge of the Federal Court. In our view, the issue is the scope of the authority of the Chief Justice of the Federal Court under subsection 10(1.1) of the *Federal Courts Act*. Subsection 10(1.1) reads in relevant part as follows:

10. (1.1) … any judge of a superior, county or district court in Canada, and any person who has held office as a judge of a superior, county or district court in Canada, may, at the request of the Chief Justice of the Federal Court made with the approval of the Governor in Council, act as a judge of the Federal Court, and while so acting has all the powers of a judge of that court and shall be referred to as a deputy judge of that court.	**10.** (1.1) […] le gouverneur en conseil peut autoriser le juge en chef de la Cour fédérale à demander l'affectation à ce tribunal de juges choisis parmi les juges, actuels ou anciens, d'une cour supérieure, de comté ou de district. Les juges ainsi affectés ont qualité de juges suppléants et sont investis des pouvoirs des juges de la Cour fédérale.

[22] We conclude that the proper question to be asked in disposing of Mr. Felipa's motion is whether subsection 10(1.1) authorizes the Chief Justice to ask a person who is 75 years of age or older to "act as a judge of the Federal Court". More particularly, should the phrase "any person who has held office as a judge" in subsection 10(1.1) of the *Federal Courts Act* be interpreted by necessary implication to exclude persons who are 75 years of age or older?

[23] We note parenthetically that this question arises only in the context of a person who was once appointed a judge of a superior court but has resigned or retired. Because of the applicable

mandatory retirement provisions, anyone who is currently a judge of a superior court must be under 75 years of age.

[24] The scope of subsection 10(1.1) is a question of statutory interpretation. Before turning to the applicable principles of statutory interpretation it is important to observe that the question before the Court is not whether persons 75 years of age or older should exercise the powers of a judge of the Federal Court, or whether such persons are capable of exercising those powers. Deputy judges over the age of 75 years have served the Federal Court with distinction. Rather, the question before the Court is whether Parliament intended to give the Chief Justice the authority to request that a person over the statutorily mandated retirement age act as a judge of the Federal Court.

Principles of statutory interpretation

[25] Problems of statutory interpretation commonly arise, as in this case, when a court is presented with a question about a statute that Parliament has not expressly answered. The court must consider whether the answer is necessarily implied by relevant aspects of the statutory context and, if it is, answer the question accordingly. The answer must reflect an interpretation of the statute that is consistent with the accepted principles of statutory interpretation, and that the words of the statute can reasonably bear (*Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 at paragraph 58, R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at page 163).

[26] The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court of Canada:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter *"Construction of Statutes"*); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

See: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

[27] The Supreme Court restated this principle in the following terms in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10 (emphasis added):

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The

> relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[28] This formulation of the proper approach to statutory interpretation was recently restated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 at paragraph 27.

[29] The proper limit to the use of context was explained in the following way by the majority of the Supreme Court in *Montréal (City) v. 2952-1366 Québec Inc*., 2005 SCC 62, [2005] 3 S.C.R. 141 at paragraph 15:

> In the interpretation process, the more general the wording adopted by the lawmakers, the more important the context becomes. The contextual approach to interpretation has its limits. Courts perform their interpretative role only when the two components of communication converge toward the same point: the text must lend itself to interpretation, and the lawmakers' intention must be clear from the context.

[30] Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. As Francis Bennion wrote, "[t]he test is What did Parliament mean by these words? rather than What did Parliament mean in the abstract?" (Francis Bennion, *Bennion on Statutory Interpretation*, 5th ed. (London: LexisNexis, 2008) at page 480). A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas*

and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent. Legislative intent is "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 26).

[31] Legislative intent is a judicial construct, explained in the following terms by Lord Nicholls in *Regina v. Secretary of State for the Environment, Transport and the Regions and Another,* e*x parte Spath Holme Limited*, [2001] 2 A.C. 349 at page 396:

> Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A G* [1975] AC 591, 613:
>
> > 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.'

[32] In ascertaining legislative intent, a court interpreting legislation must recognize that a line exists between judicial interpretation and legislative drafting. This line is not to be crossed (*ATCO* at paragraph 51).

Application of the principles of statutory interpretation

[33] Having reviewed the applicable principles of statutory interpretation, the text, legislative context and purpose of subsection 10(1.1) will now be considered.

a. The text of subsection 10(1.1) of the *Federal Courts Act*

[34] No limit is placed upon the phrases "any person who has held office as a judge of a superior, county or district court in Canada" and "les juges, actuels ou anciens, d'une cour supérieure, de comté ou de district" found in subsection 10(1.1). In the absence of any words of limitation, the text is broad enough to permit a former superior, county or district court judge to act as a deputy judge of the Federal Court, irrespective of his or her age.

[35] However, as explained above, statutory interpretation requires in every case an examination of statutory context. "Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context" (*Montréal (City) v. 2952-1366 Québec Inc.*, at paragraph 10). This point is well illustrated by considering section 5.3 of the *Federal Courts Act*, which states the qualifications for the appointment of a person as a judge of the Federal Court or the Federal Court of Appeal. Section 5.3 reads as follows:

5.3 A person may be appointed a judge of the Federal Court of Appeal or the Federal Court if the person	**5.3** Les juges de la Cour d'appel fédérale et de la Cour fédérale sont choisis parmi :
(*a*) is or has been a judge of a superior, county or district court in Canada;	*a*) les juges, actuels ou anciens, d'une cour supérieure, de comté ou de district;
(*b*) is or has been a barrister or advocate of at least 10 years standing at the bar of any province; or	*b*) les avocats inscrits pendant ou depuis au moins dix ans au barreau d'une province;
(*c*) has, for at least 10 years,	*c*) les personnes ayant été membres du barreau d'une province et ayant exercé à temps plein des fonctions de nature judiciaire à l'égard d'un poste occupé en vertu d'une loi fédérale ou provinciale après avoir été inscrites au barreau, et ce pour une durée totale d'au moins dix ans.
(i) been a barrister or advocate at the bar of any province, and	
(ii) after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held under a law of Canada or a province.	

[36] A literal reading of section 5.3 of the *Federal Courts Act*, in isolation from its statutory context, could suggest that a person over the age of 75 is eligible to be appointed a judge of the Federal Court if the person meets the statutory conditions in paragraph 5.3(a), (b) or (c). But that is not a plausible interpretation of section 5.3. Why not? Because it is abundantly clear from subsection 8(2) of the *Federal Courts Act* that a person over the age of 75 is not eligible to be appointed a judge of the Federal Court.

[37] For similar reasons, the literal meaning of the text of subsection 10(1.1) of the *Federal Courts Act* does not fully convey its meaning. As explained in more detail below, the statutory context suggests that only persons under the age of 75 may be requested to act as deputy judges. As this is an interpretation that the text of subsection 10(1.1) is capable of bearing, it is the interpretation that we would adopt.

b. The legislative context of subsection 10(1.1) of the *Federal Courts Act*

[38] As the majority of the Supreme Court observed in *Montréal (City) v. 2952-1366 Québec Inc.*, at paragraph 17, the context of legislation involves a number of factors. The "overall context in which a provision was adopted can be determined by reviewing its legislative history and inquiring into its purpose." The immediate context of a provision can be determined by reviewing the legislation in which it is found. In the following paragraphs, the relevant aspects of the legislative context are reviewed.

i. Legislative evolution and history

[39] The Federal Court is the successor to the Exchequer Court. The Exchequer Court was created in 1875 pursuant to section 101 of the *Constitution Act, 1867* by an *Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, S.C. 1875, c. 11. Initially, the Chief Justice and judges of the Supreme Court of Canada were the Chief Justice and judges of the Exchequer Court.

[40] In 1887, an *Act to amend "The Supreme and Exchequer Courts Act*," *and to make better provision for the Trial of Claims against the Crown*, S.C. 1887, c. 16 came into force. The Exchequer Court of Canada was continued (section 2) and the complement of the court was set as a single judge, appointed by the Governor in Council (subsection 3(1)). Subsection 3(2) of that Act provided that:

3. (2) Any person may be appointed a judge of the Court who is or has been a judge of a superior or county court of any of the Provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said Provinces.	**3.** (2) Pourra être nommé juge de la cour quiconque sera ou aura été juge d'une cour supérieure ou de comté dans quelqu'une des provinces du Canada, ou un avocat ayant pratiqué pendant au moins dix ans au barreau de quelqu'une de ces provinces.

[41] Provision was made in subsection 3(5) for the appointment of a person to act in the event of the sickness or absence from Canada of the judge of the Court. Subsection 3(5) also spoke to the qualifications of such a person:

3. (5) In case of sickness or absence from Canada of the judge of the court, the Governor in Council may specially appoint some other person having the qualifications mentioned in subsection two of this section, who shall be sworn to the faithful performance of the duties of his office, and shall have all the powers incident thereto during the sickness or absence from Canada of the judge of the court.	**3.** (5) Dans le cas de maladie du juge de la cour ou de son absence du Canada, le Gouverneur en conseil pourra, spécialement nommer pour le remplacer quelque autre personne possédant les qualités mentionnées au paragraphe deux du présent article ci-dessus, laquelle prêtera serment de bien et fidèlement remplir les devoirs de sa charge et sera revêtue de tous les pouvoirs y attachés, durant la maladie ou l'absence du juge de la cour.

The judge of the Exchequer Court held office during good behaviour (section 4).

[42] In 1912, the complement of the Court was enlarged to consist of two judges: an *Act to amend the Exchequer Court Act*, S.C. 1912, c. 21, section 1. Thereafter, in 1920, the power to appoint a person to act as a deputy judge of the Exchequer Court was first enacted: an *Act to amend the Exchequer Court Act*, S.C. 1919-20, c. 26, section 2. This was effected by amending subsection 3(5), which by that point had become section 8 of the *Exchequer Court Act*, R.S.C. 1906, c. 140, to read as follows (emphasis added):

8. The Governor in Council may, in case of the sickness or absence from Canada or engagement upon other duty of the President or of the Puisne Judge, or, at the request of the President, for any other reason which he deems sufficient, specially appoint a deputy judge having the qualifications for appointment hereinbefore mentioned, who shall be sworn to the faithful performance of the duties of the office, and shall temporarily have all the powers incident thereto to be terminated at the pleasure of the Governor in Council.	**8.** Advenant que le président ou le juge puîné soit malade ou absent du Canada ou occupé à d'autres devoirs, ou à la demande du président pour toute autre raison qu'il juge suffisante, le Gouverneur en conseil peut spécialement nommer un juge suppléant ayant les qualités requises susmentionnées, qui est assermenté pour remplir fidèlement les devoirs de la charge, et ce juge suppléant a provisoirement tous les pouvoirs attachés à cette charge, lesquels prennent fin au gré du Gouverneur en conseil.

[43] The qualifications for appointment referred to in section 8 were as follows:

5. Any person may be appointed a judge of the Court who is or has been a judge of a superior or county court of any of the provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces.	**5.** Peut être nommé juge de la cour quiconque est ou a été juge d'une cour supérieure ou de comté dans quelqu'une des provinces du Canada, ou un avocat qui a pratiqué, pendant au moins dix ans, au barreau de quelqu'une de ces provinces.

[44] Thus, Parliament provided that to be eligible for appointment as a deputy judge of the Exchequer Court, a person must have possessed the qualifications for appointment as a judge of the Exchequer Court. A person not qualified to serve as a judge of the Court could not serve as a deputy judge of the Court. At this time, all judges were appointed for life, during good behaviour, so no issue could arise with respect to the age of any judge or deputy judge.

[45] In 1927, a mandatory retirement age was introduced for the judges of the Supreme Court of Canada and the Exchequer Court. Judges of these Courts were to "cease to hold office upon attaining the age of seventy-five years, or immediately, if he has already attained that age" (an *Act to amend the Supreme Court Act*, S.C. 1926-27, c. 38, section 2; and an *Act to amend the Exchequer Court Act*, S.C. 1926-27, c. 30, section 1).

[46] It is appropriate, when construing a statutory amendment, to identify the problem that this amendment was designed to alleviate by considering excerpts from *Hansard* (*Canada 3000 Inc., (Re); Inter-Canadian (1991) Inc.* (*Trustee of*), 2006 SCC 24, [2006] 1 S.C.R. 865 at paragraph 57). The perceived problem, as disclosed by the Parliamentary debates relating to the amendment imposing a mandatory retirement age for judges of the Supreme Court of Canada and the Exchequer Court, was that life long appointments for judges entailed an unacceptable risk that judges might not be capable of determining for themselves whether they remained fit to carry on their duties as they aged (*Hansard*, House of Commons Debates, March 10, 1927 at page 1082).

[47] The general tenor of this concern is captured in the following extract of remarks made by Mr. R.B. Bennett, later to become leader of the opposition and Prime Minister:

> … I do not desire to express a definite opinion with regard to the age, as between seventy-five or eighty, but I think you will find there is a general consensus of opinion among litigants in the country that when a judge has attained the age of seventy-five he has, not wishing to be unkind, outlived his usefulness. There are cases where this condition does not apply and there always will be such cases. But speaking generally when men have discharged the difficult duties and borne the wear and toil of professional work to the extent to which a successful practitioner does, at the age of seventy-five I think they should be willing to take a holiday and enjoy a well-earned pension. Whether seventy-five is the exact age or not, I am not prepared to say, but I do feel from my own observation that at the age of eighty no gentleman should be occupying a seat on the bench. That is my personal view.

See: *Hansard*, House of Commons Debates, March 25, 1927 at page 1556.

[48] To similar effect are the comments of the then Minister of Justice, the Honourable Ernest Lapointe, who quoted as follows from Chief Justice Taft of the United States Supreme Court:

> … There is no doubt that there are judges at seventy who have ripe judgments, active minds, and much physical vigour, and that they are able to perform their judicial duties in a very satisfactory way. Yet in a majority of cases when men come to be seventy, they have lost vigour, their minds are not as active, their senses not as acute, and their willingness to undertake great labour is not so great as in younger men, and as we ought to have in judges who are to perform the enormous task which falls to the lot of Supreme court justices. In the public interest, therefore, it is better that we lose the services of the exceptions who are good judges after they are seventy and avoid the presence on the bench of men who are not able to keep up with the work, or to perform it satisfactorily. The duty of a Supreme court judge is more than merely taking in the point at issue between the parties, and deciding it. It frequently involves a heavy task in reading records and writing opinions. It thus is a substantial drain upon one's energy. When most men reach seventy, they are loath thoroughly to investigate cases where such work involves real physical endurance.

See: *Hansard*, House of Commons Debates, March 25, 1927 at page 1562.

[49] The Debates also reflect the desire of the Minister of Justice and other members of the House of Commons that a retirement age be legislated for judges appointed to the courts established pursuant to section 96 of the *Constitution Act, 1867*. This, however, was viewed to be beyond the legislative authority of Parliament in that it required an amendment to the then *British North America Act, 1867*. The constitutional amendment necessary to impose a mandatory retirement age of 75 on judges of the section 96 courts was finally made by the U.K. Parliament in 1960.

[50] In 1927, when the mandatory retirement provision came into effect for judges of the Exchequer Court, sections 5, 8 and 9 of the *Exchequer Court Act*, R.S.C. 1927, c. 34, read as follows (emphasis added):

5. Any person may be appointed a judge of the Court who is or has been a judge of a superior or county court of any of the provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces.	**5.** Peut être nommé juge de la cour quiconque est ou a été juge d'une cour supérieure ou de comté dans quelqu'une des provinces du Canada, ou un avocat qui a exercé pendant au moins dix ans au barreau de l'une de ces provinces.
…	[. . .]
8. The Governor in Council may, in case of the sickness or absence from Canada or engagement upon other duty of the President or of the Puisne Judge, or, at the request of the President, for any other reason which he deems sufficient, specially appoint a deputy judge having the qualifications for appointment hereinbefore mentioned, who shall be sworn to the faithful performance of the duties of the office, and shall temporarily have all the	**8.** Lorsque le président ou le juge puîné est malade ou absent du Canada ou occupé à d'autres devoirs, ou lorsque le président le demande pour tout autre motif qu'il juge suffisant, le gouverneur en son conseil peut nommer un juge suppléant extraordinaire ayant les qualités requises susmentionnées. Celui-ci doit prêter serment qu'il remplira fidèlement les devoirs de la charge, et il est investi provisoirement de tous les pouvoirs attachés à cette

powers incident thereto to be terminated at the pleasure of the Governor in Council.	charge, lesquels prennent fin au gré du gouverneur en son conseil.
9. Every judge of the Court shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons: Provided that each judge, whether heretofore appointed or hereafter to be appointed, shall cease to hold office upon attaining the age of seventy-five years, or immediately, if he has already attained that age.	**9.** Tout juge de la cour reste en fonctions durant bonne conduite, mais il peut être démis par le gouverneur général, sur une adresse du Sénat et de la Chambre des communes : Toutefois, qu'il ait été nommé jusqu'ici ou qu'il le soit à l'avenir, ce juge doit cesser d'occuper sa charge dès qu'il atteint l'âge de soixante-quinze ans, ou immédiatement, s'il a déjà atteint cet âge.

[51] Pursuant to section 9 of the *Exchequer Court Act* as it read in 1927, a judge of that Court would cease to hold office upon reaching 75 years of age. While the qualifications for appointment remained unchanged, after the enactment of section 9 no individual 75 years of age or more could be appointed as a judge of the Exchequer Court. In this circumstance, did Parliament intend that a judge of a superior or county court over the age of 75 could be appointed as a deputy judge? The Chief Justice concluded that it did. At paragraph 147 of his reasons, the Chief Justice wrote that:

> Moreover, the retirement age inserted into s. 9 was a limitation and not a qualification. That limitation could not be one of the "qualifications for appointment hereinbefore mentioned" referred to in ss. 5 and 8. I conclude that s. 9 did not prohibit a person older than 75 from acting as a deputy judge of the Exchequer Court.

[52] We respectfully disagree. Section 9 of the *Exchequer Court Act* had broad application - it applied to sitting judges of the Exchequer Court and to those to be appointed in the future. Persons 75 years of age were no longer qualified or eligible to be appointed to the Court. They were no

longer qualified or eligible because Parliament had determined, as a matter of policy, that the duties of the office of judge of the Exchequer Court were best performed by individuals who had not yet attained the age of 75. That was the case in 1927, and in our view, it remains the case to this day in relation to deputy judges of the Federal Court.

[53] Implicit in this conclusion is the premise that the status of deputy judges under the *Exchequer Court Act* is relevant to the interpretation of the deputy judge provision in the *Federal Courts Act*. We consider that to be a valid premise because the Federal Court is the successor of the Exchequer Court and the provisions with respect to deputy judges contained in the *Exchequer Court Act* were continued in its successor statutes, the *Federal Court Act*, S.C. 1970-71-72, c. 1, and the *Federal Courts Act*.

[54] Further, the roles of deputy judges of the two courts are similar. As is presently the case, a person could be appointed a deputy judge of the Exchequer Court for any reason deemed sufficient by its President (section 8, above), although deputy judges were not actually used in the Exchequer Court until 1942, and were used only sporadically after that time (see the reasons of the Chief Justice at paragraph 114, citing Bushnell, *The Federal Court of Canada: A History*, 1875-1992 (Toronto: University of Toronto Press, 1997) at pages 97, 130 and 193 – 194).

[55] Finally, while the jurisdiction of the Exchequer Court and the Federal Court are different, those differences are not relevant to the question of Parliament's intent concerning the age of deputy judges.

[56] It remains only to consider whether any statutory amendments after 1927 compel the contrary conclusion. There is only one amendment to the *Exchequer Court Act* to be considered in that regard. In 1968, the *Exchequer Court Act* was amended in consequence of the enactment of the *Divorce Act*, S.C. 1967-68, c. 24, subsection 23(2). A division of the Exchequer Court called the Divorce Division was created and barristers and advocates were no longer permitted to act as a deputy judge of the Exchequer Court. Deputy judges would thereafter be current or former judges of a superior or county court. In consequence, reference to the "qualifications for appointment" of a deputy judge was removed. Subsection 8(1) was amended to read as follows (emphasis added):

8. (1) Subject to subsection (3), any judge of a superior court or county court in Canada, and any person who has held office as a judge of a superior court or county court in Canada, may, at the request of the President made with approval of the Governor in Council, sit and act as a judge of the Exchequer Court and as a judge of the Divorce Division.	**8.** (1) Sous réserve du paragraphe (3), un juge d'une cour supérieure ou d'une cour de comté au Canada, ainsi que toute personne qui a occupé un poste de juge d'une cour supérieure ou d'une cour de comté au Canada peut, à la demande du président faite avec l'approbation du gouverneur en conseil, siéger comme juge de la Court de l'Échiquier et juge de la Division des divorces.

[57] The question to be answered is whether the 1968 amendment to the *Exchequer Court Act*, particularly the deletion of any reference to the qualifications for appointment as a deputy judge, reflected a change in legislative intent concerning the age of deputy judges. Did Parliament now intend that persons 75 years of age or older could act as a deputy judge?

[58] In our view, it did not. The purpose of the 1968 amendment was to raise the level of qualification required to act as a deputy judge. Prior judicial experience was now required, and it

was for this purpose that the wording of the deputy judge provision was altered. There is no basis in the language of the statutory amendment or in the surrounding context on which to conclude that in 1968, Parliament intended to eliminate the age restriction upon deputy judges by way of a consequential amendment to the *Exchequer Court Act* made necessary by the enactment of the *Divorce Act*. We note parenthetically that at the time of the 1968 amendments to the *Exchequer Court Act*, the constitutional amendment imposing a mandatory retirement age on judges of the courts established under section 96 of the *Constitution Act, 1867* had been in effect for 8 years.

[59] The statutory provisions relating to deputy judges have remained substantially similar to the provisions as they read in 1968: see: *Exchequer Court Act*, R.S.C. 1970, c. E-11, section 9; *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), section 10; and *Federal Courts Act*, section 10, as amended by the *Courts Administration Service Act*, S.C. 2002, c. 8, section 19.

[60] This review of the legislative evolution and history of the deputy judge provisions shows that prior to the enactment of the *Federal Court Act*, Parliament did not intend that persons 75 years of age or older could be asked to act as deputy judges.

ii. The current provisions of the *Federal Courts Act*

[61] Having considered the legislative evolution of the deputy judge provisions, it is necessary to consider the current statutory context.

[62] Subsection 10(1.1) of the *Federal Courts Act* is found within that portion of the *Federal Courts Act* entitled “The Judges”. This heading encompasses sections 5 to 10.1 of the *Federal Courts Act*. Sections 5 and 5.1 deal with the constitution of the Federal Court and the Federal Court of Appeal. Sections 5.2 and 5.3 deal with who may be appointed judge and who makes such appointments. Section 5.4 deals with the required number of judges from Québec. Section 6 governs the rank and precedence of the courts and their judges, and what happens in the event of the absence or incapacity of either Chief Justice. Section 7 deals with the residence requirement and the rota of judges. Section 8 deals with the tenure of office. Section 9 deals with the oath of office and its administration. Section 10 deals with deputy judges. Finally, section 10.1 deals with the requirement of annual court meetings to discuss the rules and the administration of justice.

[63] Subsection 8(2) is the only provision in this part of the *Federal Courts Act* which assists in ascertaining Parliament’s intent as to whether persons 75 years of age or older may serve as a deputy judge.

[64] The introduction of the mandatory retirement provision in 1927 for the Supreme Court and the Exchequer Court reflected Parliament’s determination that, with age, judges may lose physical and mental efficiency so that, as a matter of policy, they should not carry out judicial duties after attaining 75 years of age. In 1960, section 99 of the *Constitution Act, 1867* was amended to provide a mandatory retirement age for the judges of the section 96 courts. This was a further expression of the same policy, expressed through the U.K. Parliament. That policy is also reflected in other federal statutes, including the *Supreme Court Act*, R.S.C. 1985, s. S-26, subsection 9(2),

and the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, subsection 7(2), and in the legislation relating to the territorial courts, established by Parliament because of its plenary legislative powers over the territories: *Northwest Territories Act*, R.S.C. 1985, c. N-27, section 33; *Nunavut Act*, S.C. 1993, c. 28, subsection 31(3); *Yukon Act*, S.C. 2002, c. 7, section 39.

[65] We note that our colleague in dissent recognizes that allowing persons to serve as deputy judges after becoming 75 is "an island of anomaly" in the midst of a "uniform sea of statutes governing courts across Canada specifying that judges must retire at age 75". He explains the anomaly by adopting the explanation proposed by the Chief Justice to the effect that the Federal Court "can experience unusual and temporary surges and overflows of work in particular areas of its unique jurisdiction, such as immigration." This is said to shed light on the meaning of subsection 10(1.1) because if only those under 75 are permitted to serve as deputy judges, the pool of judges able to help the Federal Court with a temporary overflow of work might be insufficient. The difficulty with this explanation for the anomaly is that it has no evidentiary foundation. There is no evidence that fluctuation in the volume of work is a phenomenon unique to the Federal Court. Nor is there any evidence about the number of judges who choose to retire or become a supernumerary judge before age 75. While allowing retired judges to act as deputy judges after they reach age 75 would increase the pool of judges, it is speculative to conclude that the smaller pool of judges, retired judges and supernumerary judges under the age of 75 might be insufficient to deal with the volume of work.

[66] Reading subsection 10(1.1) of the *Federal Courts Act* in its statutory context, it is our view that despite the broad language used in subsection 10(1.1), it must be understood to be subject to the implied limitation that persons 75 years of age or older should not serve as deputy judges. The contrary interpretation would violate the manifest legislative policy of Parliament that a person should not be permitted to perform judicial duties after attaining the age of 75. It defies common sense to conclude that a judge of the Federal Court on turning 75 years of age ceases to hold office and yet, at the request of the Chief Justice of the Federal Court, may continue to perform the same judicial duties as a deputy judge. It is equally illogical to conclude that a judge of the superior court of a province may cease to hold office on attaining age 75 and then assume judicial duties acting as a deputy judge of the Federal Court.

[67] Before leaving the current statutory context, it is appropriate to consider certain aspects of the *Federal Courts Act* that might support the conclusion reached by the Chief Justice.

[68] First, there is no statutory provision that specifically states when the term of a deputy judge comes to an end, and no transitional provision that permits a deputy judge to work for a certain length of time after finishing a particular hearing. It could be argued that the absence of such provisions supports the inference that the entitlement of a deputy judge to act cannot be a function of age. We do not accept this argument, for the following reason.

[69] The manner in which work is assigned to a deputy judge of the Federal Court is described by the Chief Justice as follows at paragraph 137 of his reasons:

> Unlike the full-time and supernumerary judges of the Federal Court, deputy judges no longer hold office and are no longer under the scheduling authority of the Chief Justice. The deputy judge must choose to accept the Chief Justice's request to act. The deputy judge is asked to accept assignments from the Chief Justice and may refuse to do so. Unlike the situation with judges who hold office, this is a consensual process.

As the assignment of work is "consensual," a deputy judge has no right to receive any assignment, no right to act as a judge unless asked to do so by the Chief Justice of the Federal Court, no tenure, and no right to be paid except for the days worked. Given the *ad hoc* nature of the work of a deputy judge, we draw no inference from Parliament's failure to legislate retirement provisions for deputy judges. They hold no position from which they may retire. Similarly, the absence of a transitional provision is consistent with the view that a deputy judge would not be given any assignment he or she could not complete before his or her 75th birthday.

[70] It is also arguable that support for the Chief Justice's conclusion may be found in Parliament's response to *Addy v. Canada*, [1985] 2 F.C. 452 (F.C.T.D.). The *ratio* of *Addy* was that a provision of the 1970 predecessor to the *Federal Courts Act* imposing a mandatory retirement age of 70 for judges of the Federal Court of Canada was unconstitutional in the face of subsection 99(2) of the *Constitution Act, 1867*, enacted in 1960 to establish a mandatory retirement age of 75 for judges of the superior courts. Parliament later amended the *Federal Court Act* to raise the mandatory retirement age back to 75 for judges of the Federal Court of Canada. That dealt with the *ratio* of *Addy*. However, at page 464 of *Addy*, the judge observed in *obiter* that "[t]here is no limit in the Act as to the age of such a deputy judge". Parliament did not amend the deputy judge provision to add an express age limitation despite this observation.

[71] In our view, this non-action by Parliament cannot be taken as an indication that Parliament intended no age limit for the appointment of a deputy judge. The meaning of legislation is fixed at the time of enactment (*Perka v. The Queen*, [1984] 2 S.C.R. 232 at page 264; and *Sullivan on the Construction of Statutes*, 5th ed. at pages 146-147). The comments made in *Addy* were made some 14 years after the enactment of the statutory provisions in issue in that case. The non-action of Parliament so long after the enactment of the *Federal Court Act* sheds little if any light on the intent of Parliament at the time of enactment. Further, subsection 45(4) of the *Interpretation Act*, R.S.C. 1985, c. I-21 states as follows (emphasis added):

45. (4) A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.	**45.** (4) La nouvelle édiction d'un texte, ou sa révision, refonte, codification ou modification, n'a pas valeur de confirmation de l'interprétation donnée, par décision judiciaire ou autrement, des termes du texte ou de termes analogues.

In light of this provision, the subsequent re-enactment of subsection 10(1.1) of the *Federal Court Act* after the *Addy* decision cannot be equated with the adoption of the *obiter* comments in *Addy* about the age of deputy judges.

c. The purpose of the legislation

[72] As explained above, part of the overall context in which a provision was enacted can be determined by inquiring into its purpose. The purpose of subsection 10(1.1) is to facilitate the administration of justice by allowing the Chief Justice to augment his or her judicial resources from time to time when an additional full-time position is not necessary or available.

[73] The Chief Justice observed at paragraph 108 of his reasons that parliamentary debates in 1920 and 1967 contemplated "congestion of business" as a rationale for the appointment of a deputy judge. As a general principle of statutory interpretation, subsection 10(1.1) should be interpreted to promote this legislative purpose. However, there is no evidence before the Court that this purpose requires that persons 75 years of age and older be permitted to act as a deputy judge. Thus, there is nothing to trump the policy considerations that led to the introduction of a mandatory retirement age for judges of all of the superior courts in Canada.

d. Conclusion as to the proper interpretation of subsection 10(1.1) of the *Federal Courts Act*

[74] Having reviewed the text and the legislative evolution of subsection 10(1.1) of the *Federal Courts Act*, its statutory context and its purpose, we respectfully disagree with the conclusion of the Chief Justice that a person 75 years of age or older may be requested to act as a deputy judge of the Federal Court, and find that Mr. Felipa is entitled to succeed on his motion.

Subsection 99(2) of the *Constitution Act, 1867*

[75] Much of the argument in the Federal Court involved a debate on the scope of subsection 99(2) of the *Constitution Act, 1867* (quoted above), which stipulates that a "Judge of a Superior Court" ceases to hold office upon attaining the age of 75 years. The issue was whether a judge of the Federal Court, which is a court established under section 101 of the *Constitution Act, 1867*, is a "Judge of a Superior Court" within the meaning of subsection 99(2). Section 101 reads as follows:

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the	**101.** Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque

Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.	l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.

[76] Given the basis upon which we have determined Mr. Felipa's motion, it is not necessary for us to express an opinion on this point, and we decline to do so. We reach this conclusion despite the concern, well expressed by our dissenting colleague, that Parliament may choose to amend subsection 10(1.1) of the *Federal Courts Act* to specifically permit the appointment of deputy judges over the age of 75, in which case this issue may have to be argued anew. In our view, the speculative possibility of a future legislative change generally is not a good reason to attempt to resolve a difficult legal debate.

[77] We note that the Chief Justice and our dissenting colleague consider this issue to be relevant to this case, and they have both answered it in the negative. If that conclusion is correct, then by necessary implication the judges of all courts established under section 101 of the *Constitution Act, 1867* are also outside the scope of section 96 (which provides that judges of the superior courts are to be appointed by the Governor General), subsection 99(1) (which provides that judges of the superior courts hold office during good behaviour and are removable from office by the Governor General on address of the Senate and the House of Commons), and section 100 (which requires the salaries, allowances and pensions of judges of the superior courts to be fixed and provided by Parliament).

[78] In our view, the jurisprudence has not provided a conclusive answer to the question of whether sections 96, 99 and 100 apply to the judges of courts established under section 101. We consider it arguable that section 101 judges are within the scope of sections 96, 99 and 100 insofar as those provisions state the elements of the constitutional guarantees of judicial independence, even though the *Constitution Act, 1867* is not the only source of those constitutional guarantees (see, for example, the English *Act of Settlement of 1701*, the *Act of 1760*, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3).

[79] We are not persuaded that recognizing judges of section 101 courts as coming within the scope of sections 96, 99 and 100 of the *Constitution Act, 1867* would be inconsistent with *Ontario (Attorney General) v. Canada (Attorney General)*, [1947] A.C. 127, or necessarily imply that the jurisdiction of section 101 courts extends beyond what Parliament, by statute, has carved out of the general jurisdiction of the superior courts of the provinces (as the successors to the English courts as they existed in 1867) and given to the section 101 courts.

Judicial independence

[80] Mr. Felipa argues that the statutory provisions relating to deputy judges of the Federal Court, at least as they apply to those who have previously retired from judicial office, do not afford them the degree of judicial independence required to respect Mr. Felipa's constitutional right to have his case heard by a fair and independent judiciary.

[81] As we understand this argument, the focus of Mr. Felipa's concern relates to the remuneration payable to a deputy judge of the Federal Court who does not hold office as a judge of another superior court. (A deputy judge who currently holds office as a judge of a superior court is entitled only to his or her statutory salary, and cannot receive further remuneration for acting as a deputy judge: see subsection 10(4) of the *Federal Courts* Act, quoted above.) The workload of a deputy judge who has retired from office as a judge of a superior court is entirely within the gift of the Chief Justice which means that his entitlement to the statutory *per diem* remuneration is also within the gift of the Chief Justice. Mr. Felipa argues that this gives rise to a reasonable apprehension of undue influence on the part of the Chief Justice. In our view, Mr. Felipa has raised a legitimate concern, but given the basis upon which we would dispose of this appeal, we do not consider it necessary to determine whether it is sufficient to overcome the strong presumption of integrity enjoyed by the Chief Justice and the deputy judges of the Federal Court.

Costs

[82] Mr. Felipa has asked for costs on a solicitor and client basis in this Court and in the Federal Court. In our view, Mr. Felipa has not demonstrated conduct on the part of the respondent that would warrant an award of costs on a solicitor and client basis. However, he should be awarded costs that will ensure that neither he nor his counsel is out of pocket for disbursements, and that his counsel is reasonably compensated for his services in this matter. This litigation could have been avoided by the appointment of a different judge when that was first requested in 2009. Whatever costs Mr. Felipa and his counsel have borne in this matter have more to do with the public interest in legal certainty than any benefit that could have accrued to Mr. Felipa by pursuing this issue.

Conclusion

[83] For these reasons, we would allow this appeal with costs in this Court and the Federal Court fixed in the total sum of $25,000 plus reasonable disbursements. We would set aside the order of the Chief Justice, allow Mr. Felipa's motion, and declare that the Chief Justice does not have the authority under subsection 10(1.1) of the *Federal Courts Act* to request that a retired judge of a superior court act as a deputy judge of the Federal Court after attaining the age of 75.

"K. Sharlow"
J.A.

"Eleanor R. Dawson"
J.A.

STRATAS J.A. (**Dissenting reasons**)

[84] I conclude that deputy judges may act after attaining 75 years of age.

[85] In my view, this is permitted by the *Federal Courts Act*: see paragraphs 87-137 below. Further, the mandatory retirement provision in subsection 99(2) of the *Constitution Act, 1867* does not apply to deputy judges: see paragraphs 142-164 below. Finally, deputy judges possess sufficient judicial independence under the Constitution of Canada: see paragraphs 165-180 below.

[86] It follows that I agree with the result reached by the Chief Justice of the Federal Court: 2010 FC 89. Therefore, I would dismiss the appeal, but without costs.

A. The statutory interpretation issue: the *Federal Courts Act* and deputy judges

[87] Does the *Federal Courts Act* allow deputy judges to act after they become 75 years of age? In my view, it does.

[88] My colleagues rely upon many statutory interpretation cases from the Supreme Court of Canada. I rely upon these same cases. They tell us that we are to interpret statutes "by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute": see for example, most recently, *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 at paragraph 27. The Supreme Court has also told us that "[t]he relative effects" of these factors "may vary" in

different cases (see *Canada Trustco*, *supra* at paragraph 10) but it has not discussed how and why these factors might have different relative effects in different cases. I believe that this is the point that has led us to differing results in this case.

[89] An examination of these factors and the relative effects that should be given to them reveal many interpretive clues. Some of these interpretive clues are merely *consistent* with the interpretation that the *Federal Courts Act* permits deputy judges to act after attaining 75 years of age. On the other hand, others point *only* to that interpretation. Assessing all of the interpretive clues, I conclude that the *Federal Courts Act* permits deputy judges to act after attaining 75 years of age.

- I -

[90] Section 10 of the *Federal Courts Act* provides that "any judge of a superior, county or district court in Canada, and any person who has held office as a judge of a superior, county or district court in Canada" may act as a deputy judge of the Federal Court. The full text of section 10 is as follows:

10. (1) Subject to subsection (3), any judge of a superior, county or district court in Canada, and any person who has held office as a judge of a superior, county or district court in Canada, may, at the request of the Chief Justice of the Federal Court of Appeal made with the approval of the Governor in Council, act as a judge of the Federal Court of	**10.** (1) Sous réserve du paragraphe (3), le gouverneur en conseil peut autoriser le juge en chef de la Cour d'appel fédérale à demander l'affectation à ce tribunal de juges choisis parmi les juges, actuels ou anciens, d'une cour supérieure, de comté ou de district. Les juges ainsi affectés ont qualité de juges

Appeal, and while so acting has all the powers of a judge of that court and shall be referred to as a deputy judge of that court.

suppléants et sont investis des pouvoirs des juges de la Cour d'appel fédérale.

(1.1) Subject to subsection (3), any judge of a superior, county or district court in Canada, and any person who has held office as a judge of a superior, county or district court in Canada, may, at the request of the Chief Justice of the Federal Court made with the approval of the Governor in Council, act as a judge of the Federal Court, and while so acting has all the powers of a judge of that court and shall be referred to as a deputy judge of that court.

(1.1) Sous réserve du paragraphe (3), le gouverneur en conseil peut autoriser le juge en chef de la Cour fédérale à demander l'affectation à ce tribunal de juges choisis parmi les juges, actuels ou anciens, d'une cour supérieure, de comté ou de district. Les juges ainsi affectés ont qualité de juges suppléants et sont investis des pouvoirs des juges de la Cour fédérale.

(2) No request may be made under subsection (1) or (1.1) to a judge of a superior, county or district court in a province without the consent of the chief justice or chief judge of the court of which he or she is a member, or of the attorney general of the province.

(2) La demande visée aux paragraphes (1) et (1.1) nécessite le consentement du juge en chef du tribunal dont l'intéressé est membre ou du procureur général de sa province.

(3) The Governor in Council may approve the making of requests under subsection (1) or (1.1) in general terms or for particular periods or purposes, and may limit the number of persons who may act under this section.

(3) L'autorisation donnée par le gouverneur en conseil en application des paragraphes (1) et (1.1) peut être générale ou particulière et limiter le nombre de juges suppléants.

(4) A person who acts as a judge of a court under subsection (1) or (1.1) shall be paid a salary for the period that the judge acts, at the rate fixed by the *Judges Act* for a judge of the court other than the Chief Justice of the court, less any amount otherwise payable to him or her under that Act in respect of that period, and shall also be paid the travel allowances that a judge is entitled to be paid under the *Judges Act*.

(4) Les juges suppléants reçoivent le traitement fixé par la *Loi sur les juges* pour les juges du tribunal auquel ils sont affectés, autres que le juge en chef, diminué des montants qui leur sont par ailleurs payables aux termes de cette loi pendant leur suppléance. Ils ont également droit aux indemnités de déplacement prévues par cette même loi.

[91] A number of those who have "held office as a judge of a superior, county or district court in Canada" within the meaning of section 10 of the *Federal Courts Act* ceased holding their offices when they attained 75 years of age: see, for example, subsection 99(2) of the *Constitution Act, 1867*, (applicable to superior court judges); subsection 8(2) of the *Federal Courts Act*, (applicable to judges in the Federal Courts); and subsection 9(2) of the *Supreme Court Act* (applicable to judges in the Supreme Court of Canada). All of these provisions use clear, express words requiring judges to cease holding office when they become 75 years of age.

[92] This fact was known when section 10 was enacted. Yet section 10 makes all former superior, county or district court judges eligible to serve as deputy judges and does not use express language prohibiting those who have attained 75 years of age from serving. This is consistent with the conclusion that deputy judges can act after they attain 75 years of age. This is one interpretive clue that the Chief Justice of the Federal Court took into account in reaching his conclusion. I also do so.

- II -

[93] Section 10 sits within the *Federal Courts Act* and is silent about mandatory retirement at age 75. But that silence does not exist elsewhere in the *Federal Courts Act*. In subsections 8(2) and 12(8) of the *Federal Courts Act*, Parliament enacted a retirement age, in each case 75 years of age, for other judges and prothonotaries in the Federal Courts. Subsections 8(2) and 12(8) read as follows:

8. (2) A judge of the Federal Court of Appeal or the Federal Court ceases to hold office on becoming 75 years old.	**8.** (2) La limite d'âge pour l'exercice de la charge de juge de la Cour d'appel fédérale et de la Cour fédérale est de soixante-quinze ans.
12. (8) A prothonotary, whether appointed before or after the coming into force of this subsection, shall cease to hold office on becoming 75 years old.	**12.** (8) La limite d'âge pour l'exercice de la charge de protonotaire est de soixante-quinze ans, quelle que soit la date de nomination du titulaire.

[94] Parliament's express words in these provisions dealing with federal judges and prothonotaries, sitting alongside Parliament's silence in section 10 of the same statute dealing with deputy judges, is an interpretive clue as to the meaning of section 10. This interpretative clue suggests that deputy judges, unlike other federal judges and prothonotaries, may act after attaining 75 years of age.

[95] The Chief Justice of the Federal Court found this to be a significant interpretive clue and took this into account in reaching his conclusion. In my view, he was right to do so.

- III -

[96] Mandatory retirement upon attaining age 75 is the forced termination of a person's employment because of age without regard to the individual's capabilities, merits, job performance or worth. One would expect that Parliament would use clear, express words in its legislation in order to trigger that sort of drastic consequence.

[97] And that is exactly what Parliament does. Whenever it imposes mandatory retirement of any sort, its wording is clear and express: see, for example, *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, sections 106-108; *CN Commercialization Act*, S.C. 1995, c. 24, subsection 17(2); *Canada Council for the Arts Act*, R.S.C. 1985, c. C-2, section 11; *Telesat Canada Reorganization and Divestiture Act*, S.C. 1991, c. 52, subsection 18(2); *Canada Mortgage and Housing Corporation Act*, R.S.C. 1985, c. C-7, subsection 8(3); *Canada Marine Act*, S.C. 1998, c.10, section 11; and many others. Whenever it imposes mandatory retirement based on age, its wording is clear and express: see, for example, *Auditor General Act*, R.S.C. 1985, c. A-17, subsection 3(2) (auditor general); and *Canada Elections Act*, S.C. 2000, c. 9, subsection 13(2) (chief electoral officer).

[98] In light of Parliament's consistent drafting practice in situations such as this, can it be said that section 10 of the *Federal Courts Act* or the *Federal Courts Act* itself somehow subjects deputy judges to mandatory retirement when they attain age 75? Can this be the case even though section 10 contains not a single word about mandatory retirement? I think not.

[99] Parliament's failure in section 10 to follow its consistent drafting practice when it imposes mandatory retirement is an important interpretive clue. It suggests that deputy judges under the *Federal Courts Act* can continue to act after attaining 75 years of age.

- IV -

[100] An important interpretive clue is the distinction in the *Federal Courts Act* between judicial officials who "hold office" and judicial officials who do not hold office, such as deputy judges.

[101] I note at the outset that in English, the phrase "hold office" is used repeatedly to describe certain persons. In French, more than one phrase is used.

[102] It is incumbent on us, as Canadian judges, to examine both the French and English language text: *Constitution Act, 1982*, section 18, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *R. v. Daoust*, 2004 SCC 6 at paragraph 26, [2004] 1 S.C.R. 217; Michel Bastarache, *The Law of Bilingual Interpretation* (Markham: Butterworths, 2008); Sullivan, *supra* at pages 93-120.

[103] At paragraphs 150-159 of his reasons for judgment, the Chief Justice found that the English language version of the statutory provisions in issue in this appeal, and in particular the phrase "hold office", more clearly expresses the intent of Parliament and that certain variations in the French language version due to amendments were immaterial. I agree with and adopt the Chief Justice's reasoning on this point.

[104] In the English language version, Federal Court and Federal Court of Appeal judges "hold office": *Federal Courts Act*, subsection 8(1). Prothonotaries "hold office": *Federal Courts Act*, subsection 12(7). Under the *Federal Courts Act*, those appointed as deputy judges do not "hold an

office." Instead, they "act as a judge of the Federal Court, and while so acting [have] all the powers of a judge of that court": *Federal Courts Act,* subsection 10(1.1).

[105] "Holding office" is not just a random phrase that Parliament scribbled into the *Federal Courts Act*. It is a special phrase used elsewhere to denote only particular persons for certain types of treatment. For example, special procedures, such as the receipt and display of letters patent, apply only to certain persons who are appointed to and hold "an office," not to everyone who might be performing similar functions: see, for example, *Federal Courts Act*, section 5.2; *Courts Administration Service Act*, subsection 185(13); and *Formal Documents Regulations*, C.R.C., c. 1331, subsection 4(6) (as authorized by section 3 of the *Public Officers Act*, R.S.C. 1985, c. P-31). Further, as we shall see, the security of tenure provision in section 99 of the *Constitution Act, 1867* is worded very precisely – it applies only to persons who "hold offices," and provides that those persons cease holding their offices upon attaining age 75.

[106] None of the special procedures, such as the receipt of letters patent, apply to deputy judges because they do not "hold an office." The same can be said for other non-office holding judicial officials under the *Federal Courts Act*, such as sheriffs, deputy sheriffs, marshals and deputy marshals: section 13.

[107] This distinction in the *Federal Courts Act* between those who "hold office" as a judge and all other non-office holding judicial officials extends to the issue of retirement. Parliament has provided that the "office holders" – the prothonotaries, Federal Court judges and Federal Court of

Appeal judges – must "cease to hold office on becoming 75 years old": *Federal Courts Act*, subsections 8(2) and 12(8). But Parliament has not provided for a retirement age for any of the non-office holding judicial officials, including deputy judges.

[108] What we have here is an evident design or a consistent scheme in the legislative text that we must respect: only "office holders" under the *Federal Courts Act* have to retire at age 75, not deputy judges who are only non-office holding judicial officials.

[109] I find no basis for extrapolating the mandatory retirement of "office holders" at age 75 to non-office holding judicial officials. That would be the equivalent of picking up the legislator's pen and writing words into the *Federal Courts Act*. The evident design or consistent scheme in Parliament's legislative text concerning office holders and non-office holders supplies clear meaning, a meaning that only Parliament can modify.

- V -

[110] I take it to be beyond dispute that a deputy judge, aged 74 years, 11 months and two weeks, can act as a Federal Court judge under section 10 of the *Federal Courts Act*. Suppose that a deputy judge at that age hears a two week trial and reserves his or her judgment on the day before his or her 75th birthday. Can the deputy judge release his or her judgment a week later?

[111] In the case of deputy judges, Parliament did not provide for any transitional provisions to deal with this situation.

[112] However, in the case of Federal Court and Federal Court of Appeal judges who "cease to hold office" at age 75, it has done so: *Federal Courts Act*, section 45. Those judges may continue to act for a further eight weeks to deal with matters such as reserved judgments. Similar provisions exist for other federally appointed judges: see, for example, *Supreme Court Act*, subsection 27(2); and *Judges Act*, R.S.C. 1985, c. J-1, section 41.1.

[113] In my view, the absence of any transitional provisions concerning the ability of deputy judges to release judgments after they are 75 years of age is an important interpretive clue suggesting that deputy judges can continue to act after attaining age 75. If deputy judges could not act after attaining age 75, one would expect that Parliament would have included transitional provisions, just as it did for those who must retire.

- VI -

[114] The Chief Justice noted (at paragraph 142 of his reasons) that the Federal Court has held that "[t]here is no limit in the Act as to the age of…a deputy judge": *Addy*, *supra* at page 464. The Chief Justice added (at paragraph 161 of his reasons) that Parliament must have scrutinized the *Addy* decision closely because soon afterward it amended the *Federal Court Act* (the predecessor to the current *Federal Courts Act*) to deal with certain Charter issues raised in that decision. But

Parliament left undisturbed the holding in *Addy* that deputy judges did not have a retirement age. Parliament could have reversed that holding through specific legislation, but did not do so.

[115] I agree with the Chief Justice's observations about *Addy* and regard this as another interpretive clue regarding the proper meaning of section 10 of the *Federal Courts Act*. It may not be a determinative clue, but it is consistent with the conclusion that deputy judges may act after attaining age 75.

- VII -

[116] At paragraph 147 of his reasons, the Chief Justice of the Federal Court observed that in 1927 a mandatory retirement age of 75 was added to section 9 of the *Exchequer Court Act*. He felt that he had to address this as a possible clue to the meaning of today's *Federal Courts Act* on the subject of the retirement age of deputy judges. He found that the retirement age of 75, introduced in 1927, did not apply to deputy judges of the Exchequer Court.

[117] To him, this conclusion mattered, as the Exchequer Court was a predecessor court to the Federal Court of Canada. In his view, the absence of any retirement age in the *Exchequer Court Act* for deputy judges was carried through to the *Federal Courts Act*. As we have seen, the *Federal Courts Act* does not specify a retirement age for deputy judges.

[118] Before considering the Chief Justice's conclusion, I would sound one note of disagreement. In my view, the status of deputy judges under the *Exchequer Court Act* has little bearing, if any, on the issue before us, for two main reasons. First, the statutory wording concerning the role of deputy judges in section 8 of the *Exchequer Court Act* is different from section 10 of the *Federal Courts Act*. Unlike section 10, section 8 of the *Exchequer Court Act* contained a specific example of the circumstances in which a deputy judge could act (when a regular judge in the Exchequer Court was sick or absent from Canada), an example that, as a matter of statutory interpretation, might have restricted the circumstances in which deputy judges could be used. Second, the jurisdiction of the Exchequer Court and the provisions of the *Exchequer Court Act* are different from those of the Federal Court and the *Federal Courts Act* and their predecessors, the Federal Court of Canada and the *Federal Court Act*. In my view, little significance can be drawn from the status of deputy judges on a different court regulated under a differently worded statute.

[119] However, even if I am wrong on that and it is necessary to examine the provisions of the *Exchequer Court Act*, I do agree with the Chief Justice's conclusion: the retirement age of 75, introduced in 1927, did not apply to deputy judges of the Exchequer Court. This is clear from the express wording of the *Exchequer Court Act*.

[120] Under section 8 of the *Exchequer Court Act* as it existed in 1927, the Governor in Council could appoint "a deputy judge having the qualifications for appointment *hereinbefore* mentioned" [emphasis added]. On the subject of the retirement age for deputy judges, section 8 was silent, just like section 10 of today's *Federal Courts Act*. If any retirement age were present, it would be found

in the "qualifications for appointment *hereinbefore* mentioned" [emphasis added], *i.e.*, in the sections coming before section 8, namely sections 1 to 7.

[121] Section 5 is the relevant section. Its margin note is "Who may be appointed judge," and as such is the only section described by Parliament to be about "qualifications for appointment." Other than section 5, sections 1 to 7 do not deal with "qualifications for appointment."

[122] Section 5 provides that "a person may be appointed a judge of the Court who is or has been a judge of a superior or county court in any of the provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces." Section 5 does not mention age as a qualification for appointment. In particular, it mentions no retirement age. It follows then that deputy judges could act despite having attained 75 years of age.

[123] Like today's *Federal Courts Act*, the *Exchequer Court Act* drew a distinction between those who "hold offices" and those who do not. Deputy judges were not appointed to an office: *Exchequer Court Act*, section 8. However, the regular judges of the Exchequer Court did hold an office and special procedures applied to their appointment and their conduct as judges because of that fact: *Exchequer Court Act*, section 4 (appointment under the Great Seal), section 10 (oath of office) and section 11 (procedures for the oath of office). None of these special procedures applied to deputy judges.

[124] The only retirement provision in the *Exchequer Court Act* appears in section 9. This provision cannot apply to a deputy judge for two reasons. First, section 9 comes after section 8. Therefore, section 9 cannot be considered to be "hereinbefore" within the meaning of section 8. Second, section 9 states that those who "hold office" – not deputy judges – shall "cease to hold office upon attaining the age of seventy-five years." Like today, deputy judges did not have an office to cease holding.

[125] It is true, as my colleagues note, that at least two Parliamentarians, speaking about the 1927 legislation, expressed their personal, individual view that all judges should retire at age 75. What were the views of all of the other individual Parliamentarians? In any event, the supposed intentions, purposes or policies of individual Parliamentarians are not our proper focus. Rather, we are to investigate, discern and understand the meaning of the text adopted by Parliament. As I have shown above, that text is clear. To the extent that the *Exchequer Court Act* has any bearing on the issue before us, the *Exchequer Court Act* confirms that deputy judges of the Federal Court can act after attaining 75 years of age.

-VIII -

[126] The Chief Justice used Parliamentary debates to support his conclusion that deputy judges can act after attaining 75 years of age. In particular, he noted a remark in the House of Commons made by the Honourable Mark MacGuigan that a person over 75 years of age could serve as a deputy judge: see paragraph 141 of the Chief Justice's reasons.

[127] Mr. MacGuigan's statement indeed supports the Chief Justice's conclusion. However, in my view, Parliamentary statements of Members of Parliament, even eminent ones such as Mr. MacGuigan, should be given "limited weight" and certainly "[no] more weight than [they] deserve": *Re Canada 3000 Inc.*, *supra* at paragraph 57; Sullivan, *supra* at page 612.

[128] Our main focus must be as explained above: the meaning of the words Parliament has actually adopted in its law, viewed in their proper context, and not the utterances, considered as they may be, of individual legislators, eminent as they may be.

- IX -

[129] I recognize that there is a uniform sea of statutes governing courts across Canada specifying that judges must retire at age 75. But, if my interpretation of section 10 of the *Federal Courts Act* is correct, there is an island of anomaly in the midst of that sea: deputy judges in the Federal Court can still act after age 75. Can this be explained?

[130] The Chief Justice noted in his reasons for judgment that section 10 of the *Federal Courts Act* addresses a particular pressing reality: the Federal Court can experience unusual and temporary surges and overflows of work in particular areas of its unique jurisdiction, such as immigration. In the words of the Chief Justice (at paragraph 116 of his reasons for judgment), "[d]eputy judges provide the Chief Justice of the Federal Court with the flexibility to add judicial resources where circumstances require." As an example of this, he noted that the use of deputy judges "helped the

Court minimize its backlog [while] some 20% of its full-time judges [were] engaged in the post September 11, 2001, protracted ministerial certificate litigation."

[131] To the Chief Justice, this was illustrative of the purpose behind section 10. In his view, section 10 of the *Federal Courts Act* allows for the appointment of additional judicial officials – deputy judges – to assist with these temporary surges and overflows of work, thereby furthering the objectives of access to timely justice and the efficient operation of the Federal Court. To him, this was an important interpretive clue to the meaning of the text of section 10, confirming that those who have attained 75 years of age may act as deputy judges.

[132] I agree with the Chief Justice. If only those under 75 can act as deputy judges, the pool of judges able to help the Federal Court with a temporary surge or overflow of work might be insufficient. It must be recalled that only current and former superior, county and district court judges are eligible to serve as deputy judges under section 10. Current judges have their own cases to hear and have little or no capacity to take on additional cases as a deputy judge. Many former judges have voluntarily resigned their judicial offices before age 75 because of ill health, a change in life circumstance, a preference to do something else, or a desire not to hear any more cases, and so they are unlikely to take on cases as a deputy judge.

[133] On the other hand, it is well-known that a number of former judges who were forced against their will to retire at age 75 are still available, in good health, full of energy and keen to hear cases. Indeed, many act as arbitrators and mediators in complex matters and, in recognition of their

continued capacity, skill, wisdom and experience, are paid top dollar for their services. Allowing those over age 75 to serve as a deputy judge ensures that there will be a pool of judges in the Federal Court capable, willing and able to deal with a temporary surge or overflow of work. This is confirmed by the evidence that all but one of the current pool of deputy judges was over 75 years of age at the time of the Chief Justice's decision: see the reasons of the Chief Justice, at paragraph 9. An interpretation that allows those over age 75 to serve as a deputy judge furthers the purpose of section 10 of the *Federal Courts Act*.

- X -

[134] I understand the essence of the appellant's submissions on statutory interpretation to be as follows. The appellant notes that section 10 of the *Federal Courts Act* does not have wording setting out a retirement age of 75 for deputy judges. He asks this Court to find that there is in fact a retirement age of 75 for deputy judges. He notes that other sections of the *Federal Courts Act*, predecessor Acts, other Acts, and subsection 99(2) of the *Constitution Act, 1867* require some judicial officials to retire at age 75. In his view, these reveal an "evolved understanding" about mandatory retirement for judges. In essence, he invites this Court to find that this "evolved understanding" is in section 10 of the *Federal Courts Act*. He offers this invitation despite the absence of wording in section 10 about retirement and despite the interpretative clues I have identified and analyzed above.

[135] In my view, accepting the appellant's submissions would be inconsistent with the purpose that underlies section 10 of the *Federal Courts Act*. Above, I noted that section 10 is aimed at the creation of a sufficient pool of deputy judges to handle overflows of work, a purpose that, by necessity, requires the inclusion of those over 75 years of age. Extrapolating mandatory retirement at age 75 into section 10 would lessen the likelihood that section 10 will fulfil the purpose Parliament has set for it.

[136] Further, what might the basis be for the Court accepting the appellant's invitation to make this extrapolation? An assumption by the Court that Parliament mistakenly left words out of section 10 that should have been there and so it should correct the mistake? A belief that the words of section 10 could reasonably bear the extrapolation and so the Court should go ahead and implement the extrapolation if it thinks it is a good thing? A view by the Court that all persons acting in any sort of a judicial capacity in any context anywhere should be subject to the same retirement age? In my view, none of these bases is acceptable. Each takes the Court beyond its role as investigator, discerner and applier of the meaning of the actual text that Parliament has adopted. Each takes the Court into the realm of developing assumptions, beliefs and views and casting them as law – a matter reserved to Parliament.

[137] For the foregoing reasons, I do not accept the appellant's submissions. The interpretive clues lead me to conclude that deputy judges under the *Federal Courts Act* may act after becoming 75 years of age.

B. The constitutional issues

[138] Two constitutional issues were raised in this appeal: whether the retirement requirement in subsection 99(2) of the *Constitution Act, 1867* applies to deputy judges, and whether deputy judges possess sufficient independence. Even if I agreed with my colleagues on the statutory interpretation issue, I would still consider it necessary to decide these questions.

[139] Parliament is entitled to react to this Court's judgment on the statutory interpretation issue by amending section 10 to make it perfectly clear that the Chief Justice may assign cases to deputy judges who are over age 75. It may do this in order to ensure that the Federal Court is equipped to deal with temporary surges and overflows of work.

[140] But even if Parliament amends section 10 and even if the use of the amended section 10 is urgently needed, the Chief Justice might decline to use it because of the clouds of doubt created by the unresolved constitutional issues and the majority's brief words on the subject of independence in this case. An amended section 10, aimed at providing instant assistance for temporary surges and overflows of work, will either not be used when it is needed, or it will be impractical in the face of lengthy relitigation of the constitutional objections through multiple levels of court.

[141] For the reasons I expressed in *Steel v. Canada (Attorney General)*, 2011 FCA 153 (dealing with the fundamental matter of appeal routes under a particular legislative regime), there are situations where, even though it is strictly speaking not necessary to do so, fundamental matters should be clarified once and for all, and quickly. In my view, this is one such situation: a

fundamental matter – who may hear cases in the Federal Court – is before us, the parties have argued it fully, and we should decide it completely.

(1) Deputy judges and subsection 99(2) of the *Constitution Act, 1867*

[142] At the outset, I note that subsection 99(2) of the *Constitution Act, 1867* provides that "a [j]udge of a Superior Court…shall cease to hold office upon attaining the age of seventy-five years." The words in subsection 99(2) are express, precise and clear: at age 75, these judges "cease to hold office."

[143] Above, I have already found that under the *Federal Courts Act*, deputy judges do not "hold office." Since deputy judges do not "hold office," subsection 99(2), on its express, precise and clear wording, does not apply to them.

[144] Assuming I am incorrect on this, I would still hold that subsection 99(2) of the *Constitution Act, 1867* does not apply to deputy judges.

[145] The Federal Courts were established under the authority of section 101 of the *Constitution Act, 1867*. Section 101 provides that the federal Parliament "may, notwithstanding anything in this Act," provide for the "[e]stablishment of any additional Courts for the better [a]dministration of the [l]aws of Canada." This authority sits alongside the provincial authority under subsection 92(14) and section 129 of the *Constitution Act, 1867*. Section 101 is grouped with sections 96-100 under

the heading "VII-Judicature." Under section 96, the Governor General has the power to appoint the judges of the "Superior, District and County Courts" in the provinces.

[146] The words "notwithstanding anything in this Act" in section 101 oust all other sections in the *Constitution Act, 1867*, including the retirement provision in subsection 99(2). They are unequivocal. They mean exactly what they say.

[147] In this regard, as the Chief Justice of the Federal Court noted (at paragraph 32 of his reasons), we are bound by the Privy Council's holding in *Ontario (Attorney General) v. Canada (Attorney General)*, *supra* at paragraph 19. The Privy Council held that the words "notwithstanding anything in this Act" in section 101 "cannot be ignored" and that Parliament, acting under section 101 has "a plenary authority to legislate in regard to appellate jurisdiction."

[148] It is true that explanations can be fashioned to suggest that those words were directed to oust only certain provisions of the *Constitution Act, 1867*, such as subsection 92(14) and section 129: see, for example, W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar. Rev. 1139. Professor Lederman suggests that "notwithstanding anything in this Act" means "notwithstanding anything irredeemably inconsistent," such as the grant of provincial legislative power in subsection 92(14) and section 129 of the Act. But if that were so, the words of section 101 would have contained words such as "notwithstanding subsection 92(14) and section 129 of this Act." Instead, section 101 contains the words "notwithstanding anything in this Act" – words that are about as broad, clear and unequivocal as can be imagined.

[149] Suppose that the drafters of the *Constitution Act, 1867* wanted the federal power under section 101 to exist alone without any influence from other sections in the Act, such as subsection 99(2). Could the drafters have made section 101 any clearer? Aren't the words "notwithstanding anything in this Act" clear enough? Should the drafters really have been driven to write something like "notwithstanding anything in this Act, and this means sections 1 to 147 inclusive, and such other sections as may ever be enacted, and we really, truly mean this"?

[150] While the *Constitution Act, 1867* is "a living tree capable of growth and expansion within its natural limits" (*Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at page 136), carefully-worded, explicit text cannot be ignored. The text of subsections 99(2) and 101 are "natural limits" we must respect. They form part of a careful demarcation and compromise between federal and provincial jurisdiction over a common subject-matter, in this case the judiciary, and as such we must proceed with restraint: *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549.

[151] I acknowledge that the Supreme Court has read sections 96-100 as supporting a general principle, resident outside of the explicit text of the *Constitution Act, 1867*, that all judges must enjoy security of tenure, security of remuneration and independence: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. That principle applies to and limits the federal power to establish and constitute courts under section 101. But this is not an example of sections outside of section 101 (such as subsection 99(2)) somehow being imported into section 101 despite the words "notwithstanding anything in this Act." Rather, the *Reference* is an example of how the unwritten principles that are said to underlie and suffuse all of the text of our

Constitution can themselves be the source of constitutional relief in appropriate cases (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217).

[152] In this connection, I would add that there is no general, unwritten constitutional principle that all judges in Canada must retire at age 75. No court interpreting the constitutional requirement of security of tenure has specified that there must be a particular age of retirement. That would be unsustainable. For the first 93 years of Canada's history, section 99 of the *Constitution Act, 1867* specified no retirement age: judges were appointed for life.

[153] At paragraphs 35-54 of his reasons, the Chief Justice of the Federal Court describes a longstanding and consistent understanding at the federal level that section 99 of the *Constitution Act, 1867* does not apply to the courts established under section 101. He demonstrates that since 1875 Parliament has considered it necessary to legislate for the courts it has established under section 101 on the subject-matter covered by subsection 99(2). In other words, since 1875, Parliament did not view the subject matter of subsection 99(2) as applying to its courts.

[154] Further, the Chief Justice notes that, for many years, Parliament's legislation has set a retirement age that was different from that required by section 99 of the *Constitution Act, 1867*:

(a) From 1927 to 1960, section 101 judges, including judges of the Supreme Court of Canada, were required by federal legislation to retire at age 75.

However, at the same time, section 99 of the *Constitution Act, 1867* permitted a judge of the "Superior Court" to serve for life.

(b) In 1970, Parliament established a new Federal Court and set a mandatory retirement age of 70 years. Somewhat later, and to the present day, the mandatory retirement age has been 75 years. However, from 1970 to the present day, subsection 99(2) of the *Constitution Act, 1867* required a judge of a "Superior Court" to retire at age 75.

[155] In this vein, the Chief Justice also points to Parliamentary statements of key political actors at the federal level that show a longstanding and consistent understanding for much of our nation's 144-year history that section 99 of the *Constitution Act, 1867* does not apply to the federal courts created under section 101.

[156] In support of his view of relevance, the Chief Justice of the Federal Court invoked "the presumption against legislative redundancy." This is a canon of construction normally relevant to the interpretation of ordinary statutes, not constitutional text. I also accept the appellant's submission that legislative practice and constitutional understandings in the interpretation of the *Constitution Act, 1867* are not always relevant or deserving of much weight. The Constitution says what it says and practices and understandings must be measured against it.

[157] Nevertheless, I think that the Chief Justice was right in this particular context and in this particular case to consider legislative practice and constitutional understandings and be comforted by them when reaching his conclusions.

[158] In saying this, I restrict myself to contexts such as the case before us. Longstanding and consistent governmental actions, practices and understandings are to be given no overall weight in Charter adjudication – the Supreme Court has told us that there is no room for any sort of presumption of constitutionality under the Charter: *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110. But presumptions of constitutionality – very much rebuttable in a particular case – have been applied in some contexts under the *Constitution Act, 1867*: see, for example, *Reference re the Farm Products Marketing Act*, [1957] S.C.R. 198 at pages 242-43 and 255.

[159] In our constitutional framework, the courts are responsible for making the final decisions on constitutional interpretation. They are duty-bound to strike down legislative and executive actions and practices that are wrong, even where they are longstanding and consistently followed. But we must recognize that these other branches of government do try, as they must, to keep their actions and practices within the limits of the powers given to them under the Constitution. This involves making judgments, implicitly or explicitly, regarding the limits in the Constitution. Other branches of government are interpreters of the Constitution.

[160] Constitutional interpretation is not our exclusive preserve. It would be arrogant for us to ignore others' constitutional interpretations as manifested in their practices and actions. In my view,

there is nothing wrong for us to consider and critically assess, without deference, the constitutional interpretations of other branches of government, as manifested in their practices and actions, especially where those practices and actions are consistent and longstanding. See Note, "Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation" (2007) 120 Harv. L. Rev. 1914; Jason T. Burnette, "Eyes on Their Own Paper: Practical Construction in Constitutional Interpretation," (2004-2005) 39 Ga. L. Rev. 1065.

[161] As the Chief Justice of the Federal Court noted, for nearly a century and a half, everyone, including Parliament, has been acting on the basis that section 99 of the *Constitution Act, 1867* does not apply to the federal courts created under section 101 of the *Constitution Act, 1867*. There is no evidence of any other practice or understanding to the contrary.

[162] Before we say that Parliament has been wrong for most of Canada's history – before we say that we alone are right and all others for most of Canada's history have been wrong – we must be convinced that we are driven to that result by objective, sound constitutional analysis.

[163] In this case, the consistent and longstanding practices and understandings identified by the Chief Justice of the Federal Court gave comfort to him in the conclusion he reached. I similarly so find, and I agree with his conclusion.

[164] For the foregoing reasons, I conclude that the mandatory retirement provision in subsection 99(2) of the *Constitution Act, 1867* does not apply to deputy judges.

(2) Deputy judges and judicial independence under the Constitution of Canada

[165] In this Court, the appellant submitted that deputy judges could not act because they do not enjoy the independence guaranteed under the Constitution.

[166] This issue suffers from an unsatisfactory lack of definition. The grounds listed in the notice of motion that gave rise to this issue in the Federal Court only mention a breach of "the applicant's constitutional rights to a fair and independent judiciary" and the only source for these rights is said to be the "*Constitution Act, 1867 and 1982*." The notices of constitutional question do nothing more than refer to the deficient notice of motion. Finally, in this Court, the notice of appeal states that the Chief Justice of the Federal Court "erred in law in his analysis, interpretation, and application of the unwritten constitutional principles and imperatives of the *Canada Act and Constitution Act, 1982*."

[167] These statements are too vague: they do not identify, with any useful precision, the constitutional issues in the case or the submissions to be advanced. The Crown should have objected. It did not, with the result that the argument before the Federal Court on this issue was diffuse, raising issues of constitutionalism, federalism and the rule of law. The transcript of argument shows a broad, unfocused, moving target that touched on all sorts of concepts, packaged overall by the appellant as a "separation of powers" issue.

[168] During the hearing in this Court, the appellant made some oral submissions on whether deputy judges met the requirement of judicial independence in our Constitution. The Crown responded. The Court invited the parties to file further written submissions on this issue. They did so. We have reviewed and considered those submissions. They are sufficient for us to decide this issue.

[169] The precise nature of the appellant's constitutional objection remains unclear, but it appears that the appellant is focusing on the lack of judicial independence arising from the *per diem* status of deputy judges' remuneration and their selection to hear cases by the Chief Justice. In my view, the appellant's constitutional objection should be dismissed.

[170] Judicial independence has both an individual and an institutional dimension, each of which depends on the presence of objective conditions or guarantees that ensure that the judiciary is free from interference from any other entity: *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857 at paragraph 18. Judges must be both institutionally independent, and independent in the particular case.

[171] Because the goal of judicial independence is maintaining public confidence in the impartiality of the judiciary, judges must not only be independent in fact. They must also be seen to be independent. Thus, in determining whether a judge enjoys the necessary objective conditions or guarantees of judicial independence, we must ask ourselves: "What would an informed person, viewing the matter realistically, and practically – and having thought the matter through –

conclude?": See *R. v. Valente*, [1985] 2 S.C.R. 673 at pages 684 and 689 and *Tobiass*, *supra* at paragraph 70.

[172] The core of judicial independence is freedom from outside interference. Dickson C.J., in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, described this core as follows (at page 69):

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge [even a Chief Justice] – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

[173] It is here that the Appellant sees room for mischief. Deputy judges' remuneration is governed by subsection 10(4) of the *Federal Courts Act*. It provides for a set formula based on the remuneration provided to other judges under the *Judges Act*. Deputy judges are paid for the days that they are assigned to a case. In other words, deputy judges are paid on a *per diem* basis.

[174] The appellant focuses on this and suggests that the *per diem* structure creates an appearance of lack of independence. He notes that a deputy judge is assigned work by the Chief Judge. The more work assigned, the more money the deputy judge will make. From there, the appellant leaps to the conclusion that there will be the appearance, if not the reality, that a deputy judge will want to reach a result that will please the Chief Justice or, put another way, that the Chief Justice will assign cases to those he feels will reach a particular result.

[175] I do not accept this as a plausible scenario. The informed person, viewing the matter realistically and practically and thinking the matter through, would conclude that there is no actual or apparent threat to judicial independence. He or she would understand that:

(a) Chief Justices in all courts are responsible for the assignment of work to judges and, in appeal courts, the setting of panels of judges. Chief Justices always decide who hears a particular case. No one would seriously suggest that this power of Chief Justices somehow affects the independence of judges to decide the cases as they see fit.

(b) Chief Justices do their share of hearing cases, and can even assign themselves to cases. This is a normal, accepted feature of how our judiciary operates and has never been seen as evidence of a lack of impartiality or independence.

(c) Chief Justices are aware that they do not have the right to impose their views on the judges to whom they assign cases, and do not do so.

(d) Chief Justices must use their power under section 10 of the *Federal Courts Act* to appoint deputy judges and assign cases to them only for the purpose for which the power was given. As I have explained above, under section 10 of the *Federal Courts Act* deputy judges act in order to deal with unusual and temporary surges and overflows of work. The assignment of cases to deputy

judges is not a diversion of cases from existing judges for a nefarious purpose, but rather a necessary measure to deal with unusual circumstances.

(e) If deputy judges have any incentive to please Chief Justices, it is to discharge their responsibilities as well as the regular complement of Federal Court judges do. It is a leap in reasoning to conclude that deputy judges who have conducted themselves impeccably over many years and whose record warrants selection as a deputy judge would suddenly act improperly and decide a case other than on their own independent, good faith view of the merits.

[176] In assessing the appellant's objection based on lack of independence, we must remember that there is a presumption that judges will carry out their duties properly, with integrity, and will not allow themselves to be manipulated or influenced by their Chief Justice in a particular case: *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267, Abella J.; *Wewaykum Indian Band v. Canada*, 2003 SCC 445, [2003] 2 S.C.R. 259, McLachlin C.J.; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at paragraph 32, L'Heureux-Dubé J. and McLachlin J. (as she then was), and at paragraphs 116-17, Major J. In my view, that presumption has not been rebutted in this case.

[177] The appellant also cites *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405, for the proposition that all *per diem* salary arrangements for judges violate judicial independence and are invalid. *Mackin* says no such thing. In *Mackin*, the Supreme Court did not hold that all *per diem* payment schemes are unconstitutional.

Rather, the particular scheme in *Mackin* was unconstitutional because the New Brunswick government had failed to refer the issue of judges' remuneration to an independent, effective and objective body.

[178] It is true that a judicial appointment by the executive for a limited term of years, renewable by the executive, can create an apprehension that the judge will cater to the desires of the executive, vitiating independence: *Leblanc v. The Queen*, 2011 CMAC 2. But that is not the situation here. As the Chief Justice of the Federal Court explains (at paragraph 112 of his reasons), as a matter of practice under section 10 of the *Federal Courts Act*, "[t]he executive plays no role in the [C]hief [J]ustice's decision to request that a specific eligible person act as a deputy judge." Once the executive sets up the number of deputy judge positions, the only discretion is exercised by the Chief Justice: the Chief Justice, without executive involvement, develops a roster of deputy judges and assigns cases, as he does in all cases in the Court, to those who are available and appropriate. The remuneration is set by a non-discretionary formula specified in subsection 10(4) of the *Federal Courts Act*.

[179] Nothing in these reasons should be taken to preclude a litigant from challenging, on good evidence, the actual or apparent independence of a particular deputy judge assigned to hear and determine a particular case, the propriety of a particular deputy judge's appointment and selection to hear a particular case (including whether the power to appoint a deputy judge was used contrary to the purpose of section 10 of the *Federal Courts Act*), or the jurisdiction or capacity of a particular deputy judge to hear and determine a particular case.

[180] Therefore, I dismiss the appellant's objection based on lack of independence.

C. Other portions of my colleagues' reasons

[181] In my colleagues' well-written, carefully reasoned decision, they set out the background and history of this case. They also conclude that the appellant had the right to appeal the order dismissing his motion and that the standard of review to be applied in this appeal is correctness. I agree with my colleagues' conclusions and reasons on these matters. In addition, had I agreed with my colleagues in the result of this appeal, I would have agreed with their proposed costs award.

D. Proposed disposition

[182] For the foregoing reasons, I would dismiss the appeal. In light of the circumstances that prompted the Federal Court to order costs in favour of the appellant despite his lack of success in that Court, and in light of the appellant's further lack of success in this Court, I would order that no costs be awarded in this Court.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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