Date: 20100126

Docket: IMM-1086-09

Citation: 2010 FC 89

Ottawa, Ontario, January 26, 2010

PRESENT: THE CHIEF JUSTICE

BETWEEN:

LUIS ALBERTO FELIPA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The core issue in this proceeding is whether a person who is beyond 75 years of age can act as a deputy judge of the Federal Court.

[2] This issue presents two principal questions:

a. Is the Federal Court a superior court within the meaning of s. 99(2) of the *Constitution Act, 1867*?

b. Does s. 8(2) of the *Federal Courts Act* preclude a person over 75 years of age from acting as a deputy judge of the Federal Court?

[3] Both questions raise similar issues of statutory interpretation. However, because the first question affects a constitutional provision and the other an enactment of Parliament, it is preferable that each be addressed separately.

Procedural background

[4] On August 16, 2009, the applicant requested the adjournment of the hearing of this application for judicial review, then scheduled for Tuesday, August 18, 2009, on the ground that the presiding judge, a deputy judge older than 75 years of age, "…has no jurisdiction, and is no longer vested, as a (Superior) Court Justice, either under s. 96, or s. 101 of the *Constitution Act, 1867* and has no authority to preside pursuant to either the *Federal Court* (sic) *Act* or the *Judges Act*."

[5] On August 18, 2009, after receiving oral submissions from both parties, the hearing was adjourned to a date to be fixed by the Office of the Judicial Administrator.

[6] On August 19, 2009, the hearing was rescheduled for Wednesday, September 30, 2009. It was further ordered that any preliminary motion challenging the jurisdiction of a deputy judge, over the age of 75, to hear and determine these proceedings should be filed no later than August 31, 2009. Contrary to the Court's usual practice, a deputy judge over 75 years of age was identified in the scheduling order as the presiding judge to provide a factual basis for any jurisdictional challenge.

[7] The applicant asserted his challenge, the parties filed their respective motion materials and a notice of constitutional question was served and filed in accordance with s. 57 of the *Federal Courts Act*. The hearing concerning the applicant's motion was set for September 23-24, 2009, and was completed by supplementary submissions, requested by the Court, on October 28, 2009.

[8] The deputy judge assigned to this proceeding served as a judge of the Superior Court for the province of Quebec until his 75th birthday, at which time he ceased to hold office.

[9] When the applicant filed his contestation, several other judges were acting from time to time as deputy judges. Some were named after holding office as Federal Court judges. Three were named after serving as judges for the Superior Court of Quebec. Each deputy judge was over 75 with the exception of one who had chosen early retirement from the Federal Court.

[10] The Chief Justice of the Federal Court requested the deputy judges, each of whom had held office as a judge of a superior court in Canada, to act as a judge of the Federal Court, pursuant to s. 10(1.1) of the *Federal Courts Act* and the corresponding order in council, P.C. 2003-1779, dated November 6, 2003.[1]

[11] I will now turn to the first of the two principal questions to be considered.

[1] P.C. 2003-1779. For the text of the order in council, see Annex 1.

Does the mandatory age of retirement of 75 years in s. 99(2) of the *Constitution Act, 1867* apply to deputy judges of the Federal Court?

[12] The judicature provisions are found in ss. 96 through 101 under Part VII of the *Constitution Act, 1867* entitled "Judicature".[2] These sections delineate the jurisdiction of Parliament in relation to the judicature of Canada. The legislative authority of the provincial legislatures is set out in ss. 92(14) and 129. The legislative authority over the establishment, maintenance and organization of provincial courts, superior or otherwise, was given to the provincial legislatures by ss. 92(14) of the *Constitution Act, 1867*. Section 129 of the *Constitution Act, 1867* continued all courts in existence in the provinces subject only to their being abolished by the authorized legislative authority.

[13] Four of the six judicature provisions, ss. 96, 99, 100 and 101, are of particular interest to this proceeding.

[14] Section 96 assigns the power to appoint "Judges of the Superior, District and County Courts in each Province" (emphasis added) to the Governor General. It is common ground that this provision, as well as ss. 97 and 98, does not apply to the Federal Court or any other court established pursuant to s. 101.

[2] For the text of the judicature provisions and ss. 92(14) and 129 see Annex 2.

[15] Section 99(1) governs the removal from office of judges of superior courts and s. 99(2) states that a judge shall cease to hold office upon attaining the age of 75 years.

[16] Unlike s. 96 which makes reference to "the Judges of the Superior, District, and County Courts in each Province", the wording of ss. 99(1) and (2) is limited to "the Judges of the Superior Courts" and "a judge of a Superior Court" respectively. Each of ss. 96 through 98 refers to one or more of the provincial courts in existence at the time of Confederation.

[17] Section 100 provides that the compensation of judges of the "Superior, District, and County Courts…and of the Admiralty Courts" shall be fixed and provided for by Parliament. Its application is not explicitly limited by the words "in each Province".

[18] For the first thirty years of the existence of s. 101 courts, the salary of their judges was fixed in legislation separate and distinct from that setting the salary of judges of the provincial superior courts.[3] From 1906, Parliament set the salary of all superior court judges under "*An Act respecting Judges of Dominion and Provincial Courts*", commonly referred to as the *Judges Act*.[4] This is an indication, it seems to me, that Parliament was exercising its obligation to determine the salaries of "dominion" judges under s. 101 and "provincial" judges under s. 100 and eventually chose to do so in the same legislative enactment.

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[3] *An Act respecting the Governor General, the Civil List, and the Salaries of certain Public Functionaries*, S.C. 1868, c. 33, see Schedule; and, *An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, S.C. 1875, c. 11, s. 6. [*Supreme Court and Court of Exchequer Act*].

[4] *Judges Act*, R.S.C. 1906, c. 138 included all judges, whether dominion or provincial. Section 4 addresses the salary of judges of the Exchequer Court.

[19] The exceptional reference to Admiralty Courts in s. 100 reflects that, in 1867, the colonial governments, and subsequently Parliament, compensated the judges of the imperially constituted and staffed vice-admiralty courts.[5]

[20] I therefore disagree with the applicant's assertion that s. 100 squarely applies to s. 101 courts. His reliance on the words "Admiralty Courts" is virtually a concession that otherwise the Exchequer Court would not have fallen within the application of s. 100. The admiralty courts of 1867 were neither federal nor provincial courts and in any event they were abolished in 1891 by the coming into force of s. 17 of the imperial *Colonial Courts of Admiralty Act, 1890.*

[21] Finally, s. 101, a judicature provision distinct from the others, gives the Parliament of Canada, notwithstanding anything in the *Constitution Act, 1867*, the power to establish a general court of appeal for Canada and any additional courts for the better administration of the laws of Canada.

[22] The essence of the applicant's argument concerning the judicature provisions is that the absence of the qualifying words "in each province" renders s. 99 applicable to all "superior courts", including any established pursuant to s. 101. I disagree.

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[5] *Colonial Courts of Admiralty Act 1890* (U.K.), 53-54 Vict., c.27 [*Colonial Courts of Admiralty Act*]. Parliament also paid the salaries of the judges of the Maritime Court of Ontario which was established in 1877 pursuant to s. 101 of the *Constitution Act, 1867*. See the *Maritime Court Act*, S.C. 1877 c. 21 (assented to 28 April 1877). For a review of the early history of admiralty matters in Canada see: Arthur J. Stone, "Canada's Admiralty Court in the Twentieth Century" (2002) 47 McGill L.J. 511 at 522 ["Canada's Admiralty Court"]. See also: *The Woron*, [1927] A.C. 906 at pp. 909-913 (J.C.P.C.) *per* Merrivale, L.J.

[23] It is now a clear rule of statutory interpretation that "…the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 at paragraph 21.

[24] I accept the applicant's submission that the Constitution is "… a living tree capable of growth and expansion within its natural limits" and should be interpreted accordingly: *Edwards v. Canada (Attorney General),* [1930] A.C. 124 at page 136.

[25] The living tree doctrine has "its natural limits". This was noted by the Supreme Court of Canada in *Reference re Provincial Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158 at paragraph 42:

> The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed […]. It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the Charter. The tree is rooted in past and present institutions, but must be capable of growth to meet the future.

[26] Whether the Federal Court is a superior court within the meaning of s. 99(2) is not a determination to be made in a vacuum. While the Constitution remains flexible and is capable of growth, it is rooted in the past and in the framer's intent. I now turn to the historical background of the judicature provisions.

[27] In 1867, the only courts in Canada referred to as superior courts were the provincial superior courts. Because of their historic links to the high courts in England, each provincial superior court was viewed as a senior court within its jurisdiction. Sections 96 to 100, in the words of the respondent's memorandum, "articulate a number of specific rules in respect of certain courts of original jurisdiction that were the successors of the original king's justice of the central courts of England that were in existence at the time of confederation".

[28] Indeed, I expect that the words "superior courts", in the contemporary legal parlance of Canada's early history, referred exclusively to the provincial superior courts, at least until 1946 when Parliament included the Supreme Court of Canada and the Exchequer Court in the legislative definition of superior courts.[6] While I do not decide the issue on this point, the expectation I have expressed is based on my review of the extensive documentation made available to me.

[29] When ss. 96 to 100 are read in the historical context of 1867, keeping in mind the legislative intent of the framers, there is a strong indication that they were not intended to apply to any court constituted by Parliament in the exercise of its jurisdiction pursuant to s. 101.

[30] This interpretation is further supported by: (a) the language of "notwithstanding" used in s. 101 of the *Constitution Act, 1867*; (b) the presumption against redundancy in legislative interpretation; and (c) the parliamentary debates introducing a mandatory age of retirement in 1927

[6] *Judges Act*, S.C. 1946, c. 56, s. 2(c) [*Judges Act, 1946*] is the first instance of the Exchequer Court being included within the legislative definition of a superior court. The legislative definition was eventually placed in the *Interpretation Act*, S.C. 1967, c. 7, s. 35. [*Interpretation Act*].

for judges of s. 101 courts and in 1960 for provincial superior courts. I will also review (d) the status and jurisdiction of the Exchequer Court.

a) "Notwithstanding anything in this Act": s. 101 of the *Constitution Act, 1867*

[31] The words "notwithstanding anything in this Act" are clear and unambiguous and are not limited by reference to other sections of the *Constitution Act, 1867*. Thus, when Parliament creates additional courts for the better administration of the laws of Canada, it is not constrained by any section of the *Constitution Act, 1867,* including ss. 92(14), 96 to 100 and 129. The framers intended to give Parliament the power to create a general court of appeal and additional courts as long as the purpose of the additional courts was "the better administration of the laws of Canada".

[32] This conclusion is consistent with the broad interpretation given to s. 101 by the Judicial Committee of the Privy Council in *Ontario (Attorney General)* v. *Canada (Attorney General),* [1947] A.C. 127 at paragraph 19. The Privy Council concluded that Parliament had the authority to establish a final court of appellate review for Canada despite ss. 92(14) and 129 of the *Constitution Act, 1867*:

> ... s. 101 confers a legislative power on the Dominion Parliament which by its terms overrides any power conferred by s. 92 on the provinces or preserved by s. 129. "Notwithstanding anything in this Act" are words in s. 101 which cannot be ignored. They vest in the Dominion a plenary authority to legislate in regard to appellate jurisdiction, which is qualified only by that which lies outside the Act, namely, the sovereign power of the Imperial Parliament. (Emphasis added)

[33] Canadian courts have also given s. 101 a broad interpretation.[7]

[34] The words “notwithstanding anything in this Act” were intended to give Parliament plenary legislative authority in relation to the establishment, maintenance and organization of federal courts. This broad power is limited by the words “for the better administration of the laws of Canada” and the principles of judicial independence but not by s. 99.

b) The presumption against legislative redundancy

[35] The presumption against legislative redundancy also supports the view that s. 101 courts are not “superior courts” within the meaning of s. 99.

[36] Section 99 of the *Constitution Act, 1867*, and no other legislation, provides for the removal and the mandatory retirement of provincial superior court judges. A different situation was created for s. 101 judges. Provisions concerning the removal and age requirements for judges of the federal courts were enacted by Parliament in separate legislation.

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[7] *Tsartlip Indian Band v. Pacific Salmon Foundation*, [1990] 1 F.C. 609, [1989] F.C.J. No. 563 at para. 16 where Justice Muldoon states: “What the provincial superior courts are held to have in terms of the plenitude of inherent and common law jurisdiction as may be conferred under head 14 of section 92 of the *Constitution Act, 1867*, this Court has, in so far as Parliament wills it, for this Court wields its jurisdiction, in the words of section 101 "notwithstanding *anything* in this Act" which of course means notwithstanding anything in section 91, 92, 96 or whatever.” See also, *Nanaimo Community Hotel Ltd. v. Canada (Board of Referees)*, [1945] B.C.J. No. 75, 61 B.C.R. 354 at paras. 65-116. [*Nanaimo*] and see, *James Richardson & Sons Limited* v. *Minister of National Revenue*, [1980] M.J. No. 478 (Q.B.) at para. 28; *R.* v. *Reddick* [1996] C.M.A.J. No. 9 at para.12-14 *per* Strayer C.J.

[37] As early as 1875, in the legislation creating the Supreme Court of Canada and the Exchequer Court of Canada, Parliament provided that the judges of the two new courts "… shall hold their offices during good behaviour, but the Governor General may remove any such Judge or Judges upon the address of the Senate and the House of Commons."[8] This statutory language concerning the removal of judges is virtually identical to what was then s. 99, and since 1960, s. 99(1) of the *Constitution Act, 1867*.

[38] The 1887 amendments which established the Exchequer Court as separate from the Supreme Court, maintained the same provision concerning the removal of its judges.[9] The provision is still in force today in the *Federal Courts Act*.[10]

[39] Provincial judicature legislation, unlike the *Federal Courts Act* and its predecessors, has no provision which mirrors the good behaviour or age requirements in ss. 99(1) and (2) respectively of the *Constitution Act, 1867*. The provincial laws are silent on these issues concerning judges who are members of provincial superior courts.

[40] Parliament's "re-enactment" in 1875 of the substance of s. 99 of the *Constitution Act, 1867* is an early indication that s. 101 courts were not subject to s. 99.

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[8] *Supreme Court and Court of Exchequer Act, supra* note 3, at s. 5.
[9] *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, ss. 3, 4. [*Supreme and Exchequer Courts Act, 1887*].
[10] *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 5.2, 8(1). [*Federal Courts Act*]. For the text of provisions of the *Federal Courts Act* relevant to this proceeding, see Annex 3.

[41] The legislative enactments of Parliament are presumed not to be redundant internally or as amongst other legislative enactments.[11] The repetition of the provisions governing removal and, after 1960, the retirement of Supreme Court, Exchequer Court and now Federal Court judges would be unnecessary given the express language of s. 99 of the *Constitution Act, 1867*.

[42] Those who argue that s. 101 courts are included under s. 99 must explain, it seems to me, this legislative redundancy. They also have to explain Parliament's introduction of a mandatory age of retirement for s. 101 judges without a constitutional amendment, an issue I will now consider.

c) Parliamentary debates and statutory history concerning the mandatory age of retirement for judges of s. 101 courts and provincial superior courts

[43] The debates and legislative history surrounding the age of retirement of judges of the Exchequer Court and the Federal Court of Canada in 1927 and 1970, as well as the debates during the introduction of mandatory retirement at 75 for provincial superior courts in 1960, provide further support for the conclusion that s. 99 does not apply to federal courts established under s. 101 of the *Constitution Act, 1867*.

[44] These historical debates will be addressed in the following paragraphs in chronological order, starting with the debates that revolve around the age of retirement of Exchequer Court judges and concluding with the continuation of that Court as the Federal Court of Canada.

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[11] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: Lexis Nexis, 2008) at pp. 210-13.

[45] In 1867, there was no mandatory age of retirement for provincial superior court judges. They were appointed for life subject to the good behaviour provision in s. 99.

[46] In 1875, upon the creation of the Supreme Court of Canada and the Exchequer Court, the judges of those s. 101 courts were also appointed for life in accordance with the provisions in their enabling legislation.[12]

[47] In 1927, Parliament unilaterally imposed a mandatory retirement age of 75 for the judges of the then existing s. 101 courts, the Supreme Court and the Exchequer Court.[13] The change was made without constitutional amendment; this demonstrates that the parliamentarians of the day did not consider that s. 99 applied to s. 101 judges.

[48] During the parliamentary debate leading to the enactment of a mandatory age of retirement of 75, the Honourable Ernest Lapointe, then Minister of Justice, acknowledged that Parliament could impose a mandatory retirement age only for s. 101 judges. A constitutional amendment would be required to introduce a mandatory age of retirement for provincial superior court judges who had a right to sit for life:

> I am afraid that we could not meet the wishes of my honourable friend unless we asked for an amendment to the British North America Act. We have the right so far as the Supreme Court and the Exchequer Court are concerned because of the provisions of section 101.

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[12] *Supreme Court and Court of Exchequer Act*, *supra* note 3, at s. 5.
[13] *Exchequer Court Act*, S.C. 1927, c. 30, s. 1.

> …
>
> The Supreme Court of Canada and the Exchequer Court of Canada have been created and constituted in virtue of section 101 of the British North American Act, which especially states that notwithstanding anything in the act, notwithstanding section 99 or any other section, parliament had the right, when creating the Supreme court, to state that the tenure of the judges should be a life one or only until a certain age. They did not make such an enactment then, but we have the right to do it now. […] I am afraid we have no jurisdiction to extend it to other courts than the federal courts …
>
> …
>
> We have no right to deal with judges of the superior courts to the extent of restricting their tenure of office, but there is no such provision applicable to county court judges, who have not been considered as members of the superior or high courts.
>
> …
>
> … section 99 prevents us from dealing with the tenure of office of superior court or high court judges.
>
> …
>
> Fortunately we have not the same obstacle to meet as far as our federal courts are concerned …[14]
> (Emphasis added)

Mr. Lapointe's statements are further confirmation of Parliament's view that s. 99 was not applicable to federal courts. A similar view is expressed some thirty years later.

[49] In 1960, the government of the day tabled a proposed address to the United Kingdom Parliament seeking an amendment of s. 99 of the *Constitution Act, 1867* to include a mandatory retirement age of 75 years for judges of the superior, district, and county courts.[15] This recognition

[14] *House of Commons Debates*, (10 March 1927) at 1080-1081 (Hon. Lapointe).

[15] Prior to its amendment in 1960 section 99 of the *Constitution Act, 1867* provided:

that a constitutional amendment was required, almost one century after the tenure of those judges had been secured for life and thirty years after Parliament, on its own, reduced the mandatory age for judges of the Supreme Court and Exchequer Court, is further consistent demonstration that s. 99 was viewed as having no application to courts created under s. 101.

[50] Both the government and the opposition agreed that Parliament had the jurisdiction to limit the tenure of s. 101 courts and the provincial district and county courts. One of the principal concerns raised by the opposition in the debates was that the inclusion of district and county courts in s. 99(2) would remove Parliament's power to legislate regarding the tenure of judges of these courts absent a further constitutional amendment. A similar concern was raised in the Senate. In the end, the reference to county and district court judges was deleted from the proposed joint address. This explains why s. 99(2) of the *Constitution Act, 1867* refers only to judges of superior courts.

[51] The 1960 debates, like those in 1927, also support the conclusion that s. 101 courts, at that time the Exchequer Court and the Supreme Court of Canada, were not intended to be subject to the tenure provisions in s. 99(1) or (2).[16]

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.	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.

[16] *House of Commons Debates*, (14 June 1960) at 4884-4936 and (29 July 1960) at 7193-7208 and *Senate Debates*, (21 June 1960) at 834-839.

[52] In 1970, the new *Federal Court Act* provided that the judges of the Federal Court of Canada would cease to hold office upon attaining the reduced age of 70 years, five years earlier than the retirement age legislated in 1927.[17] Again, Parliament would not have done so without a constitutional amendment if it thought that s. 99(2) applied to that "superior" court.

[53] While discussing the proposed reduction of the age of retirement from 75 years to 70 years for judges of the new Federal Court of Canada, the Right Honourable John Turner, then Minister of Justice, stated:

> This change in the law can be made without any constitutional amendment since we are not dealing here with judges who were appointed pursuant to section 96 of the *British North American Act*.[18]

[54] This legislative history is further evidence that s. 99(2) is not applicable to s. 101 courts.

d) The status and jurisdiction of the Exchequer Court: a court with original and supervisory jurisdiction

[55] The applicant submitted in oral argument that the Exchequer Court was always an inferior court of record and never a superior court. In his view, the legislative and statutory history concerning the Exchequer Court, found in the debates of 1927 and 1960, is irrelevant because Parliament would not have considered it necessary to question whether an inferior court fell within the meaning of s. 99. I disagree.

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[17] *Federal Court Act*, S.C. 1970, c. 1, s. 8(2) [*Federal Court Act*].
[18] *House of Commons Debates*, (25 March 1970) at 5474 (Hon. John Turner).

[56] In 1875, Parliament established the Supreme Court of Canada and the Exchequer Court as courts of record.[19] The Supreme Court today is still legislatively referred to as a court of record.[20]

[57] A court of record is one "that is required to keep a record of its proceedings, and that may fine or imprison. Such record imports verity and cannot be collaterally impeached."[21] A court of record may be a superior court or an inferior court. [22]

[58] Both parties agree that a superior court is one which has supervisory jurisdiction over lower courts and other inferior tribunals.

[59] A superior court also has plenary jurisdiction to determine any matter arising out of its original jurisdiction and is subject only to appellate review. It is not subject to the writs of other superior courts.[23]

[60] In *Re MacDonald Estate*, [1930] 2 D.L.R. 177 at page 181, Justice Fullerton of the Manitoba Court of Appeal cited the following definition of a superior court from 15 *Corpus Juris Secundum* at page 721:

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[19] *Supreme Court and Court of Exchequer Act*, *supra* note 3, at s. 2.
[20] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 3.
[21] "Court of record," *Black's Law Dictionary*, 5th ed. (St Paul: West Publishing Company, 1979) at p. 319.
[22] Earl of Halsbury, *The Laws of England* 3rd ed., vol. 9 (London: Butterworth & Co. Ltd., 1954) at pp. 346-349. [*Laws of England*].
[23] *Mayor and C., of London v. Cox* (1867), L.R. 2 H.L. 239 at p. 262 and *Lees v. Canada*, [1974] 1 F.C. 605 at para. 5. [*Lees*].

> A superior court is a court of controlling authority over some other courts and with certain original jurisdiction of its own. Inferior courts are those which are subordinate to other courts or which are of a very limited jurisdiction.

[61] The fundamental characteristics of a superior court identified in *Re MacDonald* were endorsed by the Supreme Court of Canada in *Puerto Rico (Commonwealth) v. Hernandez*, [1973] S.C.J. No. 141. After his contextual analysis of the status of the Federal Court, which "shall continue to be a superior court of record", Justice Pigeon stated:

> … it appears to me that the Federal Court is a "superior court" in the sense of a court having supervisory jurisdiction. This is a meaning often used, as appears from the numerous authorities reviewed in *Re MacDonald*, [1930] 2 D.L.R. 177, and it is significant that such jurisdiction is conferred by the act.

[62] In *Puerto Rico,* Justice Pigeon recognized the statutory nature of both the Federal Court and the Exchequer Court. He noted that the status of a court as a superior court does not necessarily alter the jurisdiction of the court. A distinction is drawn in his reasoning between provincial "superior courts" of inherent jurisdiction and a federal statutory superior court such as the Exchequer or Federal Court. He does not conclude that the Exchequer Court was not a superior court but finds that it was not a superior court "…within the same meaning of that expression as applied to superior courts of the provinces, that is courts having jurisdiction over all cases not excluded from their authority…".[24]

[63] The Exchequer Court's jurisdiction from its first days is consistent with its characterization as a superior court.

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[24] *Puerto Rico (Commonwealth) v. Hernandez*, [1973] S.C.J. No. 141, [1975] 1 S.C.R. 228 at p. 232. [*Puerto Rico*].

[64] In 1875, s. 58 of the legislation creating the Exchequer Court gave it concurrent original jurisdiction in "… any matter which might in England be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown."[25] In 1875, the Court of Exchequer in England was a high court.[26]

[65] According to s. 59, the Exchequer Court had concurrent jurisdiction over "…all other suits of a civil nature at common law or equity, in which the Crown in the interest of the Dominion of Canada is plaintiff or petitioner."[27] This jurisdiction was unlimited by geography or quantum and was subject only to appeal to the Supreme Court of Canada.

[66] From 1887 through 1890, the Exchequer Court's jurisdiction was expanded through amendments to a number of federal acts including, the *Patent Act*,[28] the *Copyright Act*,[29] the *Trade-mark and Design Act*,[30] the *Petition of Right Act*,[31] the *Expropriation Act*[32] and the *Customs Act*[33].

[67] In 1890, the imperial Parliament passed legislation enabling Canada to create its own Colonial Court of Admiralty whose jurisdiction shall:

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[25] *Supreme Court and Court of Exchequer Act*, *supra* note 3, s. 58. See also *An Act to make further provision in regard to the Supreme Court, and the Exchequer Court, of Canada*, S.C. 1876, c. 26, s. 18.
[26] *Supreme Court of Judicature Act, 1873* (U.K.), 36-37 Vict., c. 66, ss. 3 & 4 and *Nanaimo*, *supra* note 7 at paras. 65-116.
[27] *Supreme Court and Court of Exchequer Act*, *supra* note 3, at s. 59.
[28] *An Act to amend the Patent Act*, S.C. 1890, c. 13, s. 1.
[29] *An Act to amend the Copyright Act*, S.C. 1890, c. 12, s. 1.
[30] *An Act to amend the Trade Mark and Design Act*, S.C. 1890, c. 14, ss. 2 & 3.
[31] *Petition of Right Act*, S.C. 1876, c. 27, s. 4.
[32] *Expropriation Act*, S.C. 1889, c. 13, s. 21.
[33] *Customs Act*, S.C. 1888, c. 14, s. 2.

> 2(2) … be … as the Admiralty jurisdiction of the High Court in England … in like manner and to as full an extent as the High Court in England …[34]

[68] The imperial legislation also enacted that the Canadian legislature could:

> 3(a) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty …
>
> (b) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction …[35]

[69] Shortly thereafter, pursuant to the imperial legislation, the Canadian parliament passed the *Admiralty Act, 1891* and constituted the Exchequer Court as a Colonial Court of Admiralty. Section 3 provided:

> … the Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction , powers and authorities conferred by the said Act (*The Colonial Courts of Admiralty Act* [U.K.] 1890), and by this Act.[36](Emphasis added)

[70] The establishment of the Exchequer Court as a Colonial Court of Admiralty, exercising all of the powers and jurisdiction of the High Court in England on its admiralty side, is further support that the Exchequer Court was a superior court with civil jurisdiction and not an "inferior or subordinate court" as referred to in s. 3(b) of the imperial legislation. Moreover, the *Admiralty Act*

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[34] *Colonial Courts of Admiralty Act*, *supra* note 5 and Stone, "Canada's Admiralty Court", *supra* note 5, at 525-558.
[35] *Ibid.* See, Ian Bushnell, *The Federal Court of Canada: A History, 1875-1992*. (Toronto: University of Toronto Press, 1997) at p. 75 where he notes the distinction between unlimited civil jurisdiction and original unlimited jurisdiction. [*Federal Court of Canada*].
[36] *Admiralty Act*, S.C. 1891, c. 29.

made provision for the appointment of "local" and "surrogate" judges whose decisions and orders were subject to appellate review by the judges of the Exchequer Court.[37]

[71] Although the Exchequer Court was primarily a trial court, from time to time it was granted supervisory jurisdiction over federal boards or tribunals. This jurisdiction was exceptional since as a general rule, supervisory power over federal boards was exercised by the provincial superior courts.[38]

[72] However, from its earliest days, the Exchequer Court exercised supervisory jurisdiction. As early as 1890, the Exchequer Court had the power to issue a writ of *scire facias* in patent related matters.[39] It also had jurisdiction to entertain applications for *mandamus*.[40]

[73] In 1933, the Exchequer Court was given exclusive jurisdiction over prerogative remedies affecting military personnel serving overseas.[41]

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[37] *Ibid*, section 14 and Halsbury, *Laws of England*, *supra* note 22, at pp. 402-407.
[38] *Three Rivers Boatman Ltd. c. Canada (Conseil des Relations Ouvrières)*, [1969] S.C.R. 607 at p. 618 and *Puerto Rico*, *supra* note 24, at p. 232.
[39] *An Act to amend the Patent Act*, S.C. 1890, c. 13, s. 1 gave the Exchequer Court the jurisdiction to issue the writ of *scire facias* which had been granted to courts with jurisdiction under the *Patent Act* by *An Act respecting Patents of Invention*, S.C. 1872, c. 26, s. 29. For s*cire facias* as a prerogative writ, see, S.A. de Smith, *Judicial Review of Administrative Action*, 2nd ed. (London: Stevens & Sons Ltd., 1968) at pp. 368-369, Clive Lewis, Q.C., *Judicial Remedies in Public Law*, 4th ed. (London: Street & Maxwell, 2009) at p. 67, and Jean-François Jobin, *L'article 96 de la Loi constitutionnelle de 1867 et les organismes inférieurs d'appel* (Cowansville: Les Éditions Yvon Blais Inc., 1964) at p. 93 and note 332.
[40] *Continental Oil Co. v. Canada (Commissioner of Patents)*, [1934] Ex. C.R. 118 and *Gamache v. Jones*, [1967] 1 Ex. C.R. 308.
[41] *An Act to amend the Exchequer Court Act*, S.C. 1933, c. 13, s. 1, which is the precursor to s. 18(2) in today's *Federal Courts Act*, *supra* note 10.

[74] In 1959, Parliament gave the Exchequer Court exclusive jurisdiction to grant prerogative writs in relation to any order or finding of the National Energy Board:[42]

19. (1) Except as provided in this Act, every decision or order of the Board is final and conclusive.	19. (1) Sauf ce que prévoit la présente loi, chaque décision ou ordonnance de l'Office est définitive et péremptoire.
(2) The Exchequer Court of Canada has exclusive original jurisdiction to hear and determine every application for a writ of *certiorari*, prohibition or *mandamus* or for an injunction in relation to any decision or order of the Board or any proceedings before the Board.	(2) La Cour de l'Échiquier du Canada a une exclusive juridiction de première instance pour entendre et décider toute requête en vue d'un bref de *certiorari*, de prohibition ou de *mandamus* ou en vue d'un injonction concernant toute décision ou ordonnance de l'Office ou toutes procédures devant celui-ci.
(3) An decision or order of the Board is not subject to review or to be restrained, removed or set aside by *certiorari*, prohibition, *mandamus* or injunction or any other process or proceeding in the Exchequer Court on the ground	(3) Une décision ou ordonnance de l'Office n'est soumise à aucune revision ni n'est susceptible d'être empêchée, abolie ou écartée par *certiorari*, prohibition, *mandamus* ou injonction ou quelque autre pièce légale ou procédure devant la Cour de l'Échiquier pour le motif
(a) that a question of law or fact was erroneously decided by the Board; or	(a) que l'Office a décidé erronément une question de droit ou de fait; ou
(b) that the Board had no jurisdiction to entertain the proceedings in which the decision or order was made or to make the decision or order.	(b) que l'Office n'était pas compétent pour accueillir les procédures au cours desquelles la décision ou ordonnance a été établie ou pour rendre la décision ou l'ordonnance.

[75] Subsequent legislation granted the Exchequer Court exclusive, if limited, supervisory jurisdiction over other federal boards or tribunals.[43]

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[42] *National Energy Board Act*, S.C. 1959, c. 46, s. 19(2).
[43] *Anti-dumping Act*, S.C. 1968, c. 10, s. 30(2); *Broadcasting Act*, S.C. 1968, c. 25, s. 26(3); *Northern Inland Waters Act*, S.C. 1970, c. 66, s. 21(3).

[76] From early in its history, the Exchequer Court also exercised a limited appellate jurisdiction.[44]

[77] Another important indicator is that the decisions of the Exchequer Court of Canada were final. If the Court exceeded its jurisdiction, the only recourse available to a party was to seek appellate review. This is one of the hallmarks of a superior court.[45]

[78] By 1907, at least two decisions of senior courts concluded that the Exchequer Court was not subject to the supervisory jurisdiction of the provincial superior courts and, by implication at least, was not an inferior tribunal.[46]

[79] The Exchequer Court also had the jurisdiction to punish contempt committed not in the face of the court, a power reserved to superior courts.[47]

[80] The conclusion that the Exchequer Court was, in fact, a superior court, is supported by its inclusion in the definition of "superior court" in the 1946 *Judges Act* and later in the *Interpretation Act*.[48] While this is not conclusive, it indicates that Parliament intended to establish a superior court in the federal domain when it created the Exchequer Court.

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[44] See for example: *An Act respecting the Official Arbitrators*, S.C. 1879, c. 8, s. 2; *Admiralty Act*, *supra* note 36, s.14; *Income War Tax Act, 1917*, 7-8 S.C. 1917, c. 28 ss. 17 & 18; *Estate Tax Act*, S.C. 1958, c. 29, s. 24.
[45] *Lees*, *supra* note 23, at para. 5.
[46] *Canada v. Bank of Nova Scotia* (1885), 11 S.C.R. 1 *per* Taschereau J. and *Hodge v. Béique et al.* 33 Que. S.C. 90 (Court of Review) *per* Dunlop J. at p. 94.
[47] *Canadian Broadcasting Corp. v. Quebec (Police Commission),* [1979] 2 S.C.R. 618.
[48] *Judges Act,1946*, *supra* note 6, at s. 2(c) and *Interpretation Act*, *supra* note 6, at s. 35.

[81] The applicant had a final argument in the event he failed to persuade me that the Federal Court of Canada, created in 1971, came within the ambit of the superior courts envisaged in s. 99(2).

[82] His submission is based on the U.K. *Canada Act 1982*[49] which re-enacted all of Canada's previous constitutional provisions, including s. 99(2). This occurred some eleven years after the creation of the Federal Court of Canada as a s. 101 superior court of record.

[83] As I understand the applicant's argument, the legislators in 1982 would have known the Federal Court was a superior court. Also, in his view, the words "Superior Court" in s. 99(2) encompassed all Canadian superior courts. Because the legislators re-enacted s. 99(2) without an amendment excluding the Federal Court from its application, they must have intended to include that Court within the meaning of a superior court in s. 99(2). The applicant relies on the living tree doctrine and the many constitutional decisions supporting that rule of statutory interpretation.

[84] The applicant presented no legislative history from Canada or the United Kingdom to support his thesis.

[85] Quite simply, the interpretation he brings to the *Canada Act 1982* is beyond "the natural limits" of the living tree doctrine and must be rejected. As noted by the Supreme Court of

[49] *Canada Act 1982* (U.K.), 1982, c. 11.

Canada in *R. v. Blais*, 2003 SCC 44 at paragraph 40, "…this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision".

[86] On the basis of the foregoing analysis, I have drawn the following conclusions.

[87] The Exchequer Court was a superior court of record throughout its history. I base this conclusion on its historical antecedents, its jurisdiction and on the jurisprudence. It had the essential characteristics of a superior court but was one which was separate and distinct from the provincial superior courts. In 1965, in an *obiter* comment, the Supreme Court of Canada expressed the same view: "The Exchequer Court is a superior court of record…"[50] The applicant's assertion that the Exchequer Court was an inferior court of record is wrong.

[88] The applicant's argument that the legislative history of 1927, 1960 and 1970 is irrelevant must also fail. Parliamentarians understood the Exchequer Court to be a superior court, created under s. 101 of the *Constitution Act, 1867* and not affected by s. 99. It was their view that the mandatory retirement age for judges of s. 101 courts, and in particular the Exchequer Court, could be imposed and subsequently changed without regard to s. 99 and without the necessity of a constitutional amendment. This legislative history cannot be ignored, as the applicant suggests, on the grounds that the Exchequer Court was an inferior court. Again, the applicant's position is wrong.

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[50] *International Minerals and Chemical Corp. v. Potash Co. of America*, [1965] S.C.R. 3 at p. 9.

[89] Indeed, the legislative history is persuasive. I find that parliamentarians were correct in stating that s. 99 had no application to courts established under s. 101 and, for the purposes of this case, no application to the Exchequer Court. Their statements and their legislative enactments on the basis that s. 101 courts were not subject to s. 99 were justified.

[90] In 1970, Parliament enacted legislation to continue the Exchequer Court as the Federal Court of Canada. Section 3 of the legislation stated that the Federal Court of Canada "… shall continue to be a superior court of record …".[51] The effect of this provision, in my view, was to continue the superior court status of the Exchequer Court as the Federal Court of Canada. In 2003, similar legislative language was used continuing the status of the Trial Division of the Federal Court of Canada as the Federal Court.

[91] Accordingly, my conclusion that the Exchequer Court was not governed by s. 99 of the *Constitution Act, 1867* is equally applicable to the Federal Court of Canada and to the Federal Court. I answer the first of the two principal questions raised in this motion as follows: the Federal Court is not a superior court within the meaning of s. 99(2) of the *Constitution Act, 1867*.

[92] My conclusion, of course, is in conflict with the one drawn by Deputy Judge Campbell Grant in *Addy* v. *Canada*, [1985] F.C.J. No. 159, where he concluded that the tenure of judges of the Federal Court of Canada was protected by s. 99:

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[51] *Federal Court Act*, *supra* note 17.

> Subsection 99(1) which provides for the tenure of judges of the superior courts is general. It applies generically to all superior court judges no matter whether the judge has been appointed a superior court judge of a province or to a superior court created under s. 101.

He also held that a mandatory age of retirement of 70 for judges of the Federal Court of Canada offended s. 15 of the *Canadian Charter of Rights and Freedoms*. The motion before me did not lend itself to the consideration of this *Charter* issue.

[93] The decision in *Addy* does not explain how Parliament could have enacted mandatory age limits for the Supreme Court and Exchequer Court in 1927, with no constitutional amendment, if s. 99 were applicable to those courts or their judges.

[94] In addition, the decision in *Addy* discloses no information that Deputy Judge Grant was made aware of the legislative debates in 1927, 1960 and 1970 concerning s. 99. He does not explain his conclusion that s. 99(1) applied to s. 101 courts in the context of the contrary view held by successive governments and parliaments over some five decades. Nor is it clear that he addressed the legislative redundancy between s. 9 of the *Exchequer Court Act* or s. 8 of the *Federal Court Act* which repeated for the judges of those courts substantially the same language as in s. 99(1).

[95] Also, Deputy Judge Grant issued his reasons prior to the decision in *R.* v. *Valente*, [1985] 2 S.C.R. 673, where Justice Le Dain distinguished between judges of the superior courts, county court judges and judges of the federally established courts concerning judicial independence and security of tenure:

> There are, of course, a variety of ways in which the essentials of security of tenure may be provided by constitutional or legislative provision. As I have indicated, superior court judges in Canada enjoy what is generally regarded as the highest degree of security of tenure in the constitutional guarantee of s. 99 of the *Constitution Act, 1867* that they shall hold office during good behaviour until the age of seventy-five, subject to removal by the Governor General on address of the Senate and House of Commons. The judges of this Court, the Federal Court of Canada and the Tax Court of Canada also enjoy, under their respective governing statutes, a tenure during good behaviour until a specified age of retirement, subject to removal only on address of the Senate and House of Commons.
> (Emphasis added)

[96] Deputy Judge Grant's decision appears to have been motivated, in part, by his concern for the judicial independence of s. 101 judges. That concern, whatever its justification in 1985, has today, in the words of the respondent's memorandum:

> … been substantially alleviated by the expansive articulation of the scope of constitutional protection to all courts in *Provincial Courts Judges (No. 1)* and subsequent cases such as *Ell v. Alberta*
>
> …
>
> From the viewpoint of constitutional protections for judicial independence, it is no longer necessary to advocate an interpretation that would stretch the scope of ss. 96 to 100 beyond its natural boundaries.
> (Footnotes omitted.)

I agree with the respondent's submissions.

[97] In 1985, the jurisprudence on the independence of the judiciary and the subsequent extension of those guarantees to courts, other than s. 96 courts was in its infancy. Given the evolution of the law concerning the guarantees of judicial independence,[52] it is no longer necessary

[52] See for example the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. [*PEI Reference*].

to look to ss. 96 to 100 as the sole source for ensuring the independence of courts that would otherwise not fall within the purview of ss. 96 and 100 of the *Constitution Act, 1867*. The courts have held that the preamble of the *Constitution Act, 1867* protects the judicial independence of all courts be they superior or inferior.[53]

[98] In short, I am respectfully of the view that Deputy Judge Grant was in error when he concluded that the application of s. 99 extended to the Federal Court of Canada. His conclusion is simply inconsistent with the persuasive legislative history, including the introduction of mandatory age limits without recourse to constitutional amendment.

[99] I will now turn to the second principal question raised in this motion.

Does s. 8(2) of the *Federal Courts Act* preclude a person over 75 years of age from acting as a deputy judge of the Federal Court?

[100] Section 8(2) of the *Federal Courts Act* provides that:

A judge of the Federal Court of Appeal or the Federal Court ceases to hold office on becoming 75 years old.	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.

[53] In the *PEI Reference* the Supreme Court extended the principles of judicial independence to provincial courts and judges to which s. 96 is not applicable. Subsequent decisions have extended the requirements of judicial independence to other judicial officers including justices of the peace, deputy judges and masters.

[101] The applicant argues that s. 8(2) is applicable to deputy judges. In his view, a deputy judge is a judge of the Federal Court within the meaning of s. 8(2) and cannot act as a deputy judge beyond 75 years of age. I disagree: a person who acts as a deputy judge does not "hold office" as a judge of the Federal Court.

[102] Indeed, even if I were wrong in my earlier analysis of *Addy* and in my conclusion that the Federal Court is not a superior court within the meaning of s. 99(2), that constitutional provision, in my view, would not prevent a Chief Justice from asking a former judge, over 75, to act as a deputy judge. Simply put, deputy judges do not hold office as judges of the Federal Court and cannot, therefore, cease to hold an office to which they have not been appointed.

[103] This conclusion is based on: (a) the legislative history of deputy judges in the Exchequer and Federal Courts, (b) the eligibility requirement for deputy judges; and (c) the statutory interpretation of ss. 8 and 10 of the *Federal Courts Act*.

[104] The power to appoint a judge for a temporary purpose can be traced as far back as 1887 when the Exchequer Court was composed of one judge. Parliament provided for the appointment of another person on a temporary basis where the sole judge of the Exchequer Court was unable to act because of sickness, absence from Canada or having an interest in any case before the court.[54]

[54] *Supreme and Exchequer Courts Act*, *supra* note 9, at s. 3.5.

[105] In 1920, the office of *puisne* judge was added to the composition of the Exchequer Court. This is the first time that the term "deputy judge" was used to describe the person appointed in the case of the sickness, absence from Canada, inability to act of a judge of the Exchequer Court or, at the request of its President, for any other purpose deemed sufficient.[55]

[106] The eligibility requirement to be a judge or a deputy judge of the Exchequer Court was the same. The person had to be 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 provinces.

[107] In 1968, members of the bar could no longer be asked to act as deputy judges. A deputy judge of the Exchequer Court was required to be a judge of a superior or county court in Canada or any person who has held office as a judge of a superior court or county court in Canada.

[108] The parliamentary debates, as early as 1920 and subsequently in 1967, contemplated "congestion of business" as a reason to use a deputy judge.[56]

[109] The current version of s. 10(1.1) of the *Federal Courts Act* is substantially the same as the provision adopted when the Federal Court of Canada was created in 1970. During the clause by clause examination of Bill C-192, the following words were added to the subsection: "… while so acting has all the powers of a judge of the Court …".

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[55] *An Act to amend the Exchequer Court Act*, S.C. 1920, c. 26, s. 2.
[56] *House of Commons Debates* (10 May 1920) at 2200-2203 and (19 December 1967) at 5635.

[110] Today, none of the provincial superior courts in Canada has the legislative authority to request persons to act as deputy judges in the manner envisaged by s. 10(1.1).

[111] The eligibility requirement for a deputy judge of the Federal Court is set out in s. 10(1.1) of the *Federal Courts Act*, which is reproduced here for ease of reference:

> 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.

[112] The executive 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. Order in council P.C. 2003-1779 of November 6, 2003, states that the Governor in Council "…approves that the Chief Justice of the Federal Court make requests to any judge of a superior, county or district court in Canada and any person who has held office as such a judge to act as a deputy judge of the Federal Court …".[57]

[57] The current order in council replaced P.C. 1973-6/1953 of July 10, 1973.

[113] The remuneration of a deputy judge is determined in accordance with s. 10(4) of the *Federal Courts Act*. Judicial notice can be taken that the amount is generally in the range of $400 *per diem*.

[114] The use of deputy judges in the Exchequer Court, although authorized in 1920, did not occur until 1942 and was sporadic until the creation of the Federal Court of Canada in 1971.[58]

[115] Deputy judges have been requested to participate in the work of the Federal Court for over three decades. Many of these deputy judges acted after reaching the mandatory age of retirement for judges.[59] According to Quicklaw, some 20 deputy judges, acting when they were over 75 years of age, participated in over 1,500 reported decisions of the Federal Court of Canada prior to December 31, 1999.[60] No deputy judges acted over the next four years. Since 2004, some seven deputy judges, acting when they were older than 75, have presided over approximately 450 cases in the Federal Court, most of which were decided between 2005 and 2009. This anecdotal history is informative, yet not determinative of the legal issues in this motion.

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[58] Bushnell, *The Federal Court*, *supra* note 35 at pp. 97, 130, and 193-94.

[59] Letter from Mr. Raymond P. Guenette, Chief Administrator, Courts Administration Service to Me Michel LeBrun, July 17, 2009, which can be found in the record of these proceedings and Marina Strauss, "Understaffed Federal Court forced to use retired judges" *The Globe and Mail* (30 August 1982) A5 which reported, "A shortage of Federal Court judges has led to a growing use of retired provincial Supreme Court judges as substitutes … some of them 80 years old and most usually over 75."

[60] The deputy judges and their decisions can be identified through Quicklaw. Their dates of birth have been confirmed by the Office of the Commissioner of Federal Judicial Affairs in a letter dated January 12, 2010 that has been placed on the Court file. Two deputy judges, the Honourable Darrel Heald and the Honourable François Chevalier, participated in over 350 cases between 1994-99 after they had reached the mandatory retirement age of 75 for judges and no longer held office in their respective Courts, the Federal Court of Canada and the Quebec Superior Court. Deputy Judge Heald acted primarily in the Trial Division and presided over his last hearing in June 1998. Deputy Judge Chevalier acted only in the Appeal Division.

[116] Deputy judges provide the Chief Justice of the Federal Court with the flexibility to add judicial resources where circumstances require. Consequently, the recent use of deputy judges has helped the Court minimize its backlog with some 20% of its full-time judges engaged in the post September 11, 2001, protracted ministerial certificate litigation.

[117] The applicant relies on statutory interpretation to support his position that deputy judges are Federal Court judges and therefore subject to the mandatory retirement provisions in s. 8(2) of the *Federal Courts Act*.

[118] During the hearing of this motion, the applicant asserted that a superior court judge who retires at an age younger than 75 nonetheless continues to hold office until the mandatory age of retirement. In his view, this retired judge continues to be a member of the superior court from which he resigned. He made these statements in support of his statutory interpretation of ss. 10(1.1) and (2).

[119] As I understand his argument, the applicant maintains that the discretion given to the Chief Justice of the Federal Court in s. 10(1.1) to ask "any person who has held office as a judge of a superior court" to act as a deputy judge is limited by the words in s. 10(2): "No request may be made to a judge of a superior court…without the consent of the chief justice … of the court of which he or she is a <u>member</u>".

[120] From this premise, the applicant draws two conclusions.

[121] First, in his view, the judge who opts for early retirement continues to be a member of the court from which he has retired.

[122] This position is, in my respectful view, not sustainable. The judge who chooses to retire, according to the provisions of the *Judges Act* or for whatever other reason, creates a vacancy on the court in question and is replaced in due course by the Governor in Council in a manner consistent with the Court's judicial complement. Simply put, a superior court judge who resigns or retires no longer holds office.

[123] Second, he argues that since superior court judges cease to hold office at 75, and are therefore no longer members of a superior court, the wording of s. 10(2) would preclude judges over 75 from being asked to act as deputy judges.

[124] This second argument also fails to withstand scrutiny. The applicant ignores the plain wording of s. 10(1.1) which permits the Chief Justice, subject only to s. 10(3), to request the assistance of "any judge of a superior … court in Canada and any person who has held office as a judge of a superior … court…". Persons over 75 who have held office as judges of superior courts are not excluded by the language used in s. 10(1.1).

[125] I therefore reject the applicant's interpretation of s. 10(1.1) and conclude that it envisages two categories of deputy judges: current and former judges. This is set out in the respondent's written submissions:

> … The first group comprises any judge of the superior, district or county courts in Canada. … Section 99 of the *Constitution Act, 1867* clearly applies to provincial superior courts. Therefore, proposed deputy judges who are active members of a provincial superior court will necessarily be under 75.
>
> The second group comprises "any person who has held office as a judge of a superior, county or district court". Parliament is presumed to have intended to mean something different in using the words "has held office". If the intent was only to include the group of sitting superior court judges these additional words would not have been included. The plain meaning of the section is to provide the deputy judges also may be requested from among retired former members of provincial superior courts. Those who have held office, but are retired, will not necessarily be under 75 years of age.
> (Footnotes omitted.)

[126] It is the second category of deputy judge, one who "has held office" or has retired as a judge of any superior court in Canada (including the Federal Court) and, in particular, one in that category who is over 75 years of age that is of concern in this proceeding.

[127] The respondent's submissions on the distinction between the status of a deputy judge and a judge of the Federal Court are stated succinctly and are ones which I endorse:

> That status of deputy judges is distinct from that of judges of the court is evident not only from the history of s. 10, but also from the terms of the regime which presently governs their assignment. Deputy judges do not hold office but act as judges of the court, having the powers of a judge of the court while acting. They are not included in the composition of the court. Rather they are only deputy judges for the duration of their assignment. This is recognized in their exclusion from the definition of "judge" in the *Judges Act*.

> Had Parliament intended deputy judges have the same status as "judges" of the Federal Court, the FCA and the *Judges Act* could have been drafted to expressly include them as judges of the court and to refer to them as such in s. 10(1.1). The fact that Parliament chose different language is a clear signal that this is not the case and that s. 8(2) does not apply to deputy judges.
>
> There is no need and therefore no requirement that deputy judges reside in the National Capital Region, unlike judges of the court who are required to do so. This accords with the purpose of s. 10 because it furthers the efficient administration of the court to have deputy judges readily available in localities where the court sits. The salary payable to deputy judges is prescribed within s. 10 itself and is not governed by the *Judges Act* as is the case for all federally-appointed judges. However, the salary is set at rates fixed by the *Judges Act* with appropriate and necessary qualifications.
> (Footnotes omitted)

[128] In the applicant's submission, the inclusion of s. 10(1.1) in the section of the *Federal Courts Act* entitled "The Judges" leads to the conclusion that Deputy Judges are judges of the Federal Court. I disagree.

[129] There is no legislative definition of "deputy judge". The definitions of "judge" in the former *Federal Court Act* and in the *Judges Act* do not include the term "deputy judge". The *Judges Act* defines a "judge" as including: "a chief justice, a senior associate chief justice, associate chief justice, supernumerary judge, senior judge and regional senior judge."[61] In both statutes, the definition of "judge" is inclusive.

[130] The use of the term "including" in a definition or enumeration may have more than one purpose. It may be used to add "specifics that would not ordinarily be included in the general term"

[61] *Judges Act*, R.S.C. 1985, c. J-1, s. 2 "judge".

thereby ensuring that items which may not be obviously included in the definition are identified as belonging.[62] It may be for this reason that the definition of "judge" specifically identifies offices other than that of a *puisne* judge.

[131] Contrary to the applicant's submission, the sections concerning "The Judges" support the view that a "deputy judge" is not a judge for the purpose of the *Judges Act* or within the meaning of the *Federal Courts Act*.

[132] Section 5.1 of the *Federal Courts Act* defines "the constitution" or composition of the Federal Court.

[133] The judicial complement of the Federal Court consists of its Chief Justice and 32 other judges. There exists an equal number of additional offices for supernumerary judges. In addition, every judge of the Federal Court of Appeal is an *ex officio* judge of the Federal Court.

[134] Section 5.1 makes no mention of deputy judges in the composition of the Court. The provision defines the Court's complement as consisting of 33 judges, including the Chief Justice. The latter has no power to increase the number of judges who hold office. That authority resides with Parliament.

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[62] Sullivan, *Construction of Statutes*, *supra* note 11 at pp. 238-39.

[135] Section 10(1.1) does not define a deputy judge as a Federal Court judge. It authorizes a deputy judge, upon the request of the Chief Justice, to act as a judge of the Federal Court. The provision further stipulates that a deputy judge, while so acting, has all the powers of a judge of the Federal Court. It does not create another office of judge. A deputy judge *acts* as a judge of the Federal Court. The deputy judge does not hold the office of a judge of the Federal Court within the meaning of s. 5.1 or s.8.

[136] Finally, the applicant raised the assignment power given to the Chief Justice in s. 15(2) of the *Federal Courts Act*.[63] If, he argued, deputy judges are not judges then s. 15(2) does not apply to them.

[137] 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.

[138] When a deputy judge chooses to act, the Chief Justice is required, as in other cases, to make: "the arrangements that may be necessary or proper for the holding of courts…" envisaged in s. 15(2). Section 15 does not support the applicant's position.

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[63] For s. 15(2) of the *Federal Courts Act*, see Annex 3.

[139] Based on a common sense and contextual reading of ss. 5.1, 8 and 10 of the *Federal Courts Act*, I conclude that deputy judges do not hold the "office" of judge of the Federal Court. They are not appointed by the Governor in Council by letters patent under the Great Seal pursuant to s. 5.2. They are not subject to the residency requirement of a judge of the Federal Court under s. 7. Their salary is governed by s. 10(4) and not by the *Judges Act*, except by way of reference in that subsection. They are asked to act from time to time by the Chief Justice.

[140] In summary, the power to ask a retired superior court judge to act as a deputy judge is not constrained by the mandatory retirement age set out in s. 8(2) or by the wording of s. 10(1.1) of the *Federal Courts Act*. The Chief Justice of the Federal Court may request an eligible person over 75 years of age to act as a deputy judge.

[141] The Honourable Mark MacGuigan, then a parliamentarian and later a judge of the Federal Court of Canada – Appeal Division, understood that a person beyond 75 years of age could be requested to a deputy judge:

> Mr. MacGuigan: …
>
> > The device of allowing the better judges to come back beyond the mandatory retirement age has been a successful one in the United States. Some judges in their eighties are performing well. It seems to me that this is the kind of judgment which a Chief Justice could make if there is sufficient demand. … Just because a man feels he no longer wants to sit everyday and retires is no reason why, if his faculties are still there and he is highly regarded by those administering the Court, he could not be called back occasionally to do additional jobs.[64]

[64] Justice Legal Affairs Committee – May 26, 1970 at page 31:68

[142] The decision in *Addy* is the only one brought to the Court's attention with a substantive reference to the age of Federal Court deputy judges. Deputy Judge Grant, in his *obiter* comments, was of the view that a deputy judge was not subject to a statutory retirement age:

> There is no limit in the Act as to the age of such a deputy judge. This fact is cited as a discrimination against the judges of all the courts. However, a person called to act as a deputy judge has no right to act as a judge until invited to do so by the Chief Justice of the Federal Court. He may accept such invitation or decline it. If he chooses to preside over the case, he ceases to be a deputy judge when he completes that assignment. He therefore has no tenure of office and his participation in trials in the Federal Court is not comparable to that of Federal Court judges nor relevant to the issues herein.[65]

[143] The scheme set out in s. 10 is internally consistent and unambiguous. The Chief Justice may request the temporary assistance of sitting superior court judges, with the approval of their chief justice; or, superior court judges who have ceased to hold office. Judges who have "ceased to hold office" include those who have reached the mandatory retirement age of 75. This is consonant with the comments made by the Honourable Mark MacGuigan and Deputy Judge Campbell Grant and with the practice of the Federal Court of Canada over the past 30 years.

[144] In reaching this conclusion, I have taken into account two issues which were not canvassed by the Court or the parties during the hearing of the motion.

[145] Neither party made submissions concerning ss. 5, 8 and 9 of the *Exchequer Court Act*, as those provisions read in the 1927 and 1952 revised statutes of Canada.

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[65] *Addy v. Canada*, [1985] 2 F.C. 452 at p. 464.

[146] It was in 1927 that a mandatory retirement age of 75 years was first set out in s. 9 of the *Exchequer Court Act*. For the reasons I have mentioned above, a deputy judge of that earlier period, like today's deputy judge, did not hold office as a *puisne* judge of the Court. Consequently, s.9 of the *Exchequer Court Act*, like s. 8(2) of the current *Federal Courts Act*, did not affect deputy judges.

[147] 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.[66]

[148] In any event, s. 8 was repealed and replaced in 1968. The amended s.8 used words similar to those found in s. 10(1) of the *Federal Court Act* and s. 10(1.1) of the *Federal Courts Act* to describe the eligibility requirements of deputy judges.

[149] Today, those requirements are found in s. 10(1.1) of the *Federal Courts Act* which makes no reference to s. 5.3 concerning the qualifications for a Federal Court judge or to s. 8(2) concerning the cessation of office.

[150] A second issue that neither party raised is whether the English and French versions of ss. 8(2) and 10(1.1) may have different meanings as the result of amendments made to them.

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[66] My view is consistent with the historical record which shows that approximately one-half of the decisions issued by deputy judges between 1942 and 1968 were signed by two persons each over 75 years of age: Deputy Judges Hyndman and Sheppard.

[151] The amendments to the French version of s. 8(2), if they do give rise to a meaning different from the plain meaning of the English versions, were made as part of the 1985 statute revision process[67] and cannot be taken to change the meaning or application of the law.[68] In the event of an inconsistency between a consolidated statute and the original Act, the original statute prevails to the extent of the inconsistency.[69]

[152] Thus, the current French version of s. 8(2) which uses the language of "l'âge limite pour l'exercice de la charge de juge" is to be interpreted in a manner consistent with the former French version of that provision which reflects the intent of Parliament. The pre-1985 French version of s. 8(2) provided: "[u]n juge de la Cour cesse d'occuper son poste…" mirroring the current English version which has remained substantially unchanged for over 70 years.

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[67] The French version of s. 8(2) was first amended by s.7 of an *Act to amend the Judges Act, the Federal Court Act and the Tax Court of Canada Act* S.C. 1987 c. 21 which was given Royal Assent on June 30, 1987. This amendment used the language of "cesse d'occuper son poste". On December 17, 1987 Royal Assent was given to the *Federal Court Act*, R.S.C. 1985, c. F-7 which changed the language of "cesse d'occuper son poste" found in s. 8(2) of R.S.C. 1970, (2nd Supp.) c.10 and S.C. 1987 c.21. However, the changes made by S.C. 1987 c. 21 were only incorporated into the consolidated *Federal Court Act* by R.S.C. 1985 (3rd Supp.) c. 16 which changed the wording of the French version of s. 8(2) used in S.C. 1987 c.21 so that it reflected the language of the French version of s. 8(2) of 1985 R.S.C. c. F-7. Supplements to the Revised Statutes of Canada were made under the authority of ss.12 – 15 of the *Revised Statutes of Canada, 1985 Act*, R.S.C. 1985, c. 40 (3rd Supp.)

[68] *Legislation Revision and Consolidation Act*, R.S.C. 1985 c. S-20, ss. 6(e), (f), 30 and 31(2). See also s. 4 of the *Revised Statutes of Canada, 1985 Act.* The effect of the statute revision process has been the subject of judicial comment in the following decisions: *Sarvannis* v. *Canada* 2002 SCC 28 at para. 13; *Flota Cubana De Pesca* v. *Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 1713 (C.A.) at para. 41; *Beothuk Data Systems Ltd., Seawatch Division* v. *Dean* [1997] F.C.J. No. 1117 (C.A.) para. 43-44; and, *Goodswimmer* v. *Canada (Attorney General)* [1995] F.C.J. No. 454 (C.A.) para. 15. A recent decision on point was rendered by Barnes J. in 2009**:** *League for Human Rights of B'nai Brith Canada* v. *Canada*, [2009] F.C.J. No. 689 at para. 40. See also Sullivan, *Construction of Statutes*, *supra* note 11 at pp. 98-99.

[69] *Legislation Revision and Consolidation Act*, s. 31(2)

[153] This interpretation is consonant with the intent of Parliament as made evident in s.7 of the *Act to amend the Judges Act, the Federal Court Act and the Tax Court of Canada Act*, S.C. 1987, c.21 which used the pre-1985 wording of s. 8(2).[70] That wording is also substantially similar to the French version of s. 99(2) of the *Constitution Act, 1867*.

[154] In summary, the English version of s. 8(2), which mirrors s. 99(2), has remained substantially unchanged since its inception in 1927. Prior to the 1985 revision, there was no material change to the French version, which also mirrored s. 99(2). Nothing, in my review of the legislative history of s. 8(2), has convinced me that the 1985 revision of the French version of s. 8(2) by a three person Statute Revision Commission was intended to alter the state of the law as it was expressed by Parliament for over 50 years.[71]

[155] Indeed, the unchanging nature of the English version over such an extended period of time, and its similarity to s. 99(2), would, in any event, lead me to conclude that the English version of the provision more clearly expresses the intent of Parliament.

[156] I would apply the same rationale and principles of statutory interpretation to the language differences in s. 10(1.1).

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[70] The amendments made to s.8 of the *Federal Court Act* by S.C. 1987 c. 21 were Parliament's response to the decision in *Addy, supra*. They were deemed to come into force on April 17, 1985. The primary purpose of those amendments as expressed by Mr. François Guérin, Parliamentary Secretary to the Minister of Justice and the Attorney General of Canada was to "set a consistent age of retirement for all judges appointed by the federal Government." (House of Commons Debates, March 27, 1987, p. 4643) Thus, Parliament specifically focused on the wording of s. 8(2) and reverted to the pre-1985 French language version which used the phrase "cesse d'occuper son poste".

[71] These amendments were brought into force by the *Revised Statute, 1985 Act* given Royal Assent on December 17, 1987.

[157] The English version of s. 10(1.1) has remained substantially the same since 1970.[72] The reference to “has held office” has been constant throughout and parallels the language in s. 99(2).

[158] From 1968 until 1985, the French language version referred to “toute personne qui a occupé un poste de juge”. In 1985, the phrase is shortened to: “juges, actuels ou anciens” which I find conveys the same idea in a more concise manner. I find no material change in the meaning of the 1970 French version of s. 10(1) and the 1985 version of that same provision.

[159] In conclusion, given the substantially unchanged English versions of ss. 8(2) and 10(1.1) over time, the wording of s. 99(2) of the *Constitution Act, 1867*, and the limited authority of the Statute Revision Commission, I attribute no intent, on the part of Parliament, to change the meaning of the law when the wording of the French language versions of ss. 8(2) and 10(1.1) was amended.

[160] I therefore answer the second of the two principal questions raised in this motion as follows: s. 8(2) of the *Federal Courts Act* does not preclude a person over 75 years of age from acting as a deputy judge of the Federal Court. This conclusion is consistent with the principles of statutory interpretation, with the limited legislative history and the *obiter* statement of Deputy Judge Grant in *Addy*. There is no conflict between ss. 8(2) and 10(1.1).

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[72] I have noted no material differences in the English and French versions of the provision as adopted in 1968 and amended in 1970 in the first *Federal Court Act*.

[161] Parliament amended s. 8 of the *Federal Court Act* in 1987 in response to the *Charter* issues raised in the *Addy* decision. Parliamentarians would have been aware of the view expressed in Deputy Judge Campbell Grant's decision that there was no age limit for the deputy judges. Despite this, Parliament did not see fit to impose an age limit on deputy judges.

[162] The applicant also raised issues of constitutionalism, federalism and rule of law which he limited, in oral argument, to a separation of powers issue. In making his oral submissions on the separation of powers doctrine the applicant did not challenge the independence, institutional or individual, of deputy judges.[73]

[163] In brief, he asserted that the appointment of a deputy judge over the age of 75 by the Chief Justice offends the constitutional requirement that judges be appointed solely by the executive branch of governance and is thus contrary to the separation of powers doctrine.

[164] However, he maintained that this issue does not arise where the judge has not yet attained 75 years of age since, according to the applicant, a judge under 75 does not cease to hold office even if that judge has resigned or retired.

[165] As noted above, I reject the applicant's assertion that a superior court judge does not cease to hold office in any circumstances before reaching 75, apart from removal in accordance with s. 99(1) of the *Constitution Act, 1867*. Put simply, judges who retire or resign cease to hold office.

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[73] See pp. 299-301 of transcript from September 24, 2009.

[166] Nor do I find that s. 10(1.1) offends the doctrine of the separation of powers. The Chief Justice is not "appointing" a judge to the Federal Court. In his capacity as the administrative judge, whose primary interest is the proper administration of justice and of the Court, the Chief Justice is asking a current or former judge to "act as a judge of the Federal Court" pursuant to a general authorization by the executive branch of governance. These experienced jurists may choose to assist the Court or may decline the request.

[167] Moreover, the mechanism which permits the Chief Justice of the Federal Court to ask individuals to act as deputy judges is constrained by two requirements. First, the eligibility of individuals is limited by s. 10(1.1) of the *Federal Courts Act* to a Canadian superior, county or district court judge or a person who has held such office. Second, the request may only be made with the approval of the Governor in Council which is found in the blanket authorization set out in order in council P.C. 2003-1779.

[168] I therefore reject the applicant's assertion that s. 10(1.1) offends the doctrine of separation of powers.

Miscellaneous issues

[169] The applicant also submits that the Governor in Council was under a positive obligation to seek clarification of the issue raised in this motion pursuant to s. 53 of the *Supreme Court of*

Canada Act once Parliament responded to the *Addy* decision by amending s. 8(2) of the *Federal Court Act* in 1987.

[170] I adopt the position taken by the respondent that the use of the word "may" in s. 53 gives the Governor in Council discretion. I find that nothing, in the circumstances of this matter, obliges the Governor in Council to refer a question to the Supreme Court of Canada.

[171] The applicant further submits that ss. 72 to 74 of the *Immigration and Refugee Protection Act* [74] preclude a deputy judge from hearing his application if deputy judges do not hold office as "judges" of the Federal Court.

[172] This assertion cannot be sustained. Section 10 (1.1) gives a deputy judge all the powers of a judge of the Federal Court. The determination of matters enumerated in ss. 72 to 74 of IRPA is one of the powers of a judge of the Federal Court. To interpret s. 10(1.1) otherwise would result in a legislative absurdity.

Certification

[173] In this interlocutory motion, the applicant has challenged the jurisdiction of a deputy judge over 75 years of age to preside over the hearing of two related applications for judicial review under the *Immigration and Refugee Protection Act*. The applicant challenges the two decisions refusing the relief he sought for humanitarian and compassionate consideration and for pre-removal risk assessment.

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[74] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[174] The Court and both parties agreed at the outset of the hearing that this interlocutory judgement should be subject to appellate review. The procedural issue before me is whether any appeal should be as of right under s. 27 of the *Federal Courts Act* or subject to the certification process under s. 74(d) of the immigration legislation.

[175] In my view, the certification of a serious question is not necessary. The motion before me is a "separate, divisible judicial act" with respect to the application for judicial review: *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 421 at paragraph 48; and *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at paragraphs 60 and following. Either party may appeal this interlocutory judgment pursuant to s. 27 of the *Federal Courts Act* without the necessity of a certified question.

[176] However, as I indicated during the hearing, if I am wrong on this point and s. 74(d) of the IRPA is applicable to this judgment, I am prepared to certify a serious question, substantially in the language suggested by the parties:

a) Does s. 99(2) of the *Constitution Act, 1867* apply to deputy judges of the Federal Court?

b) Are deputy judges, acting pursuant to s. 10(1.1) of the *Federal Courts Act*, subject to the cessation of office provision in s. 8(2)?

Costs

[177] The respondent has not sought costs on this interlocutory motion. As the losing party, the applicant would normally have no right to costs.

[178] The applicant was prepared to proceed with the underlying application for judicial review before a full time or supernumerary judge of the Court. However, the jurisdictional issue he raised was also invoked by a significant number of other applicants in immigration matters upon the Court's disclosure of the issue. Consequently, it was in the interests of the administration of justice to have the issue of age concerning deputy judges clarified through adjudication.

[179] For this reason, despite the result of the motion, I have chosen to exercise my discretion under Rule 400(3)(o) of the *Federal Courts Rules* and award costs to the applicant in the amount of $6000. If I am wrong in my view that the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, do not apply to this motion, which I have characterized earlier as a "separate, divisible judicial act", I would award costs, pursuant to Rule 22, for the same "special reasons" and in the same amount.

[180] As I have just suggested, this jurisdictional motion has been in the nature of public interest litigation. I wish to acknowledge the cooperation of counsel for both parties in assuring its timely adjudication. The Attorney General of Canada filed two volumes of informative legislative history concerning the Federal Court and its predecessor courts. I am grateful to those responsible for assembling this material on short notice.

ORDER

THIS COURT ORDERS that:

1. The applicant's motion is dismissed;

2. In the event I am wrong in my view that this motion is a "separate , divisible judicial act" not subject to s. 74(d) of the *Immigration and Refugee Protection Act*, the following question, with its two aspects, is certified:

    a) Does s. 99(2) of the *Constitution Act, 1867* apply to deputy judges of the Federal Court?

    b) Are deputy judges, acting pursuant to s. 10(1.1) of the *Federal Courts Act*, subject to the cessation of office provision in s. 8(2)?

3. The respondent will pay costs to the applicant in the amount of $6000, in any event of the cause.

4. A copy of this Order and Reasons for Order shall be placed in file IMM-1087-09.

"Allan Lutfy"

Chief Justice

CANADA

P.C. 2003-1779
November 6, 2003

PRIVY COUNCIL- CONSEIL PRIVÉ

Whereas, by Order in Council P.C. 1973-6/1953 of July 10, 1973, the Governor in Council approved that the Chief Justice of the Federal Court of Canada make requests to any judge of a superior, county or district court in Canada and any person who was held office as such a judge to act as a deputy judge of the Federal Court of Canada up to a maximum of twenty persons acting in that capacity;

Whereas the *Courts Administration Service Act,* which came into force on July 2, 2003, amended the *Federal Court Act* by continuing the Appeal and Trial Divisions of the Federal Court of Canada as two separate courts under the names "Federal Court of Appeal" and "Federal Court" and by replacing the provisions of that Act relating to deputy judges;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Justice, hereby

(a) repeals Order in Council P.C. 1973-6/1953 of July 10, 1973;

(b) pursuant to subsections 10(1) and (3) of the *Federal Courts Act,*

(i) approves that the Chief Justice of the Federal Court of Appeal make requests to any judge of a superior, county or district court in Canada and any person who has held office as such a judge to act as a deputy judge of the Federal Court of Appeal, and

(ii) limits to five the number of persons who may act in that capacity; and

(c) pursuant to subsections 10(1.1) and (3) of the *Federal Courts Act,*

(i) approves that the Chief Justice of the Federal Court make requests to any judge of a superior, county or district court in Canada and any person who has held office as such a judge to act as a deputy judge of the Federal Court, and

(ii) limits to fifteen the number of persons who may act in that capacity.

CERTIFIED TO BE A TRUE COPY-COPIE CERTIFIÉE CONFORME

CLERK OF THE PRIVY COUNCIL-LE GREFFIER DU CONSEIL PRIVE

ANNEX 2

Relevant extracts of the *Constitution Act, 1867*.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

…

VII. Judicature

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

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

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.

(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

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

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

…

VII. Judicature

96. Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

97. Jusqu'à ce que les lois relatives à la propriété et aux droits civils dans Ontario, la Nouvelle-Écosse et le Nouveau-Brunswick, et à la procédure dans les cours de ces provinces, soient rendues uniformes, les juges des cours de ces provinces qui seront nommés par le gouverneur-général devront être choisis parmi les membres des barreaux respectifs de ces provinces.

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

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) Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent

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.

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.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are being paid by Salary, shall be fixed and provided by the Parliament of Canada.

100. Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l'Amirauté, lorsque les juges de ces dernières sont alors salariés, seront fixés et payés par le parlement du Canada.

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

101. Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque 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.

…

…

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

129. Sauf toute disposition contraire prescrite par la présente loi, toutes les lois en force en Canada, dans la Nouvelle-Écosse ou le Nouveau-Brunswick, lors de l'union, tous les tribunaux de juridiction civile et criminelle, toutes les commissions, pouvoirs et autorités ayant force légale, et tous les officiers judiciaires, administratifs et ministériels, en existence dans ces provinces à l'époque de l'union, continueront d'exister dans les provinces d'Ontario, de Québec, de la Nouvelle-Écosse et du Nouveau-Brunswick respectivement, comme si l'union n'avait pas eu lieu; mais ils pourront, néanmoins (sauf les cas prévus par des lois du parlement de la Grande-Bretagne ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande), être révoqués, abolis ou modifiés par le parlement du Canada, ou par la législature de la province respective, conformément à l'autorité du parlement ou de cette législature en vertu de la présente loi.

ANNEX 3

Relevant provisions of the Federal Courts Act, R.S.C. 1985, c. F-7	Dispositions applicables de la *Loi sur les Cours fédérales*, L.R.C. 1985, c. F-7
5.1 (1) The Federal Court consists of a chief justice called the Chief Justice of the Federal Court, who is the president of the Federal Court, and 32 other judges.	**5.1** (1) La Cour fédérale se compose du juge en chef, appelé juge en chef de la Cour fédérale, qui en est le président, et de trente-deux autres juges.
(2) For each office of judge of the Federal Court, there is an additional office of supernumerary judge that a judge of the Federal Court may elect under the *Judges Act* to hold.	(2) La charge de juge de la Cour fédérale comporte un poste de juge surnuméraire, qui peut être occupé, conformément à la *Loi sur les juges*, par un juge de ce tribunal.
(3) For the office of Chief Justice of the Federal Court, there is an additional office of judge that the Chief Justice may elect under the *Judges Act* to hold.	(3) La charge de juge en chef de la Cour fédérale comporte également un poste de simple juge que son titulaire peut décider, conformément à la *Loi sur les juges*, d'occuper.
(4) Every judge of the Federal Court of Appeal is, by virtue of that office, a judge of the Federal Court and has all the jurisdiction, power and authority of a judge of the Federal Court.	(4) Les juges de la Cour d'appel fédérale sont d'office juges de la Cour fédérale et ont la même compétence et les mêmes pouvoirs que les juges de la Cour fédérale.
5.2 The judges of the Federal Court of Appeal and the Federal Court are to be appointed by the Governor in Council by letters patent under the Great Seal.	**5.2** La nomination des juges de la Cour d'appel fédérale et de la Cour fédérale se fait par lettres patentes du gouverneur en conseil revêtues du grand sceau.
5.3 A person may be appointed a judge of the Federal Court of Appeal or the Federal Court if the person	**5.3** Les juges de la Cour d'appel fédérale et de la Cour fédérale sont choisis parmi :
(a) is or has been a judge of a superior, county or district court in Canada;	*a*) les juges, actuels ou anciens, d'une cour supérieure, de comté ou de district;
(b) is or has been a barrister or advocate of at least 10 years standing at the bar of any province; or	*b*) les avocats inscrits pendant ou depuis au moins dix ans au barreau d'une province;
(c) has, for at least 10 years, (i) been a barrister or advocate at the bar of any province, and (ii) after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held under a law of Canada or a	*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.

province.

…

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.

(2) A judge of the Federal Court of Appeal or the Federal Court ceases to hold office on becoming 75 years old.

(3) A judge who holds office on March 1, 1987 may retire at the age of seventy years.

…

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.

(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.

(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.

(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

…

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) 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.

(3) Les juges en fonctions le 1er mars 1987 peuvent prendre leur retraite à l'âge de soixante-dix ans.

…

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) 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) 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) 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

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*.

suppléance. Ils ont également droit aux indemnités de déplacement prévues par cette même loi.

…

…

15. (1) Subject to the Rules, any judge of the Federal Court may sit and act at any time and at any place in Canada for the transaction of the business of the court or any part of it and, when a judge so sits or acts, the judge constitutes the court.

15. (1) Sous réserve des règles, tout juge de la Cour fédérale peut exercer ses fonctions en tout temps et partout au Canada pour les travaux de ce tribunal; il constitue alors la Cour fédérale.

(2) Subject to the Rules, the Chief Justice of the Federal Court shall make all arrangements that may be necessary or proper for the holding of courts, or otherwise for the transaction of business of the Federal Court, and the arrangements from time to time of judges to hold the courts or to transact that business.

(2) Sous réserve des règles, les dispositions à prendre pour les audiences ou, à quelque autre titre, les travaux de la Cour fédérale, de même que pour l’affectation des juges en conséquence, sont du ressort du juge en chef de celle-ci.

(3) The trial or hearing of any matter in the Federal Court may, by order of that court, take place partly at one place and partly at another.

(3) Sur l’ordre de la Cour fédérale, l’instruction de toute affaire devant elle peut se dérouler en plus d’un lieu.

FEDERAL COURT

SOLICITORS OF RECORD

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