

**IN THE SUPREME COURT OF CANADA**

**(ON APPEAL FROM A JUDGMENT OF THE QUEBEC COURT OF APPEAL)**

**B E T W E E N**

**ATTORNEY GENERAL OF QUEBEC, ROCCO GALATI AND CONSTITUTIONAL RIGHTS CENTRE INC.**

**Appellants**

**- and -**

**ATTORNEY GENERAL OF CANADA, CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES, GRAND COUNCIL OF CREE (EYYOU ISTCHEE) AND CREE NATION GOVERNMENT**

**Respondents**

---

**FACTUM OF THE APPELLANT,  
CONSTITUTIONAL RIGHTS CENTRE INC.**

---

**SLANSKY LAW  
PROFESSIONAL CORPORATION  
Paul Slansky  
Barrister and Solicitor  
1062 College Street  
Lower Level  
Toronto, ON M6H 1A9  
Tel: (416) 536-1220  
Fax: (416) 536-8842  
Email: paul.slansky@bellnet.ca**

**Robert E. Houston, Q.C  
Burke-Robertson  
441 MacLaren Street  
Suite 200  
Ottawa, ON K2P 2H3  
  
TEL: (613) 236-9665  
FAX: (613) 235-4430  
E-mail: houston@burkerobertson.com**

**Counsel for the Appellant, Constitutional Rights Centre Inc.**

**(Agent for the Appellant)**

**TO:** The Registrar of this Court

**AND TO:** Attorney General of Quebec  
**Mtre. Jean-Yves Bernard**  
Direction generale des aff. jur.et legis  
Bernard, Roy (JUSTICE-QUEBEC)  
1 Rue Notre-Dame Street, 8<sup>th</sup> Floor  
Montreal, Quebec H2Y 1B6  
Tel: 514-393-2336, poste 51467  
Fax: 514-873-7074  
Email: jean-yves.bernard@  
Justice.gouv.qc.ca

Counsel for the Appellant,  
Attorney General of Quebec

**AND TO:** **Rocco Galati**  
1062 College St.,  
Lower Level  
Toronto, Ontario, M6H 1A9  
Tel: (416) 530-9684  
Fax: (416) 530-8129  
Email: rocco@idirect.com

Appellant

**AND TO:** Attorney General of Canada  
**Mtre. Alexander Pless**  
**Mtre. Claude Joyal**  
**Mtre. Sara Gauthier**  
Department of Justice Canada  
Guy-Favreau Complex  
200 Rene Levesque Blvd. West  
East Tower, 5th Floor  
Montreal, Quebec H2Z 1X4  
Tel: (514) 283-8767/283-8768/283-5805  
Fax: (514) 283-3856  
Email: apless@justice.gc.ca  
claude.joyal@justice.gc.ca

Counsel for the Respondent,  
Attorney General of Canada

**AND TO:** Canadian Association of  
Provincial Court Judges  
**Mtre. Sebastien Grammond**  
**(Att: Mtre. Mélisa Thibault)**  
Dentons Canada  
1 Place Ville Marie  
39<sup>th</sup> Floor  
Montreal, Quebec, H3B 4M7  
Tel: (514) 878-8800/(613) 562-5902  
Fax: (514) 866-2241  
Email: sgrammon@  
uottawa.ca

Counsel for the Respondent,  
Canadian Association of  
Provincial Court Judges

**AND TO:** The Grand Council of the  
Crees (Eeyon Istchee)  
O'Reilly & Associates  
**Mtre. James O'Reilly**  
**Mtre. Patricia Ochman**  
1155, Rue University  
Montreal, Quebec H3B 3A7  
Tel: (514) 871-8117  
Fax: (514) 871-9177  
Email: james.oreilly@  
orassocies.ca  
pochman@  
orassocies.ca

Counsel for the Intervener,  
The Grand Council of the  
Crees (Eeyon Istchee) and  
Cree Nation Government

## TABLE OF CONTENTS

Part		Page
<b>PART I</b>	<b>STATEMENT OF FACTS</b>	<b>1</b>
<b>PART II</b>	<b>QUESTIONS IN ISSUE</b>	<b>2</b>
PART III	STATEMENT OF ARGUMENT	<b>3</b>
	A. OVERVIEW	3
	B. A FEDERAL COURT JUDGE CANNOT BE APPOINTED TO QUEBEC COURTS	4
	1. Section 98 of the <i>Constitution Act, 1867</i>	4
	(a) <i>Supreme Court Act Reference</i>	4
	(b) Constitutional History Re Quebec Judiciary	8
	(i) Knowledge of the French/Quebec civil law, legal tradition and Social Values	8
	(ii) Need for Confidence of Quebeckers in Courts	12
	(iii) Constitutional Compromise: Confederation and Confederation Debates	15
	2. Use of Quebec Courts as a Means to By-Pass the Constitution in respect of the SCC	19
<b>PART IV</b>	<b>SUBMISSIONS CONCERNING COSTS</b>	<b>20</b>
<b>PART V</b>	<b>ORDERS SOUGHT</b>	<b>20</b>
<b>PART VI</b>	<b>TABLE OF AUTHORITIES</b>	<b>21</b>
<b>PART VII</b>	<b>STATUTORY PROVISIONS</b>	<b>21</b>

**PART I – STATEMENT OF FACTS**

1. On Friday, June 13th, 2014 the Attorney General of Canada announced the purported appointment of the Honourable Justice Mainville, of the Federal Court of Appeal, to the Quebec Court of Appeal, with the appointment to take effect July 1<sup>st</sup>, 2014.
  
2. Justice Mainville was a member of the bar of Quebec before his appointment to the Federal Court of Appeal, but was not a current member of the Quebec bar at the time of his purported appointment to the Quebec Court of Appeal.
  
3. On Monday, June 16th, 2014 the Constitutional Rights Centre Inc., along with Rocco Galati, filed an application for judicial review in the Federal Court, constitutionally challenging that appointment.
  
4. On July 29<sup>th</sup>, 2014, the Quebec Attorney General filed the following Reference questions to the Quebec Court of Appeal which effectively supplanted the Federal Court application:
  1. Which Quebec courts are covered by section 98 of the Constitution Act, 1867?
  2. What conditions for appointing judges to Quebec courts are required under section 98 of the Constitution Act, 1867 and does that section allow the appointment of persons who are members of federal courts?
  
5. On December 23, 2014, the Quebec Court of Appeal rendered its opinion on the Reference answering the Questions as follows:
  1. Which Quebec courts are covered by section 98 of the Constitution Act, 1867?

The "Courts of Quebec" contemplated by s. 98 of the Constitution Act, 1867 are those judges appointed by the Governor General, that is the Court of Appeal and the Superior Court of Quebec.

2. What conditions for appointing judges to Quebec courts are required under section 98 of the Constitution Act, 1867 and does that section allow the appointment of persons who are members of federal courts?

Section 98 of the Constitution Act, 1867 requires that a person appointed to one of Courts of Quebec have previously been a member of the Barreau du Quebec or be such a member when appointed. Therefore, a judge of the federal courts who was a member of the Barreau du Quebec prior to becoming a judge may be appointed to the Court of Appeal of Quebec or the Superior Court of Quebec

6. Rocco Galati ("Galati") and the Constitutional Rights Centre Inc. ("CRC") immediately appealed that decision. Galati and the CRC brought a motion to state a constitutional question in the terms of the original reference (both questions). The Attorney General of Quebec then also appealed, but only in respect of Question 2. The motion to state the constitutional questions was then dismissed.

## PART II – QUESTIONS IN ISSUE

7. In light of the dismissal of the motion to state the constitutional question in terms of the original Reference, the CRC only makes submissions in respect of Question 2. The CRC respectfully submits that that question should be answered as follows:

What conditions for appointing judges to Quebec courts are required under

section 98 of the Constitution Act, 1867 and does that section allow the appointment of persons who are members of federal courts?

**Answer 1:** “The person “appointed” (“selected”) under s. 98 must, at the time of “appointment” (“selection”), to a Quebec Court be a current member of the Quebec Bar and, by definition cannot allow for the appointment of a Federal Court (of Appeal) Judge.”

**Answer 2.:** The appointment or selection of a member of the Federal Court of Canada under s. 98 of the *Constitution Act, 1867* as a judge of the Quebec Superior Court or Court of Appeal is also prohibited when the appointment is used as a vehicle to by-pass the Constitutionally mandated rule that Federal Court judges cannot be appointed as Quebec judges of the Supreme Court of Canada.

### PART III – STATEMENT OF ARGUMENT

#### A. OVERVIEW

8. The Constitutional Rights Centre Inc. ("CRC") largely agrees with the positions and arguments of Rocco Galati. The Quebec Court of Appeal erred in concluding that the wording and/or historical context of s.98 of the *Constitution Act, 1867* ("CA, 1867") dictated a different result from the *Supreme Court Act Reference*<sup>1</sup>. In that case, the primary basis of the interpretation of s. 6 of the *Supreme Court Act* was the wording in French ("ou parmi") and English ("from among") connoting a present tense (the person must be currently a member of the Quebec bar). The other words, statutory context and historical context were

---

<sup>1</sup> *Reference Re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21

merely supportive of that interpretation. The Quebec Court of Appeal also erred in concluding that any concerns about appointing judges who were not current members of the Quebec bar had evaporated by 1867. This assertion is belied by express discussion of the provision in the Confederation debates and by the same concerns that continued to exist in 1875 in respect of Quebec judges of the Supreme Court of Canada.

9. In addition, there was a legitimate concern expressed and argued below, that the appointment of the Honourable Mr. Justice Mainville to the Quebec Court of Appeal, was intended as a stepping stone to his appointment to the Supreme Court of Canada<sup>2</sup>. The application by Galati and the CRC to challenge that appointment in the Federal Court and the subsequent Reference now under appeal created political realities that forced the Government of Canada to abandon that plan and appoint the Honourable Madam Justice Cote to replace the Honourable Mr. Justice LeBel. As a result, while the elevation of Justice Mainville to this Honourable Court is no longer an issue, this prospect has the potential to arise in the future and flows from the Reference question and, in the submission of the CRC, should also be answered as part of the appeal of the Reference.

**B. A FEDERAL COURT JUDGE CANNOT BE APPOINTED TO QUEBEC COURTS**

**1. SECTION 98 OF THE *CONSTITUTION ACT, 1867***

**(a) *Supreme Court Act Reference***

10. With respect to Question #2, of the Reference, it is respectfully submitted that the answer to

---

<sup>2</sup> See Galati Record, Galati Affidavit re comments of AG McKay, judges on the SCC short list and the timing (re the retirement of the Honourable Mr. Justice LeBel)

this question has been squarely, and bindingly, answered by the Supreme Court of Canada, in the *Reference Re Supreme Court Act, ss. 5 and 6*, (the “Supreme Court Act Reference”)<sup>3</sup>.

11. The wording of s. 6 of the *Supreme Court Act* in English refers to reads: "from among the advocates of that Province".<sup>4</sup> The wording of section 98 of the Constitution Act, 1867 ("CA,1867") is "from the Bar of that Province".<sup>5</sup> The meaning of these words is the same. Accordingly, when the SCC ruled in the *Supreme Court Act Reference* that a Quebec judge of the SCC must be a current member of the Quebec bar and that a Federal Court judge, who used to be a member of the Quebec bar, is not a current member of that bar<sup>6</sup>, the English language of s. 98 of the CA, 1867 requires the same interpretation.
  
12. The wording of s. 6 of the *Supreme Court Act* in French refers to reads: "ou parmi les avocats de celle-ci".<sup>7</sup> The wording of section 98 of the Constitution Act, 1867 ("CA,1867") is "parmi les membres du barreau de cette province".<sup>8</sup> The meaning of these words is the same. Accordingly, when the SCC ruled in the *Supreme Court Act Reference* that a Quebec judge of the SCC must be a current member of the Quebec bar and that a Federal Court judge, who used to be a member of the Quebec bar, is not a current member of that bar<sup>9</sup>, the French language of s. 98 of the CA, 1867 supports the same interpretation. However, the AG of Canada asserted below that there is no official French version of the CA, 1867. While this may have been true in 1867, under section 55 and 56 of the *Constitution Act*,

---

<sup>3</sup> *Supreme Court Act Reference, supra*

<sup>4</sup> *Supreme Court Act*, R.S.C., 1985, c. S-26, s. 6

<sup>5</sup> *Constitution Act, 1867*, 30 & 31 Vict, c 3, s. 98

<sup>6</sup> *Supreme Court Act Reference supra* at paras 4, 15, 17, 18, 40, 41, 42, 45

<sup>7</sup> *Supreme Court Act, supra* s. 6

<sup>8</sup> *Constitution Act, 1867*, s. 98

<sup>9</sup> *Supreme Court Act Reference, supra* at paras 4, 15, 17, 18, 40, 41, 42, 45

1982<sup>10</sup>, there is now an equally authoritative French version of the *Constitution Act, 1867* (found at the AG of Canada's website)<sup>11</sup>.

13. This Court went on to also rely on the historic purpose of s. 6 of the *Supreme Court Act* in 1875, which was never changed, to determine the purpose of the provision.<sup>12</sup> It was argued

<sup>10</sup> *Constitution Act, 1982*, ss 55 and 56:

**55.** A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

**56.** Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, **the English and French versions of that portion of the Constitution are equally authoritative.**

<sup>11</sup> Dept. of Justice website: Rapport définitif du comité de rédaction constitutionnelle française chargé d'établir, à l'intention du ministre de la Justice du Canada, un projet de version française officielle de certains textes constitutionnels: Avis au lecteur : Ce document constitue la recommandation du Comité créé au titre de l'article 55 de la *Loi constitutionnelle de 1982*; il n'a été remplacé par aucun autre document établi au titre de cet article. Table des matières: Composition du comité de rédaction constitutionnelle française: Introduction: Partie I: : textes (30) mentionnés à l'annexe de la *Loi constitutionnelle de 1982*:

**Texte no 1 : Loi de 1867 sur l'Amérique du Nord britannique, 30-31 Vict., ch. 3 (R.-U.)...**

<sup>12</sup> [18] ... this interpretation of s. 6 advances its dual purpose of ensuring that the Court has **civil law expertise and that Quebec's legal traditions and social values are represented on the Court and that Quebec's confidence in the Court be maintained...**

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

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

[48] Section 6 reflects the **historical compromise** that led to the creation of the Supreme Court. ..., **the protection of Quebec through a minimum number of Quebec judges was central to the creation of this Court.** A purposive interpretation of s. 6 must be informed by and not undermine that compromise.

[49] **The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights.**

... the antipathy to having the Civil Code of Lower Canada interpreted by judges from an alien legal tradition was not based merely on a concern for legal purity or accuracy. **It stemmed more often from the more fundamental premise that Quebec's civil-law system was an essential ingredient of its distinctive culture and therefore it required, as a matter of right, judicial custodians imbued with the methods of jurisprudence and social values integral to that culture.** [Emphasis in original.] (Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (1969), at p. 8)...

[54] **Quebec's confidence in the Court was dependent on the requirement of two (one third) Quebec judges.** Jacques-Olivier Bureau, a Senator from Quebec, saw fit to "trust the rights of his compatriots ... to this

before this Court and accepted that the requirement of knowledge of Quebec civil law was not the only purpose of s. 6 and its predecessors. In addition to knowledge of that legal system, the section required a knowledge of the legal tradition and social values, was necessary to maintain Quebec's confidence and reflected a historical and constitutional compromise. Knowledge can be obtained through education and experience and can be retained as a former member of the bar. However, an understanding of Quebec values

---

Supreme Court, as he considered their rights would be quite safe in a court of which two of the judges would have to be taken from the Bench of that Province" (*Debates of the Senate*, 2nd Sess., 3rd Parl., April 5, 1875, at p. 713). The comments of Joseph-Aldéric Ouimet, Liberal-Conservative Member for Laval, also underline that it was a matter of confidence in the Court:

**In Quebec an advocate must have ten years' practice before he can be a Judge. The Judges from the other Provinces might have the finest intelligence and the best talent possible and yet not give such satisfaction to the people of Quebec as their own judiciary. (1875 *Debates*, March 27, 1875, at p. 940)...**

[56] Viewed in this light, the purpose of s. 6 ... as a means of attaining **the twofold purpose of (i) ensuring civil law expertise and the representation of Quebec's legal traditions and social values on the Court, and (ii) enhancing the confidence of Quebec in the Court.** Requiring the appointment of current members of civil law institutions was intended to ensure not only that those judges were qualified to represent Quebec on the Court, but that they were perceived by Quebecers as being so qualified.

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

[58] This argument is not convincing. Parliament could have adopted different criteria to achieve the twofold objectives of s. 6 — for instance by requiring a qualitative assessment of a candidate's expertise in Quebec's civil law and legal traditions — but instead it chose to advance the provision's objectives by specifying objective criteria for appointment to one of the Quebec seats on the Court. ...

[59] We earlier concluded that a textual interpretation of s. 6 excludes former advocates from appointment to the Court. We come to the same conclusion on purposive grounds. ... **the underlying purpose of s. 6 is to enshrine the historical compromise that led to the creation of the Court by narrowing the eligibility for the Quebec seats. Its function is to limit the Governor in Council's otherwise broad discretion to appoint judges, in order to ensure expertise in civil law and that Quebec's legal traditions and social values are reflected in the judges on the Supreme Court, and to enhance the confidence of the people of Quebec in the Court.**

[60] ... s. 6 makes clear that judges of the federal courts are not, by virtue of being judges of those courts, eligible for appointment to the Quebec seats on this Court. The question is not whether civilist members of the federal courts would make excellent judges of the Supreme Court of Canada, but whether they are eligible for appointment under s. 6 on the basis of being former rather than current advocates of the Province of Quebec. **We conclude that they are not.**<sup>12</sup>

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

[emphasis added]

demands a current exposure. While Justice Mainville may have been a member of the bar 5 years ago, sometimes decades may pass since the person was a member of the Quebec bar (e.g. Justice Nadon: over 20 years). This justifies a requirement for current membership in the Quebec bar or in the Courts of Quebec. A Federal Court judge, even one who may sometimes geographically sit in Quebec and may deal with Quebec civil law from time to time, must reside in Ottawa and, by definition, serves the people of Canada, the entire Country, not Quebec alone. The need for confidence of the Quebec people is directly related to the constitutional history of Quebec embodied in the "constitutional compromise" reflected in s. 98 of the CA, 1867.

14. Accordingly, if the same purposes are embodied in s. 98 of the CA, 1867 as existed in respect of s. 6 of the *Supreme Court Act*, then the purposive analysis of the SCC is indistinguishable. To summarize, these features are:
- (a) Knowledge of the French/Quebec civil law, legal tradition and social values;
  - (b) Need for Confidence of Quebec in the Courts; and
  - (c) the requirement that judges be from the local bar is part of a historical and constitutional compromise.

These are features of the constitutional history leading to the constitutional compromise reflected in s.98 of the CA, 1867.

(b) **Constitutional History Re Quebec Judiciary**

- (i) **Knowledge of the French/Quebec civil law, legal tradition and social values**

15. It respectfully submitted that the constitutional history of Quebec makes it clear that one of

the concerns of Quebec at the time of Confederation was the appointment of judges who had knowledge of Quebec civil law, legal tradition and social values. Since the civil law system of Quebec was preserved in the CA, 1867, this concern focused on knowledge of the legal tradition and social values. This concern started with the conquest of Quebec and continued until the creation of the Supreme Court of Canada in 1875.

16. British law required that local law continue to be applied after military conquest.<sup>13</sup> This was initially recognized in the Articles of Capitulation, 1760.<sup>14</sup> However, in a Proclamation that followed shortly thereafter, English common law was applied to Quebec in civil matters<sup>15</sup> and an Ordinance (a legislative act of the King).<sup>16</sup> French-Canadians made complaints to Governor Murray regarding the unfairness and impractical nature of the application of British common law to a people unfamiliar with such a system without the involvement of French-Canadians.<sup>17</sup> This convinced Governor Murray and later Governor Carleton that French law should apply to civil cases<sup>18</sup> in order to ensure the continued trust and loyalty of

---

<sup>13</sup> *Calvin's Case (1608) Eng.R. 64, 7 Co Rep 1a* (Exchequer Court); *Campbell v. Hall*, (1774), 98 E.R. 1045 (K.B.) reported in Kennedy, Documents of the Canadian Constitution, 1759-1915, (1918), at pp. 79-85; P. Hogg, Constitutional Law of Canada, (5th Ed, 2007), at pp. 2-7 to 2-8; Reesor, The Canadian Constitution in Historical Perspective, (1992), at p. 5

<sup>14</sup> Articles of Capitulation of Montreal, 1760, Article XLII, in Kennedy, *supra* at pp. 6, 12

<sup>15</sup> Royal Proclamation, Oct. 7, 1763, in Kennedy, *supra* at pp. 18-21; Reesor, *supra* at p. 7; Hogg, *supra* at p. 2-8

<sup>16</sup> Ordinance Establishing Civil Courts, 1764, Kennedy, *supra*, at pp. 37-40

<sup>17</sup> Report of the Attorney and Solicitor General Regarding the Civil Government of Quebec, 1766, Kennedy, *supra*, at pp. 44-46, at p. 44 "disorders [as a result of] the attempt to carry on the Administration of Justice without the aid of natives" ("new forms" and "unknown tongue");

<sup>18</sup> Letter from Governor Murray to the Lords of Trade, Oct. 29, 1764, Kennedy, *supra* at pp. 40-41 "unless the Canadians are admitted on Juries and are allowed judges and lawyers who understand their Language, His Majesty will lose the greatest part of this valuable people."; Report of the AG, *supra* at p. 45 (Murray's proposal discussed and disputed (The AG thought that conferring with Canadian counsel should be adequate (p. 45)) and that "one or two" Justices of the Peace could be Canadian (p. 46)); and Draft Report to Earl of Hillsborough, Kennedy, *supra*, at p. 57 (the Report is lost but summary of draught is available and discussed in the criticism of the Report by Attorney General Maseres). Carleton recognized that the present law was contrary to the terms of Capitulation and was a cause of discontent (Letter from Carleton to Shelbourne, Dec. 24, 1767, Kennedy, *supra* at p. 56); AG Maseres Criticism of Governor Carleton's Report on the Laws of the Province, 1769, Kennedy, *supra*, pp. 58-59. In this report he lies about the terms of capitulation (compare to Terms of Capitulation at p. 12 of Kennedy) and

the people. This was resisted within Quebec and in Britain. The initial response was to merely allow Canadian lawyers to appear in the Courts in Quebec.<sup>19</sup> Ultimately, after testimony was heard from Governor Carleton, AG Maseres and Chief Justice Hey, Parliament passed the *Quebec Act, 1774*, which restored French civil code in civil matters.<sup>20</sup>

17. The *Quebec Act, 1774* did not deal with the problem of the composition of the Courts to deal with the French civil code. In testifying before the British Parliament, Governor Carleton had advocated the use of Canadian lawyers as judges.<sup>21</sup> However, this was not adopted. In fact, subsequent legislation did not address the issue, but did set up the Courts (as discussed below)<sup>22</sup>. The King addressed the issue in a minimalist manner by giving instructions to Governor Carleton in 1775. The King instructed that two Canadian judges be appointed to the Court of Common Pleas out of six (one in Quebec and one in Montreal).<sup>23</sup>:
18. As there had been before the Quebec Act, 1774, Quebecers lobbied for reform and opposed efforts to turn back the clock to bring back English common law in civil matters<sup>24</sup>. This included proposed reform in 1784 in respect of the futility of appearing before British judges:

---

suggests that the laws of England be applied because British judges cannot administer the laws and customs of Paris (p. 59).

<sup>19</sup> *Ordinance of 1766*, Kennedy, *supra* at pp. 48-49

<sup>20</sup> *Debates in British Parliament re Quebec Act, 1774*, Kennedy, *supra*, at pp. 86-132. The testimony of Governor Carleton was that the French-Canadians would be "hurt" to have their laws and "customs" taken from them (p. 106).

<sup>21</sup> *Debates in British Parliament re Quebec Act, 1774*, Kennedy, *supra*, testimony of Carleton at p. 112; Parliamentarians then expressed concern that since the Chief Justice admitted that he was unable to apply French laws, there was a problem as to who should be judges (pp. 128-129)

<sup>22</sup> *Ordinance for the Establishing Courts of Civil Judicature in the Province of Quebec*, Feb. 25, 1777; *An Ordinance for the Establishing Courts of Criminal Jurisdiction in the Province of Quebec*, March 4, 1777, Kennedy, *supra*, at pp. 158-159; 164-165

<sup>23</sup> *Instructions to Governor-General Carleton, 1775*, Kennedy, *supra* at pp. 150-158

<sup>24</sup> *Petition for the House of Assembly*, Nov. 24, 1784, Kennedy, *supra* at pp. 172-173. This was a petition by English to, *inter alia*, bring back English commercial laws. This was answered by French objection: Objection to the Requests Made to our August Sovereign, 1784, Kennedy, *supra*, at pp. 176-177

**That the Laws, Usages and Customs of this Country be continued...But what will become of our Rights when brought before a Court which will deviate in nothing from the British Laws and Constitution...**<sup>25</sup>

19. This was met by the reaffirmation of French civil Laws, Usages and Customs by instructions to the Governor<sup>26</sup> and later the *Constitution Act, 1791*<sup>27</sup> which also divided Quebec into the two Provinces of Upper and Lower Canada as a result of the influx of British Empire Loyalists from the newly formed USA.<sup>28</sup> However, the demands for Canadian lawyers on the bench was not addressed.
20. In the early 19th Century, with the continued influx of British Empire Loyalists, primarily into Upper Canada, there was an interest in uniting Upper and Lower Canada This proposal was opposed by the French Canadians. As a means to allow for the effective Union, guarantees for the continuation of the French civil code and promises of equal representation were advanced<sup>29</sup>. Ultimately, economic causes, discontent with British oppression of the French and general oppression by oligarchies led to rebellions in Upper and Lower Canada.<sup>30</sup> Quebec's rebellion, led initially by Papineau, ultimately led to the 92 Resolutions<sup>31</sup>. These Resolutions reflected the French-Canadian objections to various issues, including the appointment of British judges. There was objection based on the lack of knowledge of Quebec laws, legal tradition and social values<sup>32</sup>. The 92 Resolutions

<sup>25</sup> Objection to the Requests, 1784, *supra*, Kennedy, *supra*, at pp. 176; 177

<sup>26</sup> Instructions to Lord Dorchester, 1786, Kennedy, *supra* at pp. 1801-81

<sup>27</sup> The Constitution Act, 1791, s. 33, Kennedy, *supra* at pp. 207, 214; Reesor, *supra*, at p. 15; Hogg, *supra* at p. 2-9

<sup>28</sup> Reesor, *supra* at p. 12-13; Hogg, *supra* at pp. 2-8-to 2-9

<sup>29</sup> Petition from Wentworth Against Union, Kennedy, *supra*, at pp. 336-337; Report of the Select Committee on the State of Civil Government of Canada, British Parliament, July 22, 1928, Kennedy, *supra*, at pp. 345-349.

<sup>30</sup> Reesor, *supra* at pp. 17-19; Hogg, *supra* at p. 2-9

<sup>31</sup> The 92 Resolutions of 1834, Feb 21, 1834, in Kennedy, *supra* at pp. 366-367, 376-383; Reesor, *supra* at p. 20

<sup>32</sup> 92 Resolutions, *supra*, Resolution 58, 76, 77:

expressed the abuse by British judges and the continuation of the call for the reform of the appointment of Quebecers to Quebec Courts.<sup>33</sup>

**(ii) Need for Confidence of Quebecers in the Courts**

21. The need for confidence flows from legitimate concerns regarding the oppressive approach of the British towards the French Canadians. This started by the Conquest itself and the hypocritical removal of French laws required by British law and initially recognized in the Terms of Capitulation.<sup>34</sup> The need for the confidence of Quebecers in the Courts was a key point in favour of the re-introduction of French civil law in the Quebec Act, 1774.<sup>35</sup> It

---

58. Resolved, That it was only in consequence of an erroneous supposition that feudal charges were inherent in the law of this country...

76 Resolved That this partial and abusive **practice of bestowing the great majority of official places in the province ... are the least versed in its laws, and in the language - and usages of the - majority of its inhabitants**; that the result of their intermeddling in the politics of the country, ... the claim laid by the said judges "to the power of regulating the forms of legal proceedings in a manner contrary to the laws, and without the - interference of the legislature, has frequently been extended to the **fundamental rules of the law and of practice...**

77. 'Resolved, That **in consequence of their connexion** with the members of the Provincial -Administrations, **and of their antipathy to the country some of the said judges have in violation of the laws, attempted to abolish the use in the courts of law of the language spoken by the majority of the inhabitants of the country**, which is necessary to the free action of the laws, **and forms a portion of the usages guaranteed to them** in the most solemn manner by the law of nations and by statutes of the British Parliament.

<sup>33</sup> This was followed up by similar but more moderate calls for judicial reform: Declaration, of the Constitutional Association of Quebec, 1834, in Kennedy, *supra*, at pp. 388-391

<sup>34</sup> See footnotes 14-16.

<sup>35</sup> Report of the Attorney and Solicitor General Regarding the Civil Government of Quebec, 1766, Kennedy, *supra*, at pp. 44-46, at p. 44 "disorders [as a result of] the attempt to carry on the Administration of Justice without the aid of natives" ("new forms" and "unknown tongue"). Letter from Governor Murray to the Lords of Trade, Oct. 29, 1764, Kennedy, *supra* at pp. 40-41 "unless the **Canadians** are admitted on Juries and **are allowed judges and lawyers who understand their Language**, His Majesty will lose the greatest part of **this valuable people.**"; Report of the AG, *supra* at p. 45 (Murray's proposal discussed and disputed (The AG thought that conferring with Canadian counsel should be adequate (p. 45)) and that "one or two" Justices of the Peace could be Canadian (p. 46)); and Draft Report to Earl of Hillsborough, Kennedy, *supra*, at p. 57 (the Report is lost but summary of draught is available and discussed in the criticism of the Report by Attorney General Maseres). Carleton recognized that the present law was contrary to the terms of Capitulation and was a cause of discontent (Letter from Carleton to Shelbourne, Dec. 24, 1767, Kennedy, *supra* at p. 56); AG Maseres Criticism of Governor Carleton's Report on the Laws of the Province, 1769, Kennedy, *supra*, pp. 58-59. In this report he lies about the terms of capitulation (compare to Terms of Capitulation at p. 12 of Kennedy) and suggests that the laws of England be applied because British judges cannot administer the laws and customs of Paris (p. 59). Debates in British Parliament re Quebec Act, 1774, Kennedy, *supra*, at pp. 86-132. The testimony of Governor Carleton was that the French-Canadians would be "hurt" to have their laws and "customs" taken from them (p. 106). He was also critical of the judicial conduct of Chief Justice Hey

was also motivated by a fear that Quebeckers lack of confidence in the legal system might lead them to join the Americans in their revolution.<sup>36</sup> In fact, the Americans appealed to Quebec to join them in their revolutionary war against the British citing the application of British law and the failure to appoint French members of the bar to the Courts. Specifically, the American Congress said:

**...The power of judging should be exercised by persons taken from the body of the people...** Your judges, and your legislative council, as it is called, are dependent on your Governor, and he is dependent on the servant of the Crown in Great Britain...<sup>37</sup>

22. The failure to deal with these concerns in the *Quebec Act, 1774* and the *Constitution Act, 1791* contributed to the rebellion in Lower Canada in the 1830s and the 92 Resolutions. These Resolutions reflected a concern about the appointment of non-French judges contributing to the lack of confidence of Quebeckers. Some objection to the unfairness of judicial (and other) patronage appointments being predominantly British.<sup>38</sup> This had nothing to do with legal training, but went to the desire for fairness between the French and the British. There was also concern that the administration of the civil law was being done with a British bias (similar to the objections made in 1784, *supra*) thus undermining the system. Again, this was not based on, but may have been contributed to by, lack of knowledge. This demand for reform was motivated by a lack of trust by the French-

---

(p. 107). He testified that there were no Canadian English barristers, but that books of laws and customs of Paris existed (p. 108). He noted that not one Canadian had acted as a Justice of the Peace (p.108). He decried the fact that the seigneurs could no longer dispense justice (p. 108). He testified that the Canadians feared that the application of English law would result in "something terrible" (p.109). The testimony of Maseres and Chief Justice Hey were offensively Anti-Catholic, Anti-French and Anti-French-Canadian in their criticism of the French-Canadians and French law, notwithstanding their admitted ignorance of the laws (pp. 114-115, 117); The chief Justice himself admitted that he was unable to administer French laws because of his ignorance and time required to learn them (pp. 118-199), yet he continued to offer his opinions regarding the nature and meaning of these laws (p. 199-121). *Quebec Act, 1774*, s. 8, in Kennedy, *supra* at pp. 132-134; Hogg, *supra* at p. 2-8

<sup>36</sup> Kennedy, *supra*, at p. 149; Reesor, *supra* at pp. 8-10

<sup>37</sup> Address of the General Congress to the Inhabitants of the Province of Quebec, Oct. 26, 1774, in Kennedy, *supra* at pp.139-143, quotation from pp. 141-142

<sup>38</sup> 92 Resolutions, *supra*, Resolution 53-54, 56, 58, 60, especially 75 & 76

Canadians in the "justice" being dispensed by British judges<sup>39</sup>.

<sup>39</sup> 92 Resolutions, *supra*, Resolution 53-54, 56, 58, 60 and 77. In particular:

53, Resolved, ...guided by the rules of justice; and of the law of nations, the British Parliament enacted that, "in all matters of controversy, relative to property and civil rights, - resort should be had to the laws of Canada ;" that when Parliament afterwards departed from the principle ... in the courts of law ... are contrary to the engagements of the British Parliament, and to the rights guaranteed to His Majesty's Canadian subjects, on the faith of the national honour of England, and that of capitulations and treaties.

54. Resolved, ... system of law, would be a violation of those rights, and would, as long as it should exist, be obeyed by the people from motives of fear and constraint, and not from choice and affection; that the conduct of the Colonial Administrations and of their agents, and instruments in this colony, has for the most part been of a nature unjustly to create apprehensions as to the views of the people and government of the mother country, and to endanger the confidence and content of the inhabitants of this province, which can only be secured by equal laws,, and by the observance of equal justice, as the rule of conduct in all the departments of the Government....

56. Resolved, That in addition to administrative and judicial abuses which have had an injurious effect upon the public welfare and confidence, attempts have been made, from time to time, to induce the Parliament of the United Kingdom, by deceiving its justice and abusing its benevolent intentions, to adopt measures calculated to bring about combinations of the nature above mentioned ...

59. Resolved, That, independently of its many other serious imperfections, the said Act does not appear to have been founded on a sufficient knowledge of the laws which govern persons and property in this country, when it declares the laws of Great Britain to be applicable to certain incidents to real property, therein enumerated; and that it has only served to augment the confusion and doubt which had prevailed in the courts of law...

75. Resolved, That the number of the inhabitants ... of French origin are about 525,000, and those of British or other origin 75,000... 157 officers and others receiving salaries, who are apparently of British or foreign origin, and the names of 47 who are apparently natives of the country, of French origin: that this statement does not exhibit the whole disproportion which exists 'in the distribution of the public money and power, the latter class being for the most part appointed to the inferior and less lucrative offices ...

76 Resolved That this partial and abusive practice of bestowing the great majority of official places in the province on those only who are least- connected- with its permanent interests, and with the mass of its inhabitants, has been most especially remarkable in the judicial department, the judges for the three great districts having with the exception of one only in each, been systematically chosen from that class of persons who, being born out of the country, are the least versed in its laws, and in the language - and usages of the - majority of its inhabitants; that the result of their intermeddling in the politics of the country, of their connexion with the Members of the Colonial Administration, and of their prejudices in favor of institutions foreign to and at variance with those of the country, is that the majority of the said judges have introduced - great irregularity into the general system of our jurisprudence, by neglecting to ground their decisions on its recognized principles; and that the claim laid by the said judges "to the power of regulating the forms of legal proceedings in a manner contrary to the laws, and without the - interference of the legislature, has frequently been extended to the fundamental rules of the law and of practice; and that in consequence of the - same system, the administration of the criminal law is partial and uncertain, and such as to afford but little protection to the subject, and has failed to inspire that confidence which ought to be its inseparable companion.

77. 'Resolved, That in consequence of their connexion with the members of the Provincial -Administrations, and of their antipathy to the country some of the said judges have in violation of the laws, attempted to abolish the use in the courts of law of the language spoken by the majority of the inhabitants of the country...

78, Resolved, That some of the said judges, through partiality for political purposes,- and in violation of the criminal law of England as established in this country, of their duty and of their oath, have connived with divers law officers of the Crown, acting in the interest of the Provincial Administration, to allow the latter to engross and monopolize all criminal prosecutions of what nature soever, ... it was impossible for the very numerous class of His Majesty's subjects to which the latter belonged to commence with the slightest confidence any prosecution against those who, being protected by the Administration ...

23. It was acknowledged by the Report to Britain that these calls for reform, in particular the 92 Resolutions, was an indication of discontent that had to be addressed.<sup>40</sup> Even in the pro-British and Anti-French views of Lord Durham, which led to the *Act of Union, 1840*, it was acknowledged that there was "ample grounds" for the (French) Canadians to not trust the administration of justice.<sup>41</sup> Although these concerns were not addressed in the *Act of Union, 1840*, the protection of the Quebec civil code was continued.<sup>42</sup> The concerns regarding the judicial system, having not been addressed by the Union of Upper and Lower Canada into Canada West and East, in the *Act of Union, 1840*, festered until the political crisis and other circumstances brought things to a head in the mid 1860s<sup>43</sup>

### (iii) Constitutional Compromise: Confederation and Confederation Debates

24. The *Quebec Act, 1774* reintroduction of the civil law system was a constitutional compromise.<sup>44</sup> Its continuation in the face of calls for its abolition continued this compromise. The Rebellion focused the concerns of Quebecers on the problem with English judges being appointed in Quebec. In the 1860s, Confederation was needed to deal with Economic, Military and Political concerns that arose in Canada. Politically, there was

---

<sup>40</sup> Letter from Aberdeen to Aylmer, Feb. 11, 1834, in Kennedy, *supra* at pp. 396-398. It was also acknowledged in a letter to Governor-General Head, Dec. 5, 1835, in Kennedy, *supra* at pp. 412-415 that there was legitimate concern about biased patronage (p. 144).

<sup>41</sup> Lord Durham to Lord Glenelg, August 9, 1838, Kennedy, *supra* at pp. 455-461; see also Reesor, *supra* at pp. 23-25; Hogg, *supra* at p. 2-9

<sup>42</sup> *Act of Union, 1840*, ss. 46, 47, Kennedy, *supra* at pp. 536, 537; Hogg, *supra* at p. 2-10

<sup>43</sup> The French Canadians were outraged at the Union designed to subjugate them: Reesor, *supra* at p. 26-29

<sup>44</sup> Governor Cavelton advocating it and the AG opposing it (see Footnotes 21 and 35). The American calls for Quebec to join them based, in part on an appeal to Quebec's grievance re judges also reflected this compromise (see Footnotes 36-38)

a deadlock in the Canadian Legislature.<sup>45</sup> French-Canadian vs. English issues were a part of this deadlock. The only solution was to expand the union with the Maritime Colonies to break the deadlock. Confederation threatened the interests of French-Canadians in Canada East/Lower Canada/Quebec, including a fear of assimilation.<sup>46</sup> The breaking of the deadlock would take away their equality of representation with Canada West, to be replaced by representation by population.<sup>47</sup> Quebec would now be even more of a minority amongst an English majority. The only attractive political feature of Confederation for Quebec was the return to an independent legislature, at least within the Provincial sphere, which had been taken away in 1840.<sup>48</sup> The concerns expressed in the 92 Resolutions, including the concerns regarding laws and the judiciary, had to be addressed to ensure that Quebec would agree to the idea of Confederation. The CA, 1867 was negotiated in the Charlottetown, Quebec and London Conferences reflected a compromise by Quebec, giving up their protections reflected in the Act of Union in exchange for other protections (entrenched French language; Catholic Education; wide s.92 Provincial jurisdiction, especially Property and Civil Rights, and s. 98 of the CA, 1867). Without these protections, Quebec would have refused to accept Confederation.<sup>49</sup>

25. It is clear from the debates in the Canadian Legislature that the protection of French

---

<sup>45</sup> Reesor, *supra* at pp. 40-45. There were 3 government defeats in 3 years leading up to Confederation being proposed.

<sup>46</sup> Reesor, *supra* at p. 40. These concerns were espoused by the Quebec radical party, the Rouges, initially led by Papineau and then by A.A. Dorion.

<sup>47</sup> Reesor, *supra*, at pp. 44-45

<sup>48</sup> Hogg, *supra* at p. 2-10; T. Bredin, Confederation 1867, Selected Sources, 1968, p. 128, Letter from Author Gordon, L-G of New Brunswick to Secretary of State for the Colonies, Sept. 26, 1864

<sup>49</sup> The London Conference was based on the Quebec Conference but is considered to be separate since PEI and Newfoundland, who were part of the Quebec Conference did not participate in London. However, the equivalent provisions in both sets of Resolutions (Quebec and London, Resolutions 34 and 35) are the same and the same as s. 97 and 98 of the CA, 1867, except for the elimination of PEI and Newfoundland in the London Resolutions. See Senate Report on the BNA, 1939, Annex 4, generally, pp. 32-42 and 53 (Quebec), 62 (London); see also T. Bredin, *supra*, 1968, p.115

Canadians through the protection of their legal system, including an effective local judiciary, based on a lack of knowledge of Quebec values and lack of trust of the English, reflects this constitutional compromise.<sup>50</sup>

<sup>50</sup> 1864 Legislature debate re Quebec Resolutions:

J.A. MacDonald: "**The resolutions on their face bore evidence of compromise**; perhaps not one of the delegates from any of the provinces would have propounded this scheme as a whole, but being impressed with the conviction that it was highly desirable with a view to the maintenance of British power on this continent that there should be confederation and a junction of all the provinces, **the consideration of the details was entered upon in a spirit of compromise. Not one member of the Canadian government had his own views carried out in all the details** audit was the: same with the other delegates. But after a full discussion of sixteen days, and after the various details had been agreed, the resolutions as a whole were agreed to by a unanimous vote, every one of the delegates, whatever his view (as) to any of the details, being satisfied to adopt the whole scheme as adopted by a majority for each individual resolution, and to press it upon his own legislature as the only practicable scheme that could be carried." (p. 15, col. 1.)

"The proposition submitted to the House is that an address be presented to Her Majesty, praying that a bill should be passed based on these resolutions." (p. 15, col. 2.)

"**These resolutions were in the nature of a treaty, and if not adopted in their entirety the proceedings would have to be commenced do novo.**" (p. 16, col. 1.)<sup>50</sup>

1865, Debates Re Confederation, February 1865:

J.A. MacDonald: **there was as great a disinclination on the part of the various Maritime Provinces to lose their individuality, as separate political organization, as we observed in the case of Lower Canada herself. Therefore we were forced to the conclusion that we must either abandon the idea of Union altogether, or devise a system of union in which the separate provincial organizations would be in some degree preserved. So that those who were, like myself, in favor of a Legislative Union, were obliged to modify their views and accept the project of a Federal Union as the only scheme practicable even for the Maritime Provinces ...**

**The whole scheme of Confederation; as propounded by the Conference, as agreed to and sanctioned by the Canadian Government, and as now presented for the consideration of the people, and the Legislature, bears upon its face the marks of compromise. Of necessity there must have been a great deal of mutual concession. When we think of the 'representatives of five 'colonies, all supposed to have different interests, meeting together, charged with the duty of protecting those interests and of pressing the views of their own localities and sections; it must be admitted that had we not met in a spirit of conciliation, and with an anxious desire to promote this union; if we had not been impressed with the 'idea contained in the words of the resolution—'"That the 'best interests and present and future prosperity of British North America would be promoted by a Federal Union under the Crown' of Great Britain," all our efforts might-have proved to be of no avail. If we had not felt that, after coming to this conclusion, we were bound to set aside our private opinions on matters of detail, if we had not felt ourselves bound to look at what was practicable, not obstinately rejecting the opinions of others nor adhering to our own; if we had not met, I say, in a Spirit of conciliation, and with an anxious, overruling desire to form one people under one government, we never would have succeeded...**

**But to prevent local interests from overridden, the same section makes provision, that, while power is to the General Legislature to deal with this subject, no change in respect should have the force and authority of law in any province is sanctioned by the Legislature of that province. The General Legislature is to have power to establish a general Court of Appeal for the Federated Provinces. Although the Canadian Legislature has always had the to establish a Court of Appeal, to which appeals may be made from the courts of Upper and Lower Canada, we have never availed ourselves of the power. Upper Canada has its own Court of Appeal, so has Lower Canada. And this system will continue until a General Court of shall be established by the General Legislature. The Constitution not provide that such a court shall be established. There are many arguments for and against the establishment of such a court. But it was thought wise and expedient to put into the Constitution a power...**

26. Accordingly, it is clear that the historical context leading up to and reflected in s. 98 of the CA, 1867 reflected the same concerns, expressed by the same political players, in 1875, namely: a need for Quebec judges to be familiar with Quebec values, to ensure confidence of Quebecers in the Courts and reflected a constitutional compromise. The interpretation based on the wording dictated by the *Supreme Court Act Reference* is supported by the historical context and was therefore not was properly distinguished by the Quebec Court of Appeal.
27. The Attorney General of Canada filed a report of Professor Girard as evidence. The CRC challenged the admissibility (as evidence; not as an authority) and correctness<sup>51</sup>, in particular, the legal conclusion at paragraph 60 of the Girard Report. Judges take judicial

---

G.E. Cartier: Central or general government and local governments, which would at once secure and guard person, the properties and the civil and religious rights belonging to the population of each section...

H.G. Joly: **what. . . are the aspirations of the French Canadians? I have always imagined, indeed I still imagine, that they all centre in one point, the maintenance of their nationality as a shield destined for the protection of the institutions they hold most dear. For a whole century this has ever been the aim of the French Canadians; in the long years of adversity they have never for a moment lost sight of it; surmounting all obstacles, they have advanced step by step towards its attainment, and what progress have they not made? What is their position today? They number nearly a million, they have no longer ...to fear the fate of Louisiana...**

H.L. Langevin: **We do not wish to do away with our customs, manners and laws; on the contrary those are precisely what we are desirous of protecting in the most complete manner by means of Confederation...**

**... It was our desire, as representatives of Lower Canada at the Conference, that we should have under the control of our Local Legislature the constitution and organization of our courts of justice, both civil and criminal...in the proposed Constitution there is an article which provides that the judges of the courts of Lower Canada shall be appointed from members of the bar of that section. This exception was only made in favor of Lower Canada, and it is a substantial guarantee for those who fear the proposed system...**

J. Cauchon: **the civil laws...Latin sources...we hold to them as a sacred legacy; we love them because they suit our customs...The Conference has understood and respected our ideas on this point. However, if a Court of Appeal should one day be placed over the judiciary tribunals of all of the provinces...those same laws would be explained by men who would not understand them, and who would, involuntarily perhaps, graft English jurisprudence upon a French code of laws. *Such was the spectacle presented in Canada after the conquest, and no one, I am sure, would wish to see a repetition of the scene...***

<sup>51</sup> *Re L.S.U.C. and Robinette*, [1954] O.J. No.540 (H.C.J.); *Maurice v. Priel*, [1989] S.C.J. No. 37

notice of the law.<sup>52</sup> A legal opinion is inadmissible because, as a result of judicial notice it is unnecessary.<sup>53</sup> The Court, not a witness, decides what is the law. If this report is filed on this appeal, the CRC maintains this position.

## 2. USE OF THE QUEBEC COURTS AS MEANS TO BY-PASS THE CONSTITUTION IN RESPECT OF THE SCC

28. The Reference asks whether s. 98 of the CA, 1867 precludes the appointment of a Federal Court judge to the Quebec Court of Appeal. Since s. 98 serves the same purpose as s. 6 of the *Supreme Court Act*, which is constitutionalized, s. 98 would preclude the appointment of a Federal Court judge as a judge of the Quebec Court of Appeal where that appointment is being used as a means to by-pass s. 6 of the *Supreme Court Act*.
29. The doctrine of colourability or of abuse of process which can apply to the Executive act of judicial appointment. The doctrine of colourability is used to prevent the cloaking of unconstitutional objectives as constitutionally valid objectives.<sup>54</sup> The doctrine precludes doing indirectly what cannot be done directly. This is a classic formulation of abuse of process.<sup>55</sup> Further, the use of a judicial vacancy in the Quebec Court of Appeal for the purpose of parachuting in a judge temporarily so that he can then be appointed to the

---

<sup>52</sup> *R. v. The Evgenia Chandris*, [1976] S.C.J. No. 57

<sup>53</sup> *R. v. Mohan*, [1994] S.C.J. No. 36; see also: *Morris c. Morris*, [2009] Q.J. No. 2660 (Court of Quebec (civil));

45 On the second component, **the opinion cannot be admissible as to the legal issue it resolves: that is a matter for the judgment to determine. ...**

<sup>54</sup> Funston and Meehan, *Canada's Constitutional Law: in a Nutshell*, (4th, 2013), at p.49; Hogg, *supra* at p. 15-20; *Churchill Falls v. Newfoundland*, [1984] 1 S.C.R. 297 @ p. 332;

<sup>55</sup> *U.S.A. v. Cobb*, [2001] , S.C.J. No. 20; *U.S.A. v. Khadr*, [2011] O.J. No. 2060 (C.A.)

S.C.C.is an Executive interference with the independence of the judiciary.<sup>56</sup>

**PART IV– SUBMISSIONS CONCERNING COSTS**

30. The CRC does not seek costs.

**PART V– ORDER(S) SOUGHT**

31. The intervener respectfully submits that the Reference Question #2 be answered as follows:

**Answer 1.:** “The person “appointed” (“selected”) under s. 98 must, at the time of “appointment” (“selection”), to a Quebec Court be a current member of the Quebec Bar and, by definition cannot allow for the appointment of a Federal Court (of Appeal) Judge.”

**Answer 2.:** The appointment or selection of a member of the Federal Court of Canada under s. 98 of the *Constitution Act, 1867* as a judge of the Quebec Superior Court or Court of Appeal is also prohibited when the appointment is used as a vehicle to by-pass the Constitutionally mandated rule that Federal Court judges cannot be appointed as Quebec judges of the Supreme Court of Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

**DATED THIS 6th DAY OF MARCH, 2015.**

---

Paul Slansky  
1062 College Street, Toronto ON M6H 1A9  
TEL:416-536-1220; FAX:416-536-8842  
Counsel for the Appellant, Constitutional Rights Centre Inc.

---

<sup>56</sup> *Mackin v. New Brunswick*, [2002] S.C.J. No. 13; *Provincial Court Judges' Reference*, [1997] 3 S.C.R. 3

**PART VI – TABLE OF AUTHORITIES**

TAB	AUTHORITIES	PARAGRAPHS IN WHICH REFERRED
1	Bredin, <u>Confederation 1867, Selected Sources, 1968</u>	24, 25
2	<i>Calvin's Case (1608)</i> Eng.R. 64, 7 Co Rep 1a (Exchequer Court)	16
3	<i>Churchill Falls v. Newfoundland</i> , [1984] 1 S.C.R. 297	29
4	Funston and Meehan, <u>Canada's Constitutional Law: in a Nutshell</u> , (4th, 2013)	29
5	Hogg, <u>Constitutional Law of Canada</u> , (5th Ed, 2007)	17, 20, 21, 23, 24, 29
6	Kennedy, <u>Documents of the Canadian Constitution, 1759-1915</u> , (1918)	16-24
7	<i>Mackin v. New Brunswick</i> , [2002] S.C.J. No. 13	29
8	<i>Maurice v. Priel</i> , [1989] S.C.J. No. 37	27
9	<i>Morris c. Morris</i> , [2009] Q.J. No. 2660 (Court of Quebec (civil))	27
10	<i>Provincial Court Judges' Reference</i> , [1997] 3 S.C.R. 3	29
11	<i>R. v. Mohan</i> , [1994] S.C.J. No. 36	27
12	<i>R. v. The Evgenia Chandris</i> , [1976] S.C.J. No. 57	28
13	Reesor, <u>The Canadian Constitution in Historical Perspective</u> , (1992)	16, 19-21, 23, 24
14	<i>Reference Re Supreme Court Act, ss. 5 and 6</i> , 2014 SCC 21	8, 10-13, 26, 28
15	<i>Re L.S.U.C. and Robinette</i> , [1954] O.J. No.540 (H.C.J.)	27
16	<u>Senate Report on the BNA, 1939</u>	24-25
17	<i>U.S.A. v. Cobb</i> , [2001] , S.C.J. No. 20	29
18	<i>U.S.A. v. Khadr</i> , [2011] O.J. No. 2060 (C.A.)	29

**PART VII– STATUTORY PROVISIONS**

1. *Supreme Court Act*, R.S.C., 1985, c. S-26
2. *The Constitution Act, 1867*, 30 & 31 Vict, c 3, ss. 98