

**SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUÉBEC COURT OF APPEAL)**

B E T W E E N:

**ATTORNEY GENERAL OF QUÉBEC, ROCCO GALATI and
CONSTITUTIONAL RIGHTS CENTRE INC**

Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

**CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES, GRAND
COUNCIL CREE (EEYOU ISTCHEE), and CREE NATION GOVERNMENT**

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(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

A. Overview

1. Sections 97 and 98 of the *Constitution Act, 1867* require appointments to the superior, county, and district courts of the four original provinces to be made from persons who have been called to the respective provincial bars. They do not, however, impose any minimum length of bar membership or any requirement that an appointee continue to be a member of the bar at the time of appointment. The text, history and purpose of these sections and the other judicature provisions support the eligibility of former members of the relevant provincial bars for appointment to those courts.

2. The drafters of the *Constitution Act, 1867* were aware of the wide variety of existing qualifications for appointment to the pre-Confederation courts, which in some colonies included an express requirement of contemporaneous bar membership. Rather than constitutionalize a requirement of lengthy or contemporaneous bar membership, they instead decided to entrench only a basic, minimum qualification of having been a member of the relevant provincial bar, leaving more stringent qualifications to be set by statute as necessary.

3. The principles of the rule of law and the independence of the judiciary support an interpretation of sections 97 and 98 that minimizes uncertainty or confusion over the validity of section 96 appointments, while ensuring a broad and diverse pool of qualified candidates. Judges of the provincial courts, of the federal courts, masters, legal academics, and members of administrative tribunals, in addition to current members of the provincial bar, have routinely and without controversy been appointed to the section 96 courts for the past 147 years. The Appellants propose to disturb this settled understanding and practice in favour of a novel test that would call into question the validity of past and future judicial appointments, with a potential to

undermine the independence of individual judges and of the courts themselves. Ontario urges this Court to affirm the opinion of the Québec Court of Appeal that nothing in the Constitution prevents former as well as current members of a provincial bar from appointment to section 96 courts.

B. Facts

4. Ontario accepts the facts as recited by the Attorney General of Canada.¹

PART II – QUESTIONS IN ISSUE

5. In the decision under appeal, the Court of Appeal addressed two questions referred to it by the Government of Québec:

1. Which Québec courts are covered by section 98 of the *Constitution Act, 1867*?
2. What conditions for appointing judges to Québec 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?

6. Ontario takes no position on Question 1. Regarding Question 2, Ontario submits that it was correctly answered by the Court of Appeal: section 98 requires that a person appointed to the Courts of Québec have previously been a member of the Barreau du Québec, or be such a member when appointed. Therefore, a judge of the federal courts who was previously a member of the Barreau is eligible for appointment under section 98.

7. The reference questions did not refer to section 97, which applies to Ontario, New Brunswick, and Nova Scotia. The Court of Appeal, however, discussed the meaning of section

¹ Factum of the Respondent at paras 8-21.

97 in coming to its conclusions on section 98.² Ontario submits that the Court’s conclusion that section 97, like section 98, permits the appointment of both current and former members of the relevant provincial bar is correct.

8. In the alternative, if this Court accepts the submission of the Attorney General of Québec (“Québec”) that section 98 requires stricter qualifications in order to protect that province’s distinct legal system, Ontario’s position is that the same rationale does not apply to the three common law provinces bound by section 97, and that section should be interpreted as only requiring past or current bar membership.

PART III – ARGUMENT

A. The laws of the pre-Confederation provinces imposed a diversity of required qualifications which the text of the *Constitution Act, 1867* did not constitutionalize

9. In interpreting the *Constitution Act, 1867*, this Court has relied on both its text and the “internal architecture” of Canada’s Constitution, meaning that “[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole”.³ In this appeal, both textual and normative interpretative approaches lead to the same result: a minimum standard for judicial appointment that does not require contemporaneous bar membership.

10. The text of sections 97 and 98 discloses no requirement of contemporaneous bar membership. Further, sections 97 and 98 do not constitutionalize the pre-Confederation statutory requirements for judicial appointments of the four provinces to which they apply,⁴ as there was

² *Reference Re Section 98 of the Constitution Act, 1867*, 2014 QCCA 2365 at paras 40-41, 43, 49-57, 59 (“Court of Appeal Reasons”).

³ *Reference re Senate Reform*, 2014 SCC 32 at para 26.

⁴ Section 97 applies to appointments to the superior, district and county courts of Ontario, New Brunswick and Nova Scotia. It does not apply to the other common-law provinces because they did not adopt provisions of the

no consistency in such requirements among the pre-Confederation superior, district and county courts: Nova Scotia and Québec had some express requirements of contemporaneous bar membership in their pre-Confederation statutes, while Ontario and New Brunswick did not.⁵

11. To the extent that the laws of Prince Edward Island and Newfoundland and Labrador are also relevant to the interpretation of the *Constitution Act, 1867*, given that their delegates participated in some of the conferences that led to its drafting, the diversity of possible qualification requirements increases. Neither colony had a contemporaneity requirement.⁶

12. Despite the numerous existing statutory examples of how qualifications for judicial appointment could be drafted, the drafters of sections 97 and 98 chose by contrast to constitutionalize the basic minimum criterion of local bar membership without any reference to contemporaneity or years of practice. The diversity of pre-Confederation judicial qualification statutes shows how the drafters could have easily incorporated more stringent requirements into

Constitution Act, 1867 that applied to one or more but not all of the original provinces. See *Manitoba Act, 1870*, SC 1870, c 3, s 2; *British Columbia Terms of Union*, s 10; *Prince Edward Island Terms of Union*, s 14; *Alberta Act*, SC 1905, c 3, s 3; *Saskatchewan Act*, SC 1905, c 42, s 3; *Newfoundland Act (UK)*, 12&13 Geo VI, c 22, Sch, s 3.

⁵ *An Act respecting the Superior Courts of Civil and Criminal Jurisdiction*, CUSC 1859, c 10, s 7; *An Act respecting the Court of Chancery*, CUSC 1859, c 12, s 4; *An Act to make better provision for the Administration of Justice in the unorganized tracts of Country in Upper Canada*, 16 Vict, c 176, ss 2, 5, 8; *An Act respecting County Courts*, CUSC 1859, c 15, ss 2, 3, 8; *An Act to amend the Laws relative to the Courts of Original Civil Jurisdiction in Lower-Canada*, 1849, 12 Vict, c 38 [Respondent's Record ("RR") Vol 1 at 133]; *An Act to establish a Court having jurisdiction in Appeals and Criminal Matters, for Lower-Canada*, 1849, 12 Vict, c 37 [RR Vol 1 at 158]; *An Act respecting the Court of Queen's Bench*, RSLC 1861, c 77, s 2 [RR Vol 1 at 52]; *An Act to establish County Courts*, SNB 1867, c 10, s 2 [RR Vol 1 at 114]; *Supreme Court Act*, SNS 1809, c 15, s 6; *Qualifications of Judges Act*, RSNS 1864, c 37, s 1.

⁶ *An Act to authorize appointment of a Master of the Rolls to the Court of Chancery, and an Assistant Judge of the Supreme Court of Judicature in this Island*, SPEI 1848, c 6, s 1; *An Act for the better Administration of Justice in Newfoundland, and for other purposes*, 5 Geo IV, c 67, s 2; continued by *An Act to continue, until the Thirty-first Day of December One Thousand eight hundred and thirty-two, certain Acts relating to the Island of Newfoundland and the Fisheries carried on upon the Banks and Shores therefore*, 10 Geo IV, c 17, and made indefinite by *An Act to continue certain Acts relating to the Island of Newfoundland, and to provide for the Appropriate of Duties which may hereafter be raised within said Island*, 2 & 3 Will IV, c 78. Newfoundland permitted for appointments from members in the English bar and this was removed only months before Confederation, after Newfoundland's participation in the Charlottetown and Québec Conferences was concluded: *An Act to Amend the Constitution of the Supreme Court of this Colony, and to abolish the Circuit Courts*, 30th Vic, c 9, s 2.

the text had they intended to do so.⁷ To the degree that more stringent qualifications were needed to meet local requirements, section 129 of the *Constitution Act, 1867* continued the stricter pre-Confederation statutory qualifications until the national Parliament enacted different qualifications.

13. An examination of the pre-Confederation qualification provisions also shows that bar membership as a requirement for appointment was a live issue in the common law provinces, and not a concern limited to Québec.⁸ The fact that the appointment provision for Québec was separated from the provision that applied to the three common law provinces during the drafting process was simply a reflection of the fact that harmonization of the private law of the common law provinces might eventually render the concept of separate bars in those provinces moot.⁹

B. Sections 97 and 98 must be interpreted in light of the purpose of the judicature provisions to constitutionalize the independence of the judiciary

14. The *Constitution Act, 1867*'s entrenchment of the power of the Governor General to appoint section 96 judges was the culmination of a decades-long struggle among the pre-Confederation colonies to create a judiciary that was both appointed by democratically elected leaders in the colonies instead of the Colonial Office in London, and independent of that

⁷ See “Failure to follow a pattern of express reference” in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at paras 8.97-8.99.

⁸ Indeed, James Stephens Jr. lamented to a British parliamentary committee that “throughout the colonies a body of gentlemen are acting as judges who, however accomplished in other respects, are totally destitute of a legal education.” *Report from the Select Committee on the Civil Government of Canada*. British Parliamentary Papers, Cd No 569, 1828, Minutes of Evidence, 21 June 1828 at 228-230 (“*Report of the Select Committee*”).

⁹ In the “rough draft” of the *British North America Act* produced at the London Conference, judicial appointments for all four provinces were provided for in the same section (Pope, Joseph, ed *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell, 1895) at 130). They were then separated into sections 123 and 124 in the fourth draft (*Ibid* at 209), which became sections 94 and 95 in the final draft (*Ibid* at 232).

executive. Drafted with this backdrop, Part VII of the *Constitution Act, 1867* provides a constitutional basis for a unified, independent judicial presence throughout the country.¹⁰

15. The proposed requirement of contemporaneous bar memberships bears no relation to this purpose. Indeed, interpreting sections 97 and 98 to impose the types of subjective tests proposed by the Appellants would undercut this purpose by fueling uncertainty and inviting litigation over the validity of judicial appointments. The legitimacy of the provincial superior courts, whose function is “inextricably intertwined” with the rule of law,¹¹ would be undermined by such controversies, particularly when they are based on a technical interpretation of sections 97 and 98 that bears no connection with the underlying purpose of these provisions.

16. The judicature provisions were a response to the lack of independence of judges in the pre-Confederation era, which had been a long-standing grievance of reformers.¹² In 1834, Upper Canada began to remedy this defect by becoming the second colony in the Empire to have good behaviour appointments, meaning that judges no longer served at pleasure and could only be removed by the Lieutenant Governor upon a joint address of the Legislative Council and Assembly.¹³ Good behaviour appointments were expanded to Canada East in 1843¹⁴ and Nova Scotia in 1848.¹⁵ Such security of tenure did not exist in New Brunswick, British Columbia or Prince Edward Island until those provinces joined Confederation and became subject to section 99 of the *Constitution Act, 1867*.

¹⁰ *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 29; *The Queen v Beauregard*, [1986] 2 SCR 56 at p.72-73.

¹¹ *Trial Lawyers*, *supra* at para 39.

¹² See Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal, 1792-2013* (Toronto: Osgoode Society for Legal History, 2014) at 9.

¹³ *An Act to render the Judges of the Court of the King’s bench in this Province Independent of the Crown*, SUC 1834, c 2, s 1.

¹⁴ *An Act to render the Judges of the Courts of King’s Bench, in that part of this Province heretofore Lower Canada, independent of the Crown*, 7 Vict, c 15.

¹⁵ *An Act to render the Judges of the Supreme Court, and the Master of the Rolls, independent of the Crown, and to provide for their removal*, 1848 11 Vict, c 21.

17. Part VII therefore reflected the specific goal of constitutionalizing an independent judiciary in the provincial superior courts. In such a system where judges enjoy significant institutional and individual independence, the rule of law is best served by a minimally intrusive constitutional standard, which permits the executive to have access to a broad, diverse pool of applicants from which to draw the best candidates.

18. Since Confederation, the settled consensus has been that the appointment of past bar members is permissible under sections 97 and 98. Adopting an interpretation of those sections that departs from this shared understanding would create significant uncertainty concerning the legality of appointments made pursuant to this understanding, and thus chafes against the constitutional principles of both judicial independence and the rule of law.¹⁶ Where this Court is faced with competing interpretations of a constitutional provision, it should prefer the interpretation which is most harmonious with such unwritten principles. In the case of sections 97 and 98, this approach points towards affirming that a basic minimum qualification is the best way of providing clarity and predictability in judicial appointments.

19. In Ontario, this settled consensus on the meaning of section 97 means it is quite common for judicial appointments to the superior courts to include judges of the Ontario Court of Justice and its predecessor courts,¹⁷ and masters or case management masters of the Superior Court of Justice and its predecessors.¹⁸ Past appointments have also included members of administrative

¹⁶ *British Columbia v Imperial Tobacco*, 2005 SCC 49 at paras 44, 57.

¹⁷ For example, the Honourable Ian A. MacDonell, appointed July 30, 2008 (PC 2008-1475); the Honourable Irving W. André, appointed November 11, 2012 (PC 2012-1467); the Honourable Kofi N. Barnes, appointed February 7, 2013 (PC 2013-133); the Honourable Steve A. Coroza, appointed July 8, 2013 (PC 2013-0513); the Honourable Gary J. Trotter, appointed February 20, 2008 (PC 2008-0374). See also the Honourable Frederick P. Ferguson appointed to the Court of Queen's Bench of New Brunswick on December 11, 2008 (PC 2008-1892).

¹⁸ For example, the Honourable Benjamin T. Glustein, appointed December 11, 2014 (PC 2014-1432). See also the Honourable M. Deborah Hackett, appointed December 11, 2014 (PC 2014-1442) to the Court of Queen's Bench of New Brunswick.

tribunals¹⁹ and a military judge,²⁰ who may or may not have been practising members of the bar at the time of their appointment. Notably, several judges have also been appointed to the federal courts from the Ontario superior courts.²¹ As the court below pointed out in the context of Québec's courts,²² it would be absurd to suggest a court's former judges are not qualified to be re-appointed to its bench by virtue of having accepted an appointment to another court.

20. Ontario submits that there is no constitutional rationale, whether textual or normative, to exclude such eminently capable jurists from the pool of appointees available to the Governor General under section 97. More broadly, the diversity of the modern legal profession and the need for diversity in the contemporary judiciary suggest that this Court should reject the technical and uncertain interpretations proposed by the Appellants. Not only would such an approach exclude many otherwise qualified candidates, but it ignores the diversity of professional roles that lawyers pursue today. Ontario lawyers should not be deterred from pursuing non-traditional career paths due to the fear of being disqualified for appointment to the province's superior courts.

21. Indeed, the question of who is a "current" bar member for the purposes of sections 97 and 98 is not clear, furthering the uncertainty that would be created by constitutionalizing such a requirement. Under Ontario's *Law Society Act*, a person's law license "is in abeyance" when she holds office as a judicial officer or a member of a specified administrative tribunal.²³ After

¹⁹ The Honourable Grant A. Huscroft, appointed December 11, 2014 (PC 2014-1419).

²⁰ The Honourable Michael Richard Gibson, appointed February 5, 2015 (PC 2015-180).

²¹ For example, the Honourable Peter B. Annis, appointed to the Federal Court on February 7, 2013 (PC 2013-0132).

²² Court of Appeal Reasons at para 56.

²³ *Law Society Act*, RSO 1990, c L.8, s 31(1).

ceasing to hold such office the licensee may apply to have the license “restored”, which is distinct from the normal application process for a prospective licensee.²⁴

22. This ambiguity demonstrates the risk in interpreting sections 97 and 98 so as to create a constitutional yardstick by which each new variation in membership status created by either the law societies or the legislatures of four provinces will need to be measured. Such unpredictable scrutiny would also be applied to the appointment to those province’s superior courts from any judicial or quasi-judicial office whose eligibility under those sections has yet to be litigated.

23. The interpretation of sections 97 and 98 proposed by the Appellants, or any other interpretation which constitutionally entrenches a requirement of current bar membership, will almost certainly lead to further controversy and litigation. Similarly, it would invite intrusive inquiries into the specific backgrounds, career choices and merits of individual appointees, in the guise of determining the validity of their appointment. The potential for mischief arising from such controversies is clear, as is the potential threat to the independence of the judiciary and ultimately public confidence in the rule of law.

C. In the alternative, section 97 should be interpreted to impose less stringent qualifications than section 98

24. If this Court adopts Québec’s argument that the unique nature of Québec’s civil law system requires reading additional qualification requirements into section 98, Ontario submits that the same rationale does not apply to section 97. Regardless of the fact that the harmonization of the common law provinces contemplated by the text of section 97 has not been achieved, there is clearly no need for a constitutional rule to protect the legal systems of Ontario, New

²⁴ *Ibid* at s 31(2).

Brunswick and Nova Scotia from being adjudicated by judges unfamiliar with common law principles.

25. There does not appear to be any instance of a member of a federal court being appointed to Ontario's superior courts, although it has occurred in another section 97 province.²⁵ Given that such a judge would be eligible to represent any of the three original common law provinces on this Court on the basis of the statutorily required ten years' pre-appointment membership in the Law Society of Upper Canada, the Law Society of New Brunswick, or the Nova Scotia Barristers' Society (as the case may be),²⁶ it would be nonsensical to deny their competency to serve on the respective provincial superior courts from which this Court hears appeals.

PART IV – SUBMISSIONS ON COSTS

26. As an intervener, Ontario submits that costs should not be awarded to or against it.

PART V – SUBMISSIONS ON DISPOSITION

27. Ontario submits that the appeal should be dismissed. Ontario seeks 15 minutes for oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF APRIL, 2015.

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²⁵ Joseph T. Robertson of the Federal Court of Appeal as appointed to the Court of Appeal for New Brunswick on July 28, 2000; see Factum of the Respondent at para 12.

²⁶ *Reference re Supreme Court Act ss 5 and 6*, 2014 SCC 21 at paras 28-34.

PART VI – TABLE OF AUTHORITIES

Cases	Paragraph Reference in Factum
<i>British Columbia v Imperial Tobacco</i> , 2005 SCC 49	18
<i>Reference Re Section 98 of the Constitution Act, 1867</i> , 2014 QCCA 2365	7, 10, 19
<i>Reference re Senate Reform</i> , 2014 SCC 32	9
<i>Reference re Supreme Court Act, ss 5 and 6</i>	23, 25
<i>The Queen v Beauregard</i> , [1986] 2 SCR 56	14
<i>Trial Lawyers Association of British Columbia v British Columbia (Attorney General)</i> , 2014 SCC 59	14, 15
Secondary Sources	
Christopher Moore, <i>The Court of Appeal for Ontario: Defining the Right of Appeal, 1792-2013</i> (Toronto: Osgoode Society for Legal History, 2014)	16
Pope, Joseph, ed. <i>Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act</i> , Toronto, Carswell, 1895	13
<i>Report from the Select Committee on the Civil Government of Canada</i> . British Parliamentary Papers, Cd No 569, 1828, Minutes of Evidence, 21 June 1828	13
Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 6th ed. (Markham: LexisNexis, 2014)	12

PART VII - LEGISLATION

Legislation (All legislation is reproduced in the Attorney General of Ontario's Book of Authorities)	Paragraph Reference in Factum
<i>Alberta Act, SC 1905, c 3, s 3</i>	10
<i>An Act for the better Administration of Justice in Newfoundland, and for other purposes, 5 Geo IV c 67, s 2</i>	11
<i>An Act respecting County Courts, CUSC 1859, c 15, ss 2, 3, 8</i>	10
<i>An Act respecting the Court of Chancery, CUSC 1859, c 12, s 4</i>	10
<i>An Act respecting the Court of Queen's Bench, RSLC 1861, c 77, s 2</i>	10
<i>An Act respecting the Superior Courts of Civil and Criminal Jurisdiction, CUSC 1859, c 10, s 7</i>	10
<i>An Act to amend the Constitution of the Supreme Court of this Colony, and to abolish the Circuit Courts, 30th Vic, c 9, s 2</i>	11
<i>An Act to amend the Laws relative to the Courts of Original Civil Jurisdiction in Lower-Canada, 1849, 12 Vict, c 38</i>	10
<i>An Act to authorize appointment of a Master of the Rolls to the Court of Chancery, and an Assistant Judge of the Supreme Court of Judicature in this Island, S.P.E.I. 1848, c. 6</i>	11
<i>An Act to continue certain Acts relating to the Island of Newfoundland, and to provide for the Appropriate of Duties which may hereafter be raised within said Island, 2 & 3 Gul IV, c 78</i>	11
<i>An Act to continue, until the Thirty-first Day of December One Thousand eight hundred and thirty-two, certain Acts relating to the Island of Newfoundland and the Fisheries carried on upon the Banks and Shores therefore, 10 Geo IV, c 17</i>	11
<i>An Act to establish a Court having jurisdiction in Appeals and Criminal Matters, for Lower-Canada, 1849, 12 Vict, c 37</i>	10
<i>An Act to establish County Courts, SNB 1867, c 10, ss 2, 5, 8, 31(2)</i>	10, 21
<i>An Act to make better provision for the Administration of Justice in the unorganized tracts of Country in Upper Canada, 16 Vict, c 176, s 2, 5, 8</i>	10
<i>An Act to render the Judges of the Court of the King's bench in this Province</i>	16

<i>Independent of the Crown</i> , SUC 1834, c 2, s 1	
<i>An Act to render the Judges of the Courts of King's Bench, in that part of this Province heretofore Lower Canada, independent of the Crown</i> , 7 Vict, c 15	16
<i>An Act to render the Judges of the Supreme Court, and the Master of the Rolls, independent of the Crown, and to provide for their removal</i> , 1848 11 Vict, c 21	16
<i>British Columbia Terms of Union</i> , s 10	10
<i>Law Society Act</i> , RSO 1990, c L.8, s 31(1)	21
<i>Manitoba Act, 1870</i> , SC 1870, c 3, s 2	10
<i>Newfoundland Act (UK)</i> , 12&13 Geo VI, c 22, Sch, s 3	10
<i>Prince Edward Island Terms of Union</i> , s 14	10
<i>Qualifications of Judges Act</i> , RSNS 1864 c 37, s 1	10
<i>Saskatchewan Act</i> , SC 1905, c 42, s 3	10
<i>Supreme Court Act</i> , SNS 1809, c 15, s 6	10