**Court File No. 38837**

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

B E T W E E N:

**CONFÉRENCE DES JUGES DE LA COUR DU QUÉBEC**

**Appellant**
**(Intervener)**

- and -

**CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE, ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUEBEC**

**Respondents**
**(Interveners)**

*[Style of cause continues the next page]*

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# FACTUM OF THE INTERVENER, THE ATTORNEY GENERAL OF ONTARIO

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

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A N D  B E T W E E N:

**ATTORNEY GENERAL OF QUEBEC**

**Appellant**
**(Interveners)**

- and -

**CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE, ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUEBEC**

**Respondents**
**(Interveners)**

A N D  B E T W E E N:

**CONSEIL DE LA MAGISTRATURE DU QUÉBEC**

**Appellant**
**(Interveners)**

- and -

**CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE, ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUEBEC**

**Respondents**
**(Interveners)**

A N D  B E T W E E N:

**CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES**

**Appellant**
**(Interveners)**

- and -

**CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE, ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUEBEC**

**Respondents**
**(Interveners)**

*[Style of cause continues the next page]*

A N D B E T W E E N:

**CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE, ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUEBEC**

**Appellants (Interveners)**

- and –

**ATTORNEY GENERAL OF QUEBEC**

**Respondent (Interveners)**

- and –

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# PART I – OVERVIEW AND FACTS

## A. Overview

1. The purpose of s. 96 of the *Constitution Act, 1867* is to protect the compromise made at Confederation regarding the constitutional role of superior courts. According to the terms of this compromise, the Governor General appoints the judges of the superior, district, and county courts,[1] and the Parliament of Canada fixes and pays their remuneration[2]; but the provinces have the power to legislate with respect to 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", pursuant to s. 92(14).[3]

2. This compromise created a nationwide system of courts of general jurisdiction that hear matters pursuant to both federal and provincial laws, staffed by federally appointed and salaried judges, and administered by the provinces.[4] It also allowed for the creation of new courts of civil and criminal jurisdiction by the provinces,[5] and for the creation of "a General Court of Appeal for Canada" and additional courts "for the better administration of the laws of Canada" by Parliament.[6]

3. This Court has developed several distinct strands of jurisprudence under s. 96 that safeguard various essential aspects of this compromise.

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[1] *Constitution Act, 1867,* 30 & 31 Victoria, c 3, s 96.
[2] *Constitution Act, 1867,* 30 & 31 Victoria, c 3, s 100.
[3] *Constitution Act, 1867,* 30 & 31 Victoria, c 3, s 92(14).
[4] *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307 at 326–327 [*BC Law Society*]; *Valin v Langlois*, [1879] 3 SCR 1 at 19–20; *Ontario (Attorney General) v Pembina Exploration Canada Ltd*, [1989] 1 SCR 206 at para 17; *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc*, 2001 SCC 51 at para 30, [2001] 2 SCR 743.
[5] *Constitution Act, 1867,* 30 & 31 Victoria, c 3, s 92(14).
[6] *Constitution Act, 1867,* 30 & 31 Victoria, c 3, s 101.

4. First, it has held that s. 96 prevents provinces or the federal government from creating "shadow courts": inferior courts or administrative tribunals that exercise essentially the same subject matter jurisdiction as superior courts, where neither the way in which the power is exercised nor the context in which it is exercised sufficiently distinguishes the jurisdiction granted to the inferior court or administrative tribunal from what was within the exclusive jurisdiction of superior courts at Confederation. This line of cases culminated in the test set out by this Court in the *Reference re Residential Tenancies Act*.[7]

5. Second, it has held that s. 96 prohibits provinces and the federal government from stripping superior courts of a "very narrow"[8] core of institutional or structural features that are the "hallmarks" or "essential"[9] characteristics of superior courts. This line of cases includes this Court's decisions in *MacMillan Bloedel Ltd. v. Simpson*,[10] *Crevier v. A.G. (Québec)*,[11] and *Attorney General of Canada v. Law Society of British Columbia*.[12]

6. Finally, in *BCGEU v. British Columbia (Attorney General)*[13] and *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*,[14] it has held that s. 96 prohibits

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[7] *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 SCR 714 at 734–736 [*ON RTA*]; as refined by this Court's decision in *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal (NS)*, [1989] 1 SCR 238 at 252–254 [*Sobeys*].

[8] *Reference re Amendments to the Residential Tenancies Act (NS)*, [1996] 1 SCR 186 at para 56 (*per* Lamer CJC) [*NS RTA*].

[9] *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at paras 30, 35 (*per* Lamer CJC) [*MacMillan*].

[10] *MacMillan, supra*.

[11] *Crevier v Québec (Attorney General)*, [1981] 2 SCR 220 [*Crevier*].

[12] *BC Law Society, supra.*

[13] *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 [*BCGEU*].

[14] *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31 [*Trial Lawyers*].

barriers that completely bar litigants from accessing superior courts to resolve their disputes according to applicable law, so as to deprive them of any forum for resolving their legal disputes.

7. In Ontario's view, confusion among these three distinct lines of s. 96 jurisprudence explains the two principal errors made by the Court of Appeal and calls for clarification and guidance from this Court.

8. First, the Court of Appeal significantly overstated the core of superior court jurisdiction because it conflated the narrow core of superior court jurisdiction, protected by s. 96 in the *MacMillan*, *Crevier*, and *BC Law Society* line of cases, with the prohibition on barriers to accessing courts found in *Trial Lawyers* and *BCGEU*. The "core jurisdiction" of superior courts includes only those "critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system".[15] By contrast, the description of the role of superior courts in *Trial Lawyers* was stated broadly in order to illustrate the impact of the hearing fees at issue in that case on litigants. The broad interpretation of the "core" suggested by the Court of Appeal—including such ubiquitous and amorphous concepts as the preservation of the rule of law, the resolution of substantial civil disputes, and the control of the court's own process— would unduly fetter the adjudicative role of lower courts and tribunals and dramatically reduce the province's authority over the organization of courts, civil procedure, and property and civil rights.

9. Second, the Court of Appeal erred by importing elements of the *Residential Tenancies Act* test into the *MacMillan* analysis. The Court of Appeal determined what was within the core of superior court jurisdiction by reference to what was within the exclusive subject matter jurisdiction of superior courts at Confederation. This approach would expand the narrow concept of the "core"

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[15] *NS RTA*, *supra* at para 56 (*per* Lamer CJC).

to the full extent of the superior court's historically exclusive jurisdiction, "fix" or "freeze" superior courts' jurisdiction to what it was at Confederation, and render the *Residential Tenancies Act* test redundant.

10. The Court of Appeal's approach would impose undue limits on the ability of the provinces to vest jurisdiction in provincially organized and appointed courts and tribunals that overshoot the purpose of s. 96. In these submissions, Ontario offers a framework for understanding these distinct lines of jurisprudence that does not result in the expansion of the concept of the irreducible "core jurisdiction" of superior courts beyond what is necessary to protect the constitutional role of superior courts and the integrity of the compromise struck in 1867.

### B. Facts

11. The statement in the Court of Appeal's judgment that the Ontario Court of Justice has no civil jurisdiction is not correct. The Ontario Court of Justice exercises civil jurisdiction over family law matters assigned to it by legislation, including child and spousal support, custody, access and guardianship, child protection, and adoption matters.[16]

12. Ontario otherwise takes no position on the facts.

## PART II – POSITIONS ON APPELLANTS' ISSUES

13. Ontario takes no position on the issues raised by the appellants.

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[16] Reasons for decision of the Court of Appeal for Quebec dated September 12, 2019 and recorded at 2019 QCCA 1492 at para 146 ["Court of Appeal reasons"]; *Courts of Justice Act*, RSO 1990, c C.43, s 38(2).

# PART III – ARGUMENT

## A. The three strands of s. 96 caselaw

### *i. Section 96 prohibits shadow courts*

14. This Court has consistently framed the primary concern arising from transfers of subject matter jurisdiction to inferior courts and tribunals as the usurpation of the role of superior courts by "shadow courts". This line of cases culminated in the *Residential Tenancies Act* test.[17]

15. In *Reference re Residential Tenancies Act*, Justice Dickson explained that the mischief these cases address is the creation of inferior courts and tribunals with the jurisdiction of superior courts, as this would destroy the compromise reflected in s. 96.[18]

16. In *MacMillan*, in dissent (although not on this point), Justice McLachlin (as she then was) referred to this passage as support for the proposition that legislatures and Parliament "cannot be allowed to set up shadow courts exercising all or some of the powers of s. 96 courts".[19] In *Reference re Amendments to the Residential Tenancies Act (N.S.)*, this Court stated that "Shadow courts and tribunals usurping the functions of the superior courts guaranteed by s. 96 are prohibited".[20]

17. As the name implies, the mischief of shadow courts is not the destruction of superior courts, but their displacement by a parallel system of courts and tribunals not subject to the constitutional protections of superior courts and without the constitutional characteristics of superior courts.

18. The *Residential Tenancies Act* test seeks to identify the circumstances in which inferior courts and tribunals are "usurping" the historically exclusive jurisdiction of s. 96 courts, as opposed

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[17] *ON RTA, supra* at 734–736; *Sobeys, supra* at 252–255; *Grondin, supra* at 382–383; *McEvoy v New Brunswick (Attorney General)*, [1983] 1 SCR 704 at 721.
[18] *ON RTA, supra* at 728; see also *Reference re Adoption Act (Ontario)*, [1938] SCR 398 at 414 (*per* Duff CJC) [*Adoption Reference*] (quoted in *Re: BC Family Relations Act*, [1982] 1 SCR 62 at 94, *per* Estey J).
[19] *MacMillan, supra* at para 54 (*per* McLachlin J, as she then was).
[20] *NS RTA, supra* at para 73.

to when they exercise similar jurisdiction in a non-judicial manner; the jurisdiction is "merely subsidiary or ancillary" to general administrative functions assigned to the tribunal; or the powers are necessarily incidental to the achievement of a broader policy goal of the legislature.[21] The test preserves the compromise made in 1867 by protecting the exclusive jurisdiction historically exercised exclusively by superior courts at Confederation, but allowing legislatures and Parliament some latitude to create new inferior courts and administrative tribunals and to expand the jurisdiction of existing inferior courts and tribunals to meet evolving societal needs.

19. The *Residential Tenancies Act* test reflects the gradual liberalization of the judicial position regarding the problem of shadow courts.[22] The initial position on s. 96 was that it prevented provinces from conferring any judicial power on non-s. 96 courts.[23] In the *Adoption Act* reference, however, this Court approved the conferral of judicial powers on non-s. 96 courts[24]; in *John East* the Privy Council confirmed that the conferral of judicial power on a non-s. 96 court was not in itself determinative[25]; and in *Tomko*, this Court stated that "it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangements in which it appears and is exercisable under the provincial legislation".[26]

20. In *Re: B.C. Family Relations Act*, Justice Estey explained that the central role of superior courts is not jeopardized by increasing recognition of the constitutional capacity of the provinces to create provincially organized and appointed courts and tribunals:

> The history of constitutional development in our courts has been a gradually increasing recognition of the constitutional capacity of the provinces to institute programs within their constitutional spheres which entail the establishment of administrative tribunals or which

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[21] *ON RTA, supra* at 735–736.
[22] *ON RTA, supra* at 732; *NS RTA, supra* at paras 27–28.
[23] *Toronto (City) v York (Township)*, [1938] 1 DLR 593 at 595–596.
[24] *Adoption Reference, supra* at 412–414.
[25] *Labour Relations Board of Saskatchewan v John East Iron Works, Limited*, [1948] 4 DLR 673 at 680 [*John East*].
[26] *Tomko v Labour Relations Board (NS)*, [1977] 1 SCR 112 at 120.

> utilize the facilities of the provincially organized and appointed courts. This development could not be considered surprising bearing in mind the vast transformation of the Canadian community in every respect since 1867. The role of government at large has increased in the community, and the financial resources available to the government at both levels have made possible the implementation of social programs never contemplated by the draftsmen of the *British North America Act*. To meet the growing responsibilities of the federal and provincial governments the flexibility of the Constitution has been manifest in many areas. Section 96 is perhaps one of the most important illustrations. Its purpose and role in the Constitution is in no way jeopardized by the increasing recognition of the implementation of valid provincial programs through provincial administrative and judicial agencies. This will continue to be the case so long as that which is assigned to the provincial body does not have the effect in substance of conferring on that body a judicial function which "broadly conform[s] to the type of jurisdiction exercised by the superior, district or county courts" (*John East, supra*, at p. 154).[27]

*ii.* *Section 96 protects a narrow core of superior court jurisdiction*

21. In *MacMillan*, a majority of this Court held that s. 96 requires a two-stage analysis when jurisdiction is removed from a superior court. At the first stage of the analysis, the court applies the *Residential Tenancies Act* test to determine whether jurisdiction can be conferred on the other court or tribunal. At the second stage of the analysis, and only if the grant of jurisdiction to the other court or tribunal is exclusive, the court determines whether the jurisdiction falls within the narrow core of superior court jurisdiction that cannot be removed absent a constitutional amendment.[28]

22. The majority held that the power to punish youths for *ex facie* contempt was ancillary to the institutional functions of youth courts and therefore could be conferred on a youth court under the *Residential Tenancies Act* test.[29] However, it could not be removed from superior courts because *ex facie* contempt powers fell within the narrow "core" of superior court jurisdiction.[30]

23. The *MacMillan* analysis is intended to address a different, and narrower, problem than the *Residential Tenancies Act* test. Unlike the *Residential Tenancies Act* test, which focuses on what

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[27] *Re: BC Family Relations Act, supra* at 112–113.
[28] *MacMillan, supra* at paras 18, 27 (*per* Lamer CJC); see also *R v Ahmad*, 2011 SCC 6 at paras 61–65, [2011] 1 SCR 110 [*Ahmad*].
[29] *MacMillan, supra* at para 32 (*per* Lamer CJC).
[30] *MacMillan, supra* at paras 37, 42 (*per* Lamer CJC).

jurisdiction may be conferred on inferior courts or administrative tribunals without creating a shadow court, the *MacMillan* analysis focuses on what may not be removed from superior courts without stripping superior courts of their ability to perform their constitutional functions.

24. The concept that certain specifically defined powers or jurisdictions are "hallmarks" of superior courts that cannot be removed under any circumstances predates the decision in *MacMillan*. These long-recognized hallmarks include the power to review the decisions of inferior courts and administrative tribunals for jurisdictional error and the ability to review the constitutionality of federal and provincial legislation.

25. For example, in *Crevier*, the Court referred to the vesting of power in a tribunal to determine the limits of its own jurisdiction as the "hallmark of a superior court".[31] The Court in *Crevier* held that superior courts must maintain their ability to review the decisions of inferior courts and administrative tribunals for jurisdictional error. Otherwise, superior courts would be replaced at the apex of the judicial system; inferior courts and tribunals would essentially be constituted as superior courts because they would have the ability to determine the limits of their own jurisdiction without appeal or review. The Court explained that in its view the finding that a provincially constituted statutory tribunal cannot constitutionally be immunized from review of its decisions on questions of jurisdiction stood on the same footing as the limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality.[32]

26. The proposition that the review of the constitutionality of provincial and federal enactments is a hallmark of superior courts is found in this Court's decision in *Attorney General of Canada v. Law Society of British Columbia*.[33]

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[31] *Crevier, supra* at 237.
[32] *Crevier, supra* at 237–238.
[33] *BC Law Society, supra* at 327–328; see also *Canada Labour Relations Board v Paul L'Anglais Inc et al*, [1983] 1 SCR 147 at 160–161.

*iii.* *Section 96 protects access to superior courts*

27. Finally, in *Trial Lawyers*, this Court addressed the role of s. 96 in ensuring that superior courts remain accessible to litigants to resolve disputes according to the applicable law.

28. A majority of this Court held that British Columbia's hearing fee scheme prevented persons of ordinary means from bringing any public and private law matters to trial.[34] This meant that the province had not exercised its legislative authority in relation to the administration of justice in the province under s. 92(14) consistently with the right of individuals to bring cases that fall within the jurisdiction of the superior courts to those courts to be decided in accordance with the applicable law.[35] The majority reached this conclusion by relying in part on the jurisprudence under s. 96, and by holding that the province's authority pursuant to s. 92(14) must be read in light of this jurisprudence.

29. In the context of considering the impact of hearing fees on litigants' access to courts, this Court described the superior courts' "historic task", "basic judicial function", and "book of business" as resolving disputes between individuals and deciding questions of public and private law.[36] These statements describe the role of the superior court in broad terms in order to illustrate the impact of the hearing fees at issue in that case. They were not made in the context of identifying what falls within the irreducible "core" jurisdiction of a superior court under the *MacMillan* analysis.

30. The decision in *BCGEU* addresses the same issue. In *BCGEU*, this Court held that the Chief Justice of the Supreme Court of British Columbia had jurisdiction to enjoin picketing of the courts as an aspect of the court's inherent jurisdiction to punish for criminal contempt of court. The Court

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[34] *Trial Lawyers, supra* at paras 31–32, 55, 64.
[35] *Trial Lawyers, supra* at para 36.
[36] *Trial Lawyers, supra* at para 32.

stressed that picketing interfered with access to the courts by litigants, lawyers, witnesses, and the public at large, and was intended to do so.[37] Impeding access to the courts "could only lead to a massive interference with the legal and constitutional rights of the citizens of British Columbia".[38]

31. *Trial Lawyers* should be read, with *BCGEU*, as an example of the proposition that barriers to accessing superior courts may become contrary to s. 96 if they are so pronounced that they prevent any access to superior courts to decide disputes according to the applicable law.[39] However, as the majority cautioned in *Trial Lawyers*, it must be read in light of this Court's finding in *Christie* that "not every limit on access to the courts is automatically unconstitutional".[40]

32. In *Christie*, this Court held that the right of access to justice reflected in *BCGEU* "is not absolute" and may be limited by the provinces in the exercise of their authority pursuant to s. 92(14). It stated that *BCGEU* "cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional".[41] The majority in *Trial Lawyers* distinguished *Christie* from the case before it on the basis of the evidence before it, but did not overrule *Christie* or suggest that any limit on access to the courts is unconstitutional.[42]

## B. The Court of Appeal adopted an overly broad statement of what is in the core of superior court jurisdiction

33. The first principal error made by Court of Appeal was to adopt an overly broad statement of those matters that are included in the "core" jurisdiction of superior courts, and which therefore

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[37] *BCGEU*, *supra* at para 29.
[38] *BCGEU*, *supra* at para 31.
[39] *Trial Lawyers*, *supra* at para 45; see also *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 27.
[40] *British Columbia (Attorney General) v Christie*, 2007 SCC 21 at para 17, [2007] 1 SCR 873 [*Christie*]; *Trial Lawyers*, *supra* at paras 41 (*per* McLachlin CJC) and 86 (*per* Rothstein J, dissenting).
[41] *Christie*, *supra* at para 17.
[42] *Trial Lawyers*, *supra* at para 41 (*per* McLachlin CJC).

cannot be constitutionally removed from superior courts. The Court of Appeal's analysis imported the statement from *Trial Lawyers* that superior courts resolve civil disputes on issues of private and public law into the *MacMillan* "core" analysis. This resulted in a finding that the resolution of "substantial civil disputes" could not be removed from superior courts—a finding that is at odds with the existing jurisdiction of many provincial courts and tribunals that regularly provide an accessible, efficient, and affordable venue for the resolution of "substantial civil disputes". It also conflicts with the repeated dicta of this Court that this core is "very narrow" and comprised only of the "essential" jurisdiction of superior courts that is "integral" to their operations.

34. Properly understood, the "core jurisdiction" of superior courts for the purposes of the *MacMillan* analysis includes only those "critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system".[43] Contrary to the Court of Appeal's reasons, it does not include such broad and amorphous concepts as "the preservation of the rule of law" and "the resolution of disputes on issues of private and public law" (although the Court of Appeal later appeared to limit the latter to the resolution of "substantial" civil disputes).[44]

35. Ontario does not agree that the "preservation of the rule of law", "the resolution of disputes on issues of private and public law", or "the resolution of substantial civil disputes", is part of the core jurisdiction of superior courts for the purposes of the *MacMillan* analysis. These statements reflect an inappropriate application of the description of the role of superior courts made in the "access" cases to the core analysis. This approach would result in a broad and amorphous concept of "core" that would overshoot the purposes of s. 96 and unduly fetter the jurisdiction of inferior courts and tribunals.

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[43] *NS RTA*, *supra* at para 56 (*per* Lamer CJC).
[44] Court of Appeal reasons, *supra* at paras 45, 115, 137–140, 144–145.

36. This Court has been clear that the irreducible core of superior court jurisdiction protects a "very narrow" jurisdiction that is "essential" or "integral" to the continued existence and operation of superior courts.[45]

37. In *MacMillan*, Justice Lamer described the "core" or "inherent" jurisdiction of superior courts as being a jurisdiction that is "integral to their operations".[46] He also stated that to remove any part of the core "emasculates the court, making it something other than a superior court".[47] In *Reference re Amendments to the Residential Tenancies Act (N.S.)*, Justice Lamer wrote that the core jurisdiction of superior courts "includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system".[48]

*i.* *The "preservation of the rule of law" is not within the core jurisdiction of superior courts*

38. The unwritten constitutional principle of the rule of law was identified by the majority in *Trial Lawyers* as one consideration supporting the invalidity of the hearing fees at issue in that case (in addition to s. 96), because access to the court as a public forum for adjudicating disputes under the applicable law is necessary to maintaining the rule of law. But nowhere in *Trial Lawyers* did this Court hold that the rule of law is a power or jurisdiction within the core jurisdiction of superior courts. Nor do the other cases cited by the Court of Appeal support this proposition.[49] The Court of Appeal's statement that the "preservation of the rule of law" is itself a core jurisdiction of

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[45] *NS RTA*, *supra* at para 56 (*per* Lamer CJC).
[46] *MacMillan*, *supra* at para 15 (*per* Lamer CJC).
[47] *MacMillan*, *supra* at para 30 (*per* Lamer CJC).
[48] *NS RTA*, *supra* at para 56 (*per* Lamer CJC); see also *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3 at para 19 [*Criminal Lawyers' Association*].
[49] *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 747–752; *Trial Lawyers*, *supra* at paras 38–39; *NS RTA*, *supra* at para 72; *May v Ferndale Institution*, [2005] 3 SCR 809, 2005 SCC 82 at paras 29, 32, 44, 65–72; *Criminal Lawyers' Association*, *supra* at paras 17–21.

superior courts confuses the end (the maintenance of the rule of law) with the means ("those critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system"). It is the means, not the end, that s. 96 protects.

### *ii. "The resolution of disputes on issues of private and public law" is not within the core of superior court jurisdiction*

39. Nor can "the resolution of disputes on issues of private and public law" fall within the core of superior court jurisdiction. The Court of Appeal's chief support for this proposition was this Court's decision in *Trial Lawyers*. Ontario submits that, for several reasons, *Trial Lawyers* cannot be read to support a broad statement that "the resolution of disputes on issues of private and public law" falls within the narrow core of jurisdiction without which a superior court can no longer function as a superior court.

40. First, Ontario submits that *Trial Lawyers* was fundamentally concerned with barriers to accessing superior courts and that this is a different issue than what falls within the core jurisdiction of superior courts for the purposes of the *MacMillan* analysis. *Trial Lawyers* was not a case involving a transfer of power or jurisdiction from a superior court to an inferior court or tribunal and as a result it did not engage either the concern about the creation of shadow courts or the concern about stripping superior courts of the jurisdictions or powers that make them superior courts. Instead, it was a case about litigants' ability to access any court at all to resolve their disputes under the applicable law. The Court did not conduct any step of the *Residential Tenancies Act* analysis and its decision did not depend on a finding that the resolution of civil disputes is within the "core jurisdiction" of the superior courts for the purposes of the *MacMillan* analysis.[50]

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[50] *MacMillan*, *supra* at para 26 (*per* Lamer CJC); *NS RTA*, *supra* at para 107 (*per* MacLachlin J, as she then was).

41. Second, a finding that the resolution of all or even substantial disputes between individuals on issues of private and public law falls within the core of superior court jurisdiction is inconsistent with this Court's repeated cautions that the core of superior court jurisdiction is "very narrow" and includes only those powers that are "essential" to the continued existence of superior courts.[51]

42. Third, such a finding is inconsistent with this Court's s. 96 jurisprudence, which has upheld provisions granting inferior courts and administrative tribunals power to deal with, *inter alia*, labour relations disputes[52]; landlord and tenant disputes[53]; automobile insurance disputes[54]; youth criminal justice proceedings[55]; and questions of Crown privilege.[56]

43. The Court of Appeal found support for its statement that the adjudication of substantial civil disputes is part of the core jurisdiction of superior courts in Justice La Forest's judgment in *Scowby v. Glendenning*. In *Scowby* (in dissent, though not on this point), Justice La Forest wrote:

> the s. 96 courts must continue their exclusive function of determining basic judicial questions of public order and public policy, or as Estey J. has put it, those "serious and frequently profound difficulties arising in the community" which the Constitution obviously contemplated should be their responsibility: see *B.C. Family Relations Act, Re, supra*, at p. 107.[57]

44. When Justice Estey's comments are read in context in the *B.C. Family Relations Act* case, it is clear that he was not suggesting that s. 96 courts have a monopoly on "serious" or "profound" issues. Rather, he was explaining that courts of summary jurisdiction and tribunals may be more appropriate in some cases because the rules of evidence and procedure developed in superior courts

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[51] *NS RTA, supra* at para 56 (*per* Lamer CJC); *Criminal Lawyers' Association, supra* at para 19.
[52] *John East, supra* at 681–683.
[53] *NS RTA, supra* at para 108 (*per* MacLachlin J, as she then was).
[54] *Campisi v Ontario*, 2017 ONSC 2884 at paras 47–49, aff'd 2018 ONCA 869, leave to appeal to SCC dismissed, 38515 (June 20, 2019).
[55] *Reference re Young Offenders Act (PEI)*, [1991] 1 SCR 252 at 273–274.
[56] *Babcock v Canada (AG)*, 2002 SCC 57 at para 60, [2002] 3 SCR 3; *Ahmad, supra* at paras 63–64.
[57] Court of Appeal reasons, *supra* at para 140 quoting *Scowby v Glendinning*, [1986] 2 SCR 226 at para 36.

to meet the most "serious" and "profound" difficulties encountered in the community are not necessary or appropriate for all disputes. Far from being dismissive of the issues heard before inferior courts and administrative tribunals, he noted the importance of these inferior courts and tribunals whose decisions touch "the great mass of the people more intimately and more extensively than do the judgments of the superior courts".[58]

*iii.* *Inherent jurisdiction is not the same as core jurisdiction*

45. Ontario also submits that the Court of Appeal erred to the extent that it regarded the "inherent jurisdiction" and "general jurisdiction" of superior courts as equivalent to the core jurisdiction of superior courts for the purposes of the *MacMillan* analysis.

46. The Court of Appeal used the terms "inherent jurisdiction" and "core jurisdiction" interchangeably in its judgment. For example, it stated that the resolution of substantial civil disputes "forms part of the inherent jurisdiction" of superior courts.[59]

47. It is important to clarify the different meanings of the term "inherent jurisdiction". In one sense, the inherent jurisdiction of superior courts simply describes the powers or jurisdiction that superior courts have by virtue of their status as courts of law, rather than as a result of legislation. This Court has explained the powers derived from superior courts' inherent jurisdiction, citing I.H. Jacob's influential article, as

> […] the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due processes of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.[60]

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[58] *Re: BC Family Relations Act*, *supra* at 102.
[59] Court of Appeal reasons, *supra* at para 115.
[60] *Criminal Lawyers' Association*, *supra* at para 20.

48. The inherent jurisdiction of superior courts in this sense may be regulated or reduced by ordinary legislation. Jacob makes this point in his article.[61] Justice McLachlin (as she then was) also made the same point in dissent in *MacMillan*. Citing Jacob's article, she wrote:

> The inherent power of superior courts to regulate their process does not preclude elected bodies from enacting legislation affecting that process. The court's inherent powers exist to complement the statutory assignment of specific powers, not override or replace them: "The two heads of powers are generally cumulative, and not mutually exclusive".[62]

49. Similarly, in *Ontario Criminal Lawyers' Association*, this Court found that while superior courts have inherent jurisdiction to appoint *amici* where necessary, and to fix their compensation, the court's inherent jurisdiction could be, and was, limited by statute. This Court pointed out that:

> It has long been settled that the way in which superior courts exercise their powers may be structured by Parliament and the legislatures […] As Jacob notes (at p. 24): "… the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision" (emphasis added) (see also *Caron*, at para. 32).[63]

50. While in *MacMillan* Justice Lamer at times used the terms inherent jurisdiction and core jurisdiction interchangeably, there are good reasons to think that the "core" jurisdiction described in that decision was not intended to encompass the full panoply of "inherent" powers that could be exercised by superior courts in the absence of legislative authority. Rather, what Justice Lamer was referring to in *MacMillan* were those institutional features or powers that are the "hallmarks" of a superior court.[64] (Justice Lamer also called them the "essential" or "immanent" characteristics of superior courts.) Core features are "inherent" in the sense that without these powers the court could not be called a superior court, rather than inherent in the sense that the court has these powers by virtue of the common law rather than by virtue of statute.

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[61] I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Curr Legal Probs 23 at 23–24.
[62] *MacMillan*, *supra* at para 78 (*per* McLachlin J, as she then was, dissenting).
[63] *Criminal Lawyers' Association*, *supra* at para 23, see also paras 32–33; *R v Caron*, 2011 SCC 5 at para 32, [2011] 1 SCR 78.
[64] *Crevier*, *supra* at 237.

51. The Court of Appeal appears to have mistakenly found that *MacMillan* stands for the proposition that all of the powers derived from the court's inherent jurisdiction are within the core jurisdiction of superior courts such that they cannot be removed or altered without a constitutional amendment. *MacMillan* stands for a narrower proposition: s. 96 protects against the removal of the inherent power over contempt of court *ex facie*, because it is an "essential attribute of superior courts".[65] Since *MacMillan*, this Court has not suggested that the inherent jurisdiction of superior courts in this sense is coextensive with the core jurisdiction of superior courts such that no aspect of the inherent jurisdiction of superior courts can be removed without offending s. 96.

*iv.* *General jurisdiction is not the same as core jurisdiction*

52. The Court of Appeal also referred several times to the "general jurisdiction" of superior courts. The Court of Appeal appears to have been of the view that a limit on the monetary jurisdiction of the Court of Quebec is necessary to preserve the "general jurisdiction" of the superior court.[66] This reflects a confusion between the status of superior courts as courts of general jurisdiction (which Ontario agrees is an essential feature of superior courts) and the particular subject matter jurisdictions that are within the court's jurisdiction at a particular point in time.

53. The general jurisdiction of superior courts means that superior courts have jurisdiction over all matters in civil and criminal law unless it can be shown that jurisdiction has been specifically taken away from them by a valid statute.[67] This is in contradistinction to inferior courts and tribunals, which only have the jurisdiction specifically assigned to them by statute.

54. A court of general jurisdiction is a necessary part of a system in which not every statute specifies the forum in which the rights it creates may be adjudicated, and in which the common

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[65] *MacMillan*, *supra* at para 40 (*per* Lamer CJC).
[66] Court of Appeal reasons, *supra* at para 123.
[67] I H Jacob, "The Inherent Jurisdiction of the Court", *supra* at 23–24.

law admits of new causes of action, so that there must be a body that decides whether a new cause of action exists. In the Canadian constitutional system the superior courts are that body. The status of superior courts as courts of general jurisdiction is therefore a hallmark of a superior court that cannot be taken away except by constitutional amendment.

55. However, the fact that general jurisdiction is a hallmark of superior courts does not mean that all matters that fall within a superior court's jurisdiction at any point in time are “hallmark” or core jurisdictions that can never be removed. The legislature may alter the jurisdiction of superior courts by legislation that meets the *Residential Tenancies Act* test, without impairing the superior court's status as a court of general jurisdiction.

56. Furthermore, the legislature may change the substantive law that the superior court applies to determine disputes within its jurisdiction. Changes to substantive law do not engage s. 96. None of the three lines of cases has any application to a change of substantive law: not the *Residential Tenancies Act* test (since there is no transfer of jurisdiction), not *MacMillan* (since changing the law that the court applies to disputes within its jurisdiction does not affect the court’s status as a court of general jurisdiction), and not *Trial Lawyers* (since litigants can still access the courts to settle disputes to which the changed substantive law applies).

### C. The Court of Appeal erred by importing the *Residential Tenancies Act* test into the core analysis

57. The second principal error made by the Court of Appeal was to import elements of the *Residential Tenancies Act* analysis into the core analysis. Instead of conducting the first step of the *Residential Tenancies Act* test, the Court of Appeal began its analysis of the first reference question with the core analysis. It concluded that substantial civil disputes were at the core of superior court jurisdiction and then asked itself what monetary threshold would “limit” or “infringe” this core

jurisdiction.[68] When it answered this question, however, it applied the historical inquiry from the first step of the *Residential Tenancies Act* test. It appeared to determine what falls within the core of superior court jurisdiction by updating the monetary limits of some inferior courts at Confederation ($100).

58. This approach runs three risks. First, it runs the risk of enlarging the core jurisdiction of superior courts. The Court of Appeal's approach means that the core is not identified by reference to the "very narrow" set of powers that are "hallmarks" of superior courts, but by what jurisdiction superior courts happened to have exclusively at Confederation. The exclusive jurisdiction of superior courts at Confederation is a necessary but not sufficient step to identify matters within the core of superior court jurisdiction. In order to fall within the core of superior court jurisdiction, a jurisdiction must not only have been exclusive to superior courts at Confederation but must also be an "essential" attribute or a "hallmark" of a superior court.

59. Second, the Court of Appeal's approach risks freezing the jurisdiction of superior courts as of 1867. If the core jurisdiction of superior courts is determined by reference to the exclusive subject matter jurisdiction of superior courts at Confederation, and the core jurisdiction of superior courts cannot be removed except by constitutional amendment, then provinces cannot remove any jurisdiction that was within the exclusive jurisdiction of superior courts at Confederation. The result is that they can only grant concurrent jurisdiction to inferior courts and tribunals regarding jurisdictions that were within the exclusive jurisdiction of superior courts at Confederation. The Court of Appeal's approach would be contrary to this Court's jurisprudence on s. 96. This Court has repeatedly stated that s. 96 does not fix the subject matter jurisdiction of superior courts as of Confederation.[69]

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[68] Court of Appeal reasons, *supra* at para 145.
[69] *Adoption Reference*, *supra* at 418.

60. Third, the Court of Appeal's approach would make the *Residential Tenancies Act* test redundant. It would constitutionally prohibit any derogation from the historic exclusive jurisdiction of superior courts. This would eliminate any consideration of the second and third steps of the *Residential Tenancies Act* test, which were introduced to increase recognition of the constitutional capacity of legislatures to create inferior courts and tribunals, provided they do not displace superior courts. The Court of Appeal's approach would reintroduce limitations on provincial authority under s. 92(14) that were done away with by the *Residential Tenancies Act* test.[70]

## PART IV – SUBMISSIONS ON COSTS

61. As an intervenor Ontario does not request costs.

## PART V – REQUEST TO PRESENT ORAL ARGUMENT

62. Pursuant to the Order of Justice Rowe, dated February 20, 2020, the Attorney General of Ontario has been granted permission to present oral argument not exceeding ten (10) minutes at the hearing of these appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF MARCH, 2020

Sarah Kraicer

Daniel Huffaker

[70] Peter W Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed (Toronto: Carswell, 2019) at 7.3(e); *Re: BC Family Relations Act*, *supra* at 105–106 (*per* Estey J).

# PART VI – TABLE OF AUTHORITIES

| CASES | Paragraph(s) Referred to in Factum |
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