SCC File No. 38837

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUÉBEC.

BETWEEN:

CONFÉRENCE DES JUDGES DE LA COUR DU QUÉBEC

Appellant
(Intervener)

– and –

JUGE EN CHEF, JUGE EN CHEF ASSOCIÉ et
JUGE EN CHEF ADJOINTE DE LA COUR SUPÉRIEURE DU QUÉBEC

Respondents
(Interveners)

– and –

PROCUEREUR GÉNÉRAL DU QUÉBEC

Intervener
(Appellant)

– and –

PROCUEREUR GÉNÉRAL DU CANADA, PROCUREUR GÉNÉRAL DE AL COLOMBIE-BRITANNIQUE, CONSEIL DE LA MAGISTRATURE DU QUÉBEC, ASSOCIATION CANADIENNE DES JUGES DES COURS PROVINCIALES, ORGANISME D'AUTORÉGLEMENTATION DU COURTAGE IMMOBILIER DU QUÉBEC (OACIQ)

Interveners

AND BETWEEN:

PROCUEREUR GÉNÉRAL DU QUÉBEC

Appellant
(Appellant)

– and –

JUGE EN CHEF, JUGE EN CHEF ASSOCIÉE et
JUGE EN CHEF ADJOINTE DE LA COUR SUPÉRIEURE DU QUÉBEC

Respondents
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Interveners

AND BETWEEN:

CONSEIL DE LA MAGESTRATURE DU QUÉBEC

Appellant
(Intervener)

– and –

PROCUEREUR GÉNÉRAL DU QUÉBEC

Respondent
(Appellant)

– and –

PROCUREUR GÉNÉRAL DU CANADA, PROCUREUR GÉNÉRAL DE LA COLOMBIE-BRITANNIQUE, JUGE EN CHEF, JUGE EN CHEF ASSOCIÉE ET JUGE EN CHEF ADJOINTE DE LA COUR SUPÉRIEURE DU QUÉBEC, ASSOCIATION CANADIENNE DES JUGES DES COURS PROVINCIALES, ORGANISME D'AUTORÉGLEMENTATION DU COURTAGE IMMOBILIER DU QUÉBEC (OACIQ), et CONFÉRENCE DES JUGES DE LACOUR DU QUÉBEC

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AND BETWEEN:

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Appellant
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AND BETWEEN:

JUGE EN CHEF, JUGE EN CHEF ASSOCIÉE et
JUGE EN CHEF ADJOINTE DE LA COUR SUPÉRIEURE DU QUÉBEC

Appellants
(Interveners)

– and –

PROCUEREUR GÉNÉRAL DU QUÉBEC

Respondent
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PART I - OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. British Columbia's Position

1. Our legal tradition has always provided for a mix of superior courts of general jurisdiction - which includes original jurisdiction over private civil disputes of "substantial" value - with courts and tribunals characterized by a maximum monetary jurisdiction set by statute. In early modern England, such small claims tribunals were created to provide what we now call "access to justice": they originated in the principle that "justice should be taken to every man's door."[1] In the Confederation bargain, it was decided that the superior courts must be federally appointed in order to promote a unitary system of independent justice, while each province should retain its own peculiar system of small claims tribunals and the power to alter these tribunals as circumstances changed.

2. It was a necessary part of this constitutional compromise that the provincial legislatures draw a statutory line of monetary jurisdiction confining the civil jurisprudence of provincially-appointed tribunals. Above that line, only superior courts could resolve civil disputes and thereby develop the basic principles of private law: below that line, the provinces could develop courts and tribunals to resolve disputes efficiently. It is common ground that the provinces cannot, constitutionally, draw the line so high that it would interfere with the core jurisdiction of the superior courts. It is also common ground that provinces must have some flexibility in setting the monetary limit to reflect changing social, economic and technological realities in their jurisdiction. The challenge is to find a principled way of resolving the inherent tension between these two principles. This question has not been meaningfully addressed in half a century.[2]

3. The Court of Appeal here took a bright-line approach. It used a mathematical metric from economics (nominal gross domestic product or nGDP) and applied it to adjust the highest monetary jurisdiction of a non-section 96 court in the confederating provinces in 1867. On this basis, one hundred dollars at the time of Confederation could be calculated to be "equal" to somewhere between $55,000 and $66,000 in 2017. The Court below rounded this up to C$70,000 and set a

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[1] Halsbury, The Laws of England, 3rd ed., vol. 9, London, Butterworth, 1954, pp. 348-350, cited in *Reasons for Judgment,* para. 31.

[2] *Cour de Magistrat de Québec v. Barreau de la Province de Québec*, [1965] RCS 772. [*Magistrates Court Jurisdiction Reference*].

"constitutional speed limit." Since the statutory monetary jurisdiction of the Cour du Québec exceeds this calculated number, it is said to be unconstitutional. There is no evidence that the difference between the number it found to be constitutionally-acceptable and the number chosen by the National Assembly has any significant effect on the caseload of the Superior Court of Quebec. But on the Court of Appeal's account, this does not matter.

4. The Attorney General of British Columbia ("AGBC") submits that a bright line rule of this kind cannot be sensitive to the actual constitutional values at issue in sections 92(14) and 96 of the *Constitution Act, 1867*. The confederating provinces had different access to justice needs and they reconciled the competing values in diverse ways: in every case, the effect was that the superior courts were left with enough cases to develop the civil law in Quebec and the common law in the other provinces, but only a minority of the legal disputes private persons had with each other. This was constitutional because the provinces retained the right to try to develop forums without the features absolutely necessary to a superior court, but not proportionate to the need of their residents to find an authoritative resolution of their disputes. In the very different circumstances of the twenty-first century, today's provinces and territories should also be free to try solutions to what is now a crisis. They should be constrained not by a bright line rule based on what legislatures one hundred and fifty years ago found appropriate in their circumstances, but on the functional impact on the role of the section 96 courts in developing the law.

5. A test based on addressing these competing values as applied to current social facts would be consistent with adapting the *Residential Tenancies* test for compliance with section 96 to the context of small claims monetary jurisdiction.[3] The first stage of *Residential Tenancies* is concerned with what contemporary power of jurisdiction "broadly conforms" with that exercised by the superior courts at Confederation. The AGBC says, in this context, it must be the original jurisdiction over a sufficient number of high-valued claims to develop the private law. The third stage of *Residential Tenancies* looks at the institutional context, specifically whether giving a judicial function to a provincially-appointed tribunal is "necessarily incidental to the achievement of a broader policy goal of the legislature."[4] In the monetary jurisdiction context, this broader goal

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[3] *Re Residential Tenancies Act*, [1981] 1 SCR 714 [*Residential Tenancies*]. See *Massey-Ferguson Industries Ltd. v. Saskatchewan*, [1981] 2 SCR 413 at p. 429 [*MFI*].
[4] *Residential Tenancies* at p. 736.

must be ensuring that there is an accessible forum for civil disputes whose expense and timeliness is proportionate to the amount involved, and so the question of whether the tribunal's jurisdiction is incidental to this goal must be decided before it is said to be unconstitutional.

6. The AGBC therefore proposes the following test for determining whether the statutory monetary limit for a provincially-appointed court or tribunal has been set too high:

a. First, has the challenger shown that the limit impairs the ability of the superior courts to develop private law by choking off the flow of high-valued cases in which they can do that? If not, then the limit cannot be contrary to section 96.

b. Second, has the challenger shown that the limit exceeds what is incidental to the goal of providing an accessible forum whose expense and timeliness is proportionate to the amount at stake? Even an impairment of superior court jurisdiction is not contrary to section 96 if it the alternative would be that the persons with the disputes could not realistically find *any* forum in which to resolve them.

7. Both the fundamental principle of democracy and the more specific principle of presumption of constitutionality mean the onus at both stages must be on the challenger. There was no evidence here that the limit in article 35 of the Code of Civil Procedure significantly affects the ability of the superior courts to hear enough cases of substantial value to develop the law. Until that evidence is forthcoming, Quebec should not be deprived of the power it shares with other provinces to seek a path for justice to reach every door.

B. The Access to Justice Crisis and British Columbia's Response

8. The AGBC accepts the facts as stated by the Attorney General of Quebec and adds the following.

9. This case arises in the context of an access-to-justice crisis for all but the wealthiest Canadians. According to the report of the Action Committee on Access to Justice in Civil and Family Matters, Canada's existing civil justice system "is too complex, too slow and too expensive." It is "incapable of producing just outcomes that are proportional to the problems

brought to it or reflective of the needs of the people it is meant to serve."[5] 70%-90% of legal needs in society go unmet, approximately 50% of people try to solve their legal problems on their own, with no or minimal legal assistance, and a majority of litigants end up representing themselves in courts that were not designed for lay self-representation.[6]

10. There are no available statistics, now or historically, on the costs of litigation to Canadians. Most stakeholders in the justice system believe that the cost of counsel deters many people with civil disputes from seeking legal advice or representation and that the incidence of self-representation and lengths of civil trials have risen dramatically in the twenty-first century.[7]

11. Noel Semple of the University of Windsor's Faculty of Law carried out one of the most comprehensive quantitative studies of access to justice in Canada. One of his conclusions was that "[t]he high private costs of seeking justice are among the chief reasons why the civil law's promises are not being realized by Canadians."[8]

12. If there were a simple answer to Canada's access to justice crisis, it would have been implemented. Unfortunately, access to justice is a complex problem and there are no such simple solutions. But British Columbia has begun the task of trying new approaches.

13. In response to the challenges identified by the Cromwell Report, British Columbia has used its authority under section 92(14) of the *Constitution Act, 1867* to experiment with new models for providing more effective and less expensive resolution of disputes. The Civil Resolution Tribunal ("CRT") is a new dispute resolution forum created under the *Civil Resolution Tribunal Act* S.B.C. 2012, c. 25. It currently has jurisdiction to hear monetary disputes of up to $5,000 (section 3.1) or up to $50,000 in the case of motor vehicle claims.[9]

14. British Columbia's experience with the CRT will help to determine whether formalized justice systems can unlock significant improvements in terms of speed, cost and accessibility

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[5] Action Committee on Access to Justice in Civil and Family Matters, "A Roadmap For Change" (October 2013) [Cromwell Report] at page 9.
[6]Cromwell Report at p. 12.
[7]Cromwell Report at p. 12.
[8]N. Semple, "The Cost Of Seeking Civil Justice In Canada" 93(3) *Can. Bar. Rev.* 639 at p. 642.
[9]*Civil Resolution Tribunal Act*, SBC 2012, c. 25, ss. 132, 133 (1)(c); Accident Claims Regulation, B.C. Reg. 60/2019, s. 7.

through technology used in combination with redesigned dispute resolution processes. The CRT goes beyond automation of offline processes to test the potential of new services, including online problem diagnosis, self-help and triage in the early stages. It will also test the benefits of remote, text-based, asynchronous communication in the dispute resolution process. Collectively, these changes hope to create new services that increase access to justice.[10] These experiments are now being rigorously evaluated by third parties to determine how well they work.[11] Other provinces and territories can learn both from British Columbia's successes and our mistakes.

PART II - POSITION ON APPELLANT'S QUESTION

15. The AGBC intervenes on the question posed by the Attorney General of Quebec and the first question on the reference:

> Les dispositions du premier alinéa de l'article 35 du Code de procédure civile (chapitre C-25.01) fixant, à moins de 85 000 , le seuil ·de la compétence pécuniaire exclusive de la Cour du Québec, sont-elles valides au regard de l'article 96 de la Loi constitutionnelle de 1867, étant donné la compétence du Québec sur l'administration de la justice aux termes du paragraphe 92 (14) de la Loi constitutionnelle de 1867?

16. The AGBC says the answer to this question is "yes."

PART III - STATEMENT OF ARGUMENT

A. Overview of the Legal Argument

17. The Court below set a constitutional speed limit (<<*seuil pecuniare*>>)[12] by taking the maximum statutory jurisdiction of a small claims tribunal in 1867 ($100) and adjusting it in accordance with expert estimates of nGDP – the total monetary value of goods and services sold in the economy.[13] This led to four different numbers, depending on the expert relied on and on whether Quebec's or Canada's nGDP is used: the result is that $100 at Confederation was the

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[10]S. Salter, "Online Dispute Resolution and Justice Service Integration: British Columbia's Civil Resolution Tribunal", (2017) 34:1 *Windsor Yearbook of Access to Justice* 112; S. Salter & D. Thompson, "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2017) 3 *McGill J. of Dispute Resolution*.
[11]B. Toy-Cronin et. al., "Testing the promise of access to justice through online courts" (2018) 5 *Int. J. of Online Dispute Resolution* 39.
[12]*Reasons for Judgment*, para. 186.
[13]*Reasons for Judgment*, para. 167.

equivalent of something between $55,354 and $66,008 in 2017, adjusted for nGDP.[14] Although the Court found that nominal GDP is the best economic metric, it did not attempt to decide between the two competing experts – or pick Canadian or Quebec figures - and indeed rounded up to $70,000 Canadian. It is not clear whether on this approach the constitutional speed limit continues to rise every year by the rate of increase in nGDP on an annual basis or if there are "step" increases when a round figure becomes close enough.

18. The AGBC does not dispute that nGDP is a better economic metric than CPI (the measure of the market price of a basket of consumer goods) or indeed than any other specific metric. The error is more fundamental. History should not be a source of concrete numbers to be increased by any economic metric. "Historic context" is indeed central to the interpretation of the Constitution, but as a source of the "essential components" or "purposes" of constitutional provisions, not as a concrete rule to be applied regardless of those purposes. This applies to section 96 as much as anywhere else.

19. With the proper constitutional-historical methodology, we can see that the underlying purposes of sections 92(14) and 96 remain the same, but that the jurisprudential importance of those purposes comes in *applying them to the current social and technological context.* The reasons that the legal system at the time of Confederation had for developing superior courts and small claims tribunals can indeed help us understand sections 92(14) and 96 in the context of deciding how high the monetary jurisdiction of a provincially-appointed small claims tribunal can be. A federally-appointed unitary judiciary with strong constitutional protections for tenure and financial security was, from the outset, crucial to the development of both the public and private law. Part VII of the *Constitution Act, 1867* gave that core British institution the force of written constitutional guarantees. At the same time, it was recognized that small claims tribunals are needed to "take justice to each door": how that was done varied in the confederating provinces and the power to continue that variation was constitutionalized in section 92(14). In the twenty-first century, these old dilemmas face new social and technological realities. No one has an answer

[14] *Reasons for Judgment,* para. 171.

ready-to-hand to the problem of access to justice. For that very reason, provinces must be allowed to experiment and learn from experience and from each other.[15]

20. The section 96 jurisprudence about protecting the core jurisdiction of the superior courts while allowing access to less formal modes of justice developed primarily in the context of tribunals administering specialized statutory schemes. In adapting that jurisprudence to the context of monetary jurisdiction limits for small claims tribunals, two fundamental questions arise:

a. First, what, in this context, is the contemporary jurisdiction that "broadly conforms" to that of the superior courts at the time of Confederation?

b. Second, given that a small claims jurisdiction is, by definition, judicial, what is the "function" of a small claims tribunal in "the overall institutional context" of the civil dispute resolution system?

21. The AGBC argues that the enduring "nature" of superior court jurisdiction is original jurisdiction over a large enough volume of private-law claims to give guidance and develop the general private law (civil or common law). Only if the practical capacity to fulfill this function is demonstrably impaired is the provincial tribunal exercising a jurisdiction or power that broadly conforms with that exercised by the superior courts at Confederation. And a small claims tribunal's "function within the institutional context" is to provide access to justice by resolving disputes which cannot proportionately be heard at the superior court level.[16]

22. The AGBC says that the test for a challenge to a statutory small claims jurisdictional limit should be rooted in contemporary social reality. Has the challenger established that the limit is set so high that the superior courts are effectively denied the possibility of leading the development of private law? Has the limit been set in a way that clearly exceeds what is incidental to the goal of access to justice? If the answer to both these questions is "no", section 96 is not violated and the province should be allowed to pursue its own course to bringing justice to every door.

23. How is a court to carry out this balancing? The proof of the pudding is in the eating. Is the flow of cases to superior courts drying up? A better metric than the monetary value as a proportion

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[15] *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), Brandeis J. (dissenting) [*New State*].
[16] *Re B.C. Family Relations Act*, [1982] 1 SCR 62 at p. 107.

of nGDP would be the proportion of civil cases actually resolved. Even more importantly, are citizens unable to have their disputes resolved by a public and proportionate tribunal? The absence of evidence that the core functions of the superior courts in relation to private law are being impaired should be determinative.

B. General Principles of Relationship of History to Constitutional Interpretation Apply to Section 96

24. This Court recently addressed the principles regarding the relationship between historical facts and constitutional interpretation in *Comeau*.[17] The trial judge in that case rested an expansive interpretation of section 121 of the *Constitution Act, 1867* ("All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces") on the expert evidence of a historian.[18] This Court held that this was an error: expert evidence cannot be given directly on the interpretation of the constitution, since constitutional interpretation is a matter of domestic law.[19]

25. While historical facts are *relevant* to constitutional interpretation, they are not *determinative*, and they must be approached in the correct way. Constitutional texts should be placed in their proper linguistic, philosophic and *historical* context, but this context reveals *purposes* –often conflicting purposes - that must be applied in a manner that is sensitive to evolving circumstances and new realities. The underlying animating principles of the Constitution – federalism, democracy, the rule of law and the protection of minorities – fill out the textual provisions. This is the living tree doctrine. [20]

26. The Court noted in *Comeau* that the historical context of section 121 supported the need for balance in applying provisions that were the result of a compromise between competing imperatives. The Fathers of Confederation indeed had a vision of an "economic union", but this desire had to be read in light of other provisions of the Constitution, such as section 92, which gave authority to each province to make different decisions on how goods would be treated. An "absolute" guarantee of internal free trade could not prevail if it meant that provinces could not

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[17] *R. v. Comeau*, 2018 SCC 15, [2018] 1 SCR 342 [*Comeau*].
[18] *Comeau* at para. 15.
[19] *Comeau* at para. 40.
[20] *Comeau* at para. 52.

legislate in relation to property and civil rights whenever this would have an effect on interprovincial trade.[21] In other words, the Court looked at past historical compromises, embodied in the constitutional text, as a source of *countervailing* interests, values and principles.

27. Similarly, in the *Employment Insurance Reference*,[22] the Supreme Court of Canada held that the Federal Parliament could provide for income-replacement benefits during maternity and parental leave under section 91(2A) (Unemployment Insurance), even though such benefits would not have been contemplated in 1940 when section 91(2A) was added to the Constitution. Justice Deschamps did not ignore the historic compromise that led to section 91(2A) in the face of the Great Depression: this historic context was very relevant to the purpose of a constitutional provision,[23] and social evolution cannot justify changing the *nature* of the constitutional provision.[24] But the social mores of the day, in relation to the value of women's work, were not incorporated.[25] The enduring value of empowering the federal government to provide for income replacement during interruptions in employment could be applied in the different social context of the twenty-first century. The key is to distinguish the "essential components", identified both by the framers and subsequent court decisions, from the shifting social realities to which these components must be adapted.[26]

28. The application of section 96 of the *Constitution Act, 1867* has always paid special attention to the historical situation in 1867 and the division at that time between superior courts, the intermediate courts and other mid-Victorian courts and tribunals. But the principle of the "living tree" applies as much to section 96 as any other provision of the Constitution.[27] We should first look at the principles and policies ("essential components") the courts have identified in relation to the historic compromise represented by sections 92(14) and 96.

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[21] *Comeau* at para. 67.
[22] *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 SCR 669, 2005 SCC 56 [*Employment Insurance Reference*]
[23] *Employment Insurance Reference* at paras. 16-24 and 58.
[24] *Employment Insurance Reference* at para. 45.
[25] *Employment Insurance Reference* at para. 19.
[26] *Employment Insurance Reference* at para. 10.
[27] *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 SCR 186, Lamer CJC at para. 27 [*Amendments to the Residential Tenancies Act N.S.*].

29. The core principle of the jurisprudence is the "mutual modification" between sections 92(14) and 96. Each must be given meaning. Section 96 must be read in the context of the general plenary provincial legislative authority over the administration of justice under section 92(14).[28] Under that section, provincial legislatures are ultimately accountable to their voters to promote access to affordable and timely adjudication of their disputes. Because the challenges to this goal vary over time and in different parts of the country, it is vital that the Constitution not be interpreted as a straitjacket.

30. What needs to be preserved is a balance between access to affordable justice, on the one hand, and enough sufficient claims originally adjudicated by superior courts so that those courts can continue to play their traditional role in the development of the law. The Court of Appeal therefore erred in characterizing "access to justice" as a good thing to be pursued, but only within the constitutional constraints of section 96.[29] Rather, the imperative of giving provinces freedom to explore new approaches to access to justice is, by virtue of the mutual modification principle, part of the meaning of section 96 itself, rather than a policy goal external to, but constrained, by the constitutional provision.

31. Using a single economic metric does not allow for this balancing, which turns on social realities. Rather it simply invalidates jurisdictional changes which cross that line, without consideration of countervailing factors. This is especially arbitrary when the line is as contentious and uncertain as the monetary bright lines being proposed by the expert economists in this reference. The bright line approach would reduce the question of validity under section 96 to a matter of expert evidence – an approach rejected by this Court in *Comeau*.[30] Moreover, a single metric would limit provinces' ability to try different solutions depending on the needs of their own populations.

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[28] *Martineau & Sons Limited v. Montreal (City)*, [1932] 1 DLR 353 (JCPC) [*Martineau*] at p. 359; *Re Residential Tenancies Act*, [1981] 1 SCR 714 [*Residential Tenancies*] at p. 728; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 SCR 31, 2014 SCC 59 [*Trial Lawyers*] at para. 25.
[29] *Reasons for Judgment* at para. 185.
[30] *Comeau* at para. 15, 43.

32. Where the framers of the *Constitution Act, 1867* wanted to use a specific monetary threshold, they made it explicit, as with the qualifications of senators and the amounts of direct monetary transfers from the Dominion to the provinces.[31] If they had wanted to limit small claims tribunals to $100, they would have said so. While it is no doubt correct that the concepts of "nominal GDP" or the "consumer price index" were not available to them – and therefore could not have been the basis for a textual formula, this just shows how arbitrary it would be to ascribe that formula to their "original intent." What they did instead was to entrench a federally-appointed court that had the "nature" of a superior court, that filled the function of a superior court.

33. In *Residential Tenancies,* Chief Justice Dickson identified the protection of a unitary judicial system as a component of the Canadian version of federalism as the foundational value of section 96.[32] The importance of the unitary judiciary to Canadian federalism has been developed in subsequent cases.[33] It has also been stated to be an aspect of the principle of the rule of law.[34]

34. Values of federalism and the rule of law weigh on the other side of the balance as well. The underlying value of section 92(14), as with other provincial legislative authorities under the *Constitution Act, 1867,* is the reconciliation of unity with diversity, allowing each regional majority to innovate to find solutions that work for it, with those successes and failures working as examples for the other provinces.[35] Unless its actions are repugnant to section 96, each province should be able to go its own way in the administration of justice.[36]

35. Access to justice is the component of the rule of law that informs the interaction of sections 92(14) and 96.[37] As Lord Halsbury noted, English justice at the time of Confederation made

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[31] *Constitution Act, 1867*, s. 23 (qualifications of a senator), ss. 112-119 (debts and transfers at Confederation).
[32] *Residential Tenancies* at p. 728; *Young Offenders Reference*, [1991] 1 SCR 252 at p. 264.
[33] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077 at pp. 1099-1100; *Hunt v. T&N plc*, [1993] 4 SCR 289.
[34] *Amendments to the Residential Tenancies Act N.S.* at para. 72.
[35] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 58; *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3, 2007 SCC 22 at para. 22. New State, Brandeis J. (dissenting) at p. 311)
[36] *Reference Re Authority to Perform Functions Vested by Adoption Act, The Children of Unmarried Parents Act, The Deserted Wives' and Children's Maintenance Act of Ontario*, [1938] SCR 398 [*Adoption Reference*] at p. 414.
[37] *Trial Lawyers* at paras. 38 and 39.

extensive use of executive tribunals and justices of the peace to take justice to every door by ensuring there were "as many courts as there were manors in the Kingdom."[38] In the 1938 *Adoption Reference*, the Supreme Court of Canada recognized the importance of "inferior tribunals" as "touch[ing] the great mass of the people more intimately and more extensively than do the judgments of the Superior Courts".[39] In reacting to early critics of section 96 jurisprudence,[40] the Privy Council and Supreme Court of Canada applied what Chief Justice Dickson referred to as an "increasingly broad test of constitutional validity" in upholding more accessible administrative tribunals.[41]

36. In the 1986 *Scowby* case, Justice La Forest said that section 96, like "other parts of the Constitution, cannot be frozen in an 1867 mold." New techniques of dispute resolution for the expeditious disposition of disputes must be available to the provinces. What is crucial is that superior courts "continue their exclusive function of determining basic judicial questions of public order and public policy."[42] *Scowby* pointed to the *balance* between provincial freedom to develop forums proportionate to what is in dispute with maintaining a role of the unitary superior courts in *basic* judicial questions as being at the heart of the interpretative balance of ss. 92(14) and 96.

37. In *Hryniak*, the Court recognized that in the twenty-first century, the rule of law requires access to justice, that the latter involves a balance between affordability and procedure, and that getting that balance right requires a "culture shift", proportionality between what is at stake and the process involved and developing new models of adjudication reflecting "modern reality."[43] The Court insisted that the existence of an "accessible public forum" is necessary for the development of the common law, and without it the rule of law will be threatened.[44] *Hryniak* was not itself a section 96 or constitutional case. But in *Trial Lawyers*, the majority referred to *Hryniak*

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[38]Halsbury, p. 348.
[39]*Adoption Reference* at p. 415.
[40]John Willis, "Section 96 of the British North America Act" 18 *Canadian Bar Review* 517 (1940).
[41]*Residential Tenancies* at p. 732, referring to *Labour Relations Board of Saskatchewan v. John East Iron Works Limited*, [1948] 4 DLR 673 (JCPC), *Tomko v. Labour Relations Board (N.S.) et al.*, [1977] 1 SCR 112 and *Mississauga (City) v. Peel (Municipality)*, [1979] 2 SCR 244.
[42]*Scowby v. Glendinning*, [1986] 2 SCR 226 at para. 36.
[43]*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*] at para. 2.
[44]*Hryniak* at para. 26.

to recognize both accessibility and the preservation of a public forum as underlying purposes of section 96, as modified by section 92(14).[45]

38. The fundamental underlying principles at stake in the balance between sections 92(14) and 96 are therefore democracy (in particular, the principle that exercises of legislative authority should be respected unless found to be repugnant to section 96), federalism (which, in the Canadian model, points both to the need to preserve a unitary judicial system in relation to basic judicial questions of public order and public policy, as well as diversity of approaches in relation to other matters) and the rule of law (which encompasses both to the need for a unitary superior court judiciary *and* the need to develop new techniques of dispute resolution and expeditious and low-cost resolution of disputes).

C. The Monetary Jurisdiction Jurisprudence

39. At the time of Confederation, the superior courts and the intermediate section 96 courts had conduct of a minority of civil litigation. Provincially-appointed, often lay, tribunals provided justice for the bulk of cases where a barrister with the ability to appear in superior courts would have been unaffordable.

40. It was soon established that the post-Confederation provincial executives could appoint judges to the courts whose monetary jurisdiction was analogous to the Commissioners' Courts of Canada East, the Division Courts of Canada West and the Justices of the Peace and City Courts of the Maritime Provinces.[46] In *Re Small Debts Act,* the BC Courts concluded that a provincially-appointed small claims tribunal is presumptively constitutional unless it is "in effect" a section 96 court.[47] A provincially-appointed small claims tribunal may have similar procedures to section 96 courts, although they often did not. [48]

41. In *French v. McKendrick,* the Ontario Court of Appeal held that "merely" increasing the monetary jurisdiction of a small claims court did not transform it into a section 96 court.[49] It is

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[45] *Trial Lawyers* at para. 38.
[46] *Ganong v. Bayley* (1877), 17 N.B. 324; *Re Small Debts Act (B.C.),* [1896] B.C.J. No. 45.
[47] *Re Small Debts Act* at para. 15, Walkem J.
[48] *Re Small Debts Act* at para. 27, Drake J.
[49] *French v. McKendrick*, [1931] 1 D.L.R. 696 (Ont. C.A.) at para. 28-30.

worth noting that this change was not justified on the basis of inflation, which was not a problem in the early Depression, nor on more sophisticated metrics, which had yet to be developed. Rather, what was issue is whether the change had transformed the *nature* of the court.

42. In the 1965 *Magistrates Court Jurisdiction Reference*, this Court was asked to decide whether an increase in the monetary jurisdiction of a provincially-appointed inferior court could be increased from $200 to $500. The amount of the increase exceeded the only economic metric given to the Court. The highest-valued general civil claim within the jurisdiction of a non-section 96 court in the confederating provinces in 1867 was $100 and in Quebec was $25. The Supreme Court of Canada was given stipulated facts[50] in relation to the wholesale price index (WPI) and consumer price index (CPI). The WPI was 80.2 in 1867 and 244.4 in 1963, for a 305% increase. The earliest year for the CPI was 1913, and the CPI had increased by 269% since then. Using the WPI metric provided to the Court – the metric that gave the highest figure - the monetary equivalent of $100 at Confederation would have been $304.74, about 60% of what was actually approved. The Court's decision to uphold an increase to $500 was therefore a *rejection* of the proposition that economic metrics determine the constitutional limit. The possibility that the result the 1964 Court reached could be reverse engineered based on a metric (nGDP) that was not provided to it can have no jurisprudential significance.

43. Instead Justice Fauteux said the jurisprudential issue was whether the increase, by itself and without more, was likely to "change the nature" («*apte à changer le caractère*») of the inferior tribunal to make it a court within section 96.[51] At the time, the broader section 96 case law also used the intuitive concepts of "analogy" or "character" to make the comparison between 1867 and the present day. Justice Fauteux spoke of the « *problème classique* » of reconciling sections 92(14) and 96,[52] showing he was alive to the need to respect both the authority of provincial legislatures to make change to the administration of justice and the core purposes of section 96. In short, the case law regarding constitutionality of legislated jurisdictional limits was about social function

[50] *Magistrates Court Jurisdiction Reference* at p. 776.
[51] *Magistrates Court Jurisdiction Reference* at p. 781.
[52] *Magistrates Court Jurisdiction Reference* at p. 782.

("character") and not about extrapolations from the numbers that happened to be used by a provincial statute in 1867.

44. As the evidence of Messrs. St-Maurice and Geloso makes clear, there are multiple possible economic metrics that could be applied to compare a monetary sum in the past with the present. Both experts correctly reject the ordinary measure of inflation, the CPI, as inappropriate: there is no reason to think that legal costs – or the value of the kind of high-valued claim necessary to develop the private law - have gone up proportionately to the CPI. But there is no strong reason to take any of the other metrics as determinative. Nominal GDP per capita is a metric of use to economists and economic historians, but it is not responsive to the underlying values and principles of section 96. Then, as now, the reason to have high-valued claims in section 96 courts was to ensure independence and a unitary approach to the development of the most fundamental parts of the law. Then, as now, the reason to provide alternatives for lower-valued claims was so that the cost of litigation in more formal courts did not make pursuing those claims uneconomic. We do not know if the cost of litigation has risen proportionately with nGDP per capita or has grown more quickly. Nominal GDP is not a close proxy for the character of a higher-valued claim. The same can be said of other simple metrics.

D. The Residential Tenancies Test Adapted

45. A generation after the *Magistrates Court Reference*, *Residential Tenancies* developed the three-part test for determining when the allocation of jurisdiction to a provincially-appointed tribunal is contrary to section 96. The test was summarized by Chief Justice Laskin shortly afterwards as follows:

> 1. Does the challenged power or jurisdiction broadly conform to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation?
>
> 2. Is the function of the provincial tribunal within its institutional setting a judicial function, considered from the point of view of the nature of the question which the tribunal is called upon to decide […]?
>
> 3. If the power or jurisdiction of the provincial tribunal is exercised in a judicial manner, does its function as a whole in its entire institutional context violate section 96?[53]

[53] *MFI* at p. 429.

46. The *Residential Tenancies* test was developed in the context of tribunals administering specialized statutory jurisdiction in mind and not for small claims tribunals applying the general law to disputes whose value is not enough to justify a full trial before a superior court. But an appropriate translation to the context of monetary jurisdiction can be found.

47. If we look to the constitutional purposes behind section 96 courts, the civil dispute jurisdiction that "broadly conforms" with that exercised by superior courts at Confederation is the jurisdiction to decide a sufficient number of claims to be able guide the development of the private law. Superior courts were able to do this at Confederation with jurisdiction over a minority of private disputes – but they could not have done so with no "book of business" at all.

48. Similarly, at the third stage, the issue is not the institutional context of specialized regulatory administration and adjudication of particular statutory schemes, but the institutional context of a division of labour in addressing civil disputes based on the amount involved. The functional reason for this division of labour remains the same across history: superior courts could not fulfill *their* function if their processes were adapted to the smaller-value disputes, while those with such disputes could not get redress if they were required to use superior courts designed to address the basic judicial questions of public policy.

E. Test for Monetary Limits Jurisdiction Under Section 96

49. In the AGBC's submission, the Court should articulate a test that goes beyond conclusory inquiries into the effect of the monetary limit on the "character" of the court and is responsive to the underlying considerations. The democracy principle, and the general presumption of regularity in relation to statutes, requires that the burden of persuasion and proof be on the challenger to the law.

50. Section 96 is about protecting the core of superior court jurisdiction. In the context of civil disputes, superior courts operate both as reviewing courts (whether on appeal or otherwise) and as a matter of original jurisdiction. Historically, the core of their original jurisdiction in relation to civil disputes was to adjudicate complex issues of law in the context of high-valued claims. Section 96 courts were always lawyers' courts. In the context of developing private law, a unitary system has been valuable in the common-law provinces as a means of keeping the common law reasonably

consistent. In all provinces, the greater indicia of independence and the unitary structure has been of importance in developing complex areas of private law.

51. At the first stage, a claimant challenging monetary limits under section 96 must therefore demonstrate that this core of superior court original jurisdiction over private disputes has been impaired. As with the principle of interjurisdictional immunity, "impairing" is an intermediary standard between merely affecting superior court jurisdiction and sterilizing it. At this stage, the effect on the ability of the superior courts to continue to develop the private law must be significant. The monetary limits need not paralyze this aspect of the superior courts' works, but its impact must be serious.[54] Monetary limits that do not impair this function of the superior courts cannot be problematic under section 96.

52. Even if the challenger is able to demonstrate this, the countervailing consideration is the need to ensure that provinces are able to address the serious problem of access to justice. Section 96 should not become a barrier to accessible justice. Since no one has yet solved the problem, it is better to err on the side of allowing innovation to proceed. British Columbia's experiment with the CRT is still ongoing and we do not yet know how far it will be able to solve the problems the Cromwell Report identified. Other provinces will no doubt learn lessons from this experience and contribute their own lessons in turn. Section 96 should not prevent the provinces from acting as laboratories both of democracy and of access to justice.

53. The appropriate point at which to address this fundamental value in section 96 is at the third, "institutional context" stage of the *Residential Tenancies* test.[55] In *Residential Tenancies*, the Court formulated this test in two ways: first, as whether the power is "subsidiary or ancillary to general administrative functions assigned to the tribunal" and the second as whether it "may be may be necessarily incidental to the achievement of a broader policy goal of the legislature."[56] The second formulation is more useful in the context of small claims tribunals where the policy goal is to promote access to justice. Indeed, even in the administrative context, this goal has been

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[54] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536, 2010 SCC 39 at para. 44-45.
[55] *Residential Tenancies* at pp. 735-6.
[56] *Residential Tenancies* at p 732, citing *Mississauga v. Regional Municipality of Peel*, [1979] 2 S.C.R. 244.

recognized, and was critical to the finding of Justice Wilson that labour standards tribunals were acceptable under section 96 because they "provide low-cost and accessible methods of investigation and dispute resolution," particularly important in the context of lost wage and reinstatement claims. [57] At the second stage, therefore, a claimant challenging monetary limits should be required to show that the limits are not incidental to the goal of providing a forum whose timeliness and expense are proportionate to the amount at stake.

54. With these requirements, section 96 will do its work (protect the superior courts' core role), while section 92(14) will do what it needs to do (protect the ability of the provinces to experiment with ways of promoting access to justice). Rather than an attempt to reproduce the precise balance made at Confederation (adjusted only for inflation, or nGDP growth or some other economic statistic), this test will allow each generation to consider the balance for itself.

F. Application of Test to Article 35

55. On British Columbia's approach, Article 35 should be upheld. There is no evidence that Quebec's Superior Court has been deprived of the ability to develop Quebec's private law as a matter of original jurisdiction. Moreover, in light of the access to justice crisis gripping all provinces, $85,000 is by no means an excessive amount for potential experimentation with approaches not available to superior courts.

56. In particular, it is troubling that the Court of Appeal accepted a "slippery slope" argument that even though there is no evidence that jurisdiction over cases in the $70,000-$85,000 range in fact has a significant impact on the Superior Court of Quebec, this "logic" will somehow "lead" to the superior courts being "gradually stripped" of their core jurisdiction.[58] This kind of "slippery slope" reasoning fails to give weight to the constitutional interests on the other side. To be successful, a claimant should have to show an actual impairment of the capacity of the superior courts to develop the law.

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[57] *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 SCR 238 at p. 280.

[58] *Reasons for Judgment*, para. 186.

PART IV - SUBMISSIONS ON COSTS

57. British Columbia does not ask for costs and asks that no costs be awarded against it.

PART V - ORDERS SOUGHT

58. British Columbia takes no position on the second question.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th OF MARCH 2020

Per

J. Gareth Morley | Zachary Froese
Counsel for the Intervener,
Attorney General of British Columbia

PART VI - LIST OF AUTHORITIES

Jurisprudence:

Tab	Cases	Paragraph Reference
1.	*Renvoi à la Cour d'appel du Québec portant sur la validité constitutionnelle des dispositions de l'article 35 du Code de procédure civile qui fixent à moins de 85 000 $ la compétence pécuniaire exclusive de la Cour du Québec et sur la compétence d'appel attribuée à la Cour du Québec*, 2019 QCCA 1492	17, 30, 56
2.	*Cour de Magistrat de Québec v. Barreau de la Province de Québec*, [1965] RCS 772	2, 42, 43
3.	*French v. McKendrick*, [1931] 1 D.L.R. 696 (Ont. C.A.)	41
4.	*Ganong v. Bayley* (1877), 17 N.B. 324	40
5.	*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 SCR 87	37
6.	*Hunt v. T&N plc*, [1993] 4 SCR 289	33
7.	*Labour Relations Board of Saskatchewan v. John East Iron Works Limited*, [1948] 4 DLR 673 (JCPC)	35
8.	*Martineau & Sons Limited v. Montreal (City)*, [1932] 1 DLR 353 (JCPC)	29
9.	*Massey-Ferguson Industries Ltd. v. Saskatchewan*, [1981] 2 SCR 413]	5, 45
10.	*Mississauga (City) v. Peel (Municipality)*, [1979] 2 SCR 244	35
11.	*Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077	33
12.	*New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), Brandeis J. (dissenting)	19, 34
13.	*Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536, 2010 SCC 395	51
14.	*R. v. Comeau*, 2018 SCC 15, [2018] 1 SCR 342	24, 25, 26, 31
15.	*Re B.C. Family Relations Act*, [1982] 1 SCR 62	21

Tab	Cases	Paragraph Reference
16.	*Re Residential Tenancies Act*, [1981] 1 SCR 714	5, 29, 33, 35, 53
17.	*Re Small Debts Act (B.C.)*, [1896] B.C.J. No. 45	40
18.	*Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 SCR 186	28, 33
19.	*Reference Re Authority to Perform Functions Vested by Adoption Act, The Children of Unmarried Parents Act, The Deserted Wives' and Children's Maintenance Act of Ontario*, [1938] SCR 398	34, 35
20.	*Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 SCR 669, 2005 SCC 56	27
21.	*Reference re Secession of Quebec*, [1998] 2 SCR 217	34
22.	*Scowby v. Glendinning*, [1986] 2 SCR 2266.	36
23.	*Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 SCR 238	53
24.	*Tomko v. Labour Relations Board (N.S.) et al.*, [1977] 1 SCR 112	35
25.	*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 SCR 31, 2014 SCC 59 [*Trial Lawyers*]	29, 35, 37

Legislation

Tab	Legislation	Paragraph
26.	Accident Claims Regulation, B.C. Reg. 60/2019, s. 7	13
27.	*Civil Resolution Tribunal Act*, SBC 2012, c. 25, ss. 132, 133 (1)(c)	13
28.	*Constitution Act, 1867*, ss. 23, 92(14), 96, 112-119 .	4 and on

Secondary Authorities

Tab	Secondary Authorities	Paragraph
29.	Action Committee on Access to Justice in Civil and Family Matters, "A Roadmap For Change" (October 2013)	9, 10
30.	B. Toy-Cronin et. al., "Testing the promise of access to justice through online courts" (2018) 5 *Int. J. of Online Dispute Resolution* 39.	14
31.	Halsbury, *The Laws of England*, 3rd ed., vol. 9, London, Butterworth, 1954	1, 35
32.	John Willis, "Section 96 of the British North America Act" 18 *Canadian Bar Review* 517 (1940)	35
33.	N. Semple, "The Cost Of Seeking Civil Justice In Canada" 93(3) *Can. Bar. Rev.* 639	11
34.	S. Salter, "Online Dispute Resolution and Justice Service Integration: British Columbia's Civil Resolution Tribunal", (2017) 34:1 *Windsor Yearbook of Access to Justice* 112; S. Salter & D. Thompson, "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2017) 3 *McGill J. of Dispute Resolution*.	14