

**IN THE SUPREME COURT OF CANADA**

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

BETWEEN

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

APPELLANT  
(Intervener)

– and –

**CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE, and  
ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUÉBEC**

Respondents  
(Interveners)

AND BETWEEN

**ATTORNEY GENERAL OF QUÉBEC**

Appellant  
(Appellant)

– and –

**CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE, and  
ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUÉBEC**

Respondents  
(Interveners)

AND BETWEEN

**CONSEIL DE LA MAGISTRATURE DU QUÉBEC**

Appellant  
(Intervener)

– and –

**CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE and  
ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUÉBEC**

Respondents  
(Interveners)

*[Style of cause continued on next page]*

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**FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF ALBERTA  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

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AND BETWEEN :

**CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES**

Appellant  
(Intervener)

– and –

**CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE, and  
ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUÉBEC**

Respondents  
(Interveners)

AND BETWEEN :

**CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE and  
ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUÉBEC**

Appellants  
(Interveners)

– and –

**ATTORNEY GENERAL OF QUÉBEC**

Respondents  
(Interveners)

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Interveners

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**FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF ALBERTA  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

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## PART I: OVERVIEW AND FACTS

1. Alberta intervenes with respect to the scope of provincial legislative power under s. 92(14) of the *Constitution Act, 1867* as limited by s. 96 of the *Constitution Act, 1867*,<sup>1</sup> and whether the Constitution imposes a monetary limit on the original civil jurisdiction that may be conferred on courts presided over by provincially appointed judges. This issue arises from the following question referred to the Quebec Court of Appeal by the Government of Quebec:

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*?

Are the provisions of the first paragraph of article 35 of the *Code of Civil Procedure* (chapter C-25.01), setting at less than \$85,000 the limit to the exclusive monetary jurisdiction of the Court of Quebec, valid with regard to section 96 of the *Constitution Act, 1867*, given the jurisdiction of Quebec over the administration of justice under paragraph 14 of section 92 of the *Constitution Act, 1867*?

2. Alberta adopts the facts as stated by the Attorney General of Quebec.
3. Alberta also relies on the civil jurisdiction allocated to the Vice Admiralty Courts in the pre-Confederation colonies of Canada, New Brunswick, and Nova Scotia under the *Vice Admiralty Courts Act, 1863*, (U.K.) 26 Vict, c. 24.<sup>2</sup>
4. Alberta submits that the above reference question should be answered in the affirmative.

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<sup>1</sup> *Constitution Act, 1867*, U.K., 30 &31 Vict, c. 3, ss. 92(14) and 96. (Book of Authorities of the Attorney General of Quebec, tab 30)

<sup>2</sup> *Vice Admiralty Courts Act, 1863*, (U.K.) 26 Vict, c. 24. (Book of Authorities of the Chief Justice, Senior Associate Chief Justice, and Associate Chief Justice of the Superior Court of Quebec, vol. 1, tab 12)

## PART II: POSITION ON APPELLANTS' ISSUES

5. The central issue in this appeal is the proper interpretation of s. 92(14) of the *Constitution Act, 1867*, and in particular, the extent to which s. 96 of the *Constitution Act, 1867*, plays a role in limiting the scope of the provincial legislature's legislative competence over the administration of justice under s. 92(14).

6. Alberta submits that the original civil jurisdiction of the superior courts is protected from transfer to an inferior court only where that jurisdiction was exercised exclusively by superior courts before Confederation.<sup>3</sup> Determining whether the Constitution requires that original civil jurisdiction above a particular monetary limit be exercised exclusively by a superior court requires a proper characterization of the jurisdiction in question, followed by the analysis of the historical allocation of original civil jurisdiction to determine whether that jurisdiction was allocated exclusively to the superior courts in the pre-Confederation colonies of Canada, New Brunswick, and Nova Scotia.

7. The concept of the superior court's "core" jurisdiction captures a concern that is separate and distinct from the notion of exclusive original civil jurisdiction. The core jurisdiction of the superior court is concerned with the court's function as a supervising and controlling body with a crucial judicial role to play in the administration of justice in support of the rule of law.<sup>4</sup>

8. The core jurisdiction of the superior court is not to be equated with the historically exclusive original jurisdiction of the superior courts. If protecting the core jurisdiction of the superior court requires the imposition of a civil monetary limit on the original jurisdiction of non-section 96 courts, which Alberta denies, it is wholly inappropriate to convert the pre-Confederation civil monetary limits to a current value to determine that limit. Rather, the limits should be determined by assessing what is required to preserve

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<sup>3</sup> *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal (N.S.)*, [\[1989\] 1 SCR 238](#), at 256.

<sup>4</sup> *MacMillan Bloedel Ltd. v. Simpson*, [\[1995\] 4 SCR 725](#), at para. 38: "The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law."

the “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.”<sup>5</sup> In this regard, it is not apparent that the loss of original civil jurisdiction over any particular civil matter would adversely affect the inherent jurisdiction or the foundational role of the superior courts.

9. The only aspect of the superior court’s core jurisdiction that is concerned with original jurisdiction in relation to civil matters is the superior court’s residual original jurisdiction in relation to matters that have not been expressly assigned to any court or tribunal by Parliament or the relevant legislature.<sup>6</sup>

10. In relation to the question referred to the Quebec Court of Appeal by the government of Quebec, the issue of the superior court’s core jurisdiction does not arise. The question should be determined entirely on the basis of the historical analysis of the pre-Confederation allocation of original civil jurisdiction to the various courts and tribunals in the three pre-Confederation colonies that formed the Dominion of Canada in 1867.

11. Alberta says that the pre-Confederation non-section 96 courts in the colonies that formed the Dominion of Canada in 1867 shared an original civil jurisdiction sufficiently analogous to the jurisdiction conferred on superior courts in pre-Confederation Canada to permit the provinces, under s. 92(14) of the *Constitution Act, 1867*, to assign that jurisdiction to a court presided over by provincially appointed judges without any civil monetary limit.

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<sup>5</sup> *Ontario v Criminal Lawyers Association*, 2013 SCC 43, [\[2013\] 3 SCR 3](#), at para. 19.

<sup>6</sup> *Canada (HRC) v Canadian Liberty Net*, [\[1998\] 1 SCR 626](#), at para. 35: “In my view, the doctrine of inherent jurisdiction operates to ensure that, having once analyzed the various statutory grants of jurisdiction, **there will always be a court which has the power to vindicate a legal right independent of any statutory grant.** The court which benefits from the inherent jurisdiction is the court of general jurisdiction, namely, **the provincial superior court.** . The doctrine does not operate to narrowly confine a statutory grant of jurisdiction; indeed, it says nothing about the proper interpretation of such a grant. As noted by McLachlin J. in *Brotherhood*, *supra*, at para. 7, **it is a “residual jurisdiction”.**” [Emphasis added]

12. Of note in this regard is the jurisdiction allocated to the Vice Admiralty Courts. The Vice Admiralty Courts had substantial original civil jurisdiction without a monetary limit that was analogous to the original civil jurisdiction exercised by superior courts, and they had extensive geographic jurisdiction. Moreover, this Court has indicated that the Constitution permits the conferral of the jurisdiction of Vice Admiralty Courts on the provinces' non-section 96 courts.<sup>7</sup>

13. Alberta further submits that if the exclusive nature of a modern grant of original civil jurisdiction without a monetary limit to a court presided over by provincially appointed judges offends s. 96 of the *Constitution Act, 1867*, because it encroaches on the superior court's core jurisdiction, which Alberta denies, that section is not offended if the original civil jurisdiction conferred on a court presided over by provincially appointed judges is made concurrent with the original civil jurisdiction of the superior courts.<sup>8</sup>

14. The analysis of the historical allocation of original jurisdiction is not intended to, and does not serve to, identify the superior's court's core jurisdiction. Though the core jurisdiction of the superior courts would have been historically exclusive jurisdiction, that core jurisdiction is distinct from the historically exclusive original jurisdiction, and would neither overlap nor be coextensive with original civil jurisdiction.

15. Alberta submits that the question regarding monetary jurisdiction before this Court in no way engages the issue of the superior court's core jurisdiction, and based on the historical allocation of original civil jurisdiction, the first reference question should be answered in the affirmative.

16. Alberta takes no position with respect to the second reference question and the issue of appellate jurisdiction.

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<sup>7</sup> *Ontario (Attorney General) v Pembina Exploration*, [\[1989\] 1 SCR 206](#), at 228.

<sup>8</sup> *MacMillan Bloedel Ltd v. Simpson*, [\[1995\] 4 SCR 725](#), at para. 42.

### PART III: STATEMENT OF ARGUMENT

17. Under s. 92(14) of the *Constitution Act, 1867*, the provincial legislatures have the legislative authority to define the structure and the judicial jurisdiction of the courts established by the province, subject to the constraints imposed by s. 96 of the *Constitution Act, 1867*.

18. In the Nova Scotia *Residential Tenancies* reference, McLachlin J. (as she then was) commented on the limits of the constraining effect of s. 96 on s. 92(14) of the *Constitution Act, 1867* and stated:

If the inferior courts before Confederation alone exercised the power, or **shared it in a practical way** with the future superior courts, s. 96 is not engaged and no further enquiry is required.<sup>9</sup> [Emphasis added]

19. In short, s. 96 has no constraining effect on s. 92(14) where the pre-Confederation non-section 96 courts exercised exclusive jurisdiction, or the jurisdiction they exercised was shared in a practical way with the superior courts. In such circumstances, the provincial legislature is free to exercise its plenary legislative power under s. 92(14) unconstrained by s. 96.

20. Furthermore, this Court has long recognized that the jurisdiction of non-section 96 courts was not frozen or fixed as it was at the time of Confederation. In *Reference re Adoption Act*, this Court stated:

I am unable to accept the view that the jurisdiction of inferior courts, whether within or without the ambit of s. 96, was by the B.N.A. Act fixed forever as it stood at the date of Confederation.<sup>10</sup>

21. More recently, in *Re Young Offenders Act (PEI)*, endorsing the notion expressed in the *Sobeys Stores* case, this Court stated:

It was then stated in *Sobeys* that the characterization of the issue must be sufficiently narrow to avoid large accretions of jurisdiction by

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<sup>9</sup> *Reference re Residential Tenancies Act*, [\[1996\] 1 SCR 186](#), at para. 75.

<sup>10</sup> *Reference re Adoption Act*, [\[1938\] SCR 398](#), at 418.

inferior courts at the expense of superior courts, **but not so narrow as to freeze the jurisdiction of inferior courts at what it was in 1867.**<sup>11</sup> [Emphasis added]

**A. The historically exclusive original civil jurisdiction is not part of core jurisdiction**

22. The Quebec Court of Appeal, referring to the British Columbia *Trial Lawyers Association* decision, applied an overbroad notion of the superior court's core jurisdiction.<sup>12</sup> Alberta submits that the Quebec Court of Appeal erroneously expanded the notion of the constitutionally protected core jurisdiction of superior courts in a way that would erode the constitutionally valid scope of s. 92(14) of the *Constitution Act, 1867*, and would unjustifiably impair the ability of the provincial legislatures to structure their courts and provide for the administration of justice within the provinces.

23. Section 96 protects the original jurisdiction historically exercised exclusively by superior courts by preventing its conferral on courts presided over by provincially appointed judges, while providing exceptions for administrative tribunals in certain circumstances. However, s. 96 does not preclude the removal of exclusive original jurisdiction from the superior court. The legislatures are free to eliminate some civil rights and may eliminate a category of civil rights, or the causes of action with respect to those civil rights, without fear of violating s. 96 of the *Constitution Act, 1867*.<sup>13</sup>

24. That said, s. 96 also protects a core of superior court jurisdiction, which cannot be removed from the superior court.<sup>14</sup> The core of protected jurisdiction is jurisdiction that,

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<sup>11</sup> *Re Young Offenders Act (PEI)*, [\[1991\] 1 SCR 252](#), at 266.

<sup>12</sup> *In the matter: Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the Code of Civil Procedure which set at less than \$85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec*, [2019 QCCA 1492](#), at para. 140.

<sup>13</sup> See for instance *Pasiechnyk v Saskatchewan (Workers Compensation Board)*, [\[1997\] 2 SCR 890](#), at para. 39.

<sup>14</sup> *MacMillan Bloedel Ltd. v. Simpson*, [\[1995\] 4 SCR 725](#), at para. 15: "The superior courts have a core or inherent jurisdiction which is integral to their operations. **The**

if removed, would deprive the superior court of its character and essential powers as a superior court. Unlike the superior court's historically exclusive original jurisdiction, it is clear that the legislatures cannot remove the superior court's core jurisdiction.

25. Though there remains some uncertainty about the precise contours of the core of protected superior court jurisdiction, there is sufficient case law identifying aspects of that core jurisdiction that it is possible to state with confidence that the core jurisdiction does not include the original jurisdiction over any particular kind of civil dispute between private parties, though such original jurisdiction may well fall within the scope of the historically exclusive jurisdiction of the superior courts.

26. It is true that the jurisdiction to decide disputes between private parties according to the law is a fundamental characteristic of a court of law exercising civil jurisdiction. Moreover, depriving a superior court of all of its jurisdiction to decide disputes according to the law would radically transform the institutional character of the Court. However, the protection of the superior court's historically exclusive jurisdiction under s. 96 of the *Constitution Act, 1867*, precludes the removal of all of the superior court's jurisdiction and in effect removes the risk that the institutional character of the superior court can be subverted by the elimination of the court's judicial role in the resolution of disputes.

27. The practical effect of protecting historically exclusive original jurisdiction is to ensure that a significant amount of that jurisdiction remains with the superior courts, and that the superior courts are ensured a judicial role in the administration of justice. It is unnecessary and undesirable to expand the notion of core jurisdiction to include jurisdiction that can permissibly be conferred on non-section 96 courts under the first branch of the *Residential Tenancies* test.<sup>15</sup> The first branch of that test already limits the jurisdiction of the provincial legislature under s. 92(14). Expanding the scope of core jurisdiction to include non-exclusive original jurisdiction further restricts provincial

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**jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution.” [Emphasis added]**

<sup>15</sup> Reference re *Residential Tenancies Act*, [\[1996\] 1 SCR 186](#), 15 para. 74.

legislative competence without appreciably enhancing the protection of the superior court's foundational role.

28. The removal of original jurisdiction over a particular matter, even jurisdiction that was historically exclusive, is the ordinary stuff of the reform of the law and of the administration of justice, and in no way offends s. 96 of the *Constitution Act, 1867*, particularly in relation to jurisdiction that is narrowly defined. To conclude otherwise would risk frustrating legal reform. As social values change, it is common for the laws to change, and as the law changes old rights may be eliminated and new rights may be created. This proposition is illustrated, and has been endorsed by this Court in the criminal law context, in *Re Young Offenders Act (PEI)*.<sup>16</sup>

29. The legislatures can eliminate civil rights. When the legislatures eliminate rights, the jurisdiction over those rights ceases to exist and effectively results in a removal of jurisdiction, whether exclusive or otherwise. Though original jurisdiction historically exercised exclusively by a superior court can be removed from a superior court, it cannot be removed and then given to an inferior court exercising judicial functions without offending s. 96 of the *Constitution Act, 1867*.

30. In this regard, the case law indicates that historically, exclusive, original superior court jurisdiction cannot be validly assigned to an inferior court simply by making the grant of jurisdiction concurrent with the jurisdiction of the superior court. In *Sobeys Stores*, this Court stated:

It is obvious that at the first stage **s. 96 will be violated if provincial tribunals are accorded a power or jurisdiction that belonged exclusively to s. 96 Courts at Confederation**. It is equally trite law that there will be no violation if the power or jurisdiction was the exclusive preserve of inferior Courts. These propositions, however, leave unclear what the consequences are of discovering a shared, or concurrent, jurisdiction between the two levels of Court. Moreover, if concurrent jurisdiction will enable the provincial tribunal to pass the

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<sup>16</sup> *Re Young Offenders Act (PEI)*, [\[1991\] 1 SCR 252](#).

historical test, it is necessary to ask how much shared jurisdiction will suffice for this purpose.<sup>17</sup> [Emphasis added]

31. The issue in this appeal turns on whether the jurisdiction in question was historically, exclusive, original jurisdiction of the superior courts, and not whether the impugned provision removes a part of the superior court's core jurisdiction. As noted in the *Macmillan Bloedel* case,

The requirement to consider whether the corresponding removal of jurisdiction is valid only arises when the core jurisdiction of superior courts is affected. **In many instances, therefore, the Residential Tenancies test provides a complete answer to the constitutional query.**<sup>18</sup> [Emphasis added]

32. If it were simply a question of the transfer or removal of a portion of the superior court's core jurisdiction, the constitutional issue could be resolved by ensuring that the grant of jurisdiction to the inferior court was concurrent rather than exclusive.

#### **B. Monetary jurisdiction relates to the scope and not the character of the jurisdiction**

33. To determine whether the jurisdiction in question can be granted to an inferior court, the jurisdiction must be properly characterized and the allocation of pre-Confederation judicial jurisdiction assessed to determine whether the jurisdiction as characterized was exercised exclusively by the superior courts. If it was not, it is permissible for the province to grant the jurisdiction to its inferior courts without offending s. 96 of the *Constitution Act, 1867*.

34. Proper characterization of the jurisdiction in question is crucial to the successful analysis of the historical allocation of jurisdiction under the *Residential Tenancies* test. In this regard, this Court has stated:

The way in which the power or jurisdiction is characterized can have significant consequences for the historical inquiry in which **the**

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<sup>17</sup> *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal*, [1989] 1 SCR 238, at 256.

<sup>18</sup> *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, at para. 27.

**Courts must search for analogous jurisdiction in inferior Courts.**<sup>19</sup> [Emphasis added]

35. However, in the present matter, the focus of the analysis is on the monetary aspect of that historical allocation of original civil jurisdiction, since the question referred to the Quebec Court of Appeal was premised on a presumption that the underlying grant of civil jurisdiction is consistent with the constraints of s. 96.

36. Limits on the jurisdiction over the person, geographic jurisdiction, or monetary jurisdiction may all reduce the scope of operation of the allocated original civil jurisdiction without affecting the character of that jurisdiction, which this Court has said is based on the nature of the dispute.<sup>20</sup> However, the scope of operation of an inferior court's jurisdiction is a factor that may properly be considered when assessing whether jurisdiction was shared in a practical way with the superior courts. Nevertheless, the scope of operation does not alter the character of the allocated jurisdiction.

37. In *Sobeys Stores* this Court stated: "If the jurisdiction was shared, the legislation under challenge may, in some circumstances, be held valid by the historical test."<sup>21</sup> This Court has indicated that what matters is whether the jurisdiction was shared in a practical way.<sup>22</sup>

**C. Inferior courts had practical shared original jurisdiction without a monetary limit**

38. The evidence before this Court shows that many of the non-section 96 courts in the relevant colonies before Confederation exercised original jurisdiction over a number of civil matters.

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<sup>19</sup> *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal*, is characterized can have significant consequences for the historical inquiry in which **the Courts must search for analogous jurisdiction in inferior Courts.**" [Emphasis added]

<sup>20</sup> *Re Young Offenders Act (PEI)*, [\[1991\] 1 SCR 252](#), at 266.

<sup>21</sup> *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal*, [\[1989\] 1 SCR 238](#), at 259.

<sup>22</sup> *Reference re Residential Tenancies Act*, [\[1996\] 1 SCR 186](#), at para. 75.

39. Moreover, in each of the relevant pre-Confederation colonies there was also at least one non-section 96 court that exercised significant original civil jurisdiction that was not subject to any monetary limit: the Vice Admiralty Court.

40. In this light, the historical civil monetary limits placed on the original jurisdiction conferred on some non-section 96 courts should not operate to limit the scope of the provincial legislature's jurisdiction under s. 92(14) of the *Constitution Act, 1867*, particularly when pre-Confederation, non-section 96 courts in each of the relevant colonies enjoyed original civil jurisdiction that was not subject to any monetary limit.

41. In short, in each of the relevant pre-Confederation colonies, there was also at least one non-section 96 court that shared civil jurisdiction in a practical way with superior courts without the non-section 96 court's original civil jurisdiction being subject to any civil monetary limit.

42. Alberta says that in addition to the historical jurisdiction canvassed by the Attorney General of Quebec at paragraphs 61 to 98 of the Attorney General's factum, the original civil jurisdiction of the Vice Admiralty Courts must be considered in the historical analysis of pre-Confederation jurisdiction of superior and inferior courts, since it informs the analysis required to determine the constitutionally permissible scope of the provinces' legislative authority to grant jurisdiction to provincial inferior courts under s. 92(14) of the *Constitution Act, 1867*.

43. This Court has recognized that Vice Admiralty Courts were not superior, district, or county courts within the scope of s. 96 of the *Constitution Act, 1867*, and has stated:

[...] **admiralty courts were not viewed as falling within s. 96.** In fact, on the eve of Confederation, the primary jurisdiction in admiralty was exercised by special courts distinct from those contemplated by s. 96. Clearly, **this precludes any claim for s. 96 protection of admiralty jurisdiction**<sup>23</sup> [Emphasis added]

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<sup>23</sup> *Ontario (Attorney General) v Pembina Exploration*, [1989] 1 SCR 206, at 228.

44. The existence of the original civil jurisdiction conferred on the Vice Admiralty Courts in all three of the colonies that formed the Dominion of Canada in 1867 would demonstrate the geographically coextensive practical involvement of non-section 96 courts in original civil jurisdiction without any monetary limit.

45. Vice Admiralty Courts existed in the colonies of Canada, New Brunswick, and Nova Scotia in the years immediately before Confederation, and all exercised a significant amount of original civil jurisdiction as allocated by the *Vice Admiralty Courts Act, 1863*.<sup>24</sup> The allocated original civil jurisdiction was analogous to the jurisdiction exercised by the colonial superior courts. Section 10 of the *Vice Admiralty Courts Act, 1863*, which was in force at the time of Confederation, stated:

10. The Matters in respect of which the Vice Admiralty Courts shall have Jurisdiction are as follow:

(1.) Claims for Seamen's Wages:

(2.) Claims for Master's Wages, and for his Disbursements on account of the Ship:

(3.) Claims in respect of Pilotage:

(4.) Claims in respect of Salvage of any Ship, or of Life or Goods therefrom:

(5.) Claims in respect of Towage:

(6.) Claims for Damage done by any Ship:

(7.) Claims in respect of Bottomry or Respondentia Bonds:

(8.) Claims in respect of any Mortgage where the Ship has been sold by a Decree of the Vice Admiralty Court, and the Proceeds are under its Control:

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<sup>24</sup> *Vice Admiralty Courts Act, 1863*, (U.K.) 26 Vict, c. 24. (Book of Authorities of the Chief Justice, Senior Associate Chief Justice, and Associate Chief Justice of the Superior Court of Quebec, vol. 1, tab 12)

(9.) Claims between the Owners of any Ship registered, in the Possession in which the Court is established, touching the Ownership, Possession, Employment, or Earnings of such Ship:

(10.) Claims for Necessaries supplied, in the Possession in which the Court is established, to any Ship of which no Owner or Part Owner is domiciled within the Possession at the Time of the Necessaries being supplied:

(11.) Claims in respect of the building, equipping, or repairing within any British Possession of any Ship of which no Owner or Part Owner is domiciled within the Possession at the Time of the Work being done.<sup>25</sup>

46. The legislation assigning jurisdiction to the Vice Admiralty Courts did not stipulate that the civil jurisdiction assigned to those courts was subject to any monetary limit.

47. Furthermore, the geographic jurisdiction of the Vice Admiralty Courts was also extensive. Section 13 of the *Vice Admiralty Courts Act, 1863*, stated:

13. The Jurisdiction of the Vice Admiralty Courts, except where it is expressly confined by this Act to Matters arising within the Possession in which the Court is established, may be exercised, whether the Cause or Right of Action has arisen within or beyond the Limits of such Possession.<sup>26</sup>

48. In short, not only was the character of the Vice Admiralty Court's original civil jurisdiction analogous to some of the superior court's original civil jurisdiction, the geographic scope of that jurisdiction was at least as extensive and likely exceeded that of the relevant colonial superior courts.

49. Notwithstanding the maritime nature of the jurisdiction of the Vice Admiralty Courts, many of the civil disputes within the jurisdiction of the Vice Admiralty Courts, particularly

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<sup>25</sup> *Vice Admiralty Courts Act, 1863*, (U.K.) 26 Vict, c. 24, s. 10. (Book of Authorities of the Chief Justice, Senior Associate Chief Justice, and Associate Chief Justice of the Superior Court of Quebec, vol. 1, tab 12)

<sup>26</sup> *Vice Admiralty Courts Act, 1863*, (U.K.) 26 Vict, c. 24, s. 13. (Book of Authorities of the Chief Justice, Senior Associate Chief Justice, and Associate Chief Justice of the Superior Court of Quebec, vol. 1, tab 12)

those identified in s. 10 of the *Vice Admiralty Courts Act, 1863*, would properly be characterized as various kinds of contract or tort disputes, many or which would be perfectly analogous (if not identical) to disputes within the jurisdiction of the superior courts.

50. Though legislative jurisdiction over admiralty matters falls within Parliament's jurisdiction, this Court has recognized that the provinces under s. 92(14) of the *Constitution Act, 1867*, can assign judicial jurisdiction over such matters, including the judicial jurisdiction analogous to that exercised by Vice Admiralty Courts, to provincial inferior courts. In this regard, this Court in the *Pembina Exploration* case stated:

I conclude that a provincial legislature has the power by virtue of s. 92(14) of the *Constitution Act, 1867* to grant jurisdiction to an inferior court to hear a matter falling within federal legislative jurisdiction. This power is limited, however, by s. 96 of that Act and the federal government's power to expressly grant exclusive jurisdiction to a court established by it under s. 101 of the Act.<sup>27</sup> [Emphasis added]

51. The *Pembina Exploration* case provides binding authority for the proposition that s. 92(14) of the *Constitution Act, 1867*, includes the legislative authority to confer on judges appointed by the province original, civil jurisdiction without any monetary limit over civil matters analogous to the original civil jurisdiction conferred on the Vice Admiralty Courts in 1863, without offending s. 96 of the *Constitution Act, 1867*.

52. It is the actual allocation of jurisdiction at the time of Confederation that is determinative.<sup>28</sup> Though the original civil jurisdiction of Vice Admiralty Courts was established by the Parliament of the United Kingdom, its application in the confederating colonies in 1867 remains a relevant, and arguably determinative, consideration when assessing the scope of the superior courts' exclusive original civil jurisdiction.

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<sup>27</sup> *Ontario (Attorney General) v Pembina Exploration*, [\[1989\] 1 SCR 206](#), at 228.

<sup>28</sup> *Reference re Residential Tenancies Act*, [\[1996\] 1 SCR 186](#), at para. 80: "It was the actual allocation of jurisdiction before 1867 which the confederating provinces must be taken to have approved."

53. As this Court directed in *Sobeys Stores*, the proper approach is to characterize the jurisdiction in relation to analogous civil matters. In that case, this Court stated: “At the first stage the search is for ‘broad conformity’ with the powers of s. 96 Courts at Confederation. It is a search for analogous, not precisely the same, jurisdiction.”<sup>29</sup>

54. In this light, there is no reason why the original civil monetary jurisdiction, with unlimited monetary scope, formerly exercised by the Vice Admiralty Courts, should not extend generally to analogous civil matters under provincial jurisdiction.

55. Similar contract disputes, whether in relation to matters of navigation and shipping, or matters within provincial legislative competence more generally, would have analogous judicial attributes. When characterizing the matter by the type of dispute, the correct focus of the inquiry, leads to the conclusion that contractual disputes, whether in relation to maritime matters or other matters, are often virtually indistinguishable.

56. This Court’s recent decision in *Desgagnés Transport Inc v Wärtsilä Canada Inc*, where this court grappled with the question of the application of provincial contract law to a maritime matter, has in effect recognized the analogous nature of this jurisdiction. This Court concluded that both provincial law and federal law under navigation and shipping could apply to the same contract and the same contractual matter. This Court stated:

In our view, this is a clear indication that, contrary to what was necessary for maritime negligence, **it is not essential for the exercise of federal competence over navigation and shipping that only one body of law — Canadian maritime law — regulate such contracts.**<sup>30</sup> [Emphasis added]

57. The *Wärtsilä* decision leaves little doubt that the jurisdiction over maritime contractual matters should be considered analogous to contractual matters within

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<sup>29</sup> *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal*, [\[1989\] 1 SCR 238](#), at 255.

<sup>30</sup> *Desgagnés Transport Inc v Wärtsilä Canada Inc*, [2019 SCC 58](#), at para. 97.

provincial legislative competence, and that disputes in relation to those contracts would require the exercise of analogous, or virtually identical, jurisdiction.

58. The unlimited monetary jurisdiction of the Vice Admiralty Courts within the scope of their original, civil jurisdiction and the extensive geographic scope of that jurisdiction provides compelling support for the conclusion that s. 96 of the *Constitution Act, 1867*, does not require that provinces impose a civil monetary limit on civil jurisdiction properly and permissibly conferred on courts presided over by provincially appointed judges.

59. If the jurisdiction of Vice Admiralty Courts for the purposes of s. 96 of the *Constitution Act, 1867*, is characterized in a way that precludes the inclusion of original jurisdiction over contractual matters arising in relation to matters within provincial legislative competence, an anomalous result would be produced: provincially appointed judges could be empowered to resolve maritime contractual disputes while being denied the authority to decide virtually identical contractual disputes arising under provincial law. This overly narrow characterization of vice admiralty jurisdiction would be contrary to the principles established by this Court in the *Re Young Offenders Act (PEI)* and would in effect freeze the jurisdiction of this inferior court at what it was in 1867.<sup>31</sup>

60. The case law clearly distinguishes between the division of legislative powers and the legislative competence of the legislatures to confer judicial powers. In the *Pembina Exploration* case, this court stated:

[...] under s. 92(14) of the *Constitution Act, 1867* the provinces had legislative jurisdiction to grant their courts jurisdiction to hear judicial disputes arising in the province even when those disputes included matters falling within federal legislative jurisdiction subject, of course, to federal legislation validly enacted pursuant to such jurisdiction.<sup>32</sup>

61. It is important not to equate legislative jurisdiction with judicial jurisdiction when characterizing the judicial jurisdiction in question. This Court made it clear that the provincial power to confer judicial jurisdiction under s. 92(14) is not limited to the

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<sup>31</sup> *Re Young Offenders Act (PEI)*, [\[1991\] 1 SCR 252](#), at 266.

<sup>32</sup> *Ontario (Attorney General) v Pembina Exploration*, [\[1989\] 1 SCR 206](#), at 224.

legislative powers assigned to the provinces under s. 92 of the *Constitution Act, 1867*.

This Court stated in the *Pembina Exploration* case:

As Laskin J.A. notes, if federal law calls for the exercise of adjudication but is silent as to forum, the provincial courts are clearly competent to adjudicate. **In a word, judicial jurisdiction is not tied to provincial legislative jurisdiction in other areas.** In the present case, the fact that the federal Parliament may legislate in relation to the matter does not, in the absence of legislation, affect the jurisdiction of these courts.<sup>33</sup> [Emphasis added]

62. This Court's comments in the *Pembina Exploration* Case, and the allocation of jurisdiction to the Vice Admiralty Courts under the *Vice Admiralty Courts Act, 1863*, make it clear that provincial legislative competence under s. 92(14) permits the provinces to allocate civil jurisdiction over a number of civil matters without any monetary restriction to the provincial inferior courts.

63. In light of the analogous jurisdiction conferred on the Vice Admiralty Courts in all of the original confederating colonies of pre-Confederation Canada, this Court's opinion on the issue of monetary jurisdiction must take into consideration the following:

- 1) The Vice Admiralty Courts, which had extensive geographic and unlimited monetary jurisdiction, and which existed in all three of the colonies that confederated to form the Dominion of Canada, were not courts that fall within the ambit of s. 96 of the *Constitution Act, 1867*.
- 2) The jurisdiction conferred on Vice Admiralty Courts before Confederation can be conferred on courts presided over by provincially appointed judges.
- 3) In addition to jurisdiction in admiralty, the Vice Admiralty Courts also had original jurisdiction over civil matters that was unrestricted by a monetary limit.

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<sup>33</sup> *Ontario (Attorney General) v Pembina Exploration*, [\[1989\] 1 SCR 206](#), at 218.

- 4) Though jurisdiction in admiralty relates to a discrete body of law, the original civil jurisdiction conferred on Vice Admiralty Courts was analogous to, though not coextensive with, the original civil jurisdiction of the superior courts.
- 5) Contractual disputes in relation to maritime matters, which would include jurisdiction analogous to the original civil jurisdiction of the pre-Confederation Vice Admiralty Courts, can be governed by provincial contract law or federal law in relation to navigation and shipping.
- 6) Because Vice Admiralty Courts do not fall within the ambit of s. 96 of the *Constitution Act, 1867*, provincial legislatures have the constitutional authority under s. 92(14) of the *Constitution Act, 1867* to confer on provincially appointed judges jurisdiction to resolve maritime contract disputes subject to no monetary limit under either provincial or federal law.
- 7) It follows that there is no constitutionally sound reason why a provincially appointed judge, constitutionally empowered and capable of deciding a contractual dispute with no monetary limit under provincial legislation in relation to a maritime matter, should be denied the power to decide analogous, or practically identical, contractual disputes without a monetary limit simply because the contractual disputes do not relate to a maritime matter.

#### **D. Conclusion**

64. The case law establishes that, under s. 92(14) of the *Constitution Act, 1867*, the provinces have the legislative competence to confer judicial jurisdiction over some civil matters on provincially appointed judges that is not subject to any monetary limit, without offending s. 96 of the *Constitution Act, 1867*.

65. Taking into consideration the judicial jurisdiction of the non-section 96 courts established under the colonial legislation of the pre-Confederation colonies that formed the dominion of Canada in 1867, and the jurisdiction of the Vice Admiralty Courts in those

colonies established by the United Kingdom, it is apparent that non-section 96 courts meaningfully shared significant original civil jurisdiction with the section 96 courts.

66. In light of the broad civil jurisdiction allocated to the Vice Admiralty Courts, which was not subject to any monetary limit, it is a mistake to overemphasize civil monetary limits applicable in colonial inferior courts when assessing the original civil jurisdiction that non-section 96 courts shared with the superior courts.

67. The fact that the original civil jurisdiction of the Vice Admiralty Courts was not subject to any monetary limit coupled with the court's broad geographic jurisdiction is sufficient to overcome the misplaced concern over the need for a constitutionally mandated monetary limit on the constitutionally permissible original civil jurisdiction conferred on non-section 96 courts.

68. Alberta says that it is the nature of the dispute and the character of the law governing the rights underlying the dispute that is relevant when characterizing jurisdiction to assess its allocation to the various courts in pre-Confederation Canada, not the value of the claim or the value of the potential remedy.

69. The examination of the pre-Confederation legislation shows that the superior courts did not have exclusive original civil jurisdiction above a particular monetary threshold in relation to all civil matters.

70. The historical analysis of the allocation of judicial jurisdiction before Confederation provides compelling support for the proposition that the original civil jurisdiction that a province may permissibly confer on a non-section 96 court need not have a monetary limit to avoid encroaching on the historically exclusive original civil jurisdiction of the superior courts.

71. Given the nature of the question before this Court, it is unnecessary to decide whether the historical allocation of original, civil jurisdiction permits an interpretation of s. 92(14) of the *Constitution Act, 1867*, in a way that would permit the provincial legislatures to grant courts presided over by provincially appointed judges original civil jurisdiction without monetary limits.

72. However, the case law and the evidence before this Court support an affirmative answer to the first reference question.

**PART IV: SUBMISSIONS CONCERNING COSTS**

73. Alberta does not seek costs and asks that costs not be awarded against Alberta.

**PART V: REQUEST TO PRESENT ORAL ARGUMENT**

74. Pursuant to a February 20, 2020 Order of Justice Rowe, Alberta has been granted permission to present ten minutes of oral argument at the hearing of these appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of March, 2020.

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**Randy Steele**  
Constitutional and Aboriginal Law Division  
Alberta Justice and Solicitor General

**Part VI: LIST OF AUTHORITIES & LEGISLATION**

<b>Case</b>	<b>Paragraph In factum</b>
<i>Canada (HRC) v Canadian Liberty Net</i> , <a href="#">[1998] 1 SCR 626</a>	9
<i>Desgagnés Transport Inc. v Wärtsilä Canada Inc.</i> , <a href="#">2019 SCC 58</a>	56, 57
<i>MacMillan Bloedel Ltd v Simpson</i> , <a href="#">[1995] 4 SCR 725</a> (CanLII)	7, 13, 24, 31
<i>Ontario (Attorney General) v Pembina Exploration</i> , <a href="#">[1989] 1 SCR 206</a>	7, 43, 50, 60, 61, 62
<i>Pasiechnyk v Saskatchewan (Workers Compensation Board)</i> , <a href="#">[1997] 2 SCR 890</a>	23
<i>Reference re Adoption Act</i> , <a href="#">[1938] SCR 398</a>	20
<i>Reference re Amendments to the Residential Tenancies Act</i> , <a href="#">[1996] 1 SCR 186</a>	18, 27, 52
<i>Re Young Offenders Act (PEI)</i> , <a href="#">[1991] 1 SCR 252</a>	21, 28, 36, 59
<i>Ontario v Criminal Lawyers' Association of Ontario</i> , <a href="#">[2013] 3 SCR 3</a>	8
<i>Sobeys Stores Ltd. v Yeomans and Labour Standards Tribunal (N.S.)</i> , <a href="#">[1989] 1 SCR 238</a>	6, 21, 30, 34, 37, 53
 <b>Legislation</b>	
<i>Constitution Act, 1867</i> , <a href="#">U.K. 30 &amp; 31 Vict. c. 3</a> , ss 92(14) and 96	Throughout
<i>Vice Admiralty Courts Act, 1863</i> , (U.K.) 26 Vict, c. 24	3, 45, 47, 49, 62