SCC File No. 38837

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

B E T W E E N:

CONFÉRENCE DES JUGES DE LA COUR DU QUÉBEC

Appellant
(Intervener)

- and -

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

Respondents
(Interveners)

[Style of cause continues the next page]

FACTUM OF THE INTERVENER, (THE CANADIAN COUNCIL OF CHIEF JUDGES, INTERVENER)

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

FIELD LLP
2500 - 10175 101 Street
Edmonton, AB T5J 0H3

P. Jon Faulds, QC
Scott A. Matheson
Tel: (780) 643 8765
Fax: (780) 428 9329
Email: jfaulds@fieldlaw.com
smatheson@fieldlaw.com

Counsel for the Intervener, Canadian Council of Chief Judges

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener, Canadian Council of Chief Judges

A N D B E T W E E N:

ATTORNEY GENERAL OF QUEBEC

Appellant
(Interveners)

- and -

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

Respondents
(Interveners)

A N D B E T W E E N:

CONSEIL DE LA MAGISTRATURE DU QUÉBEC

Appellant
(Interveners)

- and -

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

Respondents
(Interveners)

A N D B E T W E E N:

CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

Appellant
(Interveners)

- and -

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

Respondents
(Interveners)

[Style of cause continues the next page]

A N D B E T W E E N:

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

Appellants (Interveners)

- and –

ATTORNEY GENERAL OF QUEBEC

Respondent (Interveners)

- and –

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, CONSEIL DE LA MAGISTRATURE DU QUÉBEC, CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES, ORGANISME D'AUTORÉGLEMENTATION DU COURTAGE IMMOBILIER DU QUÉBEC (OACIQ), CONFÉRENCE DES JUGES DE LA COUR DU QUÉBEC, CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE, ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUEBEC, CANADIAN COUNCIL OF CHIEF JUDGES, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA, CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

Interveners (Appellant)

BORDEN LADNER GERVAIS S.E.N.C.R.L., S.R.L.
1000 rue de La Gauchetière Ouest
Bureau 900
Montréal, QC H3B 5H4

Guy J. Pratte
François Grondin
Anaïs Bussières McNicoll
Tel.: (514) 954-2545
FAX: (514) 954-1905
Email: gpratte@blg.com

Counsel for the Appellant, Conférence des juges de la Cour du Québec

BORDEN LADNER GERVAIS LLP
1300-100 Queen Street
Ottawa, Ontario K1P 1J9

Karen Perron
Tel.: (613) 369-4795
FAX: (613) 230-8842
Email: kperron@blg.com

Agent for the Appellant, Conférence des juges de la Cour du Québec

LANGLOIS AVOCATS S.E.N.C.R.L.
1250 boul René-Lévesque Ouest 20e étage
Montréal, QC H3B 4W8

Véronique Roy
Sean Griffin
Tel.: (514) 842-7809
FAX: (514) 845-6573
Email: veronique.roy@langlois.ca

Counsel for the Respondent, Chief Justice, Senior Associate Chief Justice & Associate Chief Justice of the Superior Court of Quebec

CAZASAIKALEY LLP
220, avenue Laurier Ouest
Bureau 350
Ottawa, ON K1P 5Z9

Gabriel Poliquin
Tel.: (613) 564-8272
FAX: (613) 565-2087
Email: gpoliquin@plaideurs.ca

Agent for the Respondent, Chief Justice, Senior Associate Chief Justice, & Associate Chief Justice of the Superior Court of Quebec

DIRECTION GÉNÉRALE DES AFFAIRES JURIDIQUE ET LÉGISLATIVE
Bureau 1.03
300,boul. Jean-Lesage
Québec, QC G1K 8K6

Dominique Rousseau
Francis Demers
Jean-Yves Bernard
Tel.: (418) 649-3524 Ext: 42072
FAX: (418) 646-1656

NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, QC J8X 3R1

Pierre Landry
Tel.: (819) 503-2178
FAX: (819) 771-5397
Email: p.landry@noelassocies.com

Email:
dominique.rousseau@justice.gouv.qc.ca

Counsel for the Appellant, Attorney General of Quebec

FASKEN MARTINEAU DUMOULIN LLP
800, Place Victoria (Tour de la Bourse)
bureau 3700, C.P. 242
Montréal, QC H4Z 1E9

Marc-André Fabien
Vincent Cérat Lagana
Jesse Hartery
Tel.: (514) 397-7557
FAX: (514) 397-7600
Email: mfabien@fasken.com

Agent for the Appellant, Attorney General of Quebec

FASKEN MARTINEAU DUMOULIN LLP
55 rue Metcalfe, Bureau 1300
Ottawa, ON K1P 6L5

Sophie Arseneault
Tel.: (613) 236-3882
FAX: (613) 230-6423
Email: sarseneault@fasken.com

Counsel to the Appellant, Conseil de la magistrature du Québec

JURISTES POWER
130 rue albert bureau 1103
Ottawa, ON K1P 5G4

Audrey Mayrand
Mark C. Power
Jennifer A. Klinck
Tel.: (613) 706-1091
FAX: (613) 706-1091
Email: amayrand@juristespower.ca

Agent to the Appellant, Conseil de la magistrature du Québec

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel.: (613) 702-5560
FAX: (613) 702-5560
Email: mvincelette@powerlaw.ca

Counsel to the Appellant, Canadian Association of Provincial Court Judges

PROCUREUR GÉNÉRAL DU CANADA
284, rue Wellington, T-6060
Ottawa, ON K1A 0H8

Bernard Letarte
Ian Demers
Lindy Rouillard-Labbé
Tel.: (613) 946-2776

Agent to the Appellant, Canadian Association of Provincial Court Judges

DEPARTMENT OF JUSTICE
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

Christopher Rupar
Tel.: (613) 670-6290
FAX: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

FAX: (613) 952-6006
Email: bernard.letarte@justice.gc.ca

Counsel to the Appellant, Attorney General of Canada

Agent to the Appellant, Attorney General of Canada

MINISTÈRE DE LA JUSTICE, COLOMBIE-BRITANNIQUE
1001 Douglas Street, 6th Floor
P.O. Box 9280, Station Prov. Govt.
Victoria, BC V8W 9J7

Zachary Froese
Gareth Morley
FAX: (250) 356-9154
Email: zachary.froese@gov.bc.ca

BORDEN LADNER GERVAIS LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Telephone: (613) 369-4795
FAX: (613) 230-8842
Email: kperron@blg.com

Counsel to the Intervener, Attorney General of British Columbia

Agent to the Intervener, Attorney General of British Columbia

ORGANISME D'AUTORÉGLEMENTATION DU COURTAGE IMMOBILIER DU QUÉBEC (OACIQ)
4905 boulevard Lapinière
Bureau 2200
Brossard, QC J4Z 0G2
Vanessa Joanisse-Goulet
Tel.: (450) 462-9800 Ext: 8420
FAX: (450) 676-4454
Email: vgoulet@oaciq.com

Counsel to the Intervener, Organisme d'autoréglementation du courtage immobilier du Québec (OACIQ)

ATTORNEY GENERAL OF ALBERTA
10th Floor, 102A Tower
10025 - 102A Avenue
Edmonton, AB T5J 2Z2

Randy Steele
Tel.: (780) 422-6619

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
FAX: (613) 788-3509

FAX: (780) 643-0852
Email: randy.steele@gov.ab.ca

Counsel to the Intervener, Attorney General of Alberta

Email: lynne.watt@gowlingwlg.com

Agent to the Intervener, Attorney General of Alberta

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Sarah Kraicer
Daniel Huffaker
Tel: (416) 326-3840 / (416) 894-5276
Fax: (416) 326-4015
Email: daniel.huffaker@ontario.ca
sarah.kraicer@ontario.ca

Counsel to the Intervener, Attorney General of Ontario

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent to the Intervener, Attorney General of Ontario

HUNTER LITIGATION CHAMBERS LAW CORPORATION
2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1

Ryan Dalziel
Telephone: (604) 891-2400
FAX: (604) 647-4554
Email: rdalziel@litigationchambers.com

Counsel to the Interveners, Trial Lawyers Association of British Columbia

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4
Matthew J. Halpin
Telephone: (613) 780-8654
FAX: (613) 230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Agent to the Interveners, Trial Lawyers Association of British Columbia

NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L., S.R.L.
1, Place Ville Marie
Bureau 2500
Montréal, QC H3B 1R1

Pierre Bienvenu, Ad. E.
Azim Hussain
Caroline Bélair

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street
Suite 1500
Ottawa, ON K1P 1A4

Matthew J. Halpin
Tel.: (613) 780-8654
FAX: (613) 230-5459

Tel.: (514) 847-4747
FAX: (514) 286-5474
Email:
pierre.bienvenu@nortonrosefulbright.com

Counsel to the Interveners, Canadian Superior Courts Judges Association

Email:
matthew.halpin@nortonrosefulbright.com

Agent to the Interveners, Canadian Superior Courts Judges Association

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PART 1 OVERVIEW AND FACTS

A. Overview

1. These appeals concern the role of provincially and territorially appointed courts (PTCs) in providing access to civil justice in Canada and the constitutional limits on that role. In addressing these questions the Québec Court of Appeal (QCCA) failed to consider the nature of modern PTCs or the context in which they operate, including the pressing requirement of access to justice, and incorrectly interpreted the relevant constitutional provisions in a "frozen" manner. As a result it erred in its finding that the jurisdiction of the Court of Québec exceeded those constitutional limits by encroaching on the core jurisdiction of superior courts.

2. Modern PTCs bear little resemblance to the inferior courts of 1867. They are modern courts of record whose bench equals the standards of superior courts, whose independence is guaranteed, and which since the advent of the Charter routinely issues constitutional remedies. They are effectively a new order of court, neither s. 96 nor inferior. PTCs have exercised increasing responsibilities in the criminal justice system and the more recent expansion of their civil jurisdiction echoes the growth. The result has been to greatly expand the pool of judges by whom cases – criminal and civil – may be heard, thereby enhancing access to justice.

3. This expansion of jurisdiction of PTCs has not affected the core jurisdiction of the superior courts, including in Québec. That core jurisdiction is not threatened by provincially appointed judges hearing civil claims, particularly when those claims fall at the lower end of the monetary spectrum. The CCCJ respectfully submits the Québec Court of Appeal erred in finding such infringement solely because the Court of Québec's monetary jurisdiction modestly exceeds the present value of inferior court civil jurisdiction in 1867.

B. Facts

4. Beginning in the 1960s the provincial and territorial governments passed legislation creating a new "provincial" court to replace inferior courts in their jurisdictions in what Peter Russell referred to as a "judicialization of the magistracy".[1] These provincial courts were "a new court in our constitutional history". They were not an improvement or evolution of inferior courts but a replacement of them. There was a "clearly stated intention to break with the past and

[1] Noel Lyon and Judge Gerald Seniuk, "The Supreme Court of Canada and the Provincial Court in Canada", 79 Can. B. Rev. 77 (2000), pg. 80, citing P.H. Russell, *The Judiciary In Canada: The Third Branch of Government*, (Toronto: McGraw-Hill Ryerson, 1987), pgs. 126-27, 208-10.

create a new and even more professional court" which was "meant to be a break from the 1867 model of an inferior court."[2] These are the courts referred to herein as PTCs.

5. PTC civil jurisdiction varies widely across Canada. In three provinces (Manitoba, Ontario and Prince Edward Island) PTCs have no civil jurisdiction. Smaller civil claims are heard by the superior court in a simplified process. In six provinces PTCs have civil jurisdiction ranging from $20,000 in New Brunswick[3] to $85,000 in Québec.[4] Alberta's current limit is the second highest, at $50,000.[5] The monetary limits of most PTCs civil jurisdiction have risen in the past decade.

6. Some provinces and territories have adopted novel jurisdictional limits or structures. In British Columbia, an online Civil Resolution Tribunal (CRT) adjudicates claims up to $5,000, as well as claims arising out of motor vehicle accidents up to $50,000, while its PTC hears civil claims between $5,000 and $35,000.[6] Nova Scotia has established a separate Small Claims Court in which cases involving less than $25,000 are heard by lawyers provincially appointed as adjudicators.[7] Similar diversity exists in the territories.

7. National statistics indicate that throughout Canada in 2017-2018 less than 10% of all general civil actions (that is, excluding family matters) were commenced in PTCs.[8] Since this average includes the jurisdictions whose PTCs do not hear civil claims, the actual percentage is higher in jurisdictions with PTCs that do. For example, in Alberta 24% of all general civil claims were filed in its PTC.[9] The QCCA found that in Québec the equivalent figure was 55%.[10]

8. The bulk of claims filed in PTCs still fall at the lower end of the PTCs' monetary jurisdiction. In Saskatchewan where the monetary limit is $30,000, about 7.5% of claims filed in

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[2] Seniuk and Lyon, pg. 91-97.
[3] Affidavit of Chief Judge Terrence Matchett, para. 17 ("Matchett Affidavit").
[4] $70,000 according to the QCCA reference opinion.
[5] A not yet proclaimed amendment to Alberta's *Provincial Court Act* will allow that limit to be increased to $100,000 by regulation: Matchett Affidavit, para. 9.
[6] Matchett Affidavit, para. 19.
[7] *Ibid*.
[8] Statistics Canada, *Civil Court Survey*, as described in Chief Judge Terrence Matchett's affidavit. Manitoba and Quebec do not participate in the survey.
[9] Matchett Affidavit, para. 24.
[10] QCCA opinion, para. 100.

2018 were for amounts between $20,000 and $30,000.[11] In Alberta, with a limit of $50,000, only 8% of claims that year were for more than $25,000.[12] In Québec roughly 20-25% of cases commenced were for amounts of more than $10,000.[13]

9. PTCs generally provide simplified procedures for some or all claims falling within their jurisdiction.[14] For example, in Alberta claims up to $50,000 may be adjudicated pursuant to a simplified process or assigned to other resolution "tracks" including binding JDR.[15]

10. National statistics indicate that claims before PTCs are resolved at a faster rate than in superior courts. In 2017-18, 92% of claims filed in PTCs were resolved within one year compared to 74% in superior courts.[16]

11. PTCs typically sit in more locations than superior courts and have a higher judicial complement, as illustrated by the following examples:

Sitting locations[17]

	PTC	Superior Court
British Columbia	84	29
Alberta	72	13
Saskatchewan	74	12
Newfoundland & Labrador	10	6

Bench strength[18]

	PTC	Superior Court
British Columbia	132	85
Alberta	136	68
Québec	306	157

12. Some litigants choose to waive that part of their claim that exceeds the monetary jurisdiction of their PTC in order to be able to pursue their claim in their PTC rather than the superior court.[19]

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[11] Matchett Affidavit, para. 29.
[12] *Ibid.*
[13] *Ibid,* para 28.
[14] For example, PTCs may employ relaxed pleadings rules, informal document production, no oral discovery, limited use of expert reports, and short trials.
[15] Matchett Affidavit, para. 39.
[16] Matchett Affidavit, para. 41.
[17] Matchett Affidavit, para. 37.
[18] *Ibid,* para. 38.

PART II POSITION OF THE INTERVENER ON THE APPELLANTS' QUESTIONS

13. The Intervener's position on the Appellants' questions is as stated in the Overview.

PART III STATEMENT OF ARGUMENT

14. As the preceding circumstances illustrate, modern PTCs exercise civil jurisdiction throughout much of the country with respect to claims that are significant to the parties concerned but may be relatively modest in the context of the full range of civil litigation. Allowing or even requiring that such claims be addressed by PTCs enhances access to justice in a variety of ways. It eases the burden on superior courts, provides access to a large complement of provincial judges for the resolution of certain civil disputes, often provides "user-friendly" procedures proportionate to the amounts in issue, and makes judicial services available in a wider range of locations. By enhancing access to justice, PTC civil jurisdiction helps meet what this Court called, in *Hryniak*, "the greatest challenge to the rule of law in Canada today."[20]

15. The QCCA rejected both the modern character of PTCs and the imperative of access to justice as relevant factors in its constitutional analysis. With respect to the former it concluded an enhanced role for PTCs could only be accomplished by constitutional amendment. With respect to the latter it found that the objective of access to justice could not justify preventing the Québec Superior Court from exercising its core jurisdiction and that in any event none of the parties had sought to provide evidence that increasing Court of Québec's jurisdiction to $85,000 facilitated access to justice. The QCCA erred on both accounts.

A. The QCCA erred in applying a static and frozen approach to the interpretation of the relevant constitutional provisions and principles

16. The QCCA's analysis failed to apply the progressive interpretive approach to the constitution mandated by this Court. It rejected consideration of the modern nature of the PTCs (para 142-43) and of today's pressing need for ensuring access to justice (para 185) as relevant to the issue before it. Instead it adopted a static and backward-looking approach. The QCCA strictly analogized modern PTCs to pre-Confederation inferior courts. It found the permissible limit on the Court of Québec's civil jurisdiction to be the present value of the monetary limits of pre-confederation inferior courts. Any attempt to confer jurisdiction above that amount infringed the core jurisdiction of superior courts constitutionally guaranteed by s. 96.

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[19] *Ibid*, paras. 32-33.
[20] *Hryniak v. Mauldin*, 2014 SCC 7, para. 1.

17. This stands in stark contrast to the progressive approach evident in this Court's landmark decision on the status and role of PTCs in the *Provincial Judge's Reference.*[21] After noting the modern legislative policy of increasing the jurisdiction of PTCs, Lamer CJ observed the necessity of "a constitutional response" to these shifting jurisdictional boundaries of the courts.[22] That response was not to deny the validity of the increased jurisdiction of PTCs, but rather to find a constitutional basis to ensure they enjoyed a guarantee of judicial independence commensurate with their modern responsibilities.[23]

18. This Court's approach to interpreting our constitution recognizes that the constitution's purpose is to guide the country's present and future rather than fix it in a straitjacket from the past. Such progressive interpretation rejects "frozen concepts" in order to accommodate and address the realities of modern life.[24] Two of those realities relevant to the issues on appeal are the challenge of ensuring access to justice and the creation of modern PTCs as professional, independent courts of record charged with a high level of responsibility in Canada's justice system, both of which the QCCA declined to consider.[25]

19. The modern PTCs are constitutionally *sui generis*, neither superior nor inferior. The pre-Confederation "inferior" courts are distant evolutionary ancestors. Looking back to those "inferior" courts to address the interplay between superior courts and modern PTCs, as the QCCA , is "like trying to fit a large figure into a small, ancient suit of clothes."[26]

B. The QCCA erred in failing to consider the nature of modern PTCs. Modern PTCs are fully equipped to exercise broader jurisdiction and already do so in the criminal context.

20. While the QCCA referred to the nature and roles of the pre-Confederation inferior courts it paid scant attention to characteristics of the modern PTCs. The failure to consider this modern context further illustrates its backward-looking approach.

21. Modern PTCs are staffed by jurists appointed from essentially the same applicant pool as superior courts—from respected, well-credentialed leaders of the local bar. They enjoy similar

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[21] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.),(Provincial Judges Reference)* [1997] 3 S.C.R. 3.
[22] *Provincial Judges Reference*, para. 129.
[23] *Ibid*, paras. 126-129.
[24] *Reference re Same-Sex Marriage*, 2004 SCC 79, para. 22.
[25] See generally Seniuk and Lyon, *supra*.
[26] Seniuk and Lyon, *supra*, pg. 90.

constitutionally guaranteed independence to their superior court colleagues, including security of tenure and financial security. They are courts of record with the authority to enforce the constitutional guarantees of the *Charter.*

22. The growing role of PTCs was recognized in *Provincial Judges Reference*. They play a critical role in enforcing the provisions and protecting the values of the Constitution, they can enforce the supremacy clause in s. 52 of the *Constitution Act, 1982*, they are courts of competent jurisdiction for the purposes of ss. 24(1) and 24(2) of the *Charter*, they enforce the fundamental freedoms found in s. 2 of the *Charter* and make decisions concerning the constitutionally protected rights of Canada's aboriginal peoples. It is the extent of its responsibilities that led this Court to conclude guarantees of its independence were required, and could be found, in the Constitution.

23. The characterization of PTCs as "inferior" courts (as the QCCA did) has been described as unfortunate given the quality of the bench of PTCs, their powers and the scope of the role they perform, and the constitutional guarantees of their independence.[27] The establishment of modern PTCs was an intentional break by the provinces from the "inferior" courts present at the time of Confederation.[28]

24. One result of this modernization has been a significant expansion of PTC jurisdiction in the sphere of criminal law. As the Law Reform Commission noted in 1989: [T]he jurisdiction of Provincial Courts has increased greatly since Confederation to the point where it is the court with the broadest jurisdiction, including the power to try some of the most serious crimes."[29]

25. This has been effected with the approval of this Court, which in *McEvoy* found no constitutional defect in the incremental transfer of specified criminal powers to PTCs beyond those existing at Confederation.[30] While a transfer of *all* criminal law jurisdiction from superior courts to a PTC would offend s. 96 this Court said: "There is, in our view, a cardinal difference between mere alteration or diminution of [superior court] criminal jurisdiction and complete

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[27] Seniuk and Lyon, *supra*, pg. 85.
[28] *Ibid*., pgs. 89-90.
[29] Law Reform Commission of Canada, *Toward a Unified Criminal Court*, (Working Paper No. 59) (Ottawa, 1989), as quoted in Seniuk and Lyon, pg. 96.
[30] *Court of Unified Criminal Jurisdiction, Re*, [1983] 1 S.C.R. 704 (*McEvoy)*.

exclusion of such jurisdiction."[31] The Court declined to revisit that conclusion when a five-member panel rejected an application for leave to appeal from the Ontario Court of Appeal decision in *Trimarchi*.[32] In that case the ONCA had held that the expanded criminal powers of PTCs were constitutional, citing *McEvoy* in support of that conclusion.[33]

26. The incremental increase of PTC criminal jurisdiction approved in *McEvoy* resulted from the exercise of federal powers with respect to criminal law. There is no principled reason why similar approval should not extend to an increase in PTC civil jurisdiction arising from provincial exercise of its jurisdiction with respect to civil rights and the courts. Nor can there be any suggestion that the modest increase in Court of Québec jurisdiction at issue comes close to the "complete exclusion" of superior court civil jurisdiction of which the Court disapproved in *McEvoy*.

C. Access to justice is a pressing concern and is constitutionally guaranteed. The QCCA erred in failing to consider it.

27. Insofar as access to justice is concerned, this Court in *Hryniak* issued a pressing call "to create an environment promoting timely and affordable access to the civil justice system", for "proportional procedures tailored to the needs of the particular case" and for a judicial process that is "accessible — proportionate, timely and affordable."[34] While stated in support of a generous interpretation of Ontario's summary judgment Rule, these objectives equally support a more expansive and forward-looking approach to the assessment of the role of PTCs in meeting the demand for access to civil justice than was employed by the QCCA. [35]

28. Shortly after its decision in *Hryniak* this Court also found a constitutional guarantee of access to justice. In *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* (*B.C. Trial Lawyers*) it drew on the reasons of Lamer C.J. in both *MacMillan*

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[31] *McEvoy*.
[32] *R. v. Trimarchi*, 63 O.R. (2d) 515 (Ont. C.A.).
[33] *Ibid*.
[34] *Hryniak*, supra, paras. 2, 28.
[35] This Court's recent decision in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 noted that access to justice considerations mandated "that jurisdictional rules be interpreted flexibly" in the context of multi-jurisdictional s. 35 claims.

Bloedel and *Provincial Judges Reference* to find: "it is only natural that s. 96 provide some degree of constitutional protection for access to justice."[36]

29. While the specific context of *B.C. Trial Lawyers* concerned access to a superior court, the guarantee can only be properly understood as protecting and promoting the rights of Canadians to access any and all courts. Access to justice is concerned with the rights of citizens to have access to fair, impartial, independent courts unimpeded whether by prohibitive fees, picketers, scarce judicial resources or other impediments, and regardless of which level of government appointed the judges.

30. Indeed, this Court's first use of the phrase "access to justice" in modern times was in protecting access to both PTCs as well as superior courts in *British Columbia Government Employees' Union* (*B.C.G.E.U.*).[37] In that decision the Court upheld an injunction issued by the Chief Justice of British Columbia against picketers outside the doors of B.C. courthouses where, as the Chief Justice noted: "At the level of the Provincial Courts there are thousands of cases set for hearing or disposition each day in just about every community of the province." The injunction prohibited the picketers from "any activities whatsoever which are calculated to interfere with the operations of **any** court of justice in the province". (Emphasis added). In upholding the injunction. Dickson J. relied on general principles of the rule of law, stating "there cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice", a statement subsequently adopted in *B.C. Trial Lawyers*.

31. Taken together, *B.C.G.E.U.* and *B.C. Trial Lawyers* confirm litigants have a right of access to courts generally. The rule of law, the *Charter*, s. 96, and, in the wake of *Provincial Judges Reference*, the preamble to the *Constitution Act 1867* work together to guarantee and promote that access for all litigants to all courts.

32. For civil litigants with modest claims, many of whom are self-represented, this right is best fulfilled in PTCs. Litigation in superior court is often slow, expensive, inconvenient, and unfriendly to self-represented litigants. In contrast, PTCs may provide faster adjudication, in more locations, where acting without the need for counsel is the rule, rather than the exception.

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[36] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, para. 39.
[37] *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

Simplified processes allow litigants a day in court to resolve disputes by means proportional to the amounts at issue.

D. The QCCA erred in finding the core jurisdiction of Quebec's superior court was infringed by giving jurisdiction over claims between 70,000 and $84,999 to the Court of Québec

33. The core jurisdiction of superior courts guarantees, on a national basis, the unique and essential nature of superior courts, which are one of the cornerstones of our constitutional democracy and freedoms. However there is nothing about civil claims with a value of $70,000 to $84,999 to suggest they are part of that core such that it is "essential to the administration of justice and the maintenance of the rule of law" that they be heard by a superior court. The core jurisdiction of the superior courts comprises matters that have been variously described as the "hallmark of superior courts", "an essential attribute of superior courts", and "integral to their operations". The concept of core jurisdiction is directly related to the inherent jurisdiction which is a unique and defining feature of the superior courts.[38] Jurisdiction over the range of civil claims in issue here does not fall within that scope.

34. The QCCA, relying on *B.C. Trial Lawyers*, appears to suggest that the resolution of all civil disputes fall within the core jurisdiction of superior courts, subject only to any "inferior court" jurisdiction that had been carved out immediately prior to Confederation.[39] This misapprehends what was decided in *B.C. Trial Lawyers* and the concept of core jurisdiction. *B.C. Trial Lawyers* was not concerned with jurisdictional limits. It was about access to justice which was hindered by provincially established court fees applicable to both superior courts and PTCs.[40] The case arose in the context of a superior court proceeding and therefore the focus was on s. 96. Had the case concerned a PTC the guarantee of access to justice would have been looked for elsewhere – perhaps in the preamble where the basis for a guarantee of PTC independence was found in the *Provincial Judges Reference.* As for the concept of core jurisdiction, it is about the essential characteristics and powers of a superior court. These are not defined by reference to the pre-Confederation jurisdiction of "inferior" courts.

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[38] *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725, paras. 15, 28-38, 40.
[39] QCCA opinion, paras. 48, 138-145.
[40] The fee regime applied to all courts in BC, but the challenge arose in the context of a family dispute in superior court, see *Vilardell v. Dunham*, 2012 BCSC 748, paras. 74-78.

35. The protection of superior court core jurisdiction does not require that this Court impose a specific monetary limit on PTC civil jurisdiction. Nor would a uniform national limit be appropriate given the unique geographic, procedural, economic and other circumstances of each province and territory.

E. The exclusive nature of Court of Québec civil jurisdiction does not affect its constitutionality

36. In *Provincial Judges Reference,* Lamer C.J. noted that the legislative policy of increasing the criminal jurisdiction of PTCs often "denies litigants the choice of whether they must appear before a provincial court or a superior court". This drew no constitutional disapproval. In practical terms absence of choice is common. Plaintiffs in Québec do not have access to the superior court for the trial of claims below $85,000. Plaintiffs in Ontario do not have access to the bench strength of their PTCs for any civil claims. Claimants in Nunavut have only one choice of court. Defendants may have no choice at all. In Alberta, where jurisdiction between PTCs and superior courts is concurrent, defendants must accept the plaintiff's choice of which level of court will determine the matter.[41] As these examples illustrate, provinces have adopted many different types of institutional arrangements between their courts. Unless the arrangement in question strips the superior court of some aspect of its core jurisdiction, it does not have constitutional implications.

PARTS IV & V SUBMISSIONS CONCERNING COSTS

37. The CCCJ does not seek costs and asks no costs be awarded against it.

PART VI SUBMISSIONS CONCERNING SEALING OR CONFIDENTIALITY ORDER ETC.

38. Not applicable

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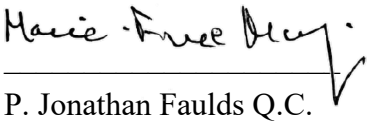
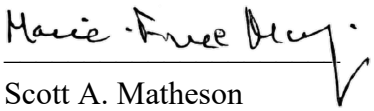
[41] Under s. 56 of the *Provincial Court Act*, cases within the Court's jurisdiction must remain there unless a counterclaim brings the matter outside that jurisdiction: *Atrium Square Investments Ltd v John Barlot Architect Ltd*, 2014 ABQB 327. The Court of Queen's Bench has no power to transfer actions filed there to the Provincial Court unless all parties consent: s. 57, *Provincial Court Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of March, 2020



P. Jonathan Faulds Q.C.
Field LLP
Counsel for the Canadian Council
of Chief Judges



Scott A. Matheson
Field LLP
Counsel for the Canadian Council
of Chief Judges

PART VII TABLE OF AUTHORITIES

Cases	Paragraph(s) Referred to in Factum
Atrium Square Investments Ltd v John Barlot Architect Ltd, 2014 ABQB 327	36
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Legislation	Paragraph(s) Referred to in Factum
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Secondary Sources	Paragraph(s) Referred to in Factum
Noel Lyon and Judge Gerald Seniuk, "The Supreme Court of Canada and the Provincial Court in Canada", 79 Can. B. Rev. 77 (2000)	4,18, 19, 23