SCC File No.: 38837

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

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 -

ATTORNEY GENERAL OF QUÉBEC

Intervener
(Appellant)

- and -

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

Interveners

[Style of cause continued on next page]

REPLY OF THE APPELLANT CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES
(Pursuant to the Order of Justice Rowe of February 20, 2020)

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AND 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 -

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Intervener
(Appellant)

- and -

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

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
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- and -

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Interveners

[Style of cause continued on next page]

AND BETWEEN:

CONSEIL DE LA MAGISTRATURE DU QUÉBEC

Appellant
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Respondent
(Appellant)

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Interveners

AND BETWEEN:

CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE, AND ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUÉBEC

Appellants
(Interveners)

\- and -

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(Appellant)

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PARTS I, II & III: REPLY TO THE ARGUMENTS OF THE INTERVENERS

1. The Trial Lawyers' Association of British Columbia ("TLABC") and the Canadian Association of Superior Court Judges ("CASCJ") both propose to measure the constitutional validity of one province's legislation by reference to the current legislation of other provinces, purportedly in the name of "national unity". TLABC argues that there is a constitutional pecuniary limit on civil jurisdiction that may be granted to a provincial court, defined by a "substantially national legislative consensus" established at $35,000, seemingly by rounding up the current average of monetary limits in provincial courts other than Quebec. Similarly, CASCJ argues that there is a violation of the core jurisdiction of superior courts where a change to pecuniary limits renders the superior court's jurisdiction "substantially different" from the jurisdiction of other superior courts in the country today.[1]

2. The Canadian Association of Provincial Court Judges ("CAPCJ") submits that these positions reflect a profound misunderstanding of the role of national unity in the interpretation of s. 96 of the *Constitution Act, 1867* and of the basic principles of constitutional interpretation.

A. The objective of national unity under s. 96 is achieved by measuring all provinces' legislation against the same constitutional "yardstick", not by comparing them to each other

3. Section 96 is indeed intended to provide a "strong constitutional base for national unity"[2]. The *Residential Tenancies* test and the core jurisdiction test under s. 96 achieve this purpose by defining the constitutional parameters of superior court jurisdiction based on principles that can be applied "in the same way across the country".[3] As explained in *Re Residential Tenancies, 1996*, "[a] rule which would permit a transfer of power in one province and deny it in another would undercut the unifying force of the s. 96 courts".[4]

4. For this reason, the historical analysis under the *Residential Tenancies* test is conducted based on the historical circumstances in all four Confederating provinces such that the constitutional validity of provincial initiatives are all measured "against the same historical

[1] "sensiblement différente par rapport à celle dont jouissent aujourd'hui les autres cours supérieures du pays" : *Factum of the CASCJ* at para 3.
[2] *Re Residential Tenancies Act, 1979*, [1981] 1 SCR 714 at 728.
[3] *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal (NS)*, [1989] 1 SCR 238 at 265-266 [*Sobeys Stores*].
[4] *Reference re Amendments to the Residential Tenancies Act (NS)*, [1996] 1 SCR 186 at para 78 [*Re Residential Tenancies, 1996*]

yardstick”.[5] Further, the core jurisdiction test prohibits all provincial legislatures and Parliament, in equal measure, from removing a very specific set of powers that are critically important and essential to maintaining the superior court’s role in upholding the rule of law.[6] In this way, all provinces’ initiatives are measured against the same constitutional “yardstick”.

5. Within these constitutional parameters, each province is free to adapt its judicial system according to local needs as it sees fit pursuant to s. 92(14) of the *Constitution Act, 1867* and the principle of federalism, which recognizes the “autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction”.[7] This means that provinces may choose to grant more or less powers to their provincial courts based on local needs, within the parameters of the *Residential Tenancies* test and the core jurisdiction test. They need not exercise the full scope of their powers to grant jurisdiction to their provincial courts at any given time, and the fact that a province has chosen to grant a particular pecuniary limit to their provincial court has no bearing on the constitutional validity of another province’s choices.

6. In other words, national unity in the context of s. 96 means measuring all provinces against the same constitutional “yardstick”, which is defined by the *Residential Tenancies* test and the core jurisdiction test, based on the text, historic context and purpose of s. 96. National unity does not entail constitutionalizing the current policy choices of certain provinces and arbitrarily penalizing other provinces for making different choices.

B. Defining constitutional limits based on current provincial legislation and practice is inconsistent with basic principles of constitutional interpretation

7. The principles of constitutional interpretation are grounded in the hierarchy of sources of law in the Canadian constitutional order. The Constitution prevails over all other sources of law.[8] The starting point of all constitutional analysis is the text of the Constitution, its purpose and context.[9] The courts are the “guardians of the Constitution” tasked with striking out legislation that

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[5] *Sobeys Stores*, *supra* note 3 at 266.

[6] *MacMillan Bloedel Ltd v Simpson,* [1995] 4 SCR 725 at para 36; *Re Residential Tenancies, 1996*, *supra* note 2 at para 56; see *Factum of the Appellant CAPCJ* at paras 25-28.

[7] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 58 [*Secession Reference*].

[8] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 52; *Secession Reference*, *supra* note 7 at paras 72, 74; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis Canada, 2014) at s. 11.73, Tab 1, BOA.

[9] *R v Comeau*, 2018 SCC 15 at para 52.

violates the Constitution.[10] To define the scope of the Constitution based on the current legislation of some provinces is to turn the hierarchy of norms on its head.

8. This Court recently applied this basic principle of constitutional interpretation in *Desgagnés Transport Inc v Wärtsilä Canada Inc*.[11] In that case, the Court considered whether a dispute concerning a contract for the sale of marine engine parts was governed by Canadian maritime law, a question that turned on the scope of federal jurisdiction over "navigation and shipping" under s. 91(10) of the *Constitution Act, 1867*. Both the majority and concurring judges agreed that the definition of maritime law adopted by Parliament in the *Federal Courts Act* could not be determinative of the scope of s. 91(10).[12] The concurring judges expressed the point as follows:

> We therefore maintain that <u>Parliament may not, by enactment, define the scope of its legislative authority</u> so as to displace the operation of the pith and substance test as the means by which a matter is determined to come within or fall outside that legislative authority. Parliament's statutory grant of jurisdiction to the Federal Court to hear certain claims described as coming within Canadian maritime law is <u>of no legal significance</u> without constitutional authority therefor. […] In this regard, we adopt the comments of de Montigny J. (as he then was) in 9171, at para. 24:
>
>> It clearly cannot delineate federal power over navigation and shipping conferred by subsection 91(10) of the *Constitution Act, 1867*, by referring to the *Federal Courts Act* definition of maritime law. Of course, <u>neither of the two levels of government can, on their own initiative and unilaterally, arrogate to themselves the authority to interpret the constitutional text by legislating on the question</u>.[13]

9. In other words, Parliament and provincial legislatures cannot, by way of enactment, change the scope of their own legislative authority under the Constitution. Legislation does not define the scope of the Constitution; it is the Constitution that defines the scope of valid legislation. Accordingly, section 96 must be interpreted based on its own text, purpose and context, not based on policy choices of some provinces as reflected in their current legislation.

10. To conclude otherwise is to enable provinces to effectively amend the Constitution without complying with the constitutional amendment formula, which generally requires the consent of Parliament and at least two-thirds of the legislative assemblies of the provinces representing at least

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[10] *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at para 89; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 140.
[11] *Desgagnés Transport Inc v Wärtsilä*, 2019 SCC 58 [*Wärtsilä*].
[12] *Wärtsilä*, *supra* note 11 at paras 24-25, 140.
[13] *Wärtsilä*, *supra* note 11 at para 140 [emphasis added].

50% of the population.[14] It would be incongruous if s. 96, which confers the power to appoint superior court judges on the federal government, could be effectively amended based on a vaguely defined consensus of the provinces, without the consent of Parliament.

11. Furthermore, consistency of practice, no matter how widespread, does not transform a practice into a constitutional norm. Even when it comes to defining constitutional conventions – those rare, non-justiciable norms of our Constitution – mere practice is not enough.[15] Many practices, from discrimination based on sexual orientation[16] to the failure to consult aboriginal peoples regarding impacts on their rights,[17] were widespread when they were declared unconstitutional by this Court. To find otherwise is to enable provinces to normalize unconstitutional legislation and government action over time and to abdicate this Court's role as guardian of the Constitution. For example, it would be unacceptable for the courts to alter their interpretation of s. 15 of the *Charter* to enable sexual orientation-based discrimination, because a majority of provinces had ceased to prohibit it or worse, had taken actions to condone it.[18]

12. Yet, this is precisely what the TLABC asks this Court to do. It asks the Court to find that all grants of jurisdiction over civil matters are invalid under an erroneous application of the *Residential Tenancies* test, and, faced with the absurdity of this outcome, asks the Court to "save" some civil jurisdiction based on a principle that violates the hierarchy of norms and the amendment formula. Defining constitutional norms based on the policy choices of certain provinces at a given time is not a principled approach to constitutional interpretation.

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[14] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 38. Without taking a position on whether s. 38 (general procedure) or s. 41 (unanimous consent) would apply, the provisions enabling amendment on a less stringent standard than the general procedure certainly do not apply (s. 43 (some but not all provinces), s. 44 (Parliament), s. 45 (provincial legislatures)).

[15] In addition to prior practice, there must be a reason for the rule and the actors involved must believe that they were bound by the rule: *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 888.

[16] *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*].

[17] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

[18] See *Vriend*, *supra* note 16.

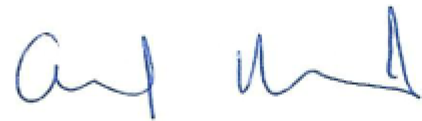
13. The CAPCJ submits that this Court must rather adopt a principled application of s. 96 by applying the *Residential Tenancies* test and the core jurisdiction test in a manner consistent with the text, purpose and context of s. 96. The objectives of national unity are achieved by measuring each province against the same, national "yardstick", not by arbitrarily entrenching the current pecuniary limits applicable in some provinces. The CAPCJ maintains that article 35 of the CCP is consistent with both the *Residential Tenancies* test and core jurisdiction test.

PARTS IV and V – COSTS AND ORDER SOUGHT

14. The CAPCJ does not seek costs and asks that none be awarded against it. The CAPCJ requests that the Court allow the appeal and answer the first reference question in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated on this 9th day of September, 2020.



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PART VII: TABLE OF AUTHORITIES

Cases	**Cited in para.**
Desgagnés Transport Inc v Wärtsilä Canada Inc., 2019 SCC 58	8
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R v Comeau, 2018 SCC 15	7
Sobeys Stores Ltd v Yeomans, [1989] 1 SCR 238	3, 4
Vriend v Alberta, [1998] 1 SCR 493	11
Secondary Sources	**Cited in para.**
Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis Canada, 2014) at s. 11.73	7