"Do As I Say, Not As I Do": Recognizing the New *Court of Québec* Test for Infringements of Section 96

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I. INTRODUCTION

In Canada's *Constitution Act, 1867*,[1] section 96 states: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province." To paraphrase Professor Paul Daly, if this lone sentence of constitutional text began as an acorn, by now it has become a great oak of Supreme Court of Canada jurisprudence.[2] Perhaps nowhere else have the "natural limits" of constitutional interpretation been tested more than with the well-watered "living tree" that is section 96.[3]

Section 96 now imposes several limits on legislative authority. Two of these are longstanding and readily drawn from the text. First, while the provincial legislatures have authority over the constitution, maintenance and organization[4] of the courts referred to in section 96 — known as "section 96 courts" or "superior courts" — only the federal executive enjoys the authority to select the individual appointees who exercise the judicial powers of those courts.[5] Second, section 96 similarly

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1 30 & 31 Vict., c. 3 (U.K.).

2 Paul Daly, "Unresolved Issues after Vavilov" (2022) 85 Sask. L. Rev. 89 at 111.

3 As Abella J. stated in her dissent in *Reference re Code of Civil Procedure (Que.), art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 304 (S.C.C.) [hereinafter "*Court of Québec Reference*"]: "That living tree has been well watered by this Court."

4 *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), s. 92(14) states: "In each Province the Legislature may exclusively make Laws in relation to . . . The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction."

5 This was well put by Perdue J.A., writing for himself only, in *Winnipeg Electric Railway Co. v. Winnipeg (City)* (1916), 30 D.L.R. 159, 26 Man. R. 584 at 612 (Man. C.A.): "The Province has power over the constitution, maintenance and organization of the provincial courts. . . . But the court when constituted by the Province has no vitality until the judge or judges are appointed and, in the case of a Superior, District or County Court, the appointment rests wholly with the Federal authority."

limits the federal legislature's authority to grant the same judicial powers.[6]

Over most of the 20th century, the bounds of these classic section 96 limits were tested with some frequency. In that era, the jurisprudence abounds with "classic section 96 cases", which is to say cases involving an impugned grant of judicial power to a body other than a superior court.[7] More recently, this area has been calmer. So far, in the 21st century, the only classic section 96 case to go to the Supreme Court of Canada has been the *Court of Québec Reference*.[8] Nevertheless, it is only a matter of time before our highest Court is faced with the next case of that nature, and at that time the question will inevitably arise: what legal test applies?

This question is complicated by the expansive trunk and canopy now grown out of section 96. For one, the two limits described above have undergone a "process of liberalization",[9] in the sense that they now permit exceptions. For another, there is a separate line of section 96 cases, more recent than the classic section 96 cases and distinct from them in the sense of being focused on a subtraction of judicial power from the superior courts rather than on a grant of power to another body. This more recent line includes successful challenges to legislation that shields administrative action from review by superior courts[10] and to legislation that generally undermines access to justice.[11] These gave rise to a third manner in which section 96 imposes a limit on legislatures. This third limit protects the superior courts across Canada, collectively as a national institution, against encroachment by either provincial or federal legislation[12] into those courts' "core jurisdiction".[13]

Unfortunately, the question of which test applies was only further complicated by

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[6] *McEvoy v. New Brunswick (Attorney General)*, [1983] S.C.J. No. 51, [1983] 1 S.C.R. 704 at 719-720 (S.C.C.) ("Sections 96 to 100 . . . should not be read as permitting the Parliament of Canada . . . to deprive the Governor General of appointing power").

[7] As will be discussed below, the classic s. 96 cases include the "inferior court cases" and the "administrative cases", but they do not include other, more recent types of "core jurisdiction case".

[8] [2021] S.C.J. No. 27, 2021 SCC 27 (S.C.C.). One classic s. 96 case subsequent to the *Court of Québec Reference* went as high as the Court of Appeal for British Columbia: *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2022] B.C.J. No. 839, 2022 BCCA 163, leave to appeal refused [2022] S.C.C.A. No. 262 (S.C.C.).

[9] *Court of Québec Reference* at para. 54.

[10] See *Crevier v. Quebec (Attorney General)*, [1981] S.C.J. No. 80, [1981] 2 S.C.R. 220 (S.C.C.).

[11] See *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, 2014 SCC 59 (S.C.C.) [hereinafter "*Trial Lawyers 2014-SCC*"].

[12] *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] S.C.J. No. 13, [1996] 1 S.C.R. 186 at para. 73 (S.C.C.) ("It follows from the constitutional status of the s. 96 courts that neither Parliament nor the legislatures may impair their status").

[13] See *MacMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725 (S.C.C.) [hereinafter "*MacMillan Bloedel*"], discussed below.

the *Court of Québec Reference* itself. There, Côté and Martin JJ. wrote for the 4-3 majority and promised that they had simply adapted the pre-existing analytical framework. That framework had come to comprise four steps, resulting from the concatenation of two tests: the three-step *Residential Tenancies* test as articulated in 1981[14] and the one-step core jurisdiction test of 1995.[15] Specifically, the majority in the *Court of Québec Reference* wrote the following:

> The multi-factored analysis we are adopting here *is not intended to replace the current law*. The analysis under s. 96 continues to involve two tests. The first — the *Residential Tenancies* test — continues to apply to any transfer of historical jurisdiction of the superior courts to an administrative tribunal or to another statutory court. The second — the core jurisdiction test — continues to apply in order to determine whether a statutory provision has the effect of removing or impermissibly infringing on any of the attributes that form part of the core jurisdiction of the superior courts.[16]

This essay argues that this promise went unfulfilled. Far from refraining from replacing the current law, the *Court of Québec Reference* instead stretched the fourth step of the framework into a novel multi-factored analysis endowed with a purpose and with mechanical features previously expressed only by the application of all four steps. As a result, a future court faced with a classic section 96 case will find it impossible to follow the example of the *Court of Québec Reference* and at the same time to follow the pre-existing four-step framework as instructed in the passage quoted above. The Court has said, "Do as I say, not as I do." Put differently, the fourth step of the analysis, originally called the core jurisdiction test, has been transformed into a novel test altogether. This essay labels it the *Court of Québec* test.

It is further argued that the new *Court of Québec* test is equipped to usurp and likely to replace the previous four-step framework. Accordingly, the best articulation of what the Supreme Court of Canada really did in the *Court of Québec Reference* came not from the majority, but from the lone dissent of Abella J., when she stated: "It may be time to consider replacing the test."[17] Finally, it is argued this new test opens the door to a significant increase in the judiciary's authority to review and either approve or disallow legislated policy choices concerning the administration of justice.

This essay proceeds as follows. Part II surveys the decades of jurisprudence that gave rise to the four-step framework as it was before the *Court of Québec Reference*. This discussion draws out details that the majority's reasoning did not grapple with, but it also acknowledges that the majority were faced with an analytical dilemma.

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[14] *Reference re Residential Tenancies Act, 1979*, [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 at 734-736 (S.C.C.) [hereinafter the "*Residential Tenancies Reference*"].

[15] *MacMillan Bloedel* at para. 15.

[16] *Court of Québec Reference* at para. 144 [emphasis in original].

[17] *Court of Québec Reference* at para. 303.

Part III briefly describes the reasoning of the majority and the two dissenting opinions in the *Court of Québec Reference*. Part IV offers this essay's core argument: instead of preserving existing law, the majority created the novel *Court of Québec* test by expanding both the purpose and mechanics of the last of the four steps in the pre-existing framework. Part V predicts two consequences: first, that the new *Court of Québec* test will usurp and replace the previous framework, despite the majority's instruction to preserve it, and second, that this new test tempts courts with significantly expanded authority to supervise legislated policy choices over the administration of justice.

II. THE JURISPRUDENCE LEADING TO THE *COURT OF QUÉBEC REFERENCE*

The jurisprudence speaks of two separate tests for section 96: the *Residential Tenancies* three-step test, plus the core jurisdiction test. Yet, the two are analytically intertwined in classic section 96 cases, in the sense that the core jurisdiction test follows the application of the *Residential Tenancies* test.[18] To describe the framework as it stood just before the *Court of Québec Reference*, I find it more helpful to speak of a single, four-step framework.

The sections below provide a few details not well explained in the written reasons of the *Court of Québec Reference* itself. For instance, these four steps follow a logical sequence: step one establishes a general rule, steps two and three provide exceptions to that general rule, and step four gives a backstop to prevent violations of section 96 that would otherwise slip past the previous three steps.

Moreover, although that logical sequence suggests that the analytical scheme is rather coherent, in actuality that scheme has long carried various tensions. Accordingly, to see the dilemma that was before the Supreme Court of Canada in the *Court of Québec Reference*, it is helpful to understand that each of the four steps emerged in its own time and context over the course of some five decades of jurisprudence addressing several sub-types of section 96 cases.

1. The Four Steps

Just before the *Court of Québec Reference*, the framework for a section 96 challenge to a legislated grant of judicial power called for the following four inquiries:

1. "Does the challenged power or jurisdiction broadly conform to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation?"[19]
2. "Is the function of the provincial tribunal within its institutional setting a judicial function, considered from the point of view of the nature of the

[18] See *Court of Québec Reference* at para. 80.

[19] *Massey-Ferguson Industries Ltd. v. Saskatchewan (Minister of Agriculture)*, [1981] S.C.J. No. 90, [1981] 2 S.C.R. 413 at 429 (S.C.C.), stating step one of the *Residential Tenancies* test.

question which the tribunal is called upon to decide . . .?"[20]

3. "If the power or jurisdiction of the provincial tribunal is exercised in a judicial manner, does its function as a whole in its entire institutional context violate s. 96?"[21]

4. Does the transfer of power or jurisdiction destroy part of the core jurisdiction of the superior courts, that is, those powers that are "essential to the administration of justice and the maintenance of the rule of law"?[22]

These inquiries are deployed pursuant to the following analytical scheme. To begin, having applied the historical inquiry contemplated by the words "at the time of Confederation" in step one, if there is no "broad conformity" between the impugned power and the jurisdiction of superior courts as of 1867, then the three-step *Residential Tenancies* test discloses no violation of section 96, but the analysis proceeds to the backstop in step four. Otherwise, although the historical inquiry reveals a *prima facie* violation of section 96, the analysis proceeds to steps two and three to determine whether an exception applies.

At steps two and three, if the institutional context surrounding the challenged judicial power demonstrates either that it is not truly "judicial" (step two) or that for the sake of preserving its surrounding statutory scheme it ought not on account of section 96 be stripped away (step three), then the three-step *Residential Tenancies* test discloses no violation of section 96, but again the analysis proceeds to the step four backstop. Otherwise, section 96 has been violated and the grant of judicial power is unconstitutional.

Finally, even if the impugned legislation has passed the three-step *Residential Tenancies* test, step four still establishes a violation of section 96 if that legislation strips away part of the core jurisdiction of a superior court.

This multi-step framework was patched together over several decades of section 96 jurisprudence. In the *Court of Québec Reference*, the majority of the Supreme Court of Canada lauded even its most ancient steps as a "rampart" that "has already proven its worth",[23] and they purported to preserve all four steps.[24] Despite the critique that this essay advances, and in all fairness to the Court, it is important to appreciate the analytical dilemma with which they were faced. The sections below

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[20] *Massey-Ferguson Industries Ltd. v. Saskatchewan (Minister of Agriculture)*, [1981] S.C.J. No. 90, [1981] 2 S.C.R. 413 at 429 (S.C.C.), stating step two of the *Residential Tenancies* test.

[21] *Massey-Ferguson Industries Ltd. v. Saskatchewan (Minister of Agriculture)*, [1981] S.C.J. No. 90, [1981] 2 S.C.R. 413 at 429 (S.C.C.), stating step three of the *Residential Tenancies* test.

[22] *MacMillan Bloedel* at para. 38, explaining the core jurisdiction test.

[23] *Court of Québec Reference* at para. 145.

[24] *Court of Québec Reference* at para. 144.

illuminate this by detailing how each of the four steps emerged in its own time and context — and was in some instances subsequently tweaked — over a period spanning the late 1930s to the mid 1990s.

(a) Step One: The "Inferior Court Cases" and the 1938 General Rule

As Wilson J. has accurately stated: "[T]he first step of the *Residential Tenancies* test . . . is drawn from the 'inferior court' cases."[25] The first sub-type of section 96 case discussed in this essay, inferior court cases are those involving a legislative grant of judicial power to a court that is not a superior court. Among decisions of the Supreme Court of Canada and the Judicial Committee of the Privy Council, I count only nine inferior court cases since Confederation,[26] including the *Court of Québec Reference* itself.

This sub-type of cases gave rise to the first step of the section 96 framework. In fact, this began with the very first inferior court case, the *Adoption Reference* of 1938. There, a constitutional challenge was brought against four provincial statutes.[27] The first statute empowered inferior courts to make an order authorizing the adoption of a child.[28] The second provided for a "special tribunal known as the Juvenile or Family Court" composed of provincial appointees[29] and empowered to try juvenile offences[30] and to hold hearings and make orders concerning the care and custody of a neglected child,[31] requiring payment of maintenance of a child by the state[32] or by a parent,[33] and imposing penalties for the ill treatment or neglect of a

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[25] *Sobeys Stores Ltd. v. Yeomans*, [1989] S.C.J. No. 13, [1989] 1 S.C.R. 238 at 254 (S.C.C.) [hereinafter "*Sobeys Stores*"].

[26] These are (1) *Reference re Authority to Perform Functions Vested by the Adoption Act, the Children's Protection Act, the Children of Unmarried Parents Act, the Deserted Wives' and Children's Maintenance Act, of Ontario*, [1938] S.C.J. No. 21, [1938] S.C.R. 398 (S.C.C.) [hereinafter the "*Adoption Reference*"]; (2) *Renvoi re Juridiction de la Cour de Magistrat (Loi concernant) (Québec)*, [1965] A.C.S. no 84, [1965] S.C.R. 772 (S.C.C.); (3) *Jones v. Edmonton Catholic School District 7*, [1976] S.C.J. No. 98, [1977] 2 S.C.R. 872 (S.C.C.); (4) *Reference re Family Relations Act (B.C.)*, [1982] S.C.J. No. 112, [1982] 1 S.C.R. 62 (S.C.C.); (5) *McEvoy v. New Brunswick (Attorney General)*, [1983] S.C.J. No. 51, [1983] 1 S.C.R. 704 (S.C.C.); (6) *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] S.C.J. No. 9, [1989] 1 S.C.R. 206 (S.C.C.); (7) *Reference re Young Offenders Act (P.E.I.)*, [1990] S.C.J. No. 60, [1991] 1 S.C.R. 252 (S.C.C.); (8) *MacMillan Bloedel*; and (9) *Court of Québec Reference*.

[27] *Adoption Reference* at 398-401.

[28] *Adoption Act*, R.S.O. 1937, c. 218, ss. 2, 9.

[29] *Adoption Reference* at 403; see *Children's Protection Act*, R.S.O. 1937, c. 312, s. 1(f).

[30] *Children's Protection Act*, R.S.O. 1937, c. 312, s. 21.

[31] *Children's Protection Act*, R.S.O. 1937, c. 312, s. 7.

[32] *Children's Protection Act*, R.S.O. 1937, c. 312, s. 10.

[33] *Children's Protection Act*, R.S.O. 1937, c. 312, s. 11.

child or for interference with a ward.[34] The third granted to provincially appointed judges the power to hold hearings and decide the identity of the parents of a child born out of wedlock[35] and order them to pay maintenance to that child.[36] The fourth empowered provincial magistrates and the juvenile court to hear complaints and order a deserting husband to pay maintenance to a deserted wife or child.[37]

In the *Adoption Reference*, Duff C.J.C. for a unanimous Supreme Court of Canada concluded that all four statutes were within the legislative authority of the province.[38] In doing so, he recognized two propositions. First, the *Constitution Act, 1867* contemplates "the existence of provincial courts and judges other than those within the ambit of section 96".[39] Second, pursuant to subsection 92(14) of the *Constitution Act, 1867*, the provincial legislature has jurisdiction to appoint the judges and judicial officers of those inferior courts.[40] There being in this manner two different categories of court, it became necessary in any inferior court case to draw a line to distinguish the judicial powers of each.

A decade later, in *John East Iron*,[41] the Privy Council adopted the reasoning from the *Adoption Reference*[42] and articulated that the question to ask in a classic section 96 case is whether the challenged judicial power "broadly conform[s] to the type of jurisdiction exercised by the Superior, District or County Courts".[43] This is the first step of the framework. It lays down the general rule that the judicial powers of superior courts may only be granted to judges appointed in accordance with section 96. On a restrained reading of section 96, there would be nothing further to say. The jurisprudence has, however, said much more.

(b) Steps Two and Three: The "Administrative Cases" and the 1960s Exceptions

The *John East Iron* case mentioned just above was not itself an inferior court case. It instead fell into a second sub-type of section 96 case; it was an "administrative case", in the sense that it involved a legislated grant of judicial power to an administrative tribunal, not to an inferior court. (The inferior court cases and administrative cases together make up the "classic section 96 cases".) In *John East*

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[34] *Children's Protection Act*, R.S.O. 1937, c. 312, ss. 14, 17, 19-20.

[35] *Children of Unmarried Parents Act*, R.S.O. 1937, c. 217, ss. 9, 12, 14.

[36] *Children of Unmarried Parents Act*, R.S.O. 1937, c. 217, ss. 14, 15.

[37] *Deserted Wives' and Children's Maintenance Act*, R.S.O. 1937, c. 211, ss. 1(1), 2(1).

[38] *Adoption Reference* at 422.

[39] *Adoption Reference* at 404.

[40] *Adoption Reference* at 413-414.

[41] *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1948] J.C.J. No. 5, [1948] 4 D.L.R. 673 (P.C.) [hereinafter "*John East Iron*"].

[42] *John East Iron* at 683.

[43] *John East Iron* at 685.

Iron, the province had granted authority to the Labour Relations Board to order an employer to reinstate a dismissed employee and to pay for monetary loss caused by the dismissal.[44] The Privy Council concluded that this was within the authority of the provincial legislature.[45]

From the Privy Council and Supreme Court of Canada, I count fully 20 administrative cases.[46] *John East Iron* was the third of these. Although in that case, as discussed above, the Privy Council laid down the general rule, Their Lordships also began the groundwork for exceptions to it.

The Privy Council decided *John East Iron* by concluding that the jurisdiction at issue was not "analogous to that of a Superior, District or County Court".[47] Yet, on Their Lordships' way to this conclusion, they expressed that "[t]he borderland in which judicial and administrative functions overlap is a wide one and the boundary is the more difficult to define in the case of a body such as the appellant Board, the greater part of whose functions are beyond doubt in the administrative sphere".[48] They also considered that the impugned legislative scheme revealed a "new conception of industrial relations" with "no analogy in those issues which were

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[44] *John East Iron* at 674.

[45] *John East Iron* at 681 and 685. See also *Reference re Family Relations Act (B.C.)*, [1982] S.C.J. No. 112, [1982] 1 S.C.R. 62 at 68 (S.C.C.), *per* Laskin C.J.C., dissenting.

[46] These are (1) *Martineau & Sons Ltd. v. Montreal*, [1931] J.C.J. No. 6, [1932] 1 D.L.R. 353 (P.C.); (2) *Toronto (City) v. York (Township)*, [1938] J.C.J. No. 1, [1938] 1 D.L.R. 593 (P.C.); (3) *John East Iron*; (4) *Dupont v. Inglis*, [1958] S.C.J. No. 39, [1958] S.C.R. 535 (S.C.C.); (5) *Farrell v. British Columbia (Worker's/Workmen's Compensation Board)*, [1961] S.C.J. No. 61, [1962] S.C.R. 48 (S.C.C.); (6) *Brooks v. Pavlick*, [1963] S.C.J. No. 76, [1964] S.C.R. 108 (S.C.C.); (7) *Tremblay v. Québec (Commission des Relations de Travail)*, [1967] S.C.J. No. 63, [1967] S.C.R. 697 (S.C.C.); (8) *Tomko v. Nova Scotia (Labour Relations Board)*, [1975] S.C.J. No. 111, [1977] 1 S.C.R. 112 (S.C.C.); (9) *Quebec (Attorney General) v. Farrah*, [1978] S.C.J. No. 24, [1978] 2 S.C.R. 638 (S.C.C.); (10) *Mississauga (City) v. Peel (Municipality)*, [1979] S.C.J. No. 46, [1979] 2 S.C.R. 244 (S.C.C.); (11) *Canadian Broadcasting Corp. v. Quebec (Police Commission)*, [1979] S.C.J. No. 60, [1979] 2 S.C.R. 618 (S.C.C.); (12) *Residential Tenancies Reference*; (13) *Crevier v. Quebec (Attorney General)*, [1981] S.C.J. No. 80, [1981] 2 S.C.R. 220 (S.C.C.); (14) *Massey-Ferguson Industries Ltd. v. Saskatchewan*, [1981] S.C.J. No. 90, [1981] 2 S.C.R. 413 (S.C.C.); (15) *British Columbia (Capital Regional District) v. Concerned Citizens of British Columbia*, [1982] S.C.J. No. 103, [1982] 2 S.C.R. 842 (S.C.C.); (16) *Quebec (Attorney General) v. Grondin*, [1983] S.C.J. No. 78, [1983] 2 S.C.R. 364 (S.C.C.); (17) *Quebec (Attorney General) v. Udeco Inc.*, [1984] S.C.J. No. 52, [1984] 2 S.C.R. 502 (S.C.C.); (18) *Sobeys Stores*; (19) *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] S.C.J. No. 64, [1992] 2 S.C.R. 394 (S.C.C.); and (20) *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] S.C.J. No. 13, [1996] 1 S.C.R. 186 (S.C.C.).

[47] *John East Iron* at 683.

[48] *John East Iron* at 679-680.

familiar to the Courts of 1867".[49] As a way of stating the lack of analogy to those courts, they spoke of the desirability of an administrative body with "experience and knowledge acquired extra-judicially" and with members "equally representative of organized employees and employers and in a certain event of the general public".[50]

Accordingly, the legal test, by calling for analogies between different bodies wielding judicial power, came to invite judicial evaluations of the public policy objectives behind legislation establishing that sort of body. Indeed, in the decades following *John East Iron*, section 96 provided little limitation to the establishment by provincial and federal legislatures of an administrative state wielding judicial powers historically held by superior courts. This expansion — or, as the Supreme Court has called it, this "process of liberalization"[51] — was mechanized by keeping the general rule in the first step of the section 96 framework and by relaxing that rule with dual exceptions in the second and third steps. These exceptions reasoned, for one, that what appears to be a judicial power may in actuality be otherwise when viewed in its institutional context (step two of the framework), and for another, that a merely incidental exercise of a superior court judicial power should not bring about a dismantling of the surrounding administrative scheme (step three).

Step two of the section 96 framework first appeared in 1963. In *Brooks v. Pavlick*,[52] provincial legislation had enabled the Master of Titles to hear and determine objections to a registration upon a title to land,[53] and the Supreme Court of Canada concluded that this was within the authority of the province.[54] Justice Spence for a unanimous Court affirmed that it is "necessary to consider not [the impugned provision] in isolation but to have regard for the act as a whole".[55] He then reasoned that the "judicial determinations" at issue "are merely necessarily incidental to the discharge of [the officer's] duties which, therefore, are not analogous to those of a [superior court]".[56] This reasoning was made with citation to a statement from the earlier *Dupont v. Inglis*[57] decision, but it advanced it a stride further. That statement in *Dupont v. Inglis*, from Rand J. for a unanimous Supreme Court, was that it was "desirable to enquire first into the real character and content of the rights which the statute creates and the means it furnishes to give them

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[49] *John East Iron* at 681.

[50] *John East Iron* at 682.

[51] *Court of Québec Reference* at para. 54, citing *Residential Tenancies Reference* at 730.

[52] [1963] S.C.J. No. 76, [1964] S.C.R. 108 (S.C.C.).

[53] *Brooks v. Pavlick*, [1963] S.C.J. No. 76, [1964] S.C.R. 108 at 109, 112-113 (S.C.C.).

[54] *Brooks v. Pavlick*, [1963] S.C.J. No. 76, [1964] S.C.R. 108 at 118 (S.C.C.).

[55] *Brooks v. Pavlick*, [1963] S.C.J. No. 76, [1964] S.C.R. 108 at 113 (S.C.C.).

[56] *Brooks v. Pavlick*, [1963] S.C.J. No. 76, [1964] S.C.R. 108 at 115 (S.C.C.).

[57] [1958] S.C.J. No. 39, [1958] S.C.R. 535 (S.C.C.).

recognition".[58] In *Dupont v. Inglis*, the province had granted to its own appointees the power to try and determine disputes between alleged stakes of mining claims,[59] and the Court concluded that this was within the authority of the province.[60]

Step three emerged just a few years later, in the 1967 decision of *Tremblay v. Québec (Commission des Relations de Travail)*.[61] There, provincial legislation had conferred upon the Labour Relations Board powers to decide whether an association had offended the enabling statute and to order the dissolution of that association.[62] Justice Abbott for a unanimous Supreme Court found that the impugned power was judicial in nature, but he upheld the provincial legislation that granted this power, reasoning that the grant was "purely incidental" to the administrative body's purpose of "maintenance of industrial peace".[63]

The distinction between steps two and three is subtle and generally beyond the scope of this essay, which simply deals with them together. As Wilson J. has explained, the second and third steps together "serve to validate some legislative schemes despite the fact that they trench on the traditional jurisdiction of s. 96 courts".[64] That is, they "provide what might be called permissible exceptions to the constitutional stricture against the reduction of superior court jurisdiction", recognizing the proposition that "s. 96 should not stand in the way of new institutional approaches to social or political problems".[65]

Although for some time it could be doubted whether the exceptions in steps two and three applied to inferior court cases, rather than only to administrative cases, an affirmative answer came conclusively in 1995 in *MacMillan Bloedel*. There, federal Parliament had granted to inferior courts exclusive jurisdiction to try youths for *ex facie* contempt, which is to say contempt proceedings involving out-of-court conduct.[66] The majority and dissent of the Supreme Court agreed that the analysis would proceed to the third step. At that step, the majority considered the "institutional function of the youth courts" and found the associated "policy objectives" to be "clear and laudable",[67] and having applied all the three steps, the

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[58] [1958] S.C.J. No. 39, [1958] S.C.R. 535 at 539 (S.C.C.).

[59] [1958] S.C.J. No. 39, [1958] S.C.R. 535 at 536-539 (S.C.C.).

[60] [1958] S.C.J. No. 39, [1958] S.C.R. 535 at 539 and 545 (S.C.C.).

[61] [1967] S.C.R. 697 (S.C.C.).

[62] *Tremblay v. Québec (Commission des Relations de Travail)*, [1967] S.C.J. No. 63, [1967] S.C.R. 697 at 700 (S.C.C.).

[63] *Tremblay v. Québec (Commission des Relations de Travail)*, [1967] S.C.J. No. 63, [1967] S.C.R. 697 at 701-702 (S.C.C.).

[64] *Sobeys Stores* at 254 [emphasis omitted].

[65] *Sobeys Stores* at 253.

[66] *MacMillan Bloedel* at para. 3.

[67] *MacMillan Bloedel* at para. 26.

majority and dissent alike would have permitted the legislation.[68] Itself an inferior court case, *MacMillan Bloedel* thus showed that the exceptions in steps two and three are not limited to administrative cases.

(c) Step Four: The "Core Jurisdiction Cases" and the 1995 Backstop

MacMillan Bloedel is significant to section 96 jurisprudence not only for demonstrating the breadth of application of the exceptions in steps two and three of the framework. It also established the fourth step, a backstop to catch violations of section 96 that would otherwise pass through the first three steps.

In *MacMillan Bloedel*, for a 5-4 majority, Lamer C.J.C. dealt quickly with all three steps of the *Residential Tenancies* test, concluding that the impugned statute was valid according to that analysis.[69] Chief Justice Lamer considered this result to be inadequate, however, because it did not address "the essence of the problem", which was "the *exclusivity* of the grant of jurisdiction to the youth court".[70] He went on to formally establish the core jurisdiction test, thus adding a fourth step to the section 96 framework. He explained that the three steps of the *Residential Tenancies* test continue to apply to determine "whether the *grant* of jurisdiction is permissible", but, in addition, the core jurisdiction test places "emphasis on core jurisdiction" to "decide whether the superior court's jurisdiction can be *ousted*".[71] This recognized the possibility for section 96 challenges beyond the classic section 96 cases.

Chief Justice Lamer drew from his own previous statement in a minority opinion that "[s]ection 96 . . . is regarded as a means of protecting the 'core' jurisdiction of the superior courts so as to provide for some uniformity throughout the country in the judicial system".[72] He purported to be bound by that statement.[73] Whatever the frailties of that use of the doctrine of *stare decisis*, Lamer C.J.C.'s conclusion was supported in substance by other prior Supreme Court of Canada decisions, such as *Crevier*,[74] *Farrah*,[75] the *Residential Tenancies Reference*[76] itself, and *McEvoy*.[77]

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[68] *MacMillan Bloedel* at paras. 26 (majority) and 94 (dissent).

[69] *MacMillan Bloedel* at para. 26.

[70] *MacMillan Bloedel* at para. 9 [emphasis in original].

[71] *MacMillan Bloedel* at para. 18 [emphasis in original].

[72] *MacMillan Bloedel* at para. 15, citing *Reference re Young Offenders Act (P.E.I.)*, [1990] S.C.J. No. 60, [1991] 1 S.C.R. 252 at 264 (S.C.C.).

[73] *MacMillan Bloedel* at paras. 15 and 18.

[74] *Crevier v. Quebec (Attorney General)*, [1981] S.C.J. No. 80, [1981] 2 S.C.R. 220 (S.C.C.), cited in *MacMillan Bloedel* at para. 35, and establishing that s. 96 courts must retain jurisdiction to review the decisions of inferior courts and administrative bodies.

[75] *Quebec (Attorney General) v. Farrah*, [1978] S.C.J. No. 24, [1978] 2 S.C.R. 638 (S.C.C.). Justice Pratte for the majority wrote, "The net combined effect of [the impugned provisions] is therefore to transfer to the Transport Tribunal part of the inherent supervisory

The basic features of what *MacMillan Bloedel* formalized as the core jurisdiction test had also appeared in Laskin's C.J.C.'s dissent in *Reference re Family Relations Act (B.C.)*.[78]

In *MacMillan Bloedel*, Lamer C.J.C. went on to "discuss the contents and contours of the core jurisdiction".[79] To provide this general definition, he drew from the "seminal article on the core or inherent jurisdiction of superior courts" by I.H. Jacob in 1970.[80] From that work, Lamer C.J.C. determined that "inherent jurisdiction . . . is of paramount importance to the existence of a superior court" and comprises a "full range of powers" which "are, together, its 'essential character' or 'immanent attribute'", so that "[t]o remove any part of this core emasculates the court, making it something other than a superior court".[81] Applying this new fourth step, Lamer C.J.C. wrote of core jurisdiction as including nothing more than that which if excluded from a superior court would "maim" or "destroy" that institution.[82]

In this essay's classification of section 96 cases into sub-types, *MacMillan Bloedel* is both a core jurisdiction case, because it involves the stripping of judicial

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authority that was vested in the Superior Court at the time of Confederation" (at 656).

[76] [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 (S.C.C.). Justice Dickson for a unanimous Court expressed the preoccupation that "[t]he provincial legislature has sought to withdraw historically entrenched and important judicial functions from the superior court", as a separate consideration from the issue that the legislature had sought to "vest [those judicial functions] in one of its own tribunals" (at 748).

[77] *McEvoy v. New Brunswick (Attorney General)*, [1983] S.C.J. No. 51, [1983] 1 S.C.R. 704 (S.C.C.). The Court described the legislation under consideration as amounting to a "complete obliteration of Superior Court criminal law jurisdiction" (at 719) and did entertain the argument that "it would be permissible to alter [the superior court jurisdiction at issue] so long as the essential core of the Superior Courts' jurisdiction remained", but they decided the case based on the separate issue that the challenged legislation would impermissibly transform the inferior court into a superior court (at 721).

[78] [1982] S.C.J. No. 112, [1982] 1 S.C.R. 62 (S.C.C.). Chief Justice Laskin (dissenting in part) rejected one of the province's arguments by reasoning that it would extend too far to say that "so long as the challenged legislation does not result in turning the [inferior court] into a [superior court], the jurisdiction conferred by [the impugned provisions] may validly be assumed and exercised by the [inferior court]" (at 67). He distinguished several prior s. 96 decisions by drawing a dividing line between two notions: first, the impugned legislation may in effect be transforming the administrative body into a s. 96 court; and second, the impugned legislation may be granting a judicial power that must exclusively belong to a s. 96 court (at 68-70).

[79] *MacMillan Bloedel* at para. 15.

[80] *MacMillan Bloedel* at para. 29.

[81] *MacMillan Bloedel* at para. 30.

[82] *MacMillan Bloedel* at para. 37.

power from a section 96 court, and an inferior court case, because it involves a grant of that power to an inferior court. From the Supreme Court of Canada, I count only three core jurisdiction cases that are not otherwise inferior court cases or administrative cases.[83] The most recent of these is *Trial Lawyers 2014-SCC*,[84] a decision worth examining. There, provincial legislation increasing court fees was declared unconstitutional based solely on the core jurisdiction test.[85] *Trial Lawyers 2014-SCC* has given rise to a set of core jurisdiction cases dealing specifically with the principle of access to justice, which now arises with some frequency in appellate cases.[86] These are not classic section 96 cases as that expression is used in this essay, because they involve no impugned grant of judicial power, only an impugned removal of power. Their expansion to section 96 went on, however, to contribute to material developments in the *Court of Québec Reference*, itself a classic section 96 case.

2. A Lingering Functional Gap in the Four Steps

Not only were the various steps in a section 96 framework developed over the span of several decades, but the mechanics of those steps also underwent several clarifications during the same period. For instance, as of the 1991 *Reference re Young Offenders Act (P.E.I.)*[87] it remained unclear whether in an inferior court case the policy goals behind the impugned legislation should be considered at the first

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[83] These are (1) *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57 (S.C.C.); (2) *R. v. Ahmad*, [2011] S.C.J. No. 6, 2011 SCC 6 (S.C.C.); (3) *Trial Lawyers 2014-SCC*.

[84] *Trial Lawyers 2014-SCC*.

[85] *Trial Lawyers 2014-SCC* at para. 64.

[86] See *Taylor v. St. Denis*, [2015] S.J. No. 1, 2015 SKCA 1 (Sask. C.A.); *Butler v. Snelgrove*, [2015] N.J. No. 332, 2015 NLCA 46 (N.L.C.A.); *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2017] B.C.J. No. 1826, 2017 BCCA 324 (B.C.C.A.), leave to appeal refused [2017] S.C.C.A. No. 446 (S.C.C.); *Patel v. Regina Qu'appelle Regional Health Authority*, [2018] S.J. No. 493, 2018 SKCA 98 (Sask. C.A.), leave to appeal refused [2019] S.C.C.A. No. 54 (S.C.C.); *J. Cote & Son Excavating Ltd. v. Burnaby (City)*, [2019] B.C.J. No. 867, 2019 BCCA 168 (B.C.C.A.), leave to appeal refused [2019] S.C.C.A. No. 291 (S.C.C.); *Ma v. Zhao*, [2019] B.C.J. No. 1259, 2019 BCCA 248 (B.C.C.A.); *Janvier v. Saskatchewan (Workers' Compensation Board)*, [2021] S.J. No. 530, 2021 SKCA 170 (Sask. C.A.); *Prairies Tubulars (2015) Inc. v. Canada (President, Border Services Agency)*, [2022] F.C.J. No. 789, 2022 FCA 92 (F.C.A.), leave to appeal refused [2022] S.C.C.A. No. 286 (S.C.C.); *Poorkid Investments Inc. v. Ontario (Solicitor General)*, [2023] O.J. No. 1209, 2023 ONCA 172 (Ont. C.A.), leave to appeal refused [2023] S.C.C.A. No. 188 (S.C.C.); *British Columbia (Attorney General) v. Le*, [2023] B.C.J. No. 932, 2023 BCCA 200 (B.C.C.A.); *Wesley v. Alberta*, [2024] A.J. No. 1011, 2024 ABCA 276 (Alta. C.A.).

[87] [1990] S.C.J. No. 60, [1991] 1 S.C.R. 252 (S.C.C.).

step or the third step.[88] In *MacMillan Bloedel*, a majority of the Supreme Court demonstrated that it should be the third.[89]

Most consequential for the matter under consideration in this essay, though, are two clarifications to the mechanics of the first step given by the Supreme Court in *Sobeys Stores*. There, the province had conferred upon the Director of Labour Standards and the Labour Standards Tribunal the power to hear and determine disputes falling within the ambit of labour standards legislation.[90] The Supreme Court concluded that this was within the authority of the province,[91] based on an application of all three steps of the *Residential Tenancies* test.[92]

Before conducting that analysis, Wilson J. provided clarifications to address two matters arising in the first step of the framework: first, the breadth with which the impugned judicial power should be characterized for the historical inquiry; and second, whether "the words 'broadly conform' to Superior Court jurisdiction mean that such jurisdiction must have been exclusive to those courts at Confederation".[93]

Justice Wilson answered the second of these in the affirmative. Consequently, to establish a *prima facie* violation at the first step, it came to be required that the judicial power granted by the impugned legislation have at the time of Confederation belonged exclusively to the superior courts.[94] That is, if the impugned judicial power was shared between inferior courts and superior courts, in the sense that the "practical involvement of inferior courts [was] broadly co-extensive with the work of superior courts",[95] then "the legislation under challenge may, in some circum-

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[88] In *Reference re Young Offenders Act (P.E.I.)*, [1990] S.C.J. No. 60, [1991] 1 S.C.R. 252 (S.C.C.), La Forest J. for a minority did not think the *Residential Tenancies* test to be "fully applicable to the case at bar" (at 281), because the second and third stages of the *Residential Tenancies* test arose from administrative law cases, and are "therefore, inapplicable to an ordinary court" (at 282). Elaborating, La Forest J. explained that "[a] power or jurisdiction exercised by an ordinary court will obviously be a 'judicial power' that is the sole or central function of the body that exercises it", such that an application of the second and third steps "will simply amount to the imposition of a foreordained conclusion" (at 282). Only the two-judge minority composed of Wilson and McLachlin JJ. proceeded past the first step of the *Residential Tenancies* test (at 281), so that a majority of the Court cannot be said to have foreclosed La Forest J.'s analysis on this point.

[89] *MacMillan Bloedel* at para. 26: at the third step of the framework, the majority considered the "institutional function of the youth courts" and found the associated "policy objectives" to be "clear and laudable".

[90] *Sobeys Stores* at 250-251.

[91] *Sobeys Stores* at 282.

[92] *Sobeys Stores* at 267-282.

[93] *Sobeys Stores* at 251.

[94] *Sobeys Stores* at 258.

[95] *Sobeys Stores* at 260.

stances, be held valid" at the first step.[96] This narrowed the set of judicial powers that could engage the first step of the section 96 framework.

On the first of the two matters, Wilson J. determined that courts must follow "a strict, that is to say a narrow, approach to characterization" of the impugned judicial power at the first step.[97] As part of the instruction in *Sobeys Stores* to prefer a narrow characterization of the impugned judicial power, Wilson J. required narrowness to be measured based on "type of dispute", not "a technical analysis of remedies".[98] In principle, this countered the defender-friendly effect of the clarification on the second matter. Justice Wilson understood that in a section 96 case, in general, those defending "the legislation will no doubt advocate a more expansive view on the assumption that the broader the characterization the more likely it will be that at least some aspects of the jurisdiction will have been within the purview of inferior courts at Confederation".[99] By instructing that a narrow characterization should be adopted, Wilson J. thus expected to favour "those challenging legislation"[100] and expected to guard against "large accretions" of judicial power that would "defeat the purposes of the constitutional provision".[101]

There was, however, one problem with this. By the time *Sobeys Stores* was decided, the classic section 96 cases had almost entirely dealt with grants of judicial power by legislative schemes targeting a narrow legal subject matter, such as residential tenancies,[102] labour relations,[103] family law[104] or youth criminal conduct.[105] As a consequence of the clarifications from *Sobeys Stores* discussed above, the three-step *Residential Tenancies* test became a poor fit for a transfer away from a section 96 court of judicial powers over a fraction of many types of dispute all at

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[96] *Sobeys Stores* at 259.

[97] *Sobeys Stores* at 254.

[98] *Sobeys Stores* at 255.

[99] *Sobeys Stores* at 253.

[100] *Sobeys Stores* at 253.

[101] *Sobeys Stores* at 254.

[102] *Residential Tenancies Reference*; *Quebec (Attorney General) v. Grondin*, [1983] S.C.J. No. 78, [1983] 2 S.C.R. 364 (S.C.C.); *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] S.C.J. No. 13, [1996] 1 S.C.R. 186 (S.C.C.).

[103] *John East Iron*; *Farrell v. British Columbia (Worker's/Workmen's Compensation Board)*, [1961] S.C.J. No. 61, [1962] S.C.R. 48 (S.C.C.); *Tremblay v. Québec (Commission des Relations de Travail)*, [1967] S.C.J. No. 63, [1967] S.C.R. 697 (S.C.C.); *Tomko v. Nova Scotia (Labour Relations Board)*, [1975] S.C.J. No. 111, [1977] 1 S.C.R. 112 (S.C.C.); *Sobeys Stores*.

[104] *Adoption Reference*; *Reference re Family Relations Act (B.C.)*, [1982] S.C.J. No. 112, [1982] 1 S.C.R. 62 (S.C.C.).

[105] *Reference re Young Offenders Act (P.E.I.)*, [1990] S.C.J. No. 60, [1991] 1 S.C.R. 252 (S.C.C.); *MacMillan Bloedel*.

once. That is precisely what occurred in the *Court of Québec Reference*.

III. THE *COURT OF QUÉBEC REFERENCE*

Indeed, in the *Court of Québec Reference*, the province had increased to $85,000 the monetary limit below which the provincial inferior court, being the Court of Québec, would enjoy jurisdiction in relation to civil claims, and the province excluded the same jurisdiction from the superior court of first instance.[106] The majority of the Supreme Court of Canada characterized the impugned judicial power as "jurisdiction over civil disputes concerning contractual and extracontractual obligations".[107] Taking that broad characterization into the historical inquiry, the majority found there to be "general shared involvement" between inferior and superior courts at the time of Confederation.[108]

This could not be avoided once the majority bound itself rigidly to the guidance from *Sobeys Stores* to at the first step characterize the impugned judicial power only based on type of dispute. They excluded from that characterization any reference to the monetary ceiling for small claims, stating that "monetary relief in a quantifiable amount" relates to remedy sought rather than type of dispute.[109] This shielded from scrutiny the true controversy in the impugned transfer of judicial power in the *Court of Québec Reference*, which related primarily to the number of cases that would be diverted away from the superior courts through a change to the monetary ceiling for small claims actions.

The majority described this problem as a "functional gap" in the three-step *Residential Tenancies* test, since the first step "cannot readily be applied to a court-to-court transfer of a vast area of jurisdiction" of a kind which "have rarely been at issue in cases where the *Residential Tenancies* test was applied".[110] They considered those first three steps of the framework to "not deal effectively with the very jurisdiction-granting provisions that are the most likely to establish [prohibited parallel] courts because of their generality".[111]

Although they were unanimous in wanting to adapt the analytical framework, the Supreme Court of Canada split three ways. The majority and the Chief Justice in dissent both concluded that the first step of the section 96 framework would permit the impugned legislation.[112] They both then applied the fourth step, being the core

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[106] *Court of Québec Reference* at para. 102.

[107] *Court of Québec Reference* at para. 73.

[108] *Court of Québec Reference* at para. 76.

[109] *Court of Québec Reference* at para. 74. On this point, Wagner C.J.C. agreed: *Court of Québec Reference* at paras. 212-214 and 216.

[110] *Court of Québec Reference* at para. 77.

[111] *Court of Québec Reference* at para. 78.

[112] *Court of Québec Reference* at paras. 76 (majority) and 228 (Wagner C.J.C., dissenting).

jurisdiction test, using a novel multi-factored analysis.

They each did this in a different manner, however. Chief Justice Wagner limited himself to "three quantitative and qualitative factors" associated with the proportion, number, nature and importance of the cases which the superior courts would continue to hear and decide despite the challenged legislation.[113] He envisaged a meaning of "core jurisdiction" that would have resulted in upholding the legislation.[114] For their part, the majority included a broader range of factors at that fourth step — six in total: "the scope of the jurisdiction being granted, whether the grant is exclusive or concurrent, the monetary limits to which it is subject, whether there are mechanisms for appealing decisions rendered in the exercise of the jurisdiction, the impact on the caseload of the superior court of general jurisdiction, and whether there is an important societal objective".[115] Ultimately, the majority concluded that the legislation violated section 96[116] and was beyond the authority of the province.[117]

Penning the third and final opinion, Abella J. in dissent contemplated an update to the four-step framework[118] that would have replaced it with a flexible approach much like that used in division of powers cases involving sections 91 and 92, and according to which a challenged piece of legislation would not be invalid because "it has simply had an incidental effect on" another constitutional provision.[119] For Abella J., it was not appropriate to weigh multiple factors.[120] Instead, "the only relevant question . . . is whether the grant [of jurisdiction to an inferior court] materially impairs the 'essential character' and functions of superior courts".[121] Justice Abella would have upheld the impugned legislation whether she had subjected it to the existing four-step framework or to her novel flexible approach.[122]

Notably, the majority's manoeuvres came on the heels of reading the section 96 jurisprudence through a lens of considerable simplification, in the sense that the majority filtered out much of the jurisprudential history and mechanical subtlety discussed in Part II, above. Indeed, although they purported to preserve the pre-existing framework, the majority quite clearly envisioned a departure from "mechanical" applications of that framework, in favour of a focus on "prin-

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[113] *Court of Québec Reference* at para. 245.

[114] *Court of Québec Reference* at para. 251.

[115] *Court of Québec Reference* at para. 88.

[116] *Court of Québec Reference* at para. 141.

[117] *Court of Québec Reference* at para. 160.

[118] *Court of Québec Reference* at para. 303.

[119] *Court of Québec Reference* at para. 329.

[120] *Court of Québec Reference* at para. 330.

[121] *Court of Québec Reference* at para. 332.

[122] *Court of Québec Reference* at para. 334.

ciples".[123] To that end, and based on their manner of reading the jurisprudence, they attributed to section 96 only two "key principles", being national unity and the rule of law,[124] and they identified one "common concept" to the multiple section 96 tests, being the "prohibition against establishing parallel courts that usurp the functions reserved to superior courts".[125] This had important implications, which are explored below.

IV. IDENTIFYING THE LEGAL TEST IN THE *COURT OF QUÉBEC REFERENCE*

As the sections below explain, the majority's analysis in the *Court of Québec Reference* cannot be reconciled with the preservation of the previous four-step framework. Instead, their reasoning created a new test for classic section 96 cases: the *Court of Québec* test. This is apparent in light of two types of modification made by the majority to the fourth step of the framework: a vast expansion to its purpose and to its mechanics.

1. The Purposive Expansion

In the first noteworthy expansion of the core jurisdiction test in the fourth step of the framework, the majority in the *Court of Québec Reference* significantly broadened its purpose. That step previously only served the purpose of protecting superior courts from measures that strike at their very essence. After the *Court of Québec Reference*, it retains that purpose and additionally now serves the purpose previously arising from the classic section 96 cases alone and reflected only in the first, second and third steps, collectively: to prevent the creation of prohibited parallel courts. Consequently, the fourth step on its own now carries the purposes previously shared across the entire four-step framework.

In the *Court of Québec Reference*, the majority embarked on its analysis of the section 96 jurisprudence leaving undiscussed much of its context and subtlety, such as that laid out in Part II, above. The majority drew from that jurisprudence two key principles: "national unity and the rule of law"; and they drew one consistent purpose: to protect against the creation of prohibited parallel courts.[126] They identified this as common to the multiple tests which had "changed over the years",[127] including the *Residential Tenancies* test itself[128] as well as tests preceding the *Residential Tenancies Reference*.[129] Then, despite acknowledging that, according to its original design, the core jurisdiction test may be offended even if no

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[123] *Court of Québec Reference* at para. 70.

[124] *Court of Québec Reference* at para. 42.

[125] *Court of Québec Reference* at para. 54.

[126] *Court of Québec Reference* at para. 31.

[127] *Court of Québec Reference* at para. 70.

[128] *Court of Québec Reference* at para. 60.

[129] *Court of Québec Reference* at paras. 55-58.

parallel court is being created,[130] they reasoned that the core jurisdiction test "operates to prevent the creation of parallel courts, like the *Residential Tenancies* test also does".[131]

A more accurate analysis would not have lost sight of the manner in which section 96 serves more than one purpose. Earlier in the majority's own reasons, they correctly noted that preventing the creation of prohibited parallel courts was one purpose, "among others".[132] Elsewhere, they correctly recognized that section 96 prohibits "against creating parallel courts *or* striking at the very essence of superior courts".[133]

These are two distinct purposes. And, as discussed in Part II above, each purpose had been housed in different parts of the framework. In particular, steps one through three (the *Residential Tenancies* test) arose from the classic section 96 cases and reflected the purpose of preventing prohibited parallel courts. Separately, step four (the core jurisdiction test) arose more recently and reflected the purpose of preventing provinces from *otherwise* striking at the very essence of section 96 courts. Until the *Court of Québec Reference*, the core jurisdiction test was concerned only with the removal of the impugned judicial power from a superior court, and it was indifferent to whether that power had also been placed elsewhere, such as in a "parallel court".

While the majority expanded the fourth step of the framework with this new purpose, they also took nothing away from its original, pre-existing purpose of protecting the "essence" of section 96 courts. As the majority stated, their modified analysis in the fourth step continues to ask the following question: "Does the grant of jurisdiction impair the superior court . . . in such a way as to alter its essential nature or prevent it from playing its role under s. 96?"[134] If anything, the majority expanded even this original purpose, as discussed below in Section V.2 of this essay.

Accordingly, so far as purpose is concerned, the fourth step in the section 96 framework now makes the first three steps redundant. After the *Court of Québec Reference*, the fourth step alone is now considered to serve the entire purpose of the first three steps: to protect against the establishment of prohibited parallel courts. The majority did not stop there, however. They also endowed the fourth step with the mechanical features to usurp and replace those first three steps.

2. The Mechanical Expansion

The second noteworthy expansion by the *Court of Québec Reference* relates to the mechanics of the core jurisdiction test in the fourth step of the section 96 framework.

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[130] *Court of Québec Reference* at para. 63.

[131] *Court of Québec Reference* at para. 66.

[132] *Court of Québec Reference* at para. 31.

[133] *Court of Québec Reference* at para. 70 [emphasis added].

[134] *Court of Québec Reference* at para. 87.

On this score, the most obvious novelty is the majority's adoption of a new multi-factored balancing exercise. In doing so, the majority made two dramatic additions. They imported into the fourth step, first, an instruction to conduct a historical inquiry in a manner previously only found in step one, and second, an instruction to consider institutional context and public policy, previously found only in steps two and three.

In their first material mechanical expansion, the majority retained the limited historical aspect of the fourth step that did appear in prior jurisprudence. That is, in reasoning that section 96 was engaged in relation to the "original general jurisdiction" of superior courts, the majority drew from the "historical origins" of section 96 courts[135] at the time of Confederation.[136]

However, the majority also dramatically expanded the historical inquiry in the core jurisdiction test in the fourth step. Among the factors in the modified analysis under that step, the majority weighed the historical monetary limit of inferior small claims courts. This served as a benchmark for determining the degree to which the challenged legislation caused a departure from "the balance between the s. 96 courts and the inferior courts at the time of Confederation".[137] The majority explained this as an integral part of the test for any inferior court case involving a modification to "the general division of labour at the time of Confederation between the inferior courts and what are now the s. 96 courts".[138] The words "at the time of Confederation" in that statement necessitate a historical inquiry.

Even more telling, the majority specifically brought into the fourth step the geographic methodology for historical comparison from the first step. They affirmed that the modified step four analysis must be based on "the four founding provinces . . . as the starting point for [the] analysis".[139] This was inspired by a clarification to the first step of the framework originally made in *Sobeys Stores*:[140] "the *Residential Tenancies* test of 1867 jurisdiction should be expanded somewhat to include examination of the general historical conditions in all four original confederating provinces".[141]

Thus, rather than simply clarifying the first step of the framework to better align

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[135] *Court of Québec Reference* at para. 83.

[136] *Court of Québec Reference* at para. 84.

[137] *Court of Québec Reference* at para. 112.

[138] *Court of Québec Reference* at para. 110.

[139] *Court of Québec Reference* at para. 107.

[140] See *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] Q.J. No. 7806, 2019 QCCA 1492 at para. 107 (Que. C.A.), citing *Sobeys Stores* at 265-267.

[141] *Sobeys Stores* at 265.

with the historical threshold it was designed to establish, the majority instructed that a similar historical inquiry is now to be conducted in the modified fourth step.

In a second dramatic expansion to the mechanics of the fourth step, the majority in the *Court of Québec Reference* imported into that step an evaluation of institutional context and legislative policy objective, matters previously only considered in the second and third steps of the framework. In their multi-factored approach in the fourth step, they gave to one factor the singular role of recognizing that a legislative invasion into core jurisdiction may be permitted if it was done in pursuit of a sufficiently "important societal objective".[142]

In their application of that factor, the majority determined that in the case at hand there were no material differences in legal procedure between the judicial powers which the province sought to take from the superior court and those it sought to give to the inferior court.[143] They indicated clearly that the challenged legislation would have fared better against the section 96 challenge if it had contemplated something distinct, such as "simplified rules on the production of evidence", "[a] summary procedure", or differentiation in "the types of remedies that may be ordered".[144]

Correspondingly, in their discussion of the factor associated with the monetary limit, the majority reasoned that "there is room in the analysis for an expansion of provincial jurisdiction in response to changes in society and to pressing needs with regard to access to justice", and they explained that this "room" specifically translates to provincial freedom to legislate in order "to establish a court with provincially appointed judges".[145]

Although in the *Court of Québec Reference* itself the policy objectives of the impugned legislation did not carry the day for the province defending that legislation, this was not for lack of potency in the associated factor in the modified step four analysis. Instead, it was a consequence only of the evidence adduced in the particular case. As the majority wrote, "The pursuit of an important societal objective may lend credence to the idea of a legitimate exercise of the provincial power in relation to the administration of justice".[146] They signalled that the weight to be assigned on account of an important societal objective is material, as a general rule. They specified that "[t]he provinces must have *considerable* flexibility in what they do to address the needs of a changing society",[147] and they indicated that, had

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[142] *Court of Québec Reference* at para. 88.

[143] *Court of Québec Reference* at paras. 128-129.

[144] *Court of Québec Reference* at para. 127.

[145] *Court of Québec Reference* at para. 112.

[146] *Court of Québec Reference* at para. 126.

[147] *Court of Québec Reference* at para. 126 [emphasis added]. See also *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2022] B.C.J. No. 839, 2022 BCCA 163 (B.C.C.A.) [hereinafter "*Trial Lawyers 2022-BCCA"*] at para. 9, citing *Court of Québec Reference* at para. 248 and interpreting the *Court of Québec Reference*

the province put forward legislation that "truly enhances access to justice", this would have been "an *important* factor in determining whether a grant of jurisdiction that affects the general private law jurisdiction of the superior courts is consistent with s. 96".[148]

As a result, a court applying only the fourth step of the framework according to the example set by the *Court of Québec Reference* will find itself wielding all the essential mechanics of the first, second, and third steps. It will find in those mechanics more than enough potency to dispose of any classic section 96 case. The likely consequences of these changes are explored below.

V. CONSEQUENCES OF THE NEW *COURT OF QUÉBEC* TEST

For classic section 96 cases, two consequences flow from the *Court of Québec Reference*. First, the new test established by the majority is likely to overtake the four-step analytical framework as it existed before. Second, that new test invites the judiciary to take up a significantly expanded role in evaluating legislatures' policy choices concerning the administration of justice.

1. Usurpation of the Previous Framework

With the novel *Court of Québec* test, the Supreme Court of Canada has granted to judges in future cases the option to leave to the side the four-step framework as it stood before, with all its technicalities, and to move only to the flexible, multi-factored analysis now inhabiting step four alone. The Court has even encouraged this, by instructing a principles-oriented approach that avoids applying the four-step framework "in a purely mechanical fashion".[149] As a matter of judicial efficiency, to begin and end with the expanded fourth step may tend to be the preferred approach, because its multi-factored balancing test has all the purposive and mechanical content needed to dispose of a classic section 96 case. It can thus render a detailed discussion of the first three steps unnecessary.

Even judges wanting to follow precedent, or otherwise reaching for the predictability of the previous four-step framework, will encounter the difficulty that the fourth step must now be applied as modified by the *Court of Québec Reference*. As was argued in Part IV above, that will amount to an analysis at the fourth step largely redundant to the first three steps. Inconsistencies between the overlapping analyses will require resolution. Those first three steps, therefore, are likely to do little more than validate the result reached at the fourth step, which is to say the novel *Court of Québec* test.

This is exemplified in the only classic section 96 appellate decision to come after

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majority as not having disagreed with Wagner C.J.C.'s statements about maintaining the province's ability to "experiment with new forms of access to civil justice".

[148] *Court of Québec Reference* at para. 142 [emphasis added].

[149] *Court of Québec Reference* at para. 70.

the *Court of Québec Reference*. In *Trial Lawyers 2022-BCCA*,[150] the impugned legislative scheme had granted to the Civil Resolution Tribunal exclusive jurisdiction in motor vehicle accident claims to determine liability, damages and entitlement to accident benefits.[151] In the decision of the Supreme Court of British Columbia, released prior to the *Court of Québec Reference*, Hinkson C.J.S.C. declared this legislative scheme to be unconstitutional after an application of all three steps of the *Residential Tenancies* test.[152] In the appellate decision, given after the *Court of Québec Reference*, the Court of Appeal was unanimous in finding an error in Hinkson C.J.S.C.'s first step of the analysis.[153]

As a consequence of this, and owing to direction given in *Sobeys Stores* concerning the historical inquiry, the first step came to require additional evidence that was not in the record.[154] Rather than remit the matter for determination on that basis, however, the Court of Appeal was unanimous in simply skipping past the *Residential Tenancies* test (the first three steps) and considering that the core jurisdiction test alone (the fourth step) could determine the issue[155] — whether to allow the appeal and uphold the impugned legislation, as the majority did, or to

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[150] *Trial Lawyers 2022-BCCA*, leave to appeal refused [2022] S.C.C.A. No. 262 (S.C.C.), revg *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2021] B.C.J. No. 389, 2021 BCSC 348 (B.C.S.C.).

[151] *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2021] B.C.J. No. 389, 2021 BCSC 348 at paras. 24-25 and 27 (B.C.S.C.).

[152] *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2021] B.C.J. No. 389, 2021 BCSC 348 (B.C.S.C.). In step one of the *Residential Tenancies* test, Hinkson C.J.S.C. characterized the subject matter "as personal injury claims in tort" (at para. 126), found that this judicial power "cannot properly be seen as jurisdiction over a novel subject matter" (at para. 138), and that it "is analogous to the jurisdiction that was exercised exclusively by superior courts in three of the four confederating provinces at the time of Confederation" (at para. 259). Turning, therefore, to step two, the Chief Justice concluded that "the impugned legislation purports to grant to the CRT . . . a judicial function" (at para. 293). At step three, the Chief Justice found "that the judicial powers conferred . . . are not necessarily incidental to the Legislature's policy goals of enhancing access to justice and preserving the sustainability of the public automobile insurance system" (at para. 375), and further that the same judicial functions "are neither subsidiary nor ancillary to any general administrative functions" (at para. 391). The Chief Justice thus declared the impugned provisions to be unconstitutional (at para. 414).

[153] *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2021] B.C.J. No. 389, 2021 BCSC 348 at paras. 116 (majority) and 186 (dissent).

[154] *Trial Lawyers 2022-BCCA* at para. 130. Having found an error in relation to New Brunswick, this led to "a 2-2 'tie'" between the four confederating provinces, which would according to the Supreme Court of Canada's direction in *Sobeys Stores* require an evaluation of the situation in the United Kingdom in 1867; yet, there had been no evidence at first instance on that issue.

[155] *Trial Lawyers 2022-BCCA* at paras. 131 (majority) and 191 (dissent).

dismiss the appeal, as the dissent would have done.

Most notably, in applying the adapted fourth step of the framework, the majority of the Court of Appeal considered there to be an important societal objective,[156] and they went on to assert that this same consideration would "lead ineluctably to a conclusion" that "the scheme would be saved at step three of the *Residential Tenancies* test".[157] That comment cannot be treated as mere *obiter dicta*. As was explained in Section II.1 of this essay, and as the Supreme Court of Canada instructed in the *Court of Québec Reference* itself,[158] an impugned statute in a classic section 96 case can be upheld only after an application of both the *Residential Tenancies* test (the first three steps) and the core jurisdiction test (the final step). *Trial Lawyers 2022-BCCA* illustrates the redundancy between the *Residential Tenancies* test and the modified core jurisdiction test, and it shows the ease with which the latter can now usurp the former.

2. Expanded Judicial Supervision of Legislative Action

Moreover, as compared to the pre-existing four-step framework, the new *Court of Québec* test invites a significant expansion of the courts' role in supervising legislatures' policy choices in the administration of justice. This is apparent once two observations are made. First, the *Court of Québec* test lowered its initial threshold, in the sense that a wider range of legislative activity now engages judicial scrutiny in the name of section 96. Second, according to the *Court of Québec* test, the sole means by which a legislature may justify its impugned activities is to persuade the reviewing court of the "important societal objective" reflected in those activities.

Beginning with the threshold of the test, it is notable that although the majority in the *Court of Québec Reference* correctly identified a "functional gap" in the pre-existing four-step framework[159] and correctly located it in the first step of that framework,[160] they chose to solve this by instead modifying the fourth step, and only the fourth step.

An alternative path, which none of the three opinions in the *Court of Québec Reference* entertained, would have simply instructed that monetary ceilings may be referred to in the characterization of the impugned judicial power at the first step of the framework. This would have incrementally adjusted the threshold for the *Residential Tenancies* test no more than needed to decide the case at hand. It would also have left unchanged the separate threshold found in the core jurisdiction test at

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[156] *Trial Lawyers 2022-BCCA* at para. 167.

[157] *Trial Lawyers 2022-BCCA* at para. 168.

[158] *Reference re Code of Civil Procedure (Que.), art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 80 (S.C.C.).

[159] *Court of Québec Reference* at para. 77.

[160] *Court of Québec Reference* at para. 78.

the fourth step. An adjustment of that nature would have been quite workable. In *Sobeys Stores* itself, the majority considered "pecuniary limits" at the first step to determine the degree of "shared involvement" between the inferior and superior courts at the time of Confederation.[161]

The majority in the *Court of Québec Reference* considered itself bound in the first step to ignore monetary ceilings in characterizing the impugned transfer of judicial power, based on the instruction from *Sobeys Stores* to focus on "type of dispute" rather than "remedies".[162] Yet, an incremental adjustment to that instruction could have responded to the dilemma in the *Court of Québec Reference* without doing any damage to the logic of *Sobeys Stores* for excluding an "analysis of remedies" at the first step. That logic was simply this: "The question of new remedies for traditional causes of action is better suited to the second and third steps . . . which are specifically designed to allow the courts to consider new approaches to old problems, approaches which are more responsive to changing social conditions".[163]

In the *Court of Québec Reference*, rather than make an adjustment to the first step, the majority instead was drawn to the core jurisdiction test located in the fourth step. They recognized that it was originally developed as a backstop and reasoned that a backstop was needed for the functional gap at hand. In their view, the fourth step was first installed in the framework to address not one particular type of gap, but broadly the "risk that gaps in the *Residential Tenancies* test would undermine the role of superior courts".[164] For the majority, the fourth step reflected a general object of "better protect[ing] the constitutional status of s. 96 courts".[165] From there, it was their view that "adapting" or "modifying" the core jurisdiction test[166] was the appropriate means of responding to the dilemma in front of them.

One major effect of the majority's adaptations to this fourth step of the analysis is a lowered threshold by which legislative activity comes under judicial scrutiny in a section 96 challenge. It must be remembered that the fourth step must always be applied even where the first three steps disclose no violation of section 96. Consequently, and in light of the purposive and mechanical expansions of the fourth step, discussed in Part IV above, a lowered threshold at the fourth step alone

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[161] *Sobeys Stores* at 260-261.

[162] *Court of Québec Reference* at para. 74.

[163] *Sobeys Stores* at 255. See also *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] S.C.J. No. 13, [1996] 1 S.C.R. 186 at para. 76 (S.C.C.).

[164] *Court of Québec Reference* at para. 64. See also *Court of Québec Reference* at para. 145: "The core jurisdiction test, which we have adapted to better reflect the principles underlying s. 96, compensates for those gaps by providing an analytical framework on the basis of which it is possible to give an adequate response to problems of this nature for which no satisfactory solution can be found in the existing case law."

[165] *Court of Québec Reference* at para. 79.

[166] *Court of Québec Reference* at paras. 71 and 79.

overtakes the effect of a higher threshold at the first step.

The change in the *Court of Québec Reference* to the threshold in the fourth step is demonstrated by the contrast between the majority's approach to defining "core jurisdiction" and that of the two dissenters, Wagner C.J.C. and Abella J., who would have preserved the existing meaning of "core jurisdiction", in its narrower form. As discussed in Section II.1(c) above, according to the core jurisdiction test's initial formulation, an infringement of section 96 would be established where the superior court had been "maimed" or "destroyed" by a removal of judicial power.[167] In a marked departure from that formulation, the new *Court of Québec* test invites judicial evaluation where legislation merely has the "effect of depriving the superior courts of an aspect of"[168] their "ability to act as courts of general jurisdiction".[169]

The majority arrived at this result in the following manner. They wrote of the entire four-step framework as collectively being "simply expressions of the principles that underlie s. 96",[170] one of these principles being that "superior courts are the *primary* guardians of the rule of law".[171] Purporting to rely on *Trial Lawyers 2014-SCC*, they stated: "As this Court noted in *Trial Lawyers*, '[t]he resolution of these disputes and resulting determination of issues . . . are central to what the superior courts do . . . To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96'".[172] This led directly to their conclusion that superior court core jurisdiction includes the "ability to act as courts of general jurisdiction".[173] They expressly described the *Trial Lawyers 2014-SCC* decision as having "reiterated" that proposition.[174]

A closer look reveals, however, that this is a significant departure from the section 96 jurisprudence, grounded in an imprecise treatment of the principle of the rule of law. Specifically, although the majority in the *Court of Québec Reference* recognized that there are "three fundamental facets of the rule of law",[175] when they drew from *Trial Lawyers 2014-SCC*, they commingled two of these facets and added one of them to the formulation of the principles underlying the fourth step of the section 96 framework, without regard to whether that facet is actually engaged according to the facts of the case.

The first facet of the rule of law, as the majority stated in the *Court of Québec*

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[167] *MacMillan Bloedel* at para. 37.

[168] *Court of Québec Reference* at para. 80.

[169] *Court of Québec Reference* at para. 82.

[170] *Court of Québec Reference* at para. 70.

[171] *Court of Québec Reference* at para. 50 [emphasis in original].

[172] *Court of Québec Reference* at para. 82, citing *Trial Lawyers 2014-SCC* at para. 32.

[173] *Court of Québec Reference* at para. 82.

[174] *Court of Québec Reference* at para. 69.

[175] *Court of Québec Reference* at para. 47.

Reference, is "equality of all before the law".[176] This engages the principle that "the law is supreme over the acts of both government and private persons", without exception,[177] and it requires "access to a court of competent jurisdiction in order to vindicate" any person whose legal entitlements are violated.[178] Equality of all before the law is offended if some are arbitrarily prevented access to courts. The second facet of the rule of law involves "the creation and maintenance of an actual order of positive laws",[179] which includes "the development of the common law".[180]

In *Trial Lawyers 2014-SCC*, the challenge was taken against a legislated increase to court fees, which had amounted to "legislation which effectively denies people the right to take their cases to court",[181] that is, to *any* court, superior or inferior. In the *Court of Québec Reference*, the challenged legislation, by contrast, transferred a set of legal disputes from a superior court to an inferior court. Unlike in *Trial Lawyers 2014-SCC*, the facts of the *Court of Québec Reference* could only engage the law-making facet of the rule of law, not the access to justice facet. This is because there was no indication in the *Court of Québec Reference* that the challenged legislation would cause particular disputes to lose a forum for adjudication altogether.[182] In their respective dissents, neither Abella J.[183] nor Wagner C.J.C.[184] fell into this inaccuracy.

Only the narrower pre-existing meaning of "core jurisdiction", which would have

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[176] *Court of Québec Reference* at para. 47.

[177] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 at para. 71 (S.C.C.), citing *Re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 at 748 (S.C.C.).

[178] *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214 at 229 (S.C.C.); see also *Trial Lawyers 2014-SCC* at paras. 38-40.

[179] *Court of Québec Reference* at para. 47.

[180] *Trial Lawyers 2014-SCC* at para. 38, citing *Hryniak v. Mauldin*, [2014] S.C.J. No. 7, 2014 SCC 7 at para. 26 (S.C.C.).

[181] *Trial Lawyers 2014-SCC* at para. 40.

[182] In the *Court of Québec Reference*, engagement with the subject of suitable judicial forum was limited to the province's assertion that "the increase in the Court of Québec's monetary ceiling facilitates access to justice", in relation to which the majority stated they could not readily draw a conclusion from the evidence provided: *Court of Québec Reference* at para. 128.

[183] *Court of Québec Reference* at para. 300. Justice Abella reasoned that the rule of law may be maintained if jurisdiction historically held by s. 96 courts is instead "assigned to [another] competent forum".

[184] *Court of Québec Reference* at para. 246. The Chief Justice similarly left open that a large number of cases could be decided by inferior courts. He recognized that the principle of the rule of law did not go further than to require the s. 96 courts to maintain powers over a sufficient "volume", "proportion", and "varie[ty]" of cases for the s. 96 courts "to state and develop the civil law in Quebec and the common law in the other provinces".

been preserved by the dissenters in the *Court of Québec Reference*, could have allowed the fourth step to remain a singular inquiry. Once the majority expanded that meaning, it became inevitable that they would require the fourth step of the framework to take on two stages: one to deploy a low initial threshold for identifying legislative encroachments into section 96, and another to then separate those encroachments that are justified from those that are not. Mechanically, the majority accomplished this by requiring in the fourth step a balancing exercise that weighs the degree of encroachment against the degree of justification.[185] As they stated of their modified core jurisdiction test: "It must first be determined whether one of the attributes of the superior courts' core jurisdiction is affected. If so, it must then be determined whether the legislation . . . impermissibly invades that core jurisdiction".[186]

In sum, the first stage in this new scheme of analysis represents a lower threshold for engaging judicial scrutiny. Once that low threshold is reached, the *Court of Québec* test proceeds to the second stage, a balancing exercise between the degree of the legislative infringement into section 96 and the degree to which the legislature has earned "flexibility" to permit that infringement.[187] Of the six factors identified and weighed by the majority in the *Court of Québec Reference*, five can only be relevant to the degree of infringement. These are the scope of jurisdiction being granted,[188] whether the grant is exclusive or concurrent,[189] the monetary limit associated with the jurisdiction granted,[190] appeal mechanisms from decisions made under that jurisdiction,[191] and impact on the superior court's caseload.[192]

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[185] *Court of Québec Reference* at para. 132.

[186] *Court of Québec Reference* at para. 80.

[187] *Court of Québec Reference* at para. 126.

[188] *Court of Québec Reference* at para. 98 ("The more vast the granted jurisdiction is, the more likely it is that the provincial court will resemble a superior court of general jurisdiction").

[189] *Court of Québec Reference* at para. 101 (In a concurrent rather than an exclusive grant of judicial power to an inferior court, "[t]he superior courts' role is . . . not undermined to the same extent").

[190] *Court of Québec Reference* at para. 110 (An increase in the historical monetary limit for actions to fall within the jurisdiction of an inferior court "would suggest that the superior courts of general jurisdiction have been deprived of part of the role they have always played").

[191] *Court of Québec Reference* at para. 121 ("If . . . there is a right to appeal directly to the provincial court of appeal, then there is no hierarchical distinction between the [inferior court and] the superior court of general jurisdiction", which "would suggest that the [inferior court] functions as a parallel court").

[192] *Court of Québec Reference* at para. 124 (Even where an impugned grant of jurisdiction to an inferior court "does not necessarily deprive the superior court of all forms of involvement in that area of jurisdiction", "the impact of the grant on the caseload retained

A legislature defending against a section 96 challenge will make submissions relating to these five factors, but the best it may hope for in those arenas is to establish a minor, rather than a major, infringement of section 96. The legislature then has at its disposal only one means of justifying that infringement. That is the sixth factor: the importance of the societal objective behind the impugned legislation. As the majority put it in the *Court of Québec Reference*, this factor "may lend credence to the idea of a legitimate exercise of [legislative authority] in relation to the administration of justice", recognizing that legislatures "must have considerable flexibility in what they do to address the needs of a changing society".[193]

Accordingly, in a manner not previously seen in the section 96 jurisprudence, the new *Court of Québec* test features a lowered threshold to engage judicial scrutiny, and that scrutiny centres on a judicial evaluation of the legislature's policy choices.

VI. CONCLUSION

In the *Court of Québec Reference*, the majority's departures from prior jurisprudence amount to a dramatic change in the analytical framework for classic section 96 cases. There is a touch of irony to the likely effect of this: in a decision focused on determining whether a provincial legislature had created a parallel court to usurp a section 96 court, the *Court of Québec Reference* has likely created a new parallel test fated to usurp the *Residential Tenancies* test of 1981 — in contradiction to the majority's express intentions.[194]

If one follows what the Court actually did in 2021, rather than what they say they did, one finds a novel *Court of Québec* test. This is a change to prior jurisprudence not accurately described by the majority, but more accurately as an affirmative response to Abella J.'s invitation to "consider replacing" the existing test.[195] The precise manner in which the pre-existing test was replaced will be illuminated in future cases. It should not escape notice, however, that the new *Court of Québec* test tempts courts with a significantly expanded latitude to review and either approve or disallow the policy choices of legislatures over the administration of justice.

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by the superior court of general jurisdiction . . . makes it possible to draw conclusions as to whether . . . a parallel court has been created").

[193] *Court of Québec Reference* at para. 126.

[194] *Court of Québec Reference* at para. 144 [emphasis in original]: "The multi-factored analysis we are adopting here is not *intended to replace the current law*", including the *Residential Tenancies* test.

[195] *Court of Québec Reference* at para. 303.