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| cid:image001.jpg@01D72252.19B69DE0  **SUPREME COURT OF CANADA** | | | |
| **Citation:** Reference re *Code of Civil Procedure* (Que.), art. 35, 2021 SCC 27, [2021] 2 S.C.R. 291 | |  | **Appeal Heard:** September 24, 2020  **Judgment Rendered:** June 30, 2021  **Docket:** 38837 |
| **Between:**  **Conférence des juges de la Cour du Québec**  Appellant  and  **Chief Justice, Senior Associate Chief Justice and**  **Associate Chief Justice of the Superior Court of Quebec**  Respondents  - and -  **Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Alberta, Conseil de la magistrature du Québec, Canadian Association of Provincial Court Judges, Organisme d’autoréglementation du courtage immobilier du Québec, Canadian Council of Chief Judges, Trial Lawyers Association of British Columbia and Canadian Superior Courts Judges Association**  Interveners  **And Between:**  **Attorney General of Quebec**  Appellant  and  **Chief Justice, Senior Associate Chief Justice and**  **Associate Chief Justice of the Superior Court of Quebec**  Respondents  - and -  **Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Conseil de la magistrature du Québec, Canadian Association of Provincial Court Judges, Organisme d’autoréglementation du courtage immobilier du Québec, Conférence des juges de la Cour du Québec, Canadian Council of Chief Judges, Trial Lawyers Association of British Columbia and Canadian Superior Courts Judges Association**  Interveners  **And Between:**  **Conseil de la magistrature du Québec**  Appellant  and  **Chief Justice, Senior Associate Chief Justice and**  **Associate Chief Justice of the Superior Court of Quebec**  Respondents  - and -  **Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Alberta, Canadian Association of Provincial Court Judges, Organisme d’autoréglementation du courtage immobilier du Québec, Conférence des juges de la Cour du Québec, Canadian Council of Chief Judges, Trial Lawyers Association of British Columbia and Canadian Superior Courts Judges Association**  Interveners  **And Between:**  **Canadian Association of Provincial Court Judges**  Appellant  and  **Chief Justice, Senior Associate Chief Justice and**  **Associate Chief Justice of the Superior Court of Quebec**  Respondents  - and -  **Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Alberta, Conseil de la magistrature du Québec, Organisme d’autoréglementation du courtage immobilier du Québec, Conférence des juges de la Cour du Québec, Canadian Council of Chief Judges, Trial Lawyers Association of British Columbia and Canadian Superior Courts Judges Association**  Interveners  **And Between:**  **Chief Justice, Senior Associate Chief Justice and**  **Associate Chief Justice of the Superior Court of Quebec**  Appellants  and  **Attorney General of Quebec**  Respondent  - and -  **Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Conseil de la magistrature du Québec, Canadian Association of Provincial Court Judges, Organisme d’autoréglementation du courtage immobilier du Québec and Conférence des juges de la Cour du Québec**  Interveners  **Official English Translation:**Reasons of Côté and Martin JJ. and reasons of Wagner C.J.  **Coram:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Martin JJ. | | | |
| **Joint Reasons for Judgment:**  (paras. 1 to 161) | Côté and Martin JJ. (Moldaver and Karakatsanis JJ. concurring) | | |
| **Reasons Dissenting in Part:**  (paras. 162 to 258) | Wagner C.J. (Rowe J. concurring) | | |
| **Dissenting Reasons:**  (paras. 259 to 336) | Abella J. | | |

**IN THE MATTER OF a 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*,** **CQLR, c. C‑25.01, 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**

Conférence des juges de la Cour du Québec Appellant

v.

Chief Justice, Senior Associate Chief Justice and

Associate Chief Justice of the Superior Court of Quebec Respondents

and

Attorney General of Canada,

Attorney General of Ontario,

Attorney General of Quebec,

Attorney General of British Columbia,

Attorney General of Alberta,

Conseil de la magistrature du Québec,

Canadian Association of Provincial Court Judges,

**Organisme d’autoréglementation du courtage immobilier du Québec,**

Canadian Council of Chief Judges,

Trial Lawyers Association of British Columbia and

Canadian Superior Courts Judges Association Interveners

‑ and ‑

Attorney General of Quebec Appellant

v.

Chief Justice, Senior Associate Chief Justice and

Associate Chief Justice of the Superior Court of Quebec Respondents

and

Attorney General of Canada,

Attorney General of Ontario,

Attorney General of British Columbia,

Attorney General of Alberta,

Conseil de la magistrature du Québec,

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**Organisme d’autoréglementation du courtage immobilier du Québec,**

Conférence des juges de la Cour du Québec,

Canadian Council of Chief Judges,

Trial Lawyers Association of British Columbia and

Canadian Superior Courts Judges Association Interveners

‑ and ‑

Conseil de la magistrature du Québec Appellant

v.

Chief Justice, Senior Associate Chief Justice and

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Attorney General of Canada,

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Canadian Association of Provincial Court Judges Appellant

v.

Chief Justice, Senior Associate Chief Justice and

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and

Attorney General of Canada,

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Conférence des juges de la Cour du Québec,

Canadian Council of Chief Judges,

Trial Lawyers Association of British Columbia and

Canadian Superior Courts Judges Association Interveners

‑ and ‑

Chief Justice, Senior Associate Chief Justice and

Associate Chief Justice of the Superior Court of Quebec Appellants

v.

Attorney General of Quebec Respondent

and

Attorney General of Canada,

Attorney General of Ontario,

Attorney General of British Columbia,

Attorney General of Alberta,

Conseil de la magistrature du Québec,

Canadian Association of Provincial Court Judges,

**Organisme d’autoréglementation du courtage immobilier du Québec and**

Conférence des juges de la Cour du Québec Interveners

**Indexed as:** Reference re *Code of Civil Procedure* (Que.), art. 35

2021 SCC 27

File No.: 38837.

2020: September 24; 2021: June 30.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Martin JJ.

on appeal from the court of appeal for quebec

*Constitutional law — Courts — Provincial jurisdiction over administration of justice — Role of superior courts — Exclusive monetary jurisdiction over civil claims for less than $85,000 granted to Court of Québec by provincial legislature — Whether grant of that exclusive jurisdiction is constitutional* *— Constitution Act, 1867, ss. 92(14), 96 — Code of Civil Procedure, CQLR, c. C‑25.01, art. 35 para. 1.*

On January 1, 2016, art. 35 para. 1 of Quebec’s new *Code of Civil Procedure* came into force. This provision grants the Court of Québec exclusive jurisdiction over all civil disputes in which the value of the subject matter or the amount being claimed is less than $85,000. The Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec filed an originating application seeking a declaratory judgment of unconstitutionality of art. 35 para. 1 *C.C.P.*in the Superior Court. In their submission, the provision is incompatible with s. 96 of the *Constitution Act, 1867*, because its effect is to deny Quebec litigants the right to file any civil claim in the Superior Court in which the value of the subject matter of the dispute is less than $85,000, thereby preventing the Superior Court from stating and advancing the law with respect to such claims. They also contested the appellate jurisdiction granted to the Court of Québec with respect to certain administrative decisions on the basis that the requirement of deference recognized in the case law is incompatible with the superior courts’ power of judicial review.

In response to those legal proceedings, the Quebec government filed with the Court of Appeal, by order in council, a notice of reference submitting two questions to it: (1) Is art. 35 para. 1 *C.C.P.*valid with regard to s. 96 of the *Constitution Act, 1867*? and (2) Is the application of the obligation of judicial deference, which characterizes the application for judicial review, to administrative appeals to the Court of Québec compatible with s. 96 of the *Constitution Act,1867*?

On the first question, the Court of Appeal concluded that art. 35 *C.C.P.* is unconstitutional because it infringes on the core jurisdiction of the Superior Court to adjudicate certain substantial civil disputes. On the second question, however, it was of the view that applying the obligation of judicial deference to administrative appeals to the Court of Québec is compatible with s. 96. This is because the Superior Court retains its full superintending and reforming power over administrative decisions and decisions of inferior tribunals as well as its fundamental role as the guardian of an independent and unified system of justice in Canada. The Conférence des juges de la Cour du Québec, the Conseil de la magistrature du Québec and the Canadian Association of Provincial Court Judges, which were interveners in the Court of Appeal, and the Attorney General of Quebec appeal to the Court as of right on the first question. The Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec, who also intervened in the Court of Appeal, appeal to the Court as of right on the second question.

*Held* (Wagner C.J. and Rowe J. dissenting in part and Abella J. dissenting): The appeals should be dismissed.

*Per* Moldaver, Karakatsanis, Côté and Martin JJ.: Article 35 para. 1 *C.C.P.*is unconstitutional. The monetary limit of the jurisdiction granted to the Court of Québec is too high when considered in its historical and institutional contexts. Because this grant has the effect of transforming the Court of Québec into a prohibited parallel court, the transfer of jurisdiction contemplated by art. 35 para. 1 *C.C.P.* exceeds the limits established by s. 96 of the *Constitution Act, 1867*.The question concerning the Court of Québec’s application of the obligation of judicial deference when it hears an appeal from certain administrative decisions does not need to be answered, since it is now moot as a result of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, and the coming into force of s. 83.1 of the Quebec *Courts of Justice Act*.

The purpose of s. 96 of the *Constitution Act, 1867* is to give effect to the compromise reached at Confederation by protecting the special status of the superior courts of general jurisdiction as the cornerstone of Canada’s unitary justice system. The principles of national unity and the rule of law are central to this organization of the judiciary.

Protecting the superior courts’ status reinforces the national character of the Canadian judicial system. The superior courts form a network of related courts whose role is to unify and ensure the uniformity of justice in Canada. Protecting the essence of the superior courts thus preserves uniformity throughout the country in the judicial system.

The rule of law is maintained through the separation of judicial, legislative and executive functions. This separation allows the courts to implement the three fundamental facets of the rule of law: equality of all before the law, the creation and maintenance of an actual order of positive laws, and oversight of the exercise of public powers. Historically, the superior courts had primary responsibility for this task. Thus, in order to preserve the superior courts’ role as the cornerstone of the judicial system, they must be able to continue acting as primary guardians of the rule of law. This role falls to them because they are ideally placed to ensure the maintenance of the rule of law. Because of their independence and national character, they are best suited to resolving disputes over the division of powers between the provinces and the federal government and ensuring that government actions do not conflict with the fundamental rights of citizens. Moreover, the superior courts’ existence and status enjoy constitutional protection against legislative interference. Subject to constitutional guarantees of judicial independence, legislatures may abolish courts with provincially appointed judges or seriously fetter their powers without falling afoul of the Constitution, whereas superior courts are constitutionally protected from such legislative interference. Only the superior courts have constitutionally protected inherent powers that flow from their very nature, and the particular purpose of those powers is to enable the superior courts to ensure the maintenance of the rule of law in Canada’s legal system. Finally, the superior courts have residual jurisdiction as courts of original general jurisdiction, meaning they may — without statutory authorization — hear any matter that has not been assigned to a statutory court, and this provides them with a comprehensive view of the law, allowing them to preserve the coherence of the judicial system and set its overall directions.

To ensure s. 96 of the *Constitution Act, 1867* can play its role to the fullest extent and achieve its purpose, the Court has developed a number of tests over the years in accordance with the living tree doctrine. The jurisprudence on s. 96 must thus not cause judicial functions to be frozen in an 1867 mould, and adaptations must be permitted to allow the legislatures scope to deal effectively with emerging social problems and concerns. However, despite this process of liberalization that has made it possible for s. 96 to be adapted to modern realities, the Court has consistently reiterated the prohibition against establishing parallel courts that usurp the functions reserved to superior courts, as such parallel courts would eviscerate the protection afforded by s. 96.

In *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714,the Court articulated the three‑step test that limits the granting of power or jurisdiction over a type of dispute where, at the time of Confederation, the power or jurisdiction came exclusively or primarily within the remit of the superior courts. According to this test, it must first be determined whether the transferred jurisdiction conforms to a jurisdiction that was dominated by superior, district or county courts at the time of Confederation. If so, it must be asked whether the jurisdiction in question was exercised in the context of a judicial function and, if the answer is yes, whether the jurisdiction is either subsidiary or ancillary to an administrative function or necessarily incidental to the achievement of a broader policy goal of the legislature.

Before a court proceeds with the first step of the test, it must characterize the jurisdiction at issue. In this case, the jurisdiction granted to the Court of Québec by art. 35 para. 1 *C.C.P.* must be characterized as one over civil disputes concerning contractual and extracontractual obligations. While this characterization is not narrow as required by *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238, its generality is a product of the expansive language of art. 35 para. 1 *C.C.P.*

The result of applying the first step of the test to this case is that there was a general shared involvement or a meaningful concurrency of power in the area of jurisdiction at issue: three of the four founding provinces’ inferior courts had, at the time of Confederation, sufficient practical involvement in matters relating to contractual and extracontractual obligations. Accordingly, the *Residential Tenancies* test does not lead to the conclusion that art. 35 para. 1 *C.C.P.* is unconstitutional with respect to the types of disputes in question. It is therefore unnecessary to proceed to the second and third steps.

A characterization like the one required by the provision at issue inappropriately favours a finding of general shared involvement, which leads to a rather strange result: the broader a grant of jurisdiction, the greater the chance that it will escape the restrictions of the *Residential Tenancies* test. Thus, even though it was developed to prohibit the creation of parallel courts, that test does not deal effectively with the very jurisdiction‑granting provisions that are the most likely to establish such courts because of their generality. This is why such a grant requires a tailored analytical framework for the purpose of determining whether a parallel court that undermines the role of the superior courts has been created.

It is therefore necessary to apply a second test, the core jurisdiction test adopted in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, which must be adapted to better reflect the principles underlying s. 96. This second test aims to do more than simply protect historical jurisdiction, as its purpose is to determine whether a grant of jurisdiction infringes on the superior courts’ core jurisdiction either through an alteration of their essential nature or because they are prevented from playing their central role conferred by s. 96. Depending on the circumstances, there are various factors that can be helpful when it comes to determining whether, by granting a jurisdiction to a court with provincially appointed judges, a legislature has created a prohibited parallel court that impairs the superior court by preventing it from playing its constitutional role.

The core jurisdiction of the superior courts includes their ability to act as courts of original general jurisdiction, that is, to hear and determine matters not exclusively assigned by law to other courts. It therefore encompasses, by necessary implication, general jurisdiction over private law matters, which must be accompanied by a subject‑matter jurisdiction that is broad enough to preserve the superior courts’ role in providing jurisprudential guidance on private law. This requires significant involvement in the resolution of disputes falling under the most fundamental branches of private law, such as property law, the law of succession and the law of obligations. A province may assign portions or offshoots of these fields to courts whose judges it appoints, but cannot limit the superior court’s involvement significantly without contravening s. 96.

In this case, the weighing of the six relevant factors leads to the conclusion that the grant to the Court of Québec of exclusive jurisdiction over civil claims for less than $85,000 prevents the Quebec Superior Court from playing its role under s. 96 in cases concerning private law matters.

First of all, the scope of the jurisdiction granted to the Court of Québec is indicative of a significant encroachment on the general private law jurisdiction of the superior courts of general jurisdiction. Article 35 para. 1 *C.C.P.* grants to the Court of Québec almost the entirety of the law of obligations, the real heart of private law, for claims of less than $85,000. Based on its scope and because of the fundamental nature of the field of law in question, the block of jurisdiction granted to the Court of Québec is unquestionably similar to the general private law jurisdiction exercised by the superior courts of general jurisdiction.

The exclusivity of the transfer accentuates the encroachment on the core jurisdiction of the superior courts. In this case, civil suits concerning contractual and extracontractual matters for less than $85,000 have been removed from the Superior Court’s jurisdiction, thereby undermining its role as the cornerstone of a unitary system of justice. The role left to the Quebec Superior Court in this field is minimal in comparison with the role of superior courts elsewhere in Canada.

The monetary ceiling of less than $85,000 fixed by art. 35 para. 1 *C.C.P.*represents an increase of approximately 29 percent over the historical ceiling of $100, which corresponds in today’s dollars to an amount of between $63,698 and $66,008. It is true that this increase is not clearly disproportionate to the historical ceiling, and the adopted amount can reasonably be connected to that ceiling insofar as it falls into a similar range. However, a monetary limit is merely one of several factors to weigh, and it cannot be determinative in itself. It must therefore be analyzed in its context and in light of the other factors.

The fact that there is no accessible appeal mechanism that would enable the superior court of general jurisdiction to review decisions of the Court of Québec reinforces the conclusion that the two courts are parallel. This means that there is no hierarchical distinction between the two courts and the superior court of general jurisdiction has no sway over decisions of the court with provincially appointed judges. Furthermore, given that the threshold for an appeal as of right is fixed at $60,000, litigants who wish to have decisions of the Court of Québec reviewed must, in most cases, go through a screening process in order to obtain leave to appeal. The Court of Québec’s decisions are thus, to some extent, more shielded from appellate review than those of the Superior Court. This factor suggests that art. 35 para. 1 *C.C.P.* transforms the Court of Québec into a prohibited parallel court that undermines the role of the superior court of general jurisdiction.

Finally, the statistical evidence produced in this case does not make it possible to determine with certainty that art. 35 para. 1 *C.C.P.* has only a minimal impact on the Superior Court’s caseload in the area of obligations. Similarly, no evidence was tendered to show that a ceiling of less than $85,000 is needed in order to achieve an important societal objective such as promoting access to justice.

In its current form, therefore, art. 35 para. 1 *C.C.P.* is not valid with regard to s. 96, given that it encroaches impermissibly on the role the Constitution reserves to the superior court of general jurisdiction.

*Per* WagnerC.J. and Rowe J. (dissenting in part): The appeals relating to the first question should be allowed, but the appeal relating to the second question should be dismissed. Article 35 *C.C.P.*is not contrary to s. 96 of the *Constitution Act, 1867*. When properly characterized in terms of its subject matter, the jurisdiction conferred by art. 35 *C.C.P.*on the Court of Québec is civil jurisdiction over contractual and extracontractual obligations. This jurisdiction was not vested exclusively in the s. 96 courts at the time of Confederation. Moreover, art. 35 *C.C.P.*does not remove from the Quebec Superior Court any power that is within its core jurisdiction.

Sections 96 and 92(14) of the *Constitution Act, 1867*, taken together, reflect one of the important compromises reached by the Fathers of Confederation with respect to the administration of justice in Canada. On the one hand, s. 92(14) gives each province the power and responsibility to legislate in relation to the administration of justice, including for the purpose of creating, transforming or abolishing judicial offices. The provinces’ power is a wide one that gives them a great deal of flexibility, allowing them, among other things, to organize their courts in a manner that favours access to justice and strengthens public confidence in the judiciary while at the same time taking their specific needs and challenges into account. On the other hand, this provincial power is subject to what s. 96 subtracts in favour of Parliament, including the power to appoint the judges of the superior courts in each province. This power of appointment implicitly limits provincial competence to endow a provincial tribunal with the powers of s. 96 courts. However, it does not follow that s. 96 freezes the civil jurisdiction of the inferior courts at what it was at the time of Confederation. The scope of s. 96 remains limited to what is necessary to ensure that the underlying objectives of the Confederation compromise are achieved, and primarily the objective of ensuring a unified judicial presence throughout Canada. Section 96 should therefore not be given an overly broad scope that would unduly limit the provinces’ ability to address complex and emerging legislative challenges related to the administration of justice.

The s. 96 analytical framework has two stages, which are concerned with the historical jurisdiction and the core jurisdiction of the superior courts. In accordance with *Residential Tenancies*, the first stage of the s. 96 analytical framework is to determine whether the grant of jurisdiction in question is permissible. The second stage is to decide whether the Superior Court’s jurisdiction can be ousted, that is, whether an exclusive grant of jurisdiction is permissible.

The analytical framework for the historical jurisdiction of the superior courts consists of a three‑step analysis that serves to determine the constitutionality of a provincial grant of jurisdiction. The first step, the historical test, involves answering the following question: Does the impugned power or jurisdiction broadly conform to an exclusive power or jurisdiction exercised by the superior, district or county courts at the time of Confederation? In the application of this test, all courts that existed in pre‑Confederation Canada must be considered, and not only those of the province in question. If the impugned jurisdiction was exercised concurrently by the superior and inferior courts at the time of Confederation, it must be determined whether the inferior courts had a general shared involvement or a meaningful concurrency of power in this regard. If so, the grant will be considered valid under the historical test. On the other hand, if the jurisdiction was exclusive to the superior courts, then it is necessary to proceed to the second and third steps of the analytical framework.

The application of the historical test must begin with a proper characterization of the jurisdiction in issue. The characterization of the impugned jurisdiction must go beyond a technical analysis of remedies, it must not be focused on the particular remedy sought, and its effect must not be to freeze the jurisdiction of the inferior courts at what it was in 1867. In addition, the allegedly exclusive nature of the jurisdiction cannot be included in its characterization. If a grant of jurisdiction satisfies both stages of the s. 96 analytical framework, then it can be exclusive. The exclusivity of the grant therefore results from the fact that both stages are met. It cannot be allowed to influence the analysis by being included in the characterization prematurely.

A proper characterization of the jurisdiction in issue must be focused rather on the type of dispute, the area of jurisdiction and the subject‑matter of the decision. This is a crucial question, as the manner in which the jurisdiction in issue is characterized can be determinative in the application of the historical test. Monetary limits are only one factor in the overall assessment among several others, including the geographic reach of the jurisdiction and the range of disputes the court could decide. There are two additional factors for assessing the extent of the courts’ shared involvement in exercising the jurisdiction in question, namely the percentage of the population that would have used the inferior courts and the frequency with which disputes amenable to their process arose. Depending on the context, certain factors will have more weight than others.

The second stage of the s. 96 analytical framework, that is, the analysis of the core jurisdiction of the superior courts, requires that two questions be answered. First, is the power in question within the core jurisdiction of the superior courts? Second, does the law have the effect of removing the power from their core jurisdiction?

The core jurisdiction of the superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. This jurisdiction is therefore a very narrow one which includes only critically important jurisdictions. Removing such powers from a superior court would, in other words, make it something other than a superior court and deprive it of its essential character. Section 96 of the *Constitution Act, 1867* gives the superior courts a core jurisdiction that allows them to resolve disputes between individuals and decide questions of private and public law. This power is meaningful only if the superior courts, as courts of original general jurisdiction, have substantial jurisdiction that allows them to state and develop the civil law in Quebec and the common law in the other provinces. The question is therefore not whether the superior court can still adjudicate substantial civil disputes, but rather whether its jurisdiction in this regard is substantial enough that it is capable of ensuring this development.

Three quantitative and qualitative factors are relevant in determining whether a statutory provision removes from a superior court part of its core jurisdiction in matters of private law: (a) the impact on the number of cases that the superior court continues to deal with; (b) the impact on the proportion of cases within the superior court’s jurisdiction compared with those within the jurisdiction of a provincially constituted court; (c) the impact on the nature and importance of the cases within the superior court’s jurisdiction. As long as the superior courts continue to hear a volume of cases that is sufficient in number and proportion and varied enough in nature and importance that they are able to state and develop the civil law in Quebec and the common law in the other provinces, they will, as a result, continue to play their unifying role in Canada’s constitutional and judicial system. Under such conditions, the legislatures can, without infringing on the superior courts’ core jurisdiction in matters of private law, confer subject‑matter jurisdiction on provincially constituted courts to empower them to hear a certain number of civil claims.

In this case, the analysis of the historical test shows that the vast majority — at least 80 percent — of civil disputes in pre‑Confederation Canada, with the exception of Lower Canada, came before the inferior courts. Although that jurisdiction was subject to monetary limits in several matters, it nevertheless indicates that there was significant coextensive involvement by the inferior courts in contractual and extracontractual matters. With regard to the Superior Court’s core jurisdiction in civil matters, the application of the three factors shows that the Superior Court continues to deal with a large number of civil cases, that the number of cases opened at the Superior Court in comparison with those opened at the Court of Québec remains relatively stable, and that the Superior Court continues to hear claims on a variety of subjects as well as the judicial applications that are the most substantial in monetary terms. Article 35 *C.C.P.*therefore does not have the effect of removing from the Quebec Superior Court its jurisdiction over substantial civil claims.

*Per* AbellaJ. (dissenting): The appeal should be allowed. Article 35 *C.C.P.*is valid with regard to s. 96 of the *Constitution Act, 1867*. Both the superior and provincial courts shared jurisdiction over substantial monetary claims at Confederation and the expansion of the jurisdiction of the provincial Court of Québec by $15,000, from $70,000 to $85,000, does not impair the core of the Superior Court’s jurisdiction in any way.

Section 92(14) of the *Constitution Act, 1867* empowers provincial governments to create provincial courts and to appoint their judges. Since Confederation, provincial courts have been a key component of Canada’s justice system, playing an indispensable role in the development of the law. The significance of the provincial courts in Canada today cannot be overstated. Parties appear before provincial court judges to have their liberty or livelihood or support and custody rights determined. Provincial courts combine with the superior courts to form a strong network of courts for litigants across Canada.

Nonetheless, over the years, the Court has occasionally limited the provinces’ authority under s. 92(14) because s. 96 guarantees that some jurisdiction must remain in the hands of federally appointed superior courts. In an effort to operationalize the jurisprudence’s approach to resolving the tension between ss. 92(14) and 96, a three‑stage test was developed in *Residential Tenancies* for analyzing the validity of a provincial grant of jurisdiction. It is essentially an historical inquiry. The first stage of the test asks whether superior, district or county courts at the time of Confederation had exclusive jurisdiction over the subject matter now being given to the provincial court. If provincial courts in a majority of the four original provinces had a practical involvement in adjudicating cases related to the particular subject matter at Confederation, there could be no finding of exclusive jurisdiction for s. 96 courts, since the jurisdiction was shared at the time. If the jurisdiction at issue was exclusively held by a s. 96 court at Confederation, the second stage of the analysis asks whether the provincial body is acting in a judicial capacity. If it is, the third stage of the analysis is triggered, which involves the assessment of the provincial court or tribunal in its institutional context in order to determine whether it is exercising a judicial power that is merely subsidiary or ancillary to general administrative functions, or one that is necessary to achieve a broad policy goal. In either of these circumstances, the grant is constitutionally permissible.

A layer was added to the test in *MacMillan Bloedel*,when the Court concluded that the legislature may not, even if its grant of jurisdiction passed the *Residential Tenancies* test, reduce or impair the core of superior court jurisdiction. The focus of this new requirement was determining whether a grant of exclusivejurisdiction to a provincial body frustrated the ability of superior courts to execute their functions.

As the jurisprudence shows,the first step in analyzing the validity of a provincial grant of jurisdiction is to characterize that grant. The boundaries of provincial court jurisdiction need not be drawn along the precise borders that existed at Confederation; rather, the inquiry centers on the type of case being heard. It is a functional approach which examines the purpose of the grant of jurisdiction. In determining the historical involvement of provincial courts in deciding civil claims, it is instructive to look at the proportion of cases that were heard by different courts at Confederation. At the time, in most provinces, a majority of civil claims were heard by provincial courts; therefore, the superior courts did not have exclusive jurisdiction over civil claims in general. Any exclusive jurisdiction was limited to a small proportion of civil claims above a certain monetary threshold. This threshold was not, however, a marker which indicated when claims became substantial, it simply aimed to maintain a balance between the different types of courts in operation at the time. In this case, the comparison of the proportion of cases heard at Confederation with today’s distribution shows that a grant of $85,000 of civil jurisdiction not only continues to respect the balance struck at the time of Confederation, but leaves superior courts with more civil jurisdiction than they had at that time. The *Residential Tenancies* test is therefore met.

At the “core jurisdiction” stage of the test, the Court has held that legislation cannot have the effect of taking away the authority superior courts need in order to make sure that they can effectively adjudicate the claims which are properly before them and to enforce their orders in those cases. However, core jurisdiction has been held to be a narrow concept, not a malleable one. It is intended to protect only the essential role and function of superior courts. As long as the essential character of superior courts is neither undermined nor impaired, provincial legislatures are constitutionally entitled to exercise their jurisdiction under s. 92(14) by creating and authorizing provincial courts, even exclusively, to respond to local justice needs, not as those needs existed at Confederation, but as they exist now. The notion that superior courts have inherited some core power over the development of private law from the pre‑Confederation English courts of inherent jurisdiction is irreconcilable with the fact that superior courts, since Confederation, have shared that role with a number of provincial courts. Superior courts have never had the exclusive responsibility of guiding the development of private law. This role, therefore, cannot be part of superior courts’ core jurisdiction.

Although the classic application of the *Residential Tenancies*/*MacMillan Bloedel* test is dispositive of the appeal, this case reveals some of the fault lines of that approach. It may be time to consider replacing the test in a way that updates the law on the relationship between ss. 92(14) and 96 and synchronizes it with the Court’s approach to constitutional interpretation generally and, in particular, with the defining admonition that the Constitution is a living tree to be interpreted flexibly. Cooperative federalism is an approach to federalism that not only accepts that an overlap between federal and provincial powers is inevitable, but is also useful because it allows governments to respond to a complex interplay of issues. There is no reason why such an approach should not be extended to the understanding of the relationship between ss. 92(14) and 96. There is a need for a generous approach to the authority of provincial governments to make jurisdictional grants to provincial adjudicative bodies since provincial governments are closer to the issues affecting most people who use the courts and to the realities of local issues. They are therefore better placed to recognize and address local concerns with the justice system.

The benefits of cooperative federalism were not a particular concern in *Residential Tenancies*. Rather, it was animated by a number of protective aspirations for s. 96 courts. The first was the desire to promote national unity through the preservation of a unitary court system and the second was ensuring that disputes are adjudicated by impartial and independent courts. The Court’s approach to s. 96 was said to reinforce the theory that certain cases must be heard by superior courts because they must be decided by independent courts. But the assumption that the Constitution protected the independence only of superior courts disintegrated in the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, where the Court recognized that provincial courts also enjoy constitutionally protected independence and are as well placed to uphold the rule of law independently as the superior courts. Appeals to the rule of law and independence, therefore, can no longer serve to narrow the jurisdiction of provincial courts. Increased constitutional recognition of the important role of provincially appointed judges within the Canadian judiciary does nothing to diminish the independence and impartiality of the superior courts. On the contrary, it enhances the judiciary as a whole and the public’s perception that the provincial court judges they appear before are no less judicial because they are appointed by a different level of government. This acknowledgment of the independence of provincial courts makes them a partner in protecting national unity.

The $15,000 increase in exclusive provincial court jurisdiction has not prevented the Superior Court of Quebec in any material way from playing its usual role in deciding the kind of civil cases it has always heard. No matter the approach taken in analyzing art. 35 *C.C.P.*, it is a valid exercise of the province’s right under s. 92(14) to administer justice and to constitute courts of civil jurisdiction in Quebec.

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By Wagner C.J. (dissenting in part)

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APPEALS from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Bich, Kasirer, Levesque, Vauclair, Mainville and Hogue JJ.A.), 2019 QCCA 1492, [2019] Q.J. No. 7806 (QL), 2019 CarswellQue 10358 (WL Can.), in the matter of the reference pertaining to the constitutional validity of the provisions of article 35 of the *Code of Civil Procedure*, CQLR, c. C‑25.01, 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. Appeals dismissed, Wagner C.J. and Rowe J. dissenting in part and Abella J. dissenting.

François Grondin and Guy J. Pratte, for Conférence des juges de la Cour du Québec.

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Marc‑André Fabien and Vincent Cérat Lagana, for Conseil de la magistrature du Québec.

Audrey Mayrand and Jennifer Klinck, for the Canadian Association of Provincial Court Judges.

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English version of the judgment of Moldaver, Karakatsanis, Côté and Martin JJ. delivered by

Côté and Martin JJ. —

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1. Overview
2. The unified national judicial system is a defining feature of Canada’s judiciary. This system ensures the joint participation of the federal government and the provinces.[[1]](#footnote-1) On the one hand, the Constitution grants exclusive jurisdiction over the administration of justice to the provinces, thereby empowering them to create courts and organize them. On the other hand, it places a specific category of courts, the superior courts, at the centre of the Canadian judiciary and vests the federal government with the power to appoint their judges.
3. Over the years, the courts have endeavoured to give meaning to this characteristic of Canada’s judicial system, which stems from ss. 92(14) and 96 to 100 of the *Constitution Act, 1867*. The case law sought to strike a proper balance between provincial initiatives on the administration of justice and respect for one of the important compromises of the Fathers of Confederation, on which the special and inalienable status conferred on the s. 96 courts is grounded.
4. The first question raised in these appeals is whether art. 35 para. 1 of the *Code of Civil Procedure*, CQLR, c. C‑25.01 (“*C.C.P.*”), is consistent with s. 96 of the *Constitution Act, 1867*. Put differently, does granting exclusive jurisdiction over civil claims for less than $85,000 to the Court of Québec create a parallel or shadow court that usurps the role reserved by the Constitution to the superior courts? In this case, the legislature has not transferred a specific jurisdiction to the provincial court, but rather an extensive and exclusive jurisdiction over a vast area at the heart of private law. This case presents an opportunity for this Court to clarify the line that the provinces must not cross in exercising their jurisdiction over the administration of justice. This question represents a new milestone in the evolution of the case law on s. 96, as it concerns a wholesale court‑to‑court transfer of jurisdiction over contractual and extracontractual obligations below a specific monetary limit, which has the effect of removing these matters from the jurisdiction of the superior courts.
5. The purpose of s. 96 is to give effect to the compromise reached at Confederation by protecting the special status of the superior courts of general jurisdiction as the cornerstone of our unitary justice system. The principles of national unity and the rule of law are central to this organization of the judiciary. To ensure that s. 96 fulfills its function, this Court has developed various tests over time, the most recent being the three‑step test from *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 (“*Residential Tenancies*”), and the core jurisdiction test adopted in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725. These two tests are based on a shared concern reflected in earlier jurisprudence: the nature and role of superior courts are to be protected, and the creation of courts with provincially appointed judges that mirror or usurp the functions of superior courts is not permitted.
6. The three‑step *Residential Tenancies* test limits the granting of power or jurisdiction over a type of dispute where, at the time of Confederation, the power or jurisdiction came exclusively or primarily within the remit of the superior courts. In our view, the application of this test does not on its own render art. 35 para. 1 *C.C.P.*unconstitutional. Indeed, there was sufficient general involvement by the inferior courts in civil disputes pertaining to the law of contractual and extracontractual obligations in three of the four founding provinces.
7. The second test aims to determine whether a grant of jurisdiction infringes on the superior courts’ core jurisdiction either through an alteration of their essential nature or because they are prevented from playing their central role conferred by s. 96. Article 35 para. 1 *C.C.P.* infringes on the superior courts’ general private law jurisdiction — an essential feature that forms part of their core jurisdiction — in a way that is inconsistent with the Constitution. Both the Superior Court and the Court of Québec play an important part in maintaining the rule of law, enjoy the guarantees of judicial independence, are composed of professional, qualified judges, and promote access to justice. These shared characteristics are essential to the proper functioning of both courts and to the protection of the public. While we acknowledge these realities, the question is nevertheless whether the province’s wholesale transfer of an exclusive jurisdiction to a court with provincially appointed judges complies with s. 96.
8. In this distinct context, we have looked to a wide range of factors to answer that question: the scope of the jurisdiction granted by art. 35 para. 1 *C.C.P.*, the exclusivity of the grant, the high monetary limit, the available appeal mechanisms, and the absence of a societal objective capable of justifying the legislation. The weighing of the relevant factors leads us to conclude that the grant to the Court of Québec of exclusive jurisdiction over civil disputes concerning contractual and extracontractual obligations up to a value of less than $85,000 unduly compromises the position of s. 96 courts and is unconstitutional. The scope of the jurisdiction granted by art. 35 para. 1 *C.C.P.*, combined with the various features of the institutional context in which that jurisdiction is exercised, transforms the Court of Québec into a prohibited parallel court and impermissibly infringes on the core jurisdiction of the Superior Court. This necessarily undermines the crucial role the Quebec Superior Court plays in the Canadian judicial system.
9. We agree with the Court of Appeal that the monetary limit is too high when considered in its historical and institutional contexts. It is noteworthy that the transfer of jurisdiction to the Court of Québec not only grants a broad civil jurisdiction in the area of obligations that is circumscribed by a monetary limit, but also removes that jurisdiction from the Quebec Superior Court. This improperly impinges on the Superior Court’s ability to hear and rule on disputes in a field at the heart of Quebec private law. No other court with provincially appointed judges in Canada has a comparable exclusive jurisdiction in civil matters: the other provinces retain a form of concurrent jurisdiction between courts with provincially appointed judges and s. 96 courts.
10. Other characteristics of the Court of Québec likewise support the conclusion that the impugned article oversteps the bounds of constitutionality. Both courts hear civil cases involving contractual and extracontractual matters and apply the same laws and procedural rules in adjudicating them. Further, the Court of Québec’s decisions can be appealed directly to the Quebec Court of Appeal. As a result, the jurisdiction provided for in art. 35 para. 1 *C.C.P.* gives the Court of Québec every appearance of being a parallel court and undermines the central role reserved to the superior courts in the Canadian judicial system by ss. 96 to 100 of the *Constitution Act, 1867*. It is difficult to see what remains to distinguish the Court of Québec from a constitutionally protected superior court.
11. In our view, the second reference question, which relates to the Court of Québec’s application of the obligation of judicial deference when it hears an appeal from an administrative decision under certain provincial statutes, is now moot as a result of this Court’s decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, and the coming into force of s. 83.1 of the *Courts of Justice Act*, CQLR, c. T‑16. We therefore decide not to address it.
12. For the reasons that follow, we would dismiss the appeals on the basis that art. 35 para. 1 *C.C.P.*is unconstitutional and the second question is moot.
13. Background to the Reference to the Quebec Court of Appeal
14. On January 1, 2016, the new *Code of Civil Procedure*, including art. 35, came into force. Article 35 grants the Court of Québec exclusive jurisdiction over all civil disputes in which the value of the subject matter or the amount being claimed is less than $85,000. However, this jurisdiction excludes family matters other than adoption, and any other jurisdiction that is exclusively assigned by law to another court or adjudicative body. Article 35 para. 1 *C.C.P.*reads as follows:

The Court of Québec has exclusive jurisdiction to hear and determine applications in which the value of the subject matter of the dispute or the amount claimed, including in lease resiliation matters, is less than $85,000, exclusive of interest; it also hears and determines applications ancillary to such an application, including those for the specific performance of a contractual obligation. However, it does not have such jurisdiction in cases where jurisdiction is formally and exclusively assigned to another court or adjudicative body, or in family matters other than adoption.

1. The structure of Quebec’s judicial organization, of which art. 35 forms part, can be understood by briefly reviewing the scope of the Superior Court’s and the Court of Québec’s current jurisdictions in order to get a full picture of the issues raised by these appeals.
2. The Court of Québec, as a statutory court, may exercise only the jurisdiction conferred on it by the legislature. Under Quebec legislation, the Court of Québec has jurisdiction throughout Quebec over civil, criminal and penal matters, as well as over youth matters. This three‑pronged jurisdiction is reflected in the three divisions of the court (ss. 2, 79 and 106 of the *Courts of Justice Act*). The court also sits on administrative matters and on appeals in cases provided for by law (s. 79). Pursuant to art. 35 *C.C.P.*, the Court of Québec’s Civil Division has exclusive jurisdiction to hear and determine applications where the value of the subject matter is less than $85,000. Applications not exceeding $15,000 are heard by the Civil Division’s Small Claims Division (art. 536 *C.C.P.*).
3. By contrast, the Quebec Superior Court, as the court of original general jurisdiction, has province‑wide jurisdiction to hear and determine any matter that is not formally and exclusively assigned to another court (art. 33 para. 1 *C.C.P.*). As a result, it hears, *inter alia*, civil suits in which the amount at issue is at least $85,000, cases relating to immovable property or its dismemberments, successions and wills, and most family law cases, including divorce applications. The Superior Court also has exclusive jurisdiction over class actions and injunctions (art. 33 para. 2 *C.C.P.*), a general power of judicial review (art. 34 para. 1 *C.C.P.*) and jurisdiction to hear and determine a number of civil proceedings provided for in federal legislation, such as applications relating to bankruptcy and insolvency.
4. The Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec (“Chief Justice of the Superior Court et al.”) argue that the effect of art. 35 *C.C.P.*is to deny Quebec litigants the right to file any civil claim in the Superior Court in which the value of the subject matter of the dispute is less than $85,000. They argue this provision prevents the Superior Court from stating and advancing the law with respect to such claims. The Chief Justice of the Superior Court et al. challenge the constitutionality of art. 35 *C.C.P.*on this basis.
5. For this very reason, at the time of the *Code of Civil Procedure* reform, the Chief Justice of the Superior Court et al. urged the Quebec legislature not to raise the ceiling of the Court of Québec’s civil jurisdiction from $70,000 to $85,000. Moreover, they asked the Quebec government to submit a reference to the Quebec Court of Appeal to ask that court to rule on the constitutionality of the Court of Québec’s civil jurisdiction. After these requests were denied, the Chief Justice of the Superior Court et al. filed an originating application on July 19, 2017, seeking a declaratory judgment of unconstitutionality in the Superior Court. In their application, they also contested the appellate jurisdiction granted to the Court of Québec with respect to certain administrative decisions on the basis that the requirement of deference recognized in the case law is incompatible with the superior courts’ power of judicial review.
6. In August 2017, in response to those legal proceedings, the Quebec government issued Order in Council 880‑2017, *Concernant un renvoi à la Cour d’appel portant sur la validité constitutionnelle des dispositions de l’article 35 du Code de procédure civile qui fixent à moins de 85 000 $ la compétence pécuniaire exclusive de la Cour du Québec et sur la compétence d’appel attribuée à la Cour du Québec*, (2017) 149 G.O. II, 4495. In October 2017, the Attorney General of Quebec (“AGQ”) filed with the Court of Appeal a notice of reference submitting the following questions:

[translation]

1. Are the provisions of the first paragraph of article 35 of the *Code of Civil Procedure* (chapter C‑25.01), setting at less than $85,000 the limit to the exclusive monetary jurisdiction of the Court of Québec, valid with regard to section 96 of the *Constitution Act, 1867*, given the jurisdiction of Quebec over the administration of justice under paragraph 14 of section 92 of the *Constitution Act, 1867*?
2. Is it compatible with section 96 of the *Constitution Act, 1867* to apply the obligation of judicial deference, which characterizes the application for judicial review, to the appeals to the Court of Québec provided for in sections 147 of the *Act respecting access to documents held by public bodies and the protection of personal information* (chapter A‑2.1), 115.16 of the *Act respecting the Autorité des marchés financiers* (chapter A‑33.2), 100 of the *Real Estate Brokerage Act* (chapter C‑73.2), 379 of the *Act respecting the distribution of financial products and services* (chapter D‑9.2), 159 of the *Act respecting administrative justice* (chapter J‑3), 240 and 241 of the *Police Act* (chapter P‑13.1), 91 of the *Act respecting the Régie du logement* (chapter R‑8.1) and 61 of the *Act respecting the protection of personal information in the private sector* (chapter P‑39.1)?

(Order in Council, at p. 4496)

1. Quebec Court of Appeal, 2019 QCCA 1492
2. The Court of Appeal first outlined the origin and purpose of the provisions of the *Constitution Act, 1867* relating to the courts and the organization of justice, namely ss. 96 to 100, 129 and 133. Noting that these provisions are intended to reflect the United Kingdom’s judicial system, the court concluded that the Constitution does not allow superior courts to be abolished or deprived of their core powers. Similarly, the court held that there is “a prohibition against creating courts with provincially appointed judges that exercise, in whole or in part, the jurisdiction of the superior courts as ‘shadows’ or ‘mirrors’ thereof” (paras. 35 and 46‑47 (CanLII)). The Court of Appeal noted that the test developed in *Residential Tenancies* is generally used for this purpose.
3. The Court of Appeal considered whether art. 35 *C.C.P.*infringes on the core jurisdiction of the Quebec Superior Court (para. 102). Relying on *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, the court held that the Quebec legislature may increase the amount of the Court of Québec’s monetary jurisdiction only if it can do so without altering the core jurisdiction of the superior courts to “resolve disputes between individuals and decide questions of private . . . law” (para. 141, quoting *Trial* *Lawyers*, atpara. 32).
4. To identify the monetary limit beyond which an infringement on the core jurisdiction could not be justified, the Court of Appeal reviewed the structure of the courts in the other provinces. It then concluded that, “[i]n light of the historical context as well as the objectives tied to the rule of law and national unity arising from section 96 of the *Constitution Act, 1867* . . . the Superior Court can retain its core jurisdiction to adjudicate civil disputes only if that jurisdiction applies to ‘substantial’ claims of litigants” (para. 148 (emphasis added)).
5. The Court of Appeal took the amount of $100 as the starting point for its analysis, because that was the amount of “the maximum monetary jurisdiction exercised in 1867 by some of the inferior courts charged with hearing certain civil matters” (para. 144). However, it stressed that updating the amount “is only one of the elements for determining whether a claim is substantial for a present‑day litigant” (para. 153). An increase over and above the actual updated amount would not automatically infringe on the core jurisdiction of the superior courts (para. 154). Other factors must be considered, such as “(1) the monetary threshold for appeals as of right to the Court of Appeal; (2) the legislative objectives of the limits set on the jurisdiction of the Court of Québec and, consequently, of the Superior Court; and (3) empirical and statistical data” (para. 155).
6. The Court of Appeal concluded that art. 35 *C.C.P.*is unconstitutional because it infringes on the core jurisdiction of the Superior Court to adjudicate certain substantial civil disputes by granting the Court of Québec jurisdiction over civil claims for less than $85,000, with the exception of certain excluded civil matters. In reaching this conclusion, the court considered, among other things,(i) the updated value of an amount of $100, which was a “substantial” amount in 1867, (ii) the threshold of $60,000 established by the Quebec legislature for an appeal as of right, and (iii) the legislative background regarding the determination of the ceiling. In light of the evidence and the applicable principles, the maximum limit for the jurisdiction of the Court of Québec must, to be consistent with s. 96, fall between $55,000 and $70,000, subject to future updates (para. 188).
7. After reviewing increases in the threshold for appeals as of right and in the monetary ceiling of the civil jurisdiction of the Court of Québec, the Court of Appeal observed “that there has long been parity between the threshold for appeals as of right to the Court of Appeal and the ceiling for the Court of Québec’s exclusive jurisdiction” (para. 174). It emphasized that when these amounts were increased in 1995, the purpose was “to foster greater efficiency within the judicial system, by [among other things] adjusting the jurisdiction of the Court of Québec and reducing waiting times for hearings in the Superior Court” (para. 178). In the Court of Appeal’s opinion, the situation became problematic when legislative amendments in 2002 raised the jurisdictional ceiling from $30,000 to $70,000 with a view to reducing costs and delays, as that increase was greater than the one that would result from converting the 1867 amount of $100 to 2002 dollars ($37,175.75) (para. 181). The Court of Appeal noted that the legislative debates revealed that the idea “that inflation had eroded the Court of Québec’s jurisdiction” seemed to have been the primary motivation behind these increases (para. 182). For the most recent increase brought about as part of the *C.C.P.*reform in 2014, the legislature merely considered the previous ceiling of $70,000 and updated it to $85,000. The Court of Appeal concluded that this last increase was “the extension of an ever‑growing erosion of the constitutional jurisdiction of the Quebec Superior Court over civil matters” (para. 187).
8. On the second reference question, the Court of Appeal held that applying the obligation of judicial deference to administrative appeals to the Court of Québec is compatible with s. 96. This is because the Superior Court retains “its full superintending and reforming power over administrative decisions and decisions of inferior tribunals as well as its fundamental role as the guardian of an independent and unified system of justice in Canada” (paras. 365 and 367). We note, however, that the Court of Appeal issued its opinion before our decision in *Vavilov*.
9. Analysis on the First Question
   1. Scope of the First Reference Question
10. The first question before this Court differs from the one it considered in *Renvoi touchant la constitutionnalité de la Loi concernant la juridiction de la Cour de Magistrat*, [1965] S.C.R. 772. That decision dealt with the constitutionality of amending legislation that had raised the monetary jurisdiction of the Magistrate’s Court from $200 to $500. In that case, this Court reversed the Quebec Court of Appeal’s opinion on the basis that it had ruled on the whole of the Magistrate Court’s jurisdiction rather than specifically addressing the particular concern underlying the reference question and the recitals contained in the order in council giving rise to the reference.
11. The reference question in this case has been stated in much broader terms, and we are not limited to looking only at the legislation that increased the amount of the Court of Québec’s monetary jurisdiction from $70,000 to $85,000. With respect for the Court of Appeal, we do not agree that the question confines our analysis to “the monetary ceiling imposed by article 35 *C.C.P.*” (C.A. reasons, at para. 102; see also paras. 137‑38). As worded, the question expressly mentions the monetary limit and the exclusivity of the Court of Québec’s jurisdiction. These are distinctive characteristics of Quebec’s court structure. Unlike in other provinces, the principal distinction in Quebec between the court with provincially appointed judges and the superior court, aside from certain remedies, is the monetary limit for the disputes each court may hear. Apart from this distinction, the two courts hear and determine identical applications, apply the same *Code of Civil Procedure*, and the decisions of both can be appealed to the Quebec Court of Appeal. Quebec’s judicial system is also unique in that all civil disputes falling within the scope of art. 35 *C.C.P.*are removed from the Superior Court’s jurisdiction and assigned exclusively to the Court of Québec.
12. Although the monetary limit and the exclusivity of the grant of jurisdiction are both important to the analysis, the language of the reference question requires a more wide‑ranging analysis that takes into account how courts with provincially appointed judges and superior courts operate. The question requires a more comprehensive answer on the constitutionality of art. 35 para. 1 *C.C.P.* in light of ss. 92(14) and 96 of the *Constitution Act, 1867*. Whether the grant is constitutional must therefore be examined having regard not only to the distinctive characteristics underlined above, but also to other characteristics relating to the broader context of the grant. Such an approach is necessary to determine the impact the grant might have on the jurisdiction of the province’s superior court. In cases where this Court has examined s. 96, it has always been careful to consider the provisions at issue in their context rather than in the abstract (*Tomko v. Labour Relations Board (N.S.)*, [1977] 1 S.C.R. 112, at p. 120; *Residential Tenancies*, at p. 735; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; *MacMillan Bloedel*, at paras. 12 and 59). That is the approach that must be taken here.
    1. Constitutional Framework
13. Superior courts are the centrepiece of the unitary judicial system created by ss. 92(14), 96 to 100 and 129 of the *Constitution Act, 1867*. These provisions lay one of the key foundations of Canada’s Constitution, as they represent the balance struck between our federation’s national and provincial aspirations (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 23; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 87).
14. Constitutional provisions must be “placed in [their] proper linguistic, philosophic and historical contexts” and interpreted in a broad and purposive manner (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; see also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155‑56; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 52; *Reference re Supreme Court Act*, at para. 19). To properly understand the scope of the protection of the superior courts under s. 96, we must therefore consider the historical context, that is, the compromise reached at Confederation that is central to Canada’s judicial system, as well as the role and purpose of s. 96.
15. This Court’s juriprudence on s. 96 of the *Constitution Act, 1867* upholds the two fundamental principles underlying this provision, namely national unity and the rule of law. The case law has sought to safeguard the compromise reached at Confederation by preserving the unitary nature of our judicial system. To achieve this objective, the Court has, over the years, developed various tests designed to protect the status of the superior courts. The creation of courts that mirror the superior courts has always been considered an important limit that cannot be overstepped. All the tests have had the purpose, among others, of precluding such an outcome. If the role of the superior courts were undermined by the creation of parallel courts, Canada’s judicial system would be stripped of its unitary nature and could be transformed into a dualistic system like that of the United States.
    * 1. Compromise Reached at Confederation
16. Historically, the English judicial system was based on a dichotomy between so‑called inferior courts and the superior courts whose judges were appointed by the monarch (W. Blackstone, *Commentaries on the Laws of England* (1765), Book I, at pp. 258 and 327). The term “inferior court” was based on the fact that the powers and jurisdiction of such courts were strictly limited by their constitutions. The superior courts, on the other hand, had an inherent general jurisdiction. The advantage of the inferior courts was their accessibility; their decentralization allowed for justice to be delivered to the door of everyone in the country, whereas the royal courts were less accessible to the ordinary citizen. However, royal courts historically had more extensive legal expertise than inferior courts. For this reason, royal courts exercised a power of control and supervision over decisions of inferior courts (G. Pépin, *Les tribunaux administratifs et la Constitution — Étude des articles 96 à 101 de l’A.A.N.B.* (1969), at pp. 134‑35, quoting Halsbury, *The Laws of England* (3rd ed. 1954), vol. 9, at pp. 348‑50).
17. This fundamental dichotomy was imported into the colonies of British North America. Although the colonies established a three‑tiered system consisting of a superior court, intermediate courts and inferior courts, the classification of the courts of the Canadian provinces reflected the dichotomy of the English system. There were superior courts on the one hand, and the non‑superior courts on the other hand (Pépin, at pp. 134‑35). This judicial system was maintained until the *Constitution Act, 1867* was enacted (J. Baker, *An Introduction to English Legal History* (5th ed. 2019), at pp. 57‑59).
18. At the time of Confederation, the founding fathers chose to establish a constitution similar in principle to that of the United Kingdom, as recognized in the preamble to the *Constitution Act, 1867*. The judicial system and the constitutional arrangements passed on to us by the United Kingdom therefore constitute the historical foundation of our judicial system.
19. However, because the founding provinces opted for a federal union rather than a unitary system like the one that existed in the United Kingdom, the British judicial system required adaptation. It was modified to take into account the fact that powers in Canada are shared by two levels of government — the provinces and the federal government.
20. To guarantee both national unity and provincial autonomy, the Fathers of Confederation reached a compromise, creating a unitary justice system characterized by federal‑provincial cooperation.[[2]](#footnote-2) To begin, all courts of civil and criminal jurisdiction of the founding provinces would continue to exist (s. 129 of the *Constitution Act, 1867*). Thus, the distinction between superior and non‑superior courts that characterized the British system was expressly maintained.
21. In addition, s. 92(14) of the *Constitution Act, 1867* ensured that the provinces’ exclusive power over the administration of justice would remain intact, thereby preserving their autonomy in that regard. A province could therefore reorganize its courts to reflect its own reality and needs. However, ss. 96 to 100 created an exception to the provinces’ power by conferring on the federal government the power to appoint judges to the superior courts, fix their remuneration and remove them (*Residential Tenancies*, at p. 728). Another exception, s. 101 of the *Constitution Act, 1867*,gave the federal government the power to create federal statutory courts. This power was limited, however, as such courts would be confined by their constitutional boundaries to the administration of federal laws (*Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 33).
22. The Fathers of Confederation thus rejected the creation of a dualistic system like the ones established in other federations, including the United States. They preferred instead to establish a unitary system whose objective was national unity (*Residential Tenancies*, at p. 728).
23. The superior courts of the various provinces were called upon to form the cornerstone of this system and to act as a “unifying force”, thereby enabling the development of the law nationwide (*MacMillan Bloedel*, at paras. 11, 29 and 37; see also *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 327; *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252, at p. 264; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, at para. 72; *Windsor*, at para. 32). Because the superior courts were given an inherent general jurisdiction like that of their British predecessors, they were empowered to interpret and apply both provincial and federal law (*Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at pp. 249‑50, per La Forest J., dissenting on another point).
24. In short, the aim of the compromise reached at Confederation was not simply to maintain the pre‑existing justice system. It created a system in which responsibilities were shared between the provinces and the federal government, enabling each province to shape the judicial landscape in its own territory in accordance with local realities. Thus, there is no requirement that the judiciary be structured uniformly from one province to the next; for a province to have established its own standards or made unique choices does not in itself amount to a constitutional defect. On the contrary, ss. 92(14) and 96 work together to advance access to justice by allowing the superior courts to coexist with tribunals and courts with provincially appointed members, as long as the unitary system, of which the superior courts are the cornerstone, is preserved.
    * 1. Role and Purpose of Section 96
25. The superior courts recognized by s. 96 “have always occupied a position of prime importance in the constitutional pattern of this country” (*Law Society of British Columbia*, at p. 327; see also *Windsor*, at para. 32). Although s. 96 may on its face appear to relate solely to the federal government’s power to appoint judges, it has been interpreted by this Court as guaranteeing a nucleus to the superior courts (*Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238, at p. 264; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 27; see also *Tomko*, at p. 120). In this way, s. 96 forms a safeguard against erosion of the historic compromise. This means that neither the provinces nor the federal government may confer functions reserved to the superior courts on other courts to which s. 96 does not apply (*Residential Tenancies*, at p. 728; *Scowby*, at para. 34; *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704, at pp. 720‑21; *Windsor*, at para. 32). If a province or the federal government could, by statute, confer the essential functions of the superior courts on another court, the role of the superior courts as the cornerstone of the judicial system would evidently be eroded and the system’s unitary nature would, in turn, be undermined. A transfer of jurisdiction from the superior courts to the provincial courts could ultimately transform the Canadian system into a dualistic system. If that were to happen, it would be impossible to achieve the purpose of the compromise reached at Confederation (*Residential Tenancies*, at p. 728).
26. The superior courts’ role as the cornerstone of Canada’s judicial system is based on two key principles: national unity and the rule of law.
    * + 1. National Unity
27. One of the main objectives of the historic compromise reflected in s. 96 is to reinforce the national character of the Canadian judicial system (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose‑leaf)), vol. 1, at p. 7‑3). The superior courts form a network of related courts whose role is to unify and ensure the uniformity of justice in Canada (*ibid.*; see also *Residential Tenancies*, at p. 728). Protecting the essence of the superior courts thus preserves “uniformity throughout the country in the judicial system” (*Reference re Young Offenders Act (P.E.I.)*, at p. 264).
28. Moreover, s. 96 has the effect of counterbalancing the provinces’ exclusive power over the administration of justice by entrusting to the federal government the task of appointing the judges who will sit on the superior courts. In accordance with the intentions of the Fathers of Confederation, the administration of justice thus depends on the cooperation of governments at both levels.
29. In light of the objective of national unity, the limits imposed by s. 96 must be consistent across the country (*Sobeys*, at pp. 265‑66). To make “[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” (*Reference re Residential Tenancies Act (N.S.)*, atpara. 78). Ultimately, the constitutionally guaranteed existence of a federally appointed bench across the country has served as a unifying force and a vital safeguard of the rule of law in Canada (*ibid.*, at para. 72).
    * + 1. Rule of Law
30. The rule of law is maintained through the separation of judicial, legislative and executive functions ((A.) J. Johnson, “The *Judges Reference* and the *Secession Reference* at Twenty: Reassessing the Supreme Court of Canada’s Unfinished Unwritten Constitutional Principles Project” (2019), 56 *Alta. L. Rev.* 1077, at pp. 1100‑1101). In keeping with the principle of the separation of powers, the task of interpreting, applying and stating the law falls primarily to the judiciary (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 744; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 50).
31. This separation allows the courts to implement the three fundamental facets of the rule of law: equality of all before the law, the creation and maintenance of an actual order of positive laws, and oversight of the exercise of public powers (*Reference re Manitoba Language Rights*, at pp. 748‑51; *Imperial Tobacco*, at para. 58; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 16). Historically, the superior courts had primary responsibility for this task.
32. Thus, in order to preserve the superior courts’ role as the cornerstone of the judicial system, they must be able to continue acting as primary guardians of the rule of law as they always have (*MacMillan Bloedel*, at para. 29; *Reference re Residential Tenancies Act (N.S.)*, at para. 26, per Lamer C.J., concurring; W. R. Lederman, “The Independence of the Judiciary” (1956), 34 *Can. Bar Rev.* 769, 1139, at p. 1178; A. Lamer, “The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change” (1996), 45 *U.N.B.L.J.* 3, at p. 11; L. Huppé, *Le régime juridique du pouvoir judiciaire* (2000), at pp. 10‑11). This role falls to the superior courts because they are ideally placed to ensure the maintenance of the rule of law (*Reference re Residential Tenancies Act (N.S.)*, at paras. 26, per Lamer C.J., concurring, and 72, per McLachlin J. for the majority).
33. In light of Canada’s constitutional architecture, the superior courts are in the best position to preserve the various facets of the rule of law. Because of their independence and national character, they are best suited to resolving disputes over the division of powers between the provinces and the federal government and ensuring that government actions do not conflict with the fundamental rights of citizens (see *Amax Potash* *Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590; D. P. Jones, “A Constitutionally Guaranteed Role for the Courts” (1979), 57 *Can. Bar Rev*. 669, at p. 675). Moreover, the superior courts’ existence and status enjoy constitutional protection against legislative interference (*Reference re Residential Tenancies Act (N.S.)*, at paras. 72‑73; *Trial Lawyers*, at para. 30). As a result, the superior courts need not rely on statutorily conferred powers to fully exercise their judicial functions.
34. While it is true that this Court, in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“*Reference re Remuneration of Judges (1997)*”), recognized the independence of provincial court judges and reaffirmed the important role played by provincial courts in maintaining the rule of law, the fact remains that the superior courts are the *primary* guardians of the rule of law. Subject to constitutional guarantees of judicial independence, legislatures may abolish courts with provincially appointed judges or seriously fetter their powers without falling afoul of the Constitution, whereas superior courts are constitutionally protected from such legislative interference.
35. Only the superior courts have inherent powers that flow from their very nature, and the particular purpose of those powers is to enable the superior courts to ensure the maintenance of the rule of law in our legal system (*Reference re Residential Tenancies Act (N.S.)*, at para. 56, per Lamer C.J., concurring; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, at para. 61; *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 19 and 26). As will be seen below, these fundamental powers are constitutionally protected and therefore cannot be removed from them or unduly fettered. For example, the superior courts have the power to control their own process and enforce their orders. They also have the power to review exercises of public power for legality and to ensure that citizens are protected from arbitrary government action (*Crevier*; *U.E.S., local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 31; *Vavilov*, at para. 24). Finally, the superior courts have residual jurisdiction as courts of original general jurisdiction, meaning they may — without statutory authorization — hear any matter that has not been assigned to a statutory court. As we will explain, this provides superior courts with a comprehensive view of the law, allowing them to preserve the coherence of the judicial system and set its overall directions (R. Pepin, “Les parlements peuvent‑ils vider les cours supérieures de leur juridiction? Ont‑elles des pouvoirs ‘inhérents’, ‘inaliénables’? Réflexions sur la décision *MacMillan Bloedel Ltd.* c. *Simpson*” (1997), 22 *Queen’s L.J.* 487, at pp. 512‑13; Huppé, at pp. 12‑14).
36. Although the provincial courts also play an important part in safeguarding the rule of law, none of their powers receive the same protection. Their role as guardians of the rule of law therefore rests on a less stable foundation. This led Lamer C.J. to remark that no statutory court can be “as crucial to the rule of law” as the superior courts (*MacMillan Bloedel*, at para. 37; see also *Reference re Residential Tenancies Act (N.S.)*, at para. 72; *Trial Lawyers*, at para. 39).
    * 1. Concept Common to the Section 96 Tests: Prohibition Against Creating Parallel Courts That Undermine the Role of the Superior Courts
37. To ensure s. 96 can play its role to the fullest extent and achieve its purpose, this Court has developed various tests over the years. The most recent are the three‑step *Residential Tenancies* test and the core jurisdiction test. The Court has often reiterated that s. 96 must be able to evolve in accordance with the living tree doctrine (*Reference re Residential Tenancies Act (N.S.)*, at para. 27, per Lamer C.J., concurring; see Hogg, at pp. 15‑51 to 15‑57). The jurisprudence on s. 96 must thus not cause “judicial functions [to] be frozen in an 1867 mold”, and “[a]daptations must be permitted to allow the legislatures scope to deal effectively with emerging social problems and concerns” (*Scowby*, atpp. 250‑51, per La Forest J., dissenting; see also p. 253; *Residential Tenancies*, at pp. 749‑50).
38. In accordance with this evolutive approach, s. 96 has gone through a “process of liberalization” to adapt to modern realities (*Residential Tenancies*, at p. 730). Despite this liberalization, this Court has consistently reiterated the prohibition against establishing parallel courts that usurp the functions reserved to superior courts, as such parallel courts would eviscerate the protection afforded by s. 96.
    * + 1. Historical Jurisdiction
39. First, the decisions on s. 96 gave effect to the prohibition against creating parallel courts by protecting the historical jurisdiction of superior courts. Section 96 was originally given a “sweeping” interpretation (*Residential Tenancies*, atp. 729). In 1938, the Privy Council held that the functions conferred on the superior courts in 1867 could under no circumstances be granted to a court with provincially appointed judges, as such a grant would be invalid (*Toronto Corporation v. York Corporation*, [1938] A.C. 415 (P.C.)). For the first time, Lord Atkin expressed concern about the creation of a parallel court by framing the issue as whether the administrative body in question was “in pith and substance . . . a Superior Court, or a tribunal analogous thereto” (p. 426 (emphasis added)).
40. This Court rejected the Privy Council’s “sweeping” approach that same year in *Reference re Adoption Act*,[1938] S.C.R. 398, on the basis that it was too rigid and fixed the jurisdiction of the courts as it stood in 1867 (p. 418). Nevertheless, this Court agreed with Lord Atkin’s statement that provinces could not, directly or indirectly, create courts analogous to superior courts (p. 414).
41. The Privy Council then relaxed the applicable test in *Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd.*, [1949] A.C. 134 (P.C.), to better account for the emergence of administrative tribunals. Lord Simonds reiterated that the ultimate objective of the analysis was to determine whether “the jurisdiction exercisable by the board is not such as to constitute it a court within s. 96 of the British North America Act” (p. 152 (emphasis added); see also *Cour de Magistrat*, at p. 781).
42. In *Tomko*, the Court developed the principle that the validity of a grant of jurisdiction must be considered having regard to the “institutional framework” (p. 131) in which the jurisdiction is exercised, a principle that was subsequently incorporated into the *Residential Tenancies* test. Here again, the prohibition against creating parallel courts played an important role. Laskin C.J. stated that the creation of agencies whose members are appointed by a province and invested with jurisdiction or powers “conformable or analogous to [those] exercised . . . by Courts which are within s. 96” represents the line that may not be crossed (p. 120 (emphasis added)).
43. Finally, in *Residential Tenancies*, our Court articulated the three‑step test that remains in use today, subject to a few modifications introduced in subsequent cases:

* Characterization of the grant of jurisdiction: To determine whether a grant of jurisdiction is constitutionally infirm, a court must first properly characterize the jurisdiction being transferred.
* Three steps:

(1) Does the transferred jurisdiction conform to a jurisdiction that was dominated by superior, district or county courts at the time of Confederation?

(2) If so, was the jurisdiction in question exercised in the context of a judicial function?

(3) If the first two questions are answered in the affirmative, is the jurisdiction either subsidiary or ancillary to an administrative function or necessarily incidental to the achievement of a broader policy goal of the legislature?

(pp. 734‑36; *Attorney General of Quebec v. Grondin*, [1983] 2 S.C.R. 364; *Sobeys*, at p. 266; *Reference re Residential Tenancies Act (N.S.)*, at paras. 32, per Lamer C.J., concurring, and 74, per McLachlin J. for the majority)

1. In *Residential Tenancies*,Dickson J. (as he then was) firmly reiterated the relationship between the prohibition against creating parallel courts and the role and purpose of s. 96:

Section 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise, and the intended effect of s. 96, would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined. [p. 728]

1. In its jurisprudence subsequent to *Residential Tenancies*, this Court has consistently refused to allow the creation of parallel courts. In *McEvoy*, the Court held that the contemplated court could not be established, because it would “effectively be a s. 96 court” (pp. 718‑19). The same fundamental concept was applied in *Sobeys*, in which Wilson J., writing for the majority, stated that “s. 96 operates . . . to prevent the creation of provincial tribunals charged with exercising the jurisdiction of superior courts” (p. 245). Similarly, in *Reference re Young Offenders Act (P.E.I.)*, Lamer C.J. observed that s. 96 would be rendered meaningless if it were permissible to “constitute, maintain and organize provincial courts staffed with provincially appointed judges having the same jurisdiction and powers as superior courts” (p. 264).
2. More recently, in *MacMillan Bloedel*, McLachlin J. (as she then was), dissenting, but not on this point, noted that, “[c]learly, Parliament and the legislatures cannot be allowed to set up shadow courts exercising all or some of the powers of s. 96 courts” (para. 54). The following year, in *Reference re Residential Tenancies Act (N.S.)*,McLachlin J. reiterated, this time for the majority, that “[s]hadow courts and tribunals usurping the functions of the superior courts guaranteed by s. 96 are prohibited” (para. 73). She explained that “[i]t follows from the constitutional status of the s. 96 courts that neither Parliament nor the legislatures may impair their status” (*ibid.*). Their status would be impaired if it were possible to transfer their work to tribunals with provincially appointed members, “[s]o the wholesale transfer of superior court powers cannot be allowed” (*ibid.*).
   * + 1. Core Jurisdiction
3. The core jurisdiction test aims to do more than simply protect historical jurisdiction. It also ensures that superior courts are not impaired in such a way that they are unable to play their role under s. 96. The superior courts’ core jurisdiction includes the powers and jurisdiction essential to their role as the cornerstone of the unitary justice system and the primary guardians of the rule of law. These essential functions are not limited to inherent jurisdiction and powers in the traditional sense, but include any subject‑matter jurisdiction that meets this criterion. If these essential powers and areas of jurisdiction were transferred exclusively to another court, that court would become a parallel court — an outcome prohibited by the Constitution. It follows that the creation of a parallel court would prevent the superior courts from playing their constitutional role. That being said, even if no parallel court is created, the superior courts could be impaired to such an extent that they can no longer play their constitutional role. This would be the case if the legislature were to interfere impermissibly with the exercise of core jurisdiction by, for example, circumscribing it to the point of “maim[ing]” the superior courts in their very essence (*MacMillan Bloedel*, at para. 37).
4. Until *MacMillan Bloedel*, this Court’s decisions protected the superior courts’ role by limiting grants of their historical jurisdiction. In *MacMillan Bloedel*, the Court applied the three‑step *Residential Tenancies* test to an exclusive grant to youth courts of the power to punish young persons for *ex facie* contempt of court — a power that was traditionally exercised by superior courts. The application of that test was seen as deficient because it did not prevent the removal of this significant power from the superior courts. This Court thought it was necessary to interpret the nucleus of the superior courts as also protecting their core jurisdiction (*Sobeys*, at p. 264). Otherwise, there was a risk that gaps in the *Residential Tenancies* test would undermine the role of superior courts either by allowing the creation of parallel courts with certain powers essential to the superior courts’ role or by allowing the defining features of superior courts to be removed.
5. To preserve the essence of the superior courts, this Court therefore added a second test to the analysis of constitutionality under s. 96. It held that when the core jurisdiction of superior courts is affected, courts must ask whether the legislation has the effect of removing any of the attributes of the superior courts’ core jurisdiction (*MacMillan Bloedel*, at paras. 18 and 27). Core jurisdiction includes “critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system” (*Reference re Residential Tenancies Act (N.S.)*, at para. 56, per Lamer C.J., concurring). These defining features enable a superior court “to fulfil itself as a court of law” (*MacMillan Bloedel*, atparas. 30, 35 and 38 (emphasis deleted), quoting I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Current Legal Problems* 23, at p. 27). Their “inherent” nature is attributable to the fact that they are derived not from legislation, but “from the very nature of the court as a superior court of law” (para. 30, quoting Jacob, at p. 27). If such an attribute is removed, the measure is unconstitutional.
6. In addition to calling a removal of jurisdiction into question, this new doctrine operates to prevent the creation of parallel courts, like the *Residential Tenancies* test also does. The core jurisdiction test prevents the legislature from transferring to other courts the features that are essential to the role of the superior courts as the centrepiece of the unitary justice system and the primary guardians of the rule of law, for such transfers could transform those other courts into mirrors of the superior courts. The prohibition against parallel courts and the protection of the superior courts’ core jurisdiction are thus closely related; the creation of parallel courts affects the superior courts’ essential functions and place in the judicial system, thereby undermining or usurping their role and exceeding the limits imposed by s. 96. However, the core jurisdiction test does not merely place limits on what can be transferred to other courts. It also curbs impermissible interference by the legislature with the exercise of the jurisdiction and powers that constitute the very essence of the superior courts in order to prevent these courts from being “maim[ed]” (*MacMillan Bloedel*, at para. 37).
7. The emergence of a test protecting core jurisdiction thus marks a change in direction. Unlike the *Residential Tenancies* test, the core jurisdiction analysis is not primarily historical in nature. It is the very essence of the superior courts that is protected. The content of the core jurisdiction is therefore not limited to what the superior courts exercised exclusively at the time of Confederation. It extends to whatever is needed in order to preserve the vigour and strength of those courts. The protected powers and jurisdiction are solidly anchored in the role the superior courts are called upon to play in the maintenance of the rule of law in our unitary justice system (*MacMillan Bloedel*, at paras. 37‑38 and 41).
8. The content of the core jurisdiction includes the inherent jurisdiction and inherent powers of a superior court recognized in *MacMillan Bloedel*: namely, review of the legality and constitutional validity of laws, enforcement of its orders, control over its own process, and its residual jurisdiction as a court of original general jurisdiction.
9. The constitutional protection of the residual jurisdiction of the superior courts as courts of original general jurisdiction was reiterated in *Trial Lawyers*, in which the Court held that the imposition of hearing fees that had the effect of denying some individuals access to a court of original general jurisdiction impermissibly infringed on the core jurisdiction of the superior courts (para. 32). The hearing fees at issue caused undue hardship to litigants of modest means and therefore deprived them of access to the superior court for the adjudication of disputes over which no other court had jurisdiction. Because such litigants were not indigent, they did not qualify for any exemption from paying the hearing fees. Consequently, the superior court was deprived of its ability to hear, as the court of original general jurisdiction, disputes that involved individuals who were neither poor nor rich and over which no other court had jurisdiction. Such individuals fell through the cracks in the judicial system; their disputes could no longer be resolved by the law, which jeopardized the maintenance of an actual order of positive laws and thus the rule of law. It is impossible to conceive of a superior court being stripped of a feature so essential as its status as a court of original general jurisdiction.
   * + 1. Conclusion
10. In short, a review of this Court’s jurisprudence highlights the prohibition against creating parallel courts or striking at the very essence of superior courts, which gives full effect to the compromise reached at Confederation. Although the applicable tests may have changed over the years, they are not ends in and of themselves; they are simply expressions of the principles that underlie s. 96. Accordingly, it is important not to apply these tests in a purely mechanical fashion; on the contrary, they must be approached with those principles in mind.
    1. Application
11. We will begin by applying the *Residential Tenancies* test to determine whether art. 35 para. 1 *C.C.P.* affects a jurisdiction that has historically been exercised by the superior courts and cannot be granted to a court with provincially appointed judges. Because we conclude that the application of that test does not enable us to answer the question before the Court, we will then turn to the core jurisdiction test. As we will explain, that test must be adapted to better reflect the underlying purposes of the two tests, including that of prohibiting the creation of parallel courts. In this case, we find that the impugned provision is unconstitutional, because it impermissibly infringes on the superior courts’ general private law jurisdiction, which forms part of their core jurisdiction. In its current form, art. 35 para. 1 *C.C.P.*has the effect of transforming the Court of Québec into a parallel court that undermines the constitutional role of the Superior Court of general jurisdiction. In other words, the Court of Québec’s exclusive jurisdiction over civil claims for less than $85,000 is unconstitutional.
    * 1. Three‑Step *Residential Tenancies* Test
         1. Characterizing the Jurisdiction
12. Before proceeding with the first step of the test, we must characterize the jurisdiction at issue (*Sobeys*, at pp. 252‑55; *Reference re Young Offenders Act (P.E.I.)*, at p. 265; *Reference re Residential Tenancies Act (N.S.)*, at para. 76). The parties and interveners proposed a variety of characterizations for the jurisdiction granted to the Court of Québec by art. 35 para. 1 *C.C.P.*
13. We agree with those who argued that this provision grants jurisdiction over civil disputes concerning contractual and extracontractual obligations (A.F., AGQ, at para. 56; A.F., Conférence des juges de la Cour du Québec (“CJCQ”), at para. 93; I.F., Attorney General of Canada, at paras. 39 and 45; A.F., Conseil de la magistrature, at paras. 29 and 93; A.F., Canadian Association of Provincial Court Judges, at paras. 62 and 68). While this characterization is not “narrow” as required by *Sobeys* (p. 254; see also *MacMillan Bloedel*, at para. 25; *Reference re Young Offenders Act (P.E.I.)*, at p. 266), its generality is a product of the expansive language of art. 35 para. 1 *C.C.P.*
14. We reject the respondents’ claim that this provision refers to a [translation] “general civil jurisdiction, exclusive throughout the territory of Quebec, up to $85,000 in 2016 dollars” (R.F., Chief Justice of the Superior Court et al., at para. 78; see also I.F., Trial Lawyers Association, at para. 24). That is the kind of characterization this Court has warned against. It focuses on the type of remedy sought — monetary relief in a quantifiable amount — rather than on “the type of dispute involved” (*Reference re Residential Tenancies Act (N.S.)*, at para. 76). A monetary ceiling or geographical limitations should not be introduced into the very definition of the jurisdiction, as they provide no information about the type of dispute in question; they are merely factors that help determine whether lower courts were sufficiently involved in an area of jurisdiction at the time of Confederation (*Sobeys*, at p. 261; *Reference re Residential Tenancies Act (N.S.)*, at para. 77).
    * + 1. Historical Analysis
15. Guidance on the methodology to be used in addressing this issue can be found in *Sobeys* and in *Reference re Residential Tenancies Act (N.S.)*. At this first step, the Court must ask whether inferior courts of the four founding provinces had a “general shared involvement” or a “meaningful concurrency of power” in the area of jurisdiction in question at the time of Confederation (*Sobeys*, at pp. 260‑61 (emphasis deleted); *Reference re Residential Tenancies Act (N.S.)*, at para. 77). If they did, the grant of jurisdiction satisfies the requirements of the *Residential Tenancies* test. Otherwise, the second step of the test must be undertaken.
16. In our view, there was a general shared involvement in the area of jurisdiction at issue: three of the four founding provinces’ inferior courts had, at the time of Confederation, sufficient practical involvement in matters relating to contractual and extracontractual obligations. In Lower Canada, 60 percent of civil litigation took place in two s. 96 courts, the Superior Court or the Circuit Court (A.R., AGQ, vol. III, at p. 170). The scope and monetary ceiling of the inferior courts’ jurisdiction were far too limited to establish significant involvement in such a vast area of jurisdiction. In all the other provinces, however, inferior courts played a predominant role in the administration of civil justice. They had broad jurisdiction and heard between 80 percent (in Upper Canada and Nova Scotia) and 90 percent (in New Brunswick) of all civil cases (pp. 183, 192 and 198). In most of the provinces, therefore, there was sufficient practical involvement of the inferior courts in matters relating to contractual and extracontractual obligations. Accordingly, the *Residential Tenancies* test does not lead to the conclusion that art. 35 para. 1 *C.C.P.*is unconstitutional with respect to the types of disputes in question. It is therefore unnecessary to proceed to the second and third steps, which are of questionable relevance to the transfer before us in any event.
17. Indeed, the *Residential Tenancies* test was established at a time when administrative bodies were growing in number and a modern administrative state was emerging in Canada. The Court was sensitive to this new reality, which had not existed at Confederation. The purpose of the test was to avoid stifling institutional innovations designed to provide administrative rather than judicial solutions for social or political problems (see *Sobeys*, at pp. 253‑54). Subsequent decisions did not point to any functional gap in the test, given that a large proportion of those cases involved administrative tribunals (see, e.g., *Massey‑Ferguson Industries Ltd. v. Government of Saskatchewan*, [1981] 2 S.C.R. 413; *Crevier*; *Grondin*; *Sobeys*; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394; *Reference re Residential Tenancies Act (N.S.)*). While the first step of the test — the only one that applies in the instant case — was drawn from cases involving transfers to courts (*Sobeys*, at p. 254), it cannot readily be applied to a court‑to‑court transfer of a vast area of jurisdiction. Such broad transfers have rarely been at issue in cases where the *Residential Tenancies* test was applied. This strand of jurisprudence has generally been concerned with provisions granting limited and specific powers.
18. The case at bar instead concerns the implementation of a comprehensive scheme that divides civil disputes involving contractual and extracontractual obligations in Quebec between two courts. Given that art. 35 para. 1 *C.C.P.* grants a broad jurisdiction over civil matters, the jurisdiction cannot be characterized more narrowly. Therefore, as this Court noted about the characterization stage that precedes the first step of the analysis, the broader the granted jurisdiction is, “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” (*Sobeys*, at p. 253). As a consequence, the expansive characterization required by the provision at issue inappropriately favours a finding of general shared involvement. This leads to a rather strange result: the broader a grant of jurisdiction, the greater the chance that it will escape the restrictions of the *Residential Tenancies* test. Thus, even though it was developed to prohibit the creation of parallel courts, that test does not deal effectively with the very jurisdiction‑granting provisions that are the most likely to establish such courts because of their generality. This is why such a grant requires a tailored analytical framework for the purpose of determining whether a parallel court that undermines the role of the superior courts has been created.
19. As is clear from its application, the *Residential Tenancies* test does not provide a satisfactory framework where, as here, a broad jurisdiction at the heart of private law has been transferred to a court. Thus, this question must be considered from the standpoint of the modified core jurisdiction test so as to better protect the constitutional status of s. 96 courts.
    * 1. Core Jurisdiction Test
20. As we explained above, even if a grant of jurisdiction passes the *Residential Tenancies* test, it does not necessarily follow that the grant is constitutional. Its impact on the core jurisdiction of superior courts still has to be assessed, even if the grant is not exclusive. 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 has the effect of depriving the superior courts of an aspect of their core jurisdiction or whether it otherwise impermissibly invades that core jurisdiction.
21. In this case, art. 35 para. 1 *C.C.P.*involves the superior courts’ general private law jurisdiction. To decide whether the transfer of jurisdiction effected by art. 35 impermissibly infringes on this aspect of the superior courts’ core jurisdiction, we must weigh certain factors. We conclude that the grant to the Court of Québec of exclusive jurisdiction over civil claims for less than $85,000 prevents the Quebec Superior Court from playing its role under s. 96 in cases concerning private law matters. In short, this grant has the effect of transforming the Court of Québec into a prohibited parallel court. Accordingly, the transfer of jurisdiction contemplated by art. 35 para. 1 *C.C.P.*exceeds the limits established by s. 96 of the *Constitution Act, 1867* and is thus unconstitutional.
    * + 1. General Private Law Jurisdiction
22. The core jurisdiction of the superior courts includes their ability to act as courts of general jurisdiction, that is, to hear and determine matters not exclusively assigned by law to other courts (*MacMillan Bloedel*, at paras. 29, 32 and 37; *Canadian Liberty Net*, at para. 35; *Noël v. Société d’énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, at para. 27). It therefore encompasses, by necessary implication, general jurisdiction over private law matters (*Canadian Liberty Net*, at para. 26; Huppé, at p. 12). However, the existence of this general jurisdiction requires a broad subject‑matter jurisdiction, as it is inconceivable for the superior courts to have general jurisdiction over private law matters in a context in which every branch of private law has been exclusively assigned to other courts. This would alter the nature of superior courts by stripping them of one of their essential features, that of exercising judicial functions and stating the law in private disputes. 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 of the *Constitution Act, 1867*” (para. 32).
23. In our view, the superior courts’ core jurisdiction presupposes a broad subject‑matter jurisdiction whose scope corresponds, at the very least, to the central divisions of private law to which more specific fields of law are often attached. This can be explained by the superior courts’ historical origins and their nature as courts of original general jurisdiction, as well as by the principles of national unity and of the rule of law that underpin s. 96.
24. Historically, the English royal courts had general civil jurisdiction and were responsible for the major developments in private law (Lederman, at p. 773). The Canadian superior courts, which are descended from those courts, inherited their role of prime importance in the judicial system (*Law Society of British Columbia*, at pp. 326‑27; *MacMillan Bloedel*, at paras. 29, 32 and 36). At the time of Confederation, they had jurisdiction over all important civil cases (G. T. G. Seniuk and N. Lyon, “The Supreme Court of Canada and The Provincial Court in Canada” (2000), 79 *Can. Bar Rev*. 77, at pp. 95‑96).
25. The paramount role given to the superior courts derives in part from the fact that they are courts of original general jurisdiction. A court of original general jurisdiction is the antithesis of a specialized tribunal. A specialized tribunal draws legal conclusions based on a limited number of principles and rules falling within its area of expertise, whereas a court of original general jurisdiction considers and interprets many principles and general rules that may apply in a number of fields of law. In giving the superior courts this breadth of perspective, the framers of the Constitution intended them to ensure the maintenance and coherent development of an actual order of positive laws, as well as to ensure stability and predictability in private law relationships (*Reference re Manitoba Language Rights*, at pp. 747‑52;*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70; T. Bingham, *The Rule of Law* (2010), at pp. 38‑39; Huppé, at p. 13). If the legislatures were free to diminish, by means of unlimited transfers of jurisdiction, the superior courts’ ability to lay down the broad lines of the case law, it would no longer be possible for these courts to perform their constitutional role as the primary guardians of the rule of law.
26. This is why a general jurisdiction over private law matters must be accompanied by a subject‑matter jurisdiction that is broad enough to preserve the superior courts’ role in providing jurisprudential guidance on private law (N. Lyon, “Is Amendment of Section 96 Really Necessary?” (1987), 36 *U.N.B.L.J.* 79, at pp. 83‑84). In our view, this requires significant — though not necessarily predominant — involvement in the resolution of disputes falling under the most fundamental branches of private law, such as property law, the law of succession and the law of obligations. A province may assign portions or offshoots of these fields to courts whose judges it appoints, within the restrictions of *Residential Tenancies*. But if, in so doing, it limits the superior court’s involvement significantly, then it “alters [that court’s] essence, making it something less than a superior court” (*MacMillan Bloedel*, at para. 1). In short, a province which takes away an aspect of the court’s core jurisdiction contravenes s. 96 — a provision whose purpose lies in the “maintenance of the rule of law through the protection of the judicial role” (*Reference re Remuneration of Judges (1997)*, at para. 88 (emphasis added); *Trial Lawyers*, at para. 39). In every case, the line that must not be crossed will be dependent upon a contextual and multi‑factored analysis.
    * + 1. Purpose of the Analysis and Factors to Consider
27. Article 35 para. 1 *C.C.P.* assigns one of the fundamental branches of Quebec civil law to the Court of Québec where the value of the subject matter of a dispute is less than $85,000. It unavoidably affects an aspect of the superior courts’ core jurisdiction: their general jurisdiction over private law matters. What remains to be determined, therefore, is whether it impermissibly invades that jurisdiction. In our view, the following question must be asked: Does the grant of jurisdiction impair the superior court of general jurisdiction in such a way as to alter its essential nature or prevent it from playing its role under s. 96? If the jurisdiction‑granting provision transforms the provincial court into a parallel court prohibited by the Constitution, the answer to this question must be yes.
28. There are various factors that can be helpful when it comes to determining whether, by granting a court with provincially appointed judges a jurisdiction as broad as the one at issue in this case, a legislature has created a prohibited parallel court that impairs the superior court by preventing it from playing its constitutional role. In this case, six factors are of particular relevance: 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. This list is not exhaustive. Other factors may be relevant in different contexts: one need only think, for example, of geographical limitations. However, in the circumstances of this case and in light of the evidence before us, we are of the view that the question can be decided on the basis of these six factors.
29. In our opinion, these factors give effect to the compromise reached at Confederation concerning the special status of the superior courts of general jurisdiction in a unitary justice system. They make it possible to draw a sufficiently clear line between, on the one hand, legitimate exercises of the provinces’ power in relation to the administration of justice and, on the other hand, grants of jurisdiction to parallel courts that usurp the superior courts’ general private law jurisdiction and prevent them from playing their constitutional role. The superior courts of general jurisdiction are and must remain central to the Canadian justice system (*MacMillan Bloedel*, at paras. 22 and 51‑52). However, this Court has repeatedly noted that Canada’s Constitution is a living tree and that a court’s jurisdiction must not be frozen at what it was in 1867 (*Reference re Residential Tenancies Act (N.S.)*, at paras. 32, per Lamer C.J., concurring, and 69, per McLachlin J. for the majority; *Reference re Young Offenders Act (P.E.I.)*, at p. 266; *Sobeys*, at p. 255). But the living tree must “gro[w] and expan[d] within its natural limits” (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 56, quoting *Edwards v. Attorney‑General for Canada*, [1930] A.C. 124 (P.C.), at p. 136). Section 96 is one of these limits.
30. Before we turn to the heart of the analysis, two preliminary remarks are in order.
31. First, these appeals do not concern the Small Claims Division of the Court of Québec’s Civil Division. Even though the Small Claims Division’s jurisdiction is covered by art. 35 *C.C.P.*, the parties’ submissions did not relate to that division. There is therefore no need to apply our multi‑factored analysis to the Small Claims Division in the case before us.
32. Second, the institutional characteristics of courts with provincially appointed judges have changed considerably since 1867. Today, although the existence of courts with provincially appointed judges is not itself protected by the Constitution, those courts offer the same guarantees of judicial independence and impartiality as the superior courts.
33. Even though ss. 96 to 100 do not apply to the judges of those courts, their independence is protected as a result of the preamble to the Constitution of Canada. In *Reference re Remuneration of Judges (1997)*, this Court held that the constitutional principle of judicial independence extends to courts with provincially appointed judges, including in civil matters. Lamer C.J., writing for the majority, noted that “judicial independence [has] grown into a principle that now extends to all courts, not just the superior courts of this country” (para. 106).
34. In addition, whereas at the time of Confederation, provincial court judges generally had no legal training (J. Deslauriers, “La Cour provinciale et l’art. 96 de l’A.A.N.B.” (1977), 18 *C. de D.* 881, at p. 910; Lyon, at p. 82), the present situation is quite different. As the AGQ rightly notes, their training now meets the highest standards required of the judiciary (A.F., at para. 152). There is therefore no doubt that courts with provincially appointed judges offer the same constitutional guarantees as the superior courts and provide justice of the same quality. The provincial legislatures have considerable latitude to establish courts whose judges are appointed by the provinces and which play a part in maintaining the rule of law. However, they cannot in so doing deprive the superior courts of general jurisdiction of their essential features, nor can they create parallel courts that prevent the latter from playing the role assigned to them by s. 96.
35. With this in mind, let us now consider the relevant factors.
    * + - 1. Scope of the Jurisdiction Being Granted
36. The first factor is the scope of the jurisdiction that is granted to the court with provincially appointed judges. Is it a vast or limited area of jurisdiction? As McLachlin J. (as she then was) wrote in *MacMillan Bloedel*, the concern is that “vast areas of contract, tort and criminal jurisdiction [not] be transferred to shadow courts with impunity, thus destroying the compromise of the Fathers of Confederation and the intended effect of s. 96” (para. 67, dissenting, but not on this point).
37. The scope of the jurisdiction being granted is not a strictly quantitative factor linked to the number of disputes concerned. On the contrary, this factor requires that the jurisdiction in question be situated in relation to the main branches of private law. In determining whether the transfer is “vast” or “limited”, we must bear in mind the role of the superior courts of general jurisdiction, which, more than any other court, are responsible for ensuring the coherence of private law. If a provincial court is granted a large block of jurisdiction at the heart of private law — such as contract law or property law — that would suggest that that court is, in exercising the jurisdiction in question, acting as a prohibited parallel court and that the superior courts are impaired as a result. Whether such a grant is constitutional will then depend on the scope of the limits placed on it. In contrast, a grant of a limited jurisdiction — over matters with respect to lease, for example — will not weigh as heavily in favour of such a conclusion, since it is only a very specific branch and not the very centre of contract law.
38. Whether a grant of jurisdiction is vast or limited is a question of degree. For example, jurisdiction over civil disputes is more vast than jurisdiction over contract law, which is in turn more vast than jurisdiction over employment contracts, which is more vast than jurisdiction over individual contracts of employment, which, finally, is more vast than jurisdiction over unjust dismissals. The more vast the granted jurisdiction is, the more likely it is that the provincial court will resemble a superior court of general jurisdiction. In contrast, a limited or specific grant will be less likely to make the provincial court resemble a superior court of general jurisdiction.
39. In the case at bar, art. 35 para. 1 *C.C.P.*grants to the Court of Québec almost the entirety of the law of obligations for claims of less than $85,000. This is not just any area of jurisdiction. The law of obligations, the real heart of private law, is the foundation of a multitude of specialized subfields. In fact, it is difficult to imagine a more central field:

[translation] At the very heart of [the] social order, the law of obligations is the legal foundation of the daily lives of the members of a civil society. Indeed, the law of obligations is everyday life put in a legal equation. The essential function of this branch of private law is in fact to supply the rules required to meet the needs of human beings in their everyday relationships with one another.

(P.‑A. Crépeau, “La fonction du droit des obligations” (1998), 43 *McGill L.J.* 729, at p. 732.)

1. Based on its scope and because of the fundamental nature of the field of law in question, the block of jurisdiction granted to the Court of Québec in art. 35 para. 1 *C.C.P.*is unquestionably similar to the general private law jurisdiction exercised by the superior courts of general jurisdiction. Whether such a broad grant is valid will depend on what limits are imposed on it.
   * + - 1. Whether the Grant Is Exclusive or Concurrent
2. As courts of original general jurisdiction, the superior courts have “inherent jurisdiction over all matters, both federal and provincial, unless a different forum is specified” (*Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at p. 311). Jurisdiction granted *exclusively* to a court with provincially appointed judges is removed from the superior court in the process (*MacMillan* *Bloedel*, at para. 27). By depriving the superior courts of their capacity to resolve a particular class of disputes, exclusivity threatens their status as the cornerstone of a unitary system of justice. In contrast, a *concurrent* grant preserves that capacity. The superior courts’ role is therefore not undermined to the same extent.
3. In the instant case, civil suits concerning contractual and extracontractual matters for less than $85,000 have been removed from the Superior Court’s jurisdiction. According to the statistics that were adduced in evidence, this accounts for more than 20,000 cases a year, not including those opened in the Small Claims Division (R.R., Chief Justice of the Superior Court et al., at pp. 3‑4). This removal of jurisdiction undermines the Superior Court’s role as the cornerstone of a unitary system of justice. It means that in Quebec, a large volume of cases under one of the most fundamental branches of private law cannot be brought before a superior court of general jurisdiction. Given that the superior courts are at the heart of a nationwide *unitary* justice system, the scope of their jurisdiction should not vary disproportionately from one province to another.
4. It may therefore be helpful in this analysis to consider the situation elsewhere in Canada. Even though s. 92(14) allows for and encourages flexibility in how the justice system is organized in each province, the superior courts of general jurisdiction must retain a certain uniformity in the sense that they must be able to play their essential role in a similar manner. Across the country, a vast majority of provinces have established courts with provincially appointed judges that have jurisdiction over civil matters. Almost all are identified as small claims courts, are governed by a simplified procedure, and their decisions can be appealed to the superior courts. The highest monetary jurisdiction is $50,000, in Alberta. While these courts retain some form of concurrent jurisdiction with the superior courts, Quebec has conferred exclusive jurisdiction over civil disputes concerning contractual and extracontractual obligations on a court with provincially appointed judges. It must be borne in mind in the analysis that the terms of this grant would also be permissible in the other provinces.
5. The role left to the Quebec Superior Court in this field is minimal in comparison with the role of superior courts elsewhere in Canada. Although the Quebec Superior Court has retained its jurisdiction over major disputes relating to obligations, such as class actions or disputes in which the value of the subject matter is $85,000 or more, it is in the process of becoming inaccessible to ordinary Quebecers. Section 92(14) gives the provinces the authority to create courts in the context of their power over the administration of justice (*Reference re Residential Tenancies Act (N.S.)*, at para. 72), but that power, while broad, is limited by the scope of ss. 96 to 100, which operate in favour of the superior courts. In accordance with this Court’s case law, a grant of exclusive jurisdiction whose effect would be to completely remove one of the attributes of the core jurisdiction “would maim” the superior courts (*MacMillan Bloedel*, at para. 37) and could never be acceptable regardless of the result of applying the other factors.
   * + - 1. Monetary Limit
6. Monetary limits reflect a certain division of labour between the courts pursuant to which the superior courts play the central role. As this Court held in *Sobeys*, “the nature of the inferior‑superior court distinction will invariably mean that the former’s jurisdiction was limited in some way”, including monetarily (p. 260). The lack of a monetary ceiling or the existence of a very high monetary ceiling can blur the distinction between a superior court of general jurisdiction and a court with provincially appointed judges, thereby showing that the latter is, in reality, operating as a prohibited parallel court that prevents the former from playing its constitutional role.
7. That being said, a monetary limit is merely one of several factors to weigh; it cannot be determinative in itself. If considered in isolation, a decision to impose a particular monetary limit will always appear to be discretionary. This is why such a limit must be analyzed in its context and in light of the other factors. The approach to be taken in this regard is one that gives the provinces flexibility without making the constitutional limit imposed by s. 96 illusory.
8. The Court of Appeal properly took the $100 monetary limit that had, in 1867, circumscribed the involvement of the inferior courts of the four founding provinces in the area of jurisdiction at issue as the starting point for its analysis. Comparing the current monetary ceiling to the monetary ceiling of the inferior courts at Confederation produces a quantitative benchmark that can be used to contrast the historical role of inferior courts with the role played by a court with provincially appointed judges today. The historical monetary ceiling needs to be expressed in present‑day dollars and calculated using a reliable conversion method that allows for a useful comparison.
9. If the current and historical monetary limits are close, it might be thought that the impact on the superior courts’ role in exercising the jurisdiction in question will be lower. The fact that the two amounts are equivalent would suggest that the involvement of the court with provincially appointed judges corresponds to the inferior courts’ historical involvement.
10. However, the monetary factor must not transform the analysis into a mathematical operation; it is but one factor among several, and it is useful because it allows the analysis to be anchored in a quantitative range. The current monetary ceiling can exceed the historical ceiling without necessarily making the grant unconstitutional, just as the fact that a ceiling is under the historical ceiling could be insufficient to ensure that the grant is constitutional. In every case, the difference between the historical ceiling and the current ceiling must be analyzed having regard to the other factors in order to determine whether and, where appropriate, to what extent the superior courts’ role is undermined.
11. There should nevertheless be a reasonable connection between the current monetary ceiling and the historical one that reflects the general division of labour at the time of Confederation between the inferior courts and what are now the s. 96 courts. If the current ceiling is significantly higher than the historical ceiling of the inferior courts, that would suggest that the superior courts of general jurisdiction have been deprived of part of the role they have always played and that that part has been conferred on a court with provincially appointed judges. The constitutional basis for such a ceiling will be much more fragile if the ceiling applies to a vast area of jurisdiction at the heart of any of the fundamental branches of private law.
12. It is to be expected that the monetary limit will increase over time because of inflation. The provinces should not have to frequently take action to adjust the limit. The courts should therefore be flexible when considering an amount that retains a reasonable connection to the historical monetary ceiling. Such an approach gives the provinces the latitude they need to ensure that legislation evolves in line with the rate of inflation (National Assembly, Standing Committee on Institutions, “Étude détaillée du projet de loi no 54 — Loi portant sur la réforme du Code de procédure civile”, *Journal des débats*, vol. 37, No. 71, 2nd Sess., 36th Leg., May 2, 2002, at pp. 6‑7 and 9).
13. This flexibility also facilitates access to justice (Blackstone, *Commentaries on the Laws of England* (1768), Book III, at p. 30, “[t]he policy of our ancient constitution . . . was to bring justice home to every man’s door”). Although the current monetary limit should generally reflect the balance between the s. 96 courts and the inferior courts at the time of Confederation, 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. This goal of facilitating access to justice should therefore always give a province a certain flexibility when it sets a monetary ceiling it considers appropriate in light of its own circumstances and specific provincial reality. Quebec is free to establish a court with provincially appointed judges that is unique to it, but that court’s monetary jurisdiction must have a sufficient connection to the monetary limit that existed in 1867 in order to give effect to the compromise reached at Confederation.
14. It is true that in this approach, significant weight is given to the monetary limit as a benchmark, whereas this Court has stated in discussing the *Residential Tenancies* test that geographical limitations must carry more weight than monetary limits (*Sobeys*, at p. 260). But that statement must be read in context. The Court was considering the practical involvement of the inferior courts in a specific area of jurisdiction at the time of Confederation. Significant geographical limitations could have had a considerable impact on the percentage of the population who had recourse to those courts. The relationship between the monetary ceilings and the role the inferior courts had actually played in that area of jurisdiction was less clear. In addition, attaching less importance to the monetary factor reflected considerations linked to inflation (*Sobeys*, at p. 260).
15. The monetary factor we are proposing for this multi‑factored analysis should not be subject to the same reservations as arose from *Sobeys*. First, it already takes inflation into account. Second, the factors of this analysis relate to the impact of legislation on the role the superior courts of general jurisdiction play in Canada’s constitutional architecture; they do not relate to the question whether there was a practical involvement of the inferior courts in a specific area of jurisdiction. Third, the purpose of this analysis is to remedy the problem of a wholesale grant of a vast area of jurisdiction. The monetary limits will clearly not have the same effect on the superior courts’ role if the grant involves a specific, well‑defined area of jurisdiction as they will if it involves a vast area of jurisdiction at the heart of private law. In the latter case, it will be much harder to limit the importance to be attached to them.
16. In the case at bar, the Court of Appeal took $100 as the starting point. This amount, which served as a basis for the expert reports filed by various parties, “is the amount of the maximum monetary jurisdiction exercised in 1867 by some of the inferior courts charged with hearing certain civil matters” (para. 144). Four conversion methods were proposed, based on the consumer price index, interest rates, nominal wages and GDP per capita.
17. We agree with the Court of Appeal’s analysis as regards the consumer price index, interest rates and nominal wages (paras. 167‑71). The best approach is to select the least imperfect method — the nominal GDP method in this case — and to remain mindful of its imperfections. In any event, the monetary limits are not a straitjacket, but a quantitative benchmark that is useful for anchoring the analysis in a monetary range. As we mentioned above, there must, in order to reflect the general division of labour that has always existed between the s. 96 courts and the other courts, be a certain proportionality between the current ceiling and the historical one.
18. Although we concede that the nominal GDP per capita method has its weaknesses, it is nonetheless the one that should be used. This method has the advantage of incorporating [translation] “all changes having occurred over time that have made it possible to enhance the well‑being of individual members of a society”, and of being based on fairly reliable historical statistics (A.R., AGQ, vol. III, at pp. 68‑70). It is not perfect, as it does not account for a number of factors that are not included in calculating GDP, such as domestic activities, second‑hand transactions and environmental costs (*ibid.*). Using this method, the AGQ’s expert before the Court of Appeal arrived at an updated amount of $66,008 for Canada and $60,790 for Quebec (pp. 71‑72). The respondent’s expert, using statistics he considered to be more reliable, arrived at updated amounts of $63,698 for Canada and $55,354 for Quebec (R.R., Chief Justice of the Superior Court et al., at pp. 39 and 42; see C.A. reasons, at para. 171 and fn. 281).
19. Thus, a ceiling of $100 in 1867 is equivalent today, Canada‑wide, to an amount somewhere between $63,698 and $66,008. The current ceiling of $85,000 is 29 percent more than the higher of these two amounts. This certainly suggests that the Court of Québec’s role is greater than the historical role of the inferior courts, but this expanded role is not in itself entirely disproportionate given the gap between the current and historical ceilings and the methodological challenge of accurately converting historical monetary data. The monetary ceiling must be considered in its context in order to determine whether it undermines the role of the Quebec Superior Court by impermissibly infringing on its general private law jurisdiction. The figures must not obscure what is at issue here: the limits on the exclusive grant of a large block of jurisdiction that has an impact on the whole of Quebec civil law. When the transfer of a large block of jurisdiction affects one of the most fundamental branches of private law, the scope of the limits to which it is subject must be considerable.
    * + - 1. Appeal Mechanisms
20. Appeal mechanisms can shed helpful light on the question whether a grant of jurisdiction establishes a prohibited parallel court that undermines the role of the superior courts of general jurisdiction.
21. From a constitutional point of view, a superior court of general jurisdiction and a provincial court of appeal are both “superior court[s]” within the meaning of s. 96 (*Attorney General of Quebec v. Farrah*, [1978] 2 S.C.R. 638, at p. 656, per Pigeon J., concurring; Pépin, at p. 136; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 834). However, the fact that a provincial court of appeal has oversight of decisions of the court with provincially appointed judges does not on its own justify a conclusion that the transfer of jurisdiction at issue satisfies constitutional requirements. First, it is above all the role of the superior court *of general jurisdiction* that is protected by s. 96 (*MacMillan Bloedel*, at paras. 22, 29 and 37; *Canadian Liberty Net*, at paras. 26‑27). Second, the fact that a court with provincially appointed judges is subject to review or appeal does not authorize that court to absorb s. 96 court functions (*Re: B.C. Family Relations Act*, [1982] 1 S.C.R. 62, at p. 71, per Laskin C.J., dissenting, but not on this point).
22. Nevertheless, how decisions rendered by the provincial court in exercising the jurisdiction at issue are to be appealed may help us answer the question whether the grant of that jurisdiction prevents the superior court of general jurisdiction from playing its role. If decisions of the court with provincially appointed judges can be appealed to a superior court of general jurisdiction at little cost, without leave and with no requirement of deference on questions of law, then there is a very clear hierarchical distinction between the two courts, and the superior court of general jurisdiction retains its ability to state the law. It will then be more difficult to conclude that the grant of jurisdiction undermines the superior court’s role and impermissibly invades its general private law jurisdiction. If, on the other hand, there is a right to appeal directly to the provincial court of appeal, then there is no hierarchical distinction between the two courts and the superior court of general jurisdiction has no sway over decisions of the court with provincially appointed judges. In short, that would suggest that the court with provincially appointed judges functions as a parallel court.
23. In the instant case, decisions rendered in exercising the jurisdiction provided for in art. 35 para. 1 *C.C.P.*may be appealed to the Quebec Court of Appeal under art. 30 or 31 *C.C.P.* In most of the other provinces, decisions of a court with provincially appointed judges must be appealed to the superior court of general jurisdiction before they can be appealed to the provincial court of appeal. In such circumstances, a hierarchical distinction can be drawn between the court with provincially appointed judges and a prohibited parallel court. It can therefore be concluded that the superior court retains its role within the provincial judicial structure.
24. Articles 30 and 31 *C.C.P.*confirm that the Court of Québec’s decisions cannot be appealed to the Superior Court. To some extent, the Court of Québec’s decisions are more shielded from appellate review than those of the Superior Court. Given that the threshold for an appeal as of right is fixed at $60,000 (leave is required for an appeal in any other case), appeals as of right against decisions of the Court of Québec will be much less common than those requiring leave. In most cases, litigants who wish to have decisions of the Court of Québec reviewed must go through a screening process in order to obtain leave to appeal. This factor therefore suggests that art. 35 para. 1 *C.C.P.*transforms the Court of Québec into a prohibited parallel court that undermines the role of the superior court of general jurisdiction.
    * + - 1. Impact on the Caseload of the Superior Court of General Jurisdiction
25. A grant of jurisdiction to a court with provincially appointed judges does not necessarily deprive the superior court of all forms of involvement in that area of jurisdiction. If, for example, the grant in question is subject to a monetary ceiling, the superior court of general jurisdiction continues to have jurisdiction over claims that exceed the amount of that ceiling. But there may be circumstances in which the impact of the grant on the caseload retained by the superior court of general jurisdiction in the specific area of jurisdiction makes it possible to draw conclusions as to whether that court’s role has been undermined and whether a parallel court has been created.
26. In this case, the evidence in the record supports no conclusion as to the impact of art. 35 *C.C.P.*on the superior court’s role. The parties submitted statistics that compared the caseload falling under art. 35 *C.C.P.*with the Quebec Superior Court’s *general* civil law caseload, including in family matters and bankruptcy and insolvency cases. This means that it is impossible to determine, even approximately, what impact art. 35 *C.C.P.*has on the Superior Court’s caseload in matters *falling specifically under the law of obligations*.
    * + - 1. Pursuit of an Important Societal Objective
27. Granting jurisdiction to a court with provincially appointed judges may be the means a legislature adopts to try to address a societal concern. 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, that is, of an exercise of that power for a purpose other than the creation of a prohibited parallel court. Access to justice, for example, is an important societal objective that could justify granting certain areas of jurisdiction to courts with provincially appointed judges (*Re: B.C. Family Relations Act*, at p. 107). The provinces must have considerable flexibility in what they do to address the needs of a changing society. The only limit on their initiative is that they may not create parallel courts that undermine the role of the superior courts of general jurisdiction. That being said, it is not enough to allege that there is an important societal objective; it is also necessary to show that the objective is real and that there is a connection between the grant of jurisdiction to a court with provincially appointed judges and the achievement of the objective. Given that the provinces are responsible for the administration of justice, for the adoption of rules of practice and for the financing of court operations, they cannot avail themselves of an access to justice argument on the basis of their own failure to give the superior courts sufficient resources.
28. Access to justice can also be promoted through features like a simplified procedure and simplified rules on the production of evidence. A summary procedure, for example, or rules of evidence that are relaxed in comparison with those that apply in the superior courts, will make the court with provincially appointed judges distinctive. It will then be more difficult to conclude that the grant of jurisdiction establishes a prohibited parallel court that prevents the superior court of general jurisdiction from playing its role. Other features such as the types of remedies that may be ordered (*Tomko*, at pp. 123‑25) or the absence of representation by lawyers can also be taken into consideration.
29. The AGQ submitted that the increase in the monetary ceiling for the Court of Québec’s civil jurisdiction was a response to a concern for access to justice in areas far from urban centres. However, we agree with the Court of Appeal that the AGQ has not established that this increase facilitates access to justice (C.A. reasons, at para. 185). In fact, the Court of Québec and the Superior Court both follow the same procedure and grant the same remedies, with a few exceptions, which means that it cannot readily be concluded, without further evidence, that the increase in the Court of Québec’s monetary ceiling facilitates access to justice.
30. The procedural framework in which the jurisdiction set out in art. 35 para. 1 *C.C.P.* is exercised is the same as in the Superior Court. Except in relation to questions of jurisdiction and the rules of practice, the *Code of Civil Procedure* makes no significant distinction between the two courts in this regard. The same is true of the rules of evidence provided for in the *Civil Code of Québec*. The Court of Québec’s Small Claims Division has a simplified procedure in which parties are not represented by lawyers (arts. 536 to 570 *C.C.P.*); however, its monetary jurisdiction is quite limited compared to the one conferred on the Court of Québec by art. 35 para. 1 *C.C.P.* That limited jurisdiction cannot negate the quite obvious similarity between the procedural schemes that apply to the Court of Québec and the Superior Court.
31. Moreover, access to justice is an argument that cuts both ways in this case. Quebec is the only province that has conferred so broad a jurisdiction on its court with provincially appointed judges: elsewhere in Canada, the superior courts play the central role in civil matters. Yet it is not clear that this alone places the other provinces at a disadvantage compared with Quebec when it comes to resolving access to justice issues. Given their power in relation to the administration of justice, the provinces are free to reorganize their superior courts in order to deal with such challenges. If, for any reason, the situation is different in Quebec, no evidence on this subject was tendered. To the extent that a higher number of judges or courts is necessary, access to justice is perhaps better served by incorporating an *additional* court than by establishing an *alternative* court, that is, by adding a complementary court that is more accessible and has a simplified procedure rather than by establishing a parallel court which absorbs the superior court’s functions.
    * + 1. Weighing the Factors
32. Although the multi‑factored analysis is not a mathematical operation, it must nonetheless be capable of being transposed to a monetary scale. In our view, the historical monetary ceilings serve as a good starting point for the analysis and a useful anchor for a quantitative range. Up to the amounts of those historical ceilings, the jurisdiction‑granting provision can generally be considered to be consistent with the Constitution. But as we will explain, a legislature cannot be found to be in compliance with its obligations under s. 96 solely because it complies with the historical monetary ceilings.
33. To determine how much latitude a legislature has should it wish to exceed these historical ceilings, we must consider the various factors of the multi‑factored analysis: the scope of the jurisdiction being granted, whether the grant is exclusive or concurrent, the relationship between the proposed monetary limit and the historical monetary ceilings, appeal mechanisms, the impact of the jurisdiction‑granting provision on the superior court’s caseload, and whether there is an important societal objective. All these factors are weighed in order to strike an appropriate balance between recognition of the provinces’ jurisdiction over the administration of justice and preservation of the nature, the constitutional role and the core jurisdiction of the superior courts of general jurisdiction.
34. The more the analysis of the above factors suggests that the core jurisdiction of those courts has been infringed on, the less the province will be allowed to depart from the updated historical monetary ceilings. Conversely, the less the analysis of the factors in question suggests that the core jurisdiction of the superior courts has been infringed on, the more the province will be free to depart from those ceilings. This is essentially a continuum. At one end of the spectrum, the grant of a vast jurisdiction that is exclusive, is not accompanied by a mechanism for appealing a decision to a superior court of general jurisdiction, has a significant impact on that court’s caseload and is not justified having regard to an important societal objective will limit the legislature’s freedom and is not constitutional. The impact of such a grant on the superior court of general jurisdiction could be so great that merely complying with the historical monetary ceilings would not suffice under s. 96. At the other end of the spectrum, the concurrent grant of a more limited jurisdiction — one that is accompanied by a mechanism for appealing a decision to a superior court of general jurisdiction, has little impact on that court’s workload and is justified having regard to an important societal objective — will give the legislature considerable flexibility. In *every case*, however, there must be a reasonable connection between the monetary ceiling contemplated by the legislature and the updated historical ceilings. The two ceilings must be in a similar range so as to be consistent with the general division of labour at the time of Confederation. In the same way, an *exclusive* grant cannot “maim” the superior courts by impermissibly infringing on their core jurisdiction.
35. In this case, the historical monetary ceiling of $100 is not in dispute. In today’s dollars, this represents an amount of between $63,698 and $66,008. The amount need not be within a dollar of that range. The imperfection of the conversion methods and the flexibility that must be accorded to the provinces can justify slight differences. Nor is a province required to amend its legislation every year in order to index the monetary jurisdiction of its courts to the rate of inflation. Thus, an amount close to these ones can serve as a starting point for the analysis.
36. The monetary ceiling of less than $85,000 fixed by art. 35 para. 1 *C.C.P.* represents an increase of approximately 29 percent over the historical ceiling. This increase is not clearly disproportionate; the adopted amount can reasonably be connected to the historical ceiling insofar as it falls into a similar range. What must now be done is to weigh the various qualitative factors in order to determine whether this grant of jurisdiction is consistent with the flexibility the Quebec legislature has. In our view, the answer must be no. The Quebec legislature has only minimal flexibility, because the result of the multi‑factored analysis clearly indicates that there is an impermissible infringement on the core jurisdiction of the superior courts of general jurisdiction.
37. First, the scope of the jurisdiction granted to the Court of Québec is indicative of a significant encroachment on the general private law jurisdiction of the superior courts of general jurisdiction. This limits the Quebec legislature’s latitude. Aside from exceptional situations such as the one considered in *McEvoy*, in which a transfer of the entirety of the jurisdiction over criminal matters to a court with provincially appointed judges was proposed, it is hard to imagine a broader transfer of jurisdiction than the one effected in art. 35 para. 1 *C.C.P.*, which grants a substantial block of jurisdiction over private law matters. The law of obligations is nothing less than [translation] “the general code for the relations man [*sic*] has with his peers” (G. Trudel, *Traité de droit civil du Québec* (1946), vol. 7, at p. 15).
38. Second, the exclusivity of the transfer accentuates the encroachment on the core jurisdiction of the superior courts and reduces the flexibility the Quebec legislature has accordingly. The impact of the exclusivity of the grant is considerable: it means that the law of obligations will evolve in large part under the authority of a court with provincially appointed judges. The Superior Court’s authority over obligations will be diminished accordingly. In light of s. 96, a grant of jurisdiction as broad as this over so fundamental a field of law must be subject to very significant limits, especially if it is exclusive. An exclusive grant of jurisdiction, even one that falls within acceptable historical limits, can have a significant impact on the core jurisdiction of the superior courts.
39. Third, the fact that there is no accessible appeal mechanism that would enable the superior court of general jurisdiction to review decisions of the Court of Québec reinforces our conclusion that the two courts are parallel and that the interference is impermissible. The absence of such a mechanism contributes, once again, to reducing the province’s flexibility in relation to the updated historical ceiling.
40. Fourth, as we explained above, the statistical evidence produced in this case does not permit us to determine with certainty that art. 35 para. 1 *C.C.P.* has only a minimal impact on the Superior Court’s caseload in the area of obligations.
41. Fifth, the AGQ has not shown that a concrete public policy justified greater flexibility in relation to the historical limit. It follows that the Quebec legislature could not depart from the updated historical ceilings other than minimally.
42. In our opinion, art. 35 para. 1 *C.C.P.* in its current form infringes s. 96. Its constitutional infirmity does not arise from the high monetary limit alone, but from the combination with all the other factors. It would be possible to imagine a grant of jurisdiction that does not exclude the superior court from a field of law that is so vast and so fundamental. That is not, however, this legislation. Here, there is an exclusive grant of a vast area of jurisdiction at the core of Quebec’s private law to a court with provincially appointed judges that operates like a superior court in every respect. The grant, if it is subject to no limits other than a monetary one, transforms the Court of Québec into a s. 96 court. In other words, art. 35 para. 1 *C.C.P.*encroaches impermissibly on the role the Constitution reserves to the superior court of general jurisdiction.
43. If the Quebec legislature were to decide merely to lower the monetary ceiling for the Court of Québec’s jurisdiction without altering its institutional context or the nature of the grant of jurisdiction provided for in art. 35 para. 1 *C.C.P.*, it would, to comply with its constitutional obligations, have to establish a monetary ceiling below the updated historical ceiling so as to leave the Superior Court with a caseload that is sufficient for it to continue to play a meaningful role in the development of the law of obligations. If, on the other hand, the legislature were to decide to revise the wording of art. 35 para. 1 *C.C.P.* and the institutional context in which that jurisdiction is exercised while minimizing the impact on the Superior Court’s core jurisdiction, it would have some latitude to raise the monetary ceiling above the updated historical ceiling. The legislature should however ensure that a reasonable connection was maintained with the latter ceiling and the Superior Court was not deprived of too much of the caseload concerning the law of obligations. Whatever the legislature’s choice may be, any change, including simplified procedures, that truly enhances access to justice will be 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.
44. This multi‑factored approach gives full effect to the compromise reached at Confederation, reflected in the constitutional framework consisting of ss. 96 to 100. It is necessary in order to safeguard the unity and uniformity of the Canadian judicial system, which is the concern that motivated the framers of the Constitution. Even though the superior courts, with their guarantee of judicial independence, are no longer the sole guardians of the rule of law, the fact remains that their constitutional status must be protected. The transfer brought about by art. 35 para. 1 *C.C.P.* deprives the Quebec Superior Court of any capacity to resolve a broad range of disputes at the heart of private law, thereby creating a parallel court that infringes on the core jurisdiction of the superior courts.
45. In closing, it would seem appropriate to clarify the scope of these reasons and their impact on the other tests developed with respect to s. 96. 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. Where a transfer to a court with provincially appointed judges has an impact on the general private law jurisdiction of the superior courts, the question whether the infringement on the core jurisdiction is permissible or impermissible should be answered having regard to the factors discussed above. Those factors give the provincial legislature sufficiently clear guidance to determine what latitude it has under s. 96 when it wishes to grant a court whose judges are appointed by the province jurisdiction over a significant portion of the common law without creating a parallel court.
46. In *Residential Tenancies*, a rampart against the creation of prohibited parallel courts was erected on the basis of s. 96. That rampart has already proven its worth, as is attested by several decades of case law. As a general rule, that test will be sufficient for purposes of the analysis. But there may be cases in which it will prove to be inadequate for the role it must play where an attempt is made to assign a vast field of the general law to a court with provincially appointed judges. Such a transfer would tend to distort the historical analysis and to inappropriately favour a finding that there was a general shared involvement. Here, the grant under art. 35 para. 1 *C.C.P.* is one of those cases in which the gaps in the *Residential Tenancies* test are apparent. 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.
47. Analysis on the Second Question
48. The second question concerns the application by the Court of Québec of the “obligation of judicial deference, which characterizes the application for judicial review,” when hearing appeals of administrative decisions under one of the eight specified Acts. This question, understood correctly, is not about the constitutionality of the Court of Québec’s appellate jurisdiction, but rather about the application by the Court of Québec of the standards of judicial review, that is, the standards of reasonableness and correctness that were established in *Dunsmuir* and reiterated in *Vavilov*. We are of the view, however, that the question has become moot because the Court of Québec is no longer required to apply these standards of review when hearing an administrative appeal. Moreover, there are no exceptional circumstances that would justify answering the question despite its mootness.
49. In *Vavilov*, this Court reformed the analysis for determining the standard of review that applies to the judicial review of administrative actions. In essence, where a legislature has provided for a right of appeal to a court, the appellate standards of review developed in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 — correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law — will apply. Where the legislature has not provided for a right of appeal and has left the availability of judicial review intact, the administrative law standards of review will apply instead.
50. Furthermore, the new s. 83.1 of the *Courts of Justice Act*, which came into force on June 5, 2020, provides that the Court of Québec must now apply the *Housen* standards in exercising its jurisdiction over appeals of administrative decisions.
51. Thus, the combined effect of *Vavilov* and s. 83.1 is that the Court of Québec is no longer bound by the obligation of judicial deference and must now apply the appellate standards from *Housen* in any appeal it hears from an administrative decision. This is true of all the rights of appeal in question in this case.
52. It is not unreasonable to argue that the intermediate step of appealing to a court with provincially appointed judges before applying for judicial review to the superior court might be unconstitutional because it is likely to deprive the superior courts of a considerable number of such applications. However, we wish to be clear that we are not ruling on whether the Court of Québec’s appellate jurisdiction is constitutional, as that is not the question before us. That matter is therefore left for another day.
53. Effect of the Decision
54. In principle, a reference is merely an advisory procedure. The answer to a reference question may be viewed as a legal opinion for the executive that is analogous to an opinion provided by law officers of the Crown (*Reference re Secession of Quebec*, at para. 15). In a reference, the Court therefore does not have the power to *formally* declare a law to be unconstitutional. The only power it has is to answer the question before it (*Attorney‑General for Ontario v. Attorney‑General for Canada*, [1912] A.C. 571 (P.C.),at pp. 588‑89; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at p. 863; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3 (“*Reference re Remuneration of Judges (1998)*”), at para. 9).
55. Notwithstanding their advisory — and therefore, in principle, non‑binding — nature, opinions given in references are in practice treated as judicial decisions and are followed by other courts (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 40; see also *Reference Re Certification in the Manitoba Health Sector*, 2019 MBCA 18, [2019] 5 W.W.R. 614, at para. 23; G. Rubin, “The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law” (1960), 6 *McGill L.J.*168, at pp. 175‑80). The day after this Court gives an opinion, any trial court considering the same question would in all likelihood apply that opinion because of its persuasive weight (*Reference re Remuneration of Judges (1998)*, at para. 10). It may therefore be appropriate, where the circumstances so require, for this Court to exercise its remedial discretion to suspend the effects of its decision in the context of a reference, as it may do on an appeal.
56. This Court recently stated in *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. XXX, at para. 83, that a declaration of invalidity can be suspended “when an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration’s effect”. The analysis in this regard is guided by certain principles (para. 94). In the instant case, since suspending the declaration of invalidity would not perpetuate interference with any right guaranteed by the *Canadian Charter of Rights and Freedoms*, the most determinative principle is that of respect for the distinct institutional roles of the courts and the legislatures (paras. 97 and 126‑31).
57. The weighing of the various factors we have identified shows that the Quebec legislature has available to it a range of possible legislative measures that would be constitutional should it wish to depart from the updated historical monetary ceiling. It is not for this Court to choose which of those measures should be implemented to replace the current art. 35 para. 1 *C.C.P.* In accordance with the constitutional principles of parliamentary sovereignty and democracy, it would be preferable to leave it to the democratically elected Quebec legislature to choose which of those possibilities best reflects the interests and priorities of the people of Quebec (see *G*, at para. 97).This is all the more true where the harmful effects of a suspension would be minimal, as affected litigants would in the meantime continue to have access to the Court of Québec, an impartial and independent court that plays a part in maintaining the rule of law.
58. An immediately effective declaration would significantly impair the Quebec legislature’s ability to legislate in order to address the constitutional invalidity (*G*, at paras. 129‑30). The day after the publication of this opinion, litigants with lawsuits for identical amounts could be subject to the jurisdiction of different courts (the Court of Québec or the Superior Court) depending on whether they decide to raise a preliminary exception concerning the jurisdiction of the Court of Québec. Such a situation would generate intolerable uncertainty in the administration of civil justice in Quebec. And it would then be difficult for the Quebec legislature, in enacting a new, constitutionally compliant art. 35 *C.C.P.*, to apply transitional measures that would restore the harmony of the system.
59. For these reasons, like the Court of Appeal, we agree that our opinion that art. 35 para. 1 *C.C.P.*is unconstitutional should not be implemented for a period of 12 months from the date of its release. It is normally up to the government to demonstrate how long the suspension should be. Despite the absence of submissions on this point in this Court, we find the length of time determined by the Court of Appeal to be adequate (*G*, atpara. 135). Article 35 para. 1 *C.C.P.*should therefore be considered valid in the interim. The Quebec legislature will also turn its mind to transitional provisions once it has selected between the available constitutionally compliant options. Three comments must be made regarding the effects of this opinion, however.
60. First, any originating proceedings filed in the Court of Québec before or during the suspension period can be pursued to the conclusion of the proceedings even if the proceedings conclude after the 12‑month period has expired. Any judgment that terminates a proceeding at that time will be final and will not be affected by this Court’s opinion. The absence of such a transitional measure would deprive Quebec of a harmonious judicial system, result in great disorder and affect the implementation and enforcement of litigants’ rights. If this Court did not address this situation, the rule of law would suffer (*Reference re Manitoba Language Rights*, atpp. 750‑51).
61. Second, *res judicata* precludes the reopening of cases that were within the jurisdiction of the Court of Québec pursuant to art. 35 para. 1 *C.P.C.* and that have already been decided by that court (see *Reference re Manitoba Language Rights*, at p. 756). Any decisions rendered by the Court of Québec in such cases before this decision will thus continue to be fully effective.
62. Third, the *de facto* doctrine, which recognizes and gives effect “to the justified expectations of those who have relied upon the acts of those administering the invalid laws and to the existence and efficacy of public and private bodies corporate, though irregularly or illegally organized” (*ibid.*, at p. 757), will also save rights, obligations and other effects which have arisen out of actions performed pursuant to art. 35 *C.C.P.*by courts, judges, persons exercising statutory powers and public officials. “Such rights, obligations and other effects are, and will always be, enforceable and unassailable” (*ibid.*).
63. Disposition
64. Our answers to the stated questions are as follows:

[translation]

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

No, the provisions of the first paragraph of art. 35 of the *Code of Civil Procedure* (chapter C‑25.01) setting at less than $85,000 the limit to the exclusive monetary jurisdiction of the Court of Québec are not valid with regard to s. 96 of the *Constitution Act, 1867*.

[translation]

1. Is it compatible with section 96 of the *Constitution Act, 1867* to apply the obligation of judicial deference, which characterizes the application for judicial review, to the appeals to the Court of Québec provided for in sections 147 of the *Act respecting access to documents held by public bodies and the protection of personal information* (chapter A‑2.1), 115.16 of the *Act respecting the Autorité des marchés financiers* (chapter A‑33.2), 100 of the *Real Estate Brokerage Act* (chapter C‑73.2), 379 of the *Act respecting the distribution of financial products and services* (chapter D‑9.2), 159 of the *Act respecting administrative justice* (chapter J‑3), 240 and 241 of the *Police Act* (chapter P‑13.1), 91 of the *Act respecting the Régie du logement* (chapter R‑8.1) and 61 of the *Act respecting the protection of personal information in the private sector* (chapter P‑39.1)?

We do not answer this question, because it is now moot.

1. For the foregoing reasons, we would dismiss the appeals without costs. This opinion should not be implemented for a period of 12 months from the date of its release. Any originating proceedings filed in the Court of Québec before or during this suspension period can be pursued to the conclusion of the proceedings even if the proceedings conclude after the 12‑month period has expired.

English version of the reasons of Wagner C.J. and Rowe J. delivered by

The Chief Justice (dissenting in part) —

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1. Introduction
2. I have read the reasons of my colleagues Côté and Martin JJ., but with respect, I cannot agree with their conclusion. Like Abella J., although for different reasons, I am of the view that art. 35 para. 1 of the *Code of Civil Procedure*, CQLR, c. C‑25.01(“*C.C.P.*”), does not remove from the Quebec Superior Court part of its core jurisdiction. I explain this below.
3. The first question raised in the reference to the Quebec Court of Appeal requires an answer that strikes a balance between, on the one hand, the ability of the provinces and territories to experiment with new forms of access to civil justice through provincially or territorially constituted courts and, on the other, the need to preserve the core jurisdiction of the superior courts that allows them to state and develop the civil law or the common law.
4. Specifically, what must be determined in this case is whether art. 35 para. 1 *C.C.P.*, which raises the monetary ceiling of the Court of Québec’s civil jurisdiction from less than $70,000 to less than $85,000, is contrary to s. 96 of the *Constitution Act, 1867*. The enactment of this provision of the *C.C.P.*was part of a series of increases in the ceiling that were all related to the genesis and history of the Court of Québec, a provincially constituted court that, over the course of the reforms made to it from the time of Confederation until today, has played a key beneficial role in Quebec’s justice system by facilitating the judicial resolution of conflicts in all districts in the province.
5. Although the Quebec legislature has always regarded such increases as a way of promoting access to justice, the respondents the Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec see in them instead a gradual erosion of the superior courts’ core jurisdiction in civil matters that cannot be authorized by s. 96.
6. The Court of Appeal held that, in order to be consistent with s. 96, the monetary ceiling of the Court of Québec’s civil jurisdiction must fall between $55,000 and $70,000, subject to future updates, and that setting the ceiling for claims at less than $85,000 is therefore unconstitutional (2019 QCCA 1492, at para. 188 (CanLII)). The Court of Appeal stated that s. 96 gives the Quebec Superior Court core jurisdiction over “substantial” civil law disputes, which it defined as those involving an amount of $70,000 or more, an amount corresponding to the updated maximum value of the monetary ceiling of the inferior courts’ jurisdiction at the time of Confederation. The Court of Appeal shared the concerns raised by the respondents about the gradual erosion of the Quebec Superior Court’s civil jurisdiction and noted that the Quebec legislature has given the Court of Québec a more significant role in civil matters than any other Canadian province (paras. 147, 150 and 187).
7. The appellants the Conférence des juges de la Cour du Québec, the Attorney General of Quebec, the Conseil de la magistrature du Québec and the Canadian Association of Provincial Court Judges are appealing the answer given by the Quebec Court of Appeal to the first reference question.
8. It should be noted that both the Attorney General of Quebec and the Attorney General of Canada, who is intervening for the federal government, fully support the position that art. 35 para. 1 *C.C.P.*is constitutional. In particular, the Attorney General of Canada takes the view that the Court of Appeal’s analytical approach overlooks the *actual impact* of this article [translation] “on the Superior Court’s ability to hear civil disputes” (I.F. (AGC), at para. 5). He adds that, in the final analysis, given “its insignificant effect” on the core jurisdiction exercised by the Superior Court in this regard, art. 35 para. 1 *C.C.P.*in no way infringes s. 96 of the *Constitution Act, 1867* (para. 8).
9. In my view, the appeals relating to the first question should be allowed. In the opinion it provided on the questions referred to it (“Opinion”), the Court of Appeal interpreted the limits of the Superior Court’s core jurisdiction too broadly and froze in time the civil jurisdiction of the Court of Québec, as a provincially constituted court, rather than adopting an analytical framework attuned to the actual constitutional objectives of s. 96. These objectives include fostering a unified judicial system throughout Canada. In my opinion, the preservation of the superior courts’ ability to state and develop private law allows this objective to be achieved in accordance with s. 96.
10. For this purpose, it is not necessary to maintain the monetary ceiling of the inferior courts’ civil jurisdiction in effect at the time of Confederation. There is another approach — not only desirable but also truer to the spirit of s. 96 — that gives the provinces and territories real autonomy in the administration of civil justice and permits them to make the choices best suited to their own emerging and complex challenges. As I will explain, such an analytical framework makes it possible both to protect the essential space the provinces and territories have for experimentation in matters of access to justice, which may include expanding their courts’ civil jurisdiction, and to ensure in the process that the superior courts can continue to state and develop the civil law and the common law.
11. The analysis that follows is based on the two stages of the s. 96 analytical framework, which are concerned with the historical jurisdiction and the core jurisdiction of the superior courts.
12. With regard to the first stage of the analytical framework, I am of the view that art. 35 *C.C.P.*satisfies the three tests developed in *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714. When properly characterized in terms of its subject matter, the jurisdiction conferred by this article on the Court of Québec is civil jurisdiction over contractual and extracontractual obligations. At the time of Confederation, the inferior courts of three of the four founding provinces, with the exception of Lower Canada (the province of Quebec), exercised a general shared jurisdiction in this regard.
13. As for the second stage of the analysis, I am of the view that art. 35 *C.C.P.* does not remove from the Quebec Superior Court any power that is within its core jurisdiction. This jurisdiction must be defined narrowly and, with due respect for those who disagree, I see no need to confer on the superior courts any more power over private law disputes than is necessary.
14. Of all the possible interpretations of the Confederation compromise embodied in s. 96, the only one that seems reasonable to me is the one that ultimately allows the superior courts to state and develop private law. As long as this ability is not jeopardized, the superior courts’ core jurisdiction in this area will remain intact and the unified nature of Canada’s judicial system will be protected.
15. The provinces and territories are therefore free to increase the civil jurisdiction of their respective courts insofar as they comply with this important restriction. The following factors, which are both quantitative and qualitative, provide some helpful guidance: (a) the impact on the number of cases that the superior court continues to deal with; (b) the impact on the proportion of cases within the superior court’s jurisdiction compared with those within the jurisdiction of a provincially or territorially constituted court; (c) the impact on the nature and importance of the cases within the superior court’s jurisdiction.
16. Once these factors are applied in this case, as I will do below, the necessary conclusion is that art. 35 *C.C.P.* does not have the effect of removing the power to state and develop private law from the Quebec Superior Court. The evidence shows that the Superior Court continues to hear a sufficient number and substantial proportion of civil cases, in which it is called upon to adjudicate significant disputes that are highly varied in nature.
17. Like Quebec, other provinces are continuing, by means of innovative initiatives, to promote access to justice everywhere within their boundaries. The interpretation I adopt of s. 96, informed by the compromise of the founders of Confederation, has the advantage of giving the provinces the degree of autonomy they need in the years ahead to address the complex challenge of access to justice, an undertaking whose success does not depend on a single solution.
18. Before I embark on the analysis mentioned above, it is important to begin by providing a broad outline of the Court of Québec’s genesis and history, viewed from the standpoint of the exercise by that court of its civil jurisdiction.
19. Background
20. The history of the Court of Québec and its predecessors before and since Confederation can be divided into four phases, which go back to the pre‑Confederation period and the Commissioners’ Court, until the time the Commissioners’ Court was replaced following Confederation by the Magistrate’s Court, which was later renamed Provincial Court and, finally, Court of Québec: (1) replacement of the Commissioners’ Court by the Magistrate’s Court (1869 to 1953); (2) abolition of the Circuit Court and increase in the Magistrate Court’s civil jurisdiction (1953 to 1965); (3) replacement of the Magistrate’s Court by the Provincial Court and increase in its civil jurisdiction (1965 to 1988); (4) replacement of the Provincial Court by the Court of Québec and increase in its civil jurisdiction (1988 to today).
21. The first phase began with the creation of the Magistrate’s Court, which was established by the Quebec legislature in 1869 and given the civil jurisdiction formerly exercised by the Commissioners’ Court, also a provincially constituted court (*An Act respecting District Magistrates in this Province*, S.Q. 1869, c. 23, ss. 13, 16 and 17). Like the Commissioners’ Court, the Magistrate’s Court exercised that jurisdiction concurrently with the Circuit Court, a s. 96 court (see *Renvoi concernant la constitutionnalité de la Loi concernant la juridiction de la Cour de magistrat, 11‑12 Elizabeth II, chapitre 62*, [1965] B.R. 1, at pp. 7‑8, 11‑12 and 18‑19; *Séminaire de Chicoutimi v. La Cité de Chicoutimi*, [1973] S.C.R. 681, at pp. 689‑90). The jurisdiction of the Magistrate’s Court increased from $25 to $50 in 1871, to $99.99 in 1921 and then to less than $200 in 1946 (*An Act further to amend the law respecting District Magistrates in this Province*, S.Q. 1871, c. 9, s. 1; *An Act to amend the Code of Civil Procedure respecting the district magistrate’s court*, S.Q. 1921, c. 100, s. 1; *An Act respecting the jurisdiction of the District Magistrate’s Court*, S.Q. 1946, c. 53, s. 1). In 1922, the Circuit Court’s civil jurisdiction was transferred to the Magistrate’s Court in districts where the latter was present (*An Act to amend the Code of Civil Procedure respecting the jurisdiction of the Circuit and Magistrates’ Courts*, S.Q. 1922, c. 94).
22. The Circuit Court was abolished by the Quebec legislature in 1953, during the second phase. The jurisdiction of the Magistrate’s Court over civil suits for less than $200 then became exclusive rather than concurrent (*An Act to amend the Courts of Justice Act*, S.Q. 1952‑53, c. 29, s. 17; *An Act to amend the Code of Civil Procedure*, S.Q. 1952‑53, c. 18, s. 12). In 1963, that jurisdiction was increased to less than $500 (*An Act respecting the jurisdiction of the Magistrate’s Court*, S.Q. 1963, c. 62, s. 1).
23. In 1964, the Quebec government referred the question of whether that increase was constitutionally valid to the Court of Appeal, clearly seeking to put an end to the uncertainty surrounding its constitutionality. The Court of Appeal unanimously held that the increase was invalid on the ground that, taken together, the successive increases in the civil jurisdiction of the Magistrate’s Court had the effect of usurping the Superior Court’s role (*Renvoi concernant la constitutionnalité de la Loi concernant la juridiction de la Cour de magistrat*).
24. That decision was appealed to this Court. Fauteux J., writing for his colleagues, found that the Court of Appeal had gone beyond the question referred to it by ruling on the constitutionality of the series of increases since 1869, when it should instead have confined itself to the specific question of the increase in the monetary ceiling that was the subject of the reference (*Re* *Cour de Magistrat de Québec*, [1965] S.C.R. 772, at p. 780). On that point, Fauteux J. held for a unanimous Court that the increase in question, which had raised the ceiling from less than $200 to less than $500, was not contrary to s. 96 (p. 783).
25. In 1965, at the start of the third phase of its history, the Magistrate’s Court was renamed Provincial Court (*An Act to amend the Courts of Justice Act*, S.Q. 1965, c. 17, s. 1). Over the years, the monetary ceiling of the Provincial Court’s civil jurisdiction was raised several times, to less than $1,000 in 1966, less than $3,000 in 1969, less than $6,000 in 1979, less than $10,000 in 1982 and less than $15,000 in 1984 (*Code of Civil Procedure*, S.Q. 1965, c. 80, art. 34; *An Act to again amend the Code of Civil Procedure*, S.Q. 1969, c. 81, s. 2; *An Act to amend the Code of Civil Procedure and other legislation*, S.Q. 1979, c. 37, s. 8; *An Act to amend various legislation*, S.Q. 1982, c. 58, s. 19; *An Act to amend the Code of Civil Procedure and other legislation*, S.Q. 1984, c. 26, s. 3).
26. Finally, in the fourth phase, which began in 1988, the National Assembly of Quebec created the Court of Québec by merging the Provincial Court, the Court of Sessions of the Peace and the Youth Court (*An Act to amend the Courts of Justice Act and other legislation to establish the Court of Québec*, S.Q. 1988, c. 21, ss. 1 to 5). Because the Court of Québec inherited the Provincial Court’s civil jurisdiction, its civil jurisdiction at that time was less than $15,000; that jurisdiction increased to less than $30,000 a few years later, in 1995, then to less than $70,000 in 2002 and, finally, to less than $85,000 in 2016 (*An Act to amend the Code of Civil Procedure and the Act respecting municipal courts*, S.Q. 1995, c. 2, s. 2; *An Act to reform the Code of Civil Procedure*, S.Q. 2002, c. 7, s. 5; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 35).
27. The following table, which is based largely on the one set out in the Opinion (see para. 173), shows how the monetary ceiling of the civil jurisdiction of provincially constituted courts in Quebec has increased since 1965 and also indicates, for each increase, the corresponding value determined by updating the $100 ceiling in effect in 1867:

|  |  |  |
| --- | --- | --- |
| **Year of legislative amendment (date of assent)** | **Ceiling of the jurisdiction of the Court of Québec (formerly the Magistrate’s Court and the Provincial Court)** | **Updated value of the 1867 ceiling of $100 (where available)** |
| 1965 | $1,000 | $2,884.41 |
| 1969 | $3,000 | $3,904.83 |
| 1979 | $6,000 | $11,130.55 |
| 1982 | $10,000 | $14,732.18 |
| 1984 | $15,000 | $17,222.62 |
| 1995 | $30,000 | $27,901.34 |
| 2002 | $70,000 | $37,175.75 |
| 2014 | $85,000 | $52,843.97 (2016)  $55,354.47 (2017) |

As can be seen, before 2002, almost all of the increases were below the updated value of the $100 ceiling that existed in 1867; the situation then changed, as the ceiling of the Court of Québec’s jurisdiction greatly exceeded that value.

* 1. Objectives Pursued by the Quebec Legislature

1. In making reforms to the Quebec justice system, the province has been guided by two inseparable objectives: (1) promoting access to justice; (2) strengthening the position of the court known today as the Court of Québec as a distinct provincial judicial institution. In fact, enhancing access to justice has been a central concern underlying each increase in the monetary ceiling of the Court of Québec’s civil jurisdiction (Legislative Assembly, “Projet de loi: Code de procédure civile”, *Débats de l’Assemblée législative*, vol. 1, 1st Sess., 24th Leg., December 12 and 16, 1952, at pp. 273 and 284 (Hon. M. Duplessis); Legislative Assembly, “Bill 20 — Code de procédure civile”, *Débats de l’Assemblée législative*, vol. 2, No. 85, 4th Sess., 27th Leg., July 14, 1965, at p. 4294 (Hon. C. Wagner); National Assembly, “Bill 74 — Loi modifiant de nouveau le code de procédure civile”, *Débats de l’Assemblée nationale*, vol. 8, No. 100, 4th Sess., 28th Leg., December 9, 1969, at p. 4748 (R. Paul); National Assembly, “Projet de loi no 40 — Loi modifiant le Code de procédure civile et d’autres dispositions législatives”, *Journal des débats*, vol. 21, No. 36, 4th Sess., 31st Leg., June 5, 1979, at p. 1686 (M.‑A. Bédard); National Assembly, “Projet de loi no 101 — Loi modifiant diverses dispositions législatives”, *Journal des débats*, vol. 26, No. 100, 3rd Sess., 32nd Leg., December 13, 1982, at p. 7105 (M.‑A. Bédard); National Assembly, “Projet de loi 83 — Loi modifiant le Code de procédure civile et d’autres dispositions législatives”, *Journal des débats*, vol. 27, No. 91, 4th Sess., 32nd Leg., May 15, 1984, at p. 6033 (P.‑M. Johnson); National Assembly, “Projet de loi 41 — Loi modifiant le Code de procédure civile et la Loi sur les cours municipales”, *Journal des débats*, vol. 34, No. 8, 1st Sess., 35th Leg., December 8, 1994, at pp. 359‑60 (P. Bégin); National Assembly, “Projet de loi no 54 — Loi portant réforme du Code de procédure civile”, *Journal des débats*, vol. 37, No. 58, 2nd Sess., 36th Leg., November 20, 2001, at pp. 3769‑71 (P. Bégin); National Assembly, “Projet de loi nº 28 — Loi instituant le nouveau Code de procédure civile”, *Journal des débats*, vol. 43, No. 72, 1st Sess., 40th Leg., September 24, 2013, at pp. 4502‑9 (B. St‑Arnaud)). The proposal to streamline Quebec’s judicial system in order to make it more accessible and more capable of delivering justice effectively gained significant momentum during the Quiet Revolution and truly became the driving force behind the reform of the Quebec courts (see H. St‑Louis, “Reform of the Trial Courts in Quebec”, in P. H. Russell, ed., *Canada’s Trial Courts: Two Tiers or One?* (2007), 123, at pp. 124‑25). This explains why the Court of Québec [translation] “became the court with the widest presence throughout the territory [of Quebec]” (S. Normand, *La Cour du Québec: Genèse et développement* (2013), at p. 90).
2. The commitment to making thorough reforms to Quebec’s justice system also required modernizing and improving the structural organization of the Court of Québec as a provincial judicial institution (see P. H. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987), at p. 126). As Patrice Garant observes, those judicial reforms reflect the fact that, during and after the Quiet Revolution, [translation] “the government and legislature of Quebec became aware of the significance of the . . . Court [of Québec] as an institution that was important to Quebec’s identity” (“La Cour du Québec et la justice administrative” (2012), 53 *C. de D.* 229, at p. 242).
3. When the replacement of the Magistrate’s Court by the Provincial Court was proposed in the Legislative Assembly of Quebec in 1965, that sweeping reform proposal was driven by three main ideas: increasing the civil jurisdiction of the court in question, making it more accessible to litigants, and making it more professional; all of these objectives thus contributed jointly to the renewal of Quebec’s justice system (Legislative Assembly, “Bill No 75 — Loi modifiant la loi des tribunaux judiciaires”, *Débats de l’Assemblée legislative*, vol. 2, No. 84, 4th Sess., 27th Leg., July 13, 1965, at pp. 4232‑35 (Hon. C. Wagner)).
4. However, the spirit of reform in the Quebec legislature came up against a few obstacles, all related to s. 96, which served as a constitutional limit and check. Initial attempts to abolish the Circuit Court in the district of Montréal and to replace it with a Magistrate’s Court were rejected by the federal government (*An Act to amend the law respecting District Magistrates*, S.Q. 1888, c. 20, s. 1; *An Act to amend the law respecting district magistrates*, S.Q. 1889, c. 30, s. 1; Department of Justice, *Correspondence, Reports of the Ministers of Justice and Orders in Council Upon the Subject of Dominion and Provincial Legislation 1867‑1895* (1896), at pp. 345 and 431‑32).
5. In addition, despite this Court’s favourable decision in *Re Cour de Magistrat de Québec*,doubts remained about the constitutionality of the increase in the monetary jurisdiction of the court we now know as the Court of Québec in civil matters (see, e.g., *Débats de l’Assemblée nationale*, December 9, 1969, at pp. 4746‑48 and 4750 (R. Paul and A. Maltais); National Assembly, Commission permanente de la justice, “Projet de loi no 101 — Loi modifiant diverses dispositions législatives”, *Journal des débats*, No. 226, 3rd Sess., 32nd Leg., December 16, 1982, at pp. B‑11320 and B‑11321 (M.‑A. Bédard); National Assembly, “Projet de loi 83 — Loi modifiant le Code de procédure civile et d’autres dispositions législatives”, *Journal des débats*, vol. 27, No. 103, 4th Sess., 32nd Leg., June 7, 1984, at pp. 6826‑31 (P.‑M. Johnson)). The Court of Appeal’s decision in that case nonetheless continued to have some persuasive force based on the perception that this Court had allowed the appeal for [translation] “technical” reasons (see J. Deslauriers, “La Cour provinciale et l’art. 96 de l’A.A.N.B.” (1977), 18 *C. de D.* 881, at p. 914). That situation led the Chief Judge of the Court of Québec to state in 2007 that it was only a matter of time before there was a constitutional challenge to that court’s civil jurisdiction (see St‑Louis, at p. 132). Clearly, history has proved her right.
   1. Emergence of the Role of Provincially Constituted Courts in Canada
6. A connection can be made between, on the one hand, the almost complete absence of decisions on the interpretation and application of s. 96 involving an exclusive transfer of jurisdiction to a provincially constituted court (and not an administrative tribunal) and, on the other, the establishment and strong expansion of this type of court in Canada.
7. In 1867, magistrate’s courts exercised quite limited jurisdiction in criminal matters and were composed largely of magistrates who were not legal professionals (G. T. G. Seniuk and N. Lyon, “The Supreme Court of Canada and The Provincial Court in Canada” (2000), 79 *Can. Bar Rev.* 77, at pp. 91‑93). Starting in the 1960s, the provincial and territorial governments replaced magistrate’s courts with new “provincial” courts presided over by qualified judges who had previously practised as lawyers, which had the effect of making these courts more professional (Russell, at pp. 126‑27).
8. In parallel with the establishment of modern provincially constituted courts, the Parliament of Canada passed legislation to confer much more extensive criminal jurisdiction on them. This played a part in making these courts the backbone of the criminal justice system, even though at another time, as we know, inferior courts generally had jurisdiction only over minor criminal cases. The practical result of that significant change was to give provincial courts concurrent jurisdiction with superior courts over all offences under the *Criminal Code*, R.S.C. 1985, c. C‑46, with a few exceptions (Seniuk and Lyon, at pp. 95‑96). In 2014‑15, for example, over 99 percent of the 328,028 criminal cases dealt with by the courts involving offences committed by adults were tried by provincially constituted courts (K. Roach, *Criminal Law* (7th ed. 2018), at pp. 2‑3).
9. It should also be noted that, in recent years, a number of provinces have increased their courts’ monetary jurisdiction in civil matters. In 2014, Alberta raised its Provincial Court’s monetary ceiling from $25,000 to $50,000 (*Provincial Court Civil Division Amendment Regulation*, Alta. Reg. 139/2014), and since 2015, the Lieutenant Governor in Council has had the power to increase that ceiling to $100,000 (see *Statutes Amendment Act, 2015*, S.A. 2015, c. 12, s. 6(4)(a)(v)). In 2017, British Columbia raised its Provincial Court’s monetary ceiling from $25,000 to $35,000 as well (*Small Claims Act*, R.S.B.C. 1996, c. 430, s. 3; *Small Claims Court Monetary Limit Regulation*, B.C. Reg. 179/2005, s. 1, as amended by B.C. Reg. 120/2017, Sch. 1). A few years earlier, in 2012, British Columbia also created a new Civil Resolution Tribunal to deal with most claims in which the amount sought does not exceed $5,000 (*Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25, ss. 2, 118 and 133; *Tribunal Small Claims Regulation*, B.C. Reg. 232/2018, s. 3). Finally, Saskatchewan did the same in 2016 by increasing the claims ceiling from $20,000 to $30,000 (*The Small Claims Amendment Regulations, 2016*, Sask. Reg. 4/2016, s. 3; *The Small Claims Act, 2016*, S.S. 2016, c. S‑50.12, s. 4; *The Small Claims Regulations, 2017*, R.R.S., c. S‑50.12, Reg. 1, s. 3).
10. Given the fact that provincially constituted courts typically sit in more locations than superior courts, it must be recognized that the initiatives taken by the provincial legislatures have promoted access to justice in civil matters in the provinces in question (I.F. (Canadian Council of Chief Judges), at para. 11).
11. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, this Court was asked to consider the impact of the expansion in the provincial courts’ civil jurisdiction, a measure that, according to Lamer C.J., required a “constitutional response” (para. 129). In light of the legislative policy of granting greater jurisdiction to provincially constituted courts, this Court held that those courts therefore needed the same guarantees of judicial independence as the superior courts (para. 129).
12. These appeals represent an opportunity for this Court to provide a *constitutional response* that recognizes the efforts made by the provinces and territories to ensure modern, accessible justice that is attuned to 21st century issues, without draining all substance from the central unifying role played by the superior courts in Canada’s justice system.
13. Role of Sections 92(14) and 96 in Canada’s Constitutional Order
14. Constitutional provisions must be “placed in [their] proper linguistic, philosophic and historical contexts” (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344) and interpreted in a manner that is sensitive to evolving circumstances, as they “must continually adapt to cover new realities” (*Reference re Same‑Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 30). In addition, the underlying principles of constitutional provisions, such as federalism, may be relevant to their interpretation (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25).
15. Here, ss. 96 and 92(14) of the *Constitution Act, 1867*, taken together, reflect one of the important compromises reached by the Fathers of Confederation with respect to the administration of justice in Canada.
16. On the one hand, s. 92(14) gives each province the power and responsibility to legislate in relation to the administration of justice, including for the purpose of creating, transforming or abolishing judicial offices. Section 129 of the *Constitution Act, 1867* in fact expressly provides for the continuance of the inferior courts that had civil jurisdiction at the time of Confederation, whose powers are within the exclusive authority of the provinces under s. 92(14). The provinces’ power is a wide one that gives them a great deal of flexibility, allowing them, among other things, to organize their courts in a manner that favours access to justice and strengthens public confidence in the judiciary while at the same time taking their specific needs and challenges into account (*Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 39; see also *Reference re Adoption Act*, [1938] S.C.R. 398, at pp. 413‑14).
17. On the other hand, this provincial power is subject to what s. 96 subtracts in favour of Parliament, including the power to appoint the judges of the superior courts in each province as well as the requirements that “flow by necessary implication from [the] terms [of that provision]” (*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 66, per Major J.). Parliament’s power of appointment therefore “implicitly limit[s] provincial competence to endow a provincial tribunal with [the] powers [of s. 96 courts]” (*Re Residential Tenancies Act, 1979*, at p. 728). By giving such protection to the superior courts’ core inherent jurisdiction, which is integral to their operations, s. 96 helps to establish a strong constitutional base for national unity through a network of related Canadian courts that ensures the rule of law, interprovincial uniformity and minimum standards of decision making throughout the country (*Trial Lawyer*s *Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 29). In this sense, s. 96 confers “a special and inalienable status” on the superior courts (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 52).
18. It does not follow, in my view, that s. 96 freezes the civil jurisdiction of the inferior courts at what it was at the time of Confederation. The section does, of course, constitute an important constitutional protection, but its scope remains limited to what is necessary to ensure that the underlying objectives of the Confederation compromise are achieved, and primarily the objective of ensuring a unified judicial presence throughout Canada. Under the doctrine of mutual modification, the scope of s. 96 must be understood together with the scope of s. 92(14) so that “the Constitution operates as an internally consistent harmonious whole” (*Trial Lawyer*s, at para. 25; see *Reference re Adoption Act*, at p. 415; *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.), at p. 109). In other words, the interpretation of s. 96 must take into account “the structure of government that [the Constitution] seeks to implement” and “the manner in which the constitutional provisions are intended to interact with one another” (*Reference re Senate Reform*, at para. 26).
19. In light of the foregoing, s. 96 cannot have the effect of depriving the provinces of the autonomy and flexibility they need to administer civil justice in a manner that responds to evolving social realities and the changing needs of litigants, nor can it stand “in the way of new institutional approaches to social or political problems” (*Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238, at p. 253; see P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at pp. 155‑56; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 775). This means that s. 96 should not be given an overly broad scope that would unduly limit the provinces’ ability to address complex and emerging legislative challenges related to the administration of justice. Moreover, the case law on s. 96 has long recognized the central role that the inferior courts play in ensuring access to justice because, as Duff C.J. put it, their decisions touch “the great mass of the people more intimately and more extensively than do the judgments of the Superior Courts” (*Reference re Adoption Act*, at p. 415; see also *Re: B.C. Family Relations Act*, [1982] 1 S.C.R. 62, at pp. 106‑7 and 112‑13; P. Girard, J. Phillips and R. B. Brown, *A History of Law in Canada* (2018), vol. 1, *Beginnings to 1866*, at pp. 390‑92 and 397‑404).
20. In my view, to prevent s. 92(14) from being drained of all substance, the provinces must have real freedom to make the choices best suited to their own needs and to balance a number of important values by experimenting with new forms of access to civil justice through their courts. As Beetz J. wrote in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, unlike in a case involving the *Canadian Charter of Rights and Freedoms*,

in a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgment of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation. [p. 56]

1. Therefore, subject to the limits imposed by the historical and core jurisdiction of the s. 96 superior courts, the provincial legislatures have full power to expand their courts’ civil jurisdiction in order to facilitate access to justice. In accordance with *Re Residential Tenancies Act, 1979* and *Sobeys Stores*, the first stage of the analysis is to determine whether the grant of jurisdiction in question is permissible. The second stage is to decide whether the Superior Court’s jurisdiction can be ousted, that is, whether an exclusive grant of jurisdiction is permissible.
2. Analytical Framework for the Historical Jurisdiction of the Superior Courts
3. The three‑step analysis for determining the constitutionality of a provincial grant of jurisdiction was established by Dickson J. (as he then was) in *Re Residential Tenancies Act, 1979* and was later refined by the Court in *Sobeys Stores*, *Reference re Young Offenders Act (P.E.I.)*,[1991] 1 S.C.R. 252 (“*Reference re Young Offenders*”), and *Reference re Amendments to the Residential Tenancies Act (N.S.)*,[1996] 1 S.C.R. 186 (“*Reference re Residential Tenancies Act (N.S.)*”). The first step, the historical test, involves answering the following question: Does the impugned power or jurisdiction broadly conform to an exclusive power or jurisdiction exercised by the superior, district or county courts at the time of Confederation?
4. If the impugned jurisdiction was exercised concurrently by the superior and inferior courts at the time of Confederation, it must be determined whether the inferior courts had a “general shared involvement” (*Sobeys Stores*, at p. 260 (emphasis deleted)) or a “meaningful concurrency of power” (*Reference re Residential Tenancies Act (N.S.)*, at para. 77) in this regard. If so, the grant will be considered valid under the historical test. The historical analysis therefore strikes a balance between the preservation of the superior courts’ historical role and the need to adapt to the realities of modern society, while giving the provinces flexibility to experiment with measures to facilitate access to justice (*Sobeys Stores*, at pp. 263 and 278‑82).
5. On the other hand, if the jurisdiction was exclusive to the superior courts, then it is necessary to proceed to the second and third steps of the analytical framework.
   1. Characterization of the Jurisdiction Conferred by Article 35 C.C.P.
6. The application of the historical test must begin with a proper characterization of the jurisdiction in issue. The characterization of the impugned jurisdiction must go beyond “a technical analysis of remedies” (*Sobeys Stores*, at p. 255). It is not focused on the “particular remedy sought” (*Reference re Young Offenders*, at p. 266), but is concerned rather with the “type of dispute” (*Reference re Residential Tenancies Act (N.S.)*, at para. 76; *MacMillan Bloedel*, at para. 14), the “jurisdiction” (*Sobeys Stores*, at p. 260) or the “subject‑matter” of the decision (*Dupont v. Inglis*,[1958] S.C.R. 535, at p. 543) — in short, with the matter in issue. Moreover, the effect of the characterization must not be to “freeze the jurisdiction of inferior courts at what it was in 1867” (*Reference re Young Offenders*, at p. 266). For example, in *Sobeys Stores*, the Court characterized the power in issue as jurisdiction over unjust dismissal, not over the remedy of reinstatement. Similarly, in *Attorney General of Quebec v. Grondin*, [1983] 2 S.C.R. 364, the Court characterized the exclusive jurisdiction given to the Régie du logement as jurisdiction over disputes between landlords and tenants, without considering the $10,000 monetary ceiling at the characterization stage.
7. This is a crucial question, as the manner in which the jurisdiction in issue is characterized can be determinative in the application of the historical test. As Wilson J. recognized in *Sobeys Stores*, “those challenging legislation will probably favour the narrower view as more likely to bring success through the historical test”, whereas “[t]hose supporting 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” (p. 253).
8. Two characterizations have been proposed in this case. The respondents and the intervener the Trial Lawyers Association of British Columbia characterize the jurisdiction in issue as general civil jurisdiction that is exclusive throughout Quebec over claims for less than $85,000 (in 2016 dollars). The appellants and the intervener the Attorney General of Canada characterize it as jurisdiction over civil disputes based on contractual and extracontractual obligations.
9. In my view, the characterization proposed by the respondents — and implicitly adopted by the Court of Appeal in its analysis of core jurisdiction — presents four problems. First, it gives too much weight to the monetary ceiling established by art. 35 *C.C.P.* and therefore departs from this Court’s consistent line of cases establishing that the characterization should not be focused on the remedy sought. The value of a claim is not in itself a “type of dispute”, as the same questions of fact and law may arise regardless of the amount in issue.
10. Second, the characterization proposed by the respondents has the effect of bypassing the application of the historical test, under which, as I explain below, monetary limits are only one factor in the overall assessment among several others, including the geographic reach of the jurisdiction and the range of disputes the court could decide (*Reference re Residential Tenancies Act (N.S.)*, at para. 77). At the preliminary stage of characterization, no one factor, be it monetary or geographic, can be made so decisive.
11. In the same vein, the allegedly exclusive nature of the jurisdiction cannot be included in its characterization. If a grant of jurisdiction satisfies both stages of the s. 96 analytical framework, then it can be exclusive (*MacMillan Bloedel*, at para. 18). The exclusivity of the grant therefore *results* from the fact that both stages are met. It cannot be allowed to influence the analysis by being included in the characterization prematurely.
12. Finally, a monetary characterization could freeze the jurisdiction of the provincial courts at what it was at the time of Confederation as a result of a technical analysis of remedies, contrary to this Court’s consistent case law on this point. That approach is therefore liable to deprive the provinces of the flexibility they require to structure their courts’ jurisdiction in a manner that takes account of evolving social realities and the changing needs of litigants.
    1. Application of the Historical Test
13. The historical analysis is concerned with the jurisdiction vested exclusively in the superior courts at the time of Confederation. If the inferior courts had either a meaningful concurrency of power or a “shared involvement” in the field in question, then s. 96 does not come into play. An “overly technical” analysis must be avoided (*Reference re Residential Tenancies Act (N.S.)*, at para. 77), because what is required is analogous jurisdiction and it is not necessary “that jurisdiction . . . have been entirely or even generally concurrent, for the nature of the inferior‑superior court distinction will invariably mean that the former’s jurisdiction was limited in some way” (*Sobeys Stores*, at p. 260).
14. In *Sobeys Stores*, the Court set out three questions for assessing the extent of the courts’ shared involvement in exercising the jurisdiction in question:
    * + - 1. was the inferior court jurisdiction geographically restricted? Was it confined to certain municipal or district courts or was it being exercised province‑wide?
          2. was the inferior court jurisdiction limited to a few specific situations? . . .
          3. was the inferior court jurisdiction restricted by pecuniary limits so as to reduce its scope even after allowing for inflation? [p. 261]

In addition to these questions, two other factors were recognized by the Court in *Reference re Residential Tenancies Act (N.S.)*: the percentage of the population that would have used the inferior courts, and the frequency with which disputes amenable to their process arose (para. 77).

1. It is clear that, depending on the context, certain factors will have more weight than others. For example, “[a] significant geographical limitation would tell against the legislative scheme much more than a purely pecuniary limit” (*Sobeys Stores*, at p. 260). It is also clear that the purpose of these factors is essentially to ascertain whether a substantial percentage of the population had access to an inferior court in the field in question. This was the question that Wilson J. was considering in *Sobeys Stores* when she explained the relevance of the monetary and geographical factors in terms of “recourse to the inferior courts for the majority of colonial residents” (p. 260). As I mentioned above, the Court in *Reference re Residential Tenancies Act (N.S.)* also recognized two new analytical factors to provide a clearer picture of public access to the inferior courts, noting that the “practical involvement” of those courts in exercising the jurisdiction at issue is what matters (para. 77 (emphasis in original)).
2. In the application of the historical test, all courts that existed in pre‑Confederation Canada must be considered, and not only those of the province (then a colony) in question. As Wilson J. also recognized in *Sobeys Stores*, “consistency at the level of the historical analysis would seem to be desirable and . . . it is best achieved by measuring each s. 96 challenge against the same historical yardstick. The test at this stage should be national, not provincial” (p. 266). In other words, if the objective is to ensure the integrity of a unified judicial system, the analysis of court involvement must not be confined “within artificially circumscribed boundaries” (*Reference re Residential Tenancies Act (N.S.)*, at para. 78). Because they give priority to and focus exclusively on the historical situation in Quebec, the respondents’ arguments and the Court of Appeal’s analysis depart from this Court’s case law on this point. That methodology is contrary both to the federalism principle (*R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 78) and to the objective underlying s. 96 of ensuring a unified judicial system.
3. When the jurisdiction in issue is properly characterized, the analysis of the historical test leads to the conclusion that the jurisdiction was not vested exclusively in the s. 96 courts. I agree with my colleagues that, on the whole, the inferior courts at the time of Confederation had a general shared involvement or a meaningful concurrency of power in contractual and extracontractual matters. This is confirmed by a historical overview.
4. In Upper Canada (the province of Ontario), division courts had jurisdiction over any personal action up to $40 and any contractual claim up to $100 (D. Fyson, *Civil Justice in Mid‑Nineteenth‑Century British North America: Court Structure, Judges and Recourse to the Courts in Lower Canada, Upper Canada, New Brunswick and Nova Scotia*, April 10, 2018, reproduced in A.R. (AGQ), vol. III, at p. 126 (“Fyson Report”)). This represented about 83 percent of civil cases (p. 183).
5. In New Brunswick, the City Court of Saint John could hear civil disputes up to $80 (p. 137) and, until 1867, the Court of Common Pleas exercised jurisdiction concurrently with the New Brunswick Supreme Court in civil matters, without any monetary limits except in cases involving title to land (pp. 131‑33).
6. In Nova Scotia, justices of the peace, who were spread throughout the province, had jurisdiction over small claims up to $20 (or $80 when two justices sat) (p. 141), while the Halifax City Court had jurisdiction over actions in contract not exceeding $80 and other civil actions up to $40 (p. 144). Those actions represented the majority of civil cases in that province (p. 198).
7. In Lower Canada, commissioners’ courts had jurisdiction in contractual matters up to $25 in 228 localities (pp. 110‑13), or most of the territory, and heard approximately 26 percent of cases in 1866 (p. 170). The Montréal Recorder’s Court had jurisdiction over disputes between landlords and tenants up to $100 (p. 118), which, as this Court has stated, would correspond to “quite a substantial” monetary jurisdiction today (*Sobeys Stores*, at p. 270). The Québec Recorder’s Court heard disputes between masters and servants without any monetary limit (Fyson Report, at p. 118). The so‑called “inferior” courts therefore heard about 40 percent of civil actions in 1866 (p. 170).
8. All told, the vast majority — at least 80 percent — of civil disputes in pre‑Confederation Canada, with the exception of Lower Canada, came before the inferior courts. Although that jurisdiction was subject to monetary limits in several matters, it nevertheless indicates that there was significant coextensive involvement by the inferior courts in contractual and extracontractual matters. Those courts were truly a powerful force in the civil justice system, they had significant private law jurisdiction at the time within their respective territory, and they heard the great majority of cases. If the Court of Appeal had properly characterized the jurisdiction in question as being over “civil disputes based on contractual and extracontractual obligations”, it could not have reached any other conclusion.
9. It clearly follows that s. 96 cannot have the effect of freezing Quebec’s civil justice system at a time prior to Confederation. Section 96 unquestionably allows increases in the Court of Québec’s civil jurisdiction in light of the general historical conditions in most of the founding provinces before 1867. Quebec could therefore take this path despite the fact that the other provinces made different choices after Confederation.
10. Accordingly, it must be concluded that art. 35 *C.C.P.*satisfies the historical step of the analysis set out in *Re Residential Tenancies Act, 1979*. What remains to be determined is whether this article has the effect of removing from the Superior Court part of its core jurisdiction.
11. Analytical Framework for the Core Jurisdiction of the Superior Courts
12. I agree with the Court of Appeal’s view that, in light of *Trial Lawyers*, s. 96 of the *Constitution Act, 1867* gives the superior courts a core jurisdiction that allows them “to resolve disputes between individuals and decide questions of private and public law” (para. 48 (emphasis deleted), citing *Trial Lawyers*, at para. 32).
13. That being said, I nonetheless find that the monetary ceiling provided for in art. 35 *C.C.P.* does not have the effect of removing the power to resolve disputes between individuals and decide questions of private and public law from the Quebec Superior Court.
    1. Description of the Analytical Framework
14. The framework that has been established to protect the superior courts’ core jurisdiction does not allow this jurisdiction to be removed from them (*MacMillan Bloedel*, at para. 30). The framework involves two questions: (1) Is the power in question within the core jurisdiction of the superior courts? (2) Does the law have the effect of removing the power from their core jurisdiction?
15. The analysis required to answer the first question referred to the Court of Appeal entails identifying a power that is within the core jurisdiction of the superior courts. In *MacMillan Bloedel*, Lamer C.J. described this jurisdiction in the following manner: “The core jurisdiction . . . comprises those powers which are essential to the administration of justice and the maintenance of the rule of law” (para. 38). Removing such powers from a superior court would make it “something other than a superior court” and deprive it of its “essential character” (para. 30).
16. This Court has repeatedly emphasized that the superior courts’ core jurisdiction is “a very narrow one which includes only critically important jurisdictions” (*Reference re Residential Tenancies Act (N.S.)*, at para. 56; see also *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 59; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, at paras. 59 and 61). If they were deprived of these critically important powers, the superior courts could not continue to play their central and unifying role in our constitutional and judicial system and to uphold the rule of law (*Re Residential Tenancies Act, 1979*, at p. 728; *MacMillan Bloedel*, at paras. 15 and 35‑37; *Trial Lawyers*, at para. 32; see also *Reference re Residential Tenancies Act (N.S.)*, at para. 72; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 88; *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 17; *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 32). As noted by Professor Daly, identifying the powers that are within the superior courts’ core jurisdiction is always a very delicate exercise, as it must not lead to the jurisdiction being expanded so far as to imperil Canadian courts’ well‑established respect for institutional pluralism (P. Daly, “Section 96: Striking a Balance between Legal Centralism and Legal Pluralism”, in R. Albert, P. Daly and V. MacDonnell, eds., *The Canadian Constitution in Transition* (2019), 84, at p. 101).
17. Some of these powers are procedural and arise from the exercise by the superior courts of their inherent jurisdiction. The power to punish for all forms of contempt is one example (*MacMillan Bloedel*, at paras. 38‑41); the power to remedy abuses of process is another (*Babcock*, at para. 60; *Ahmad*, at para. 61).
18. Other powers are part of the superior courts’ subject‑matter jurisdiction. They include the power to judicially review the decisions of administrative tribunals that was recognized in *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, and the power to pronounce upon the validity of federal laws that was affirmed in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307.
19. This Court has struck down various laws whose effect was to remove from the superior courts a power arising from their core jurisdiction. I am referring here to the removal of the power to review the decisions of administrative tribunals (*Attorney General of Quebec v. Farrah*, [1978] 2 S.C.R. 638; *Crevier*) or the removal of the power to try young persons for contempt of court *ex facie* (*MacMillan Bloedel*).
20. In *Trial Lawyers*, the Court used the expressions “infringe” and “impinge” to describe the pernicious effect of a law on the superior courts’ core jurisdiction (paras. 31‑32, 36 and 45). The use of these expressions does not change the nature of the test formulated in *MacMillan Bloedel*: the question remains whether the law in question has the effect of removing a power that is within the core jurisdiction.
    1. Power to Resolve Private Law Disputes
21. In *Trial Lawyers*, McLachlin C.J. defined the superior courts’ core jurisdiction in civil matters as follows:

The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law . . . . The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, 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 of the *Constitution Act, 1867*. [para. 32]

In its analysis, the Court of Appeal relied on this passage to identify the superior courts’ core jurisdiction (paras. 115 and 140). Based on the definition quoted above, the superior courts may, at first glance, seem to have a very broad jurisdiction. I reiterate, however, that this core jurisdiction “is a very narrow one which includes only critically important jurisdictions” (*Reference re Residential Tenancies Act (N.S.)*, at para. 56).

1. The superior courts’ jurisdiction in matters of private law is limited to what is necessary for them to play their central role in maintaining the rule of law and the unity of our constitutional and judicial system. Insofar as this jurisdiction stays within these limits and contributes to protecting this crucial role played by the superior courts, it should be concluded that the definition and above all the scope given to the jurisdiction are in keeping with the principles established by the Court in this regard.
2. In order for this role to be preserved, the superior courts must, of course, have substantial jurisdiction in matters of private law, but their jurisdiction need not be exclusive. Certain powers in this area can therefore be removed from them (*Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd.*,[1949] A.C. 134 (P.C.); *Reference re Residential Tenancies Act (N.S.)*).
3. In my view, the power to resolve disputes between individuals and decide questions of private law is meaningful only if the superior courts, as courts of original general jurisdiction, have substantial jurisdiction that allows them to state and develop the civil law in Quebec and the common law in the other provinces. Otherwise, the role they have played in unifying Canada’s judicial system and maintaining the rule of law from Confederation until today would be jeopardized.
   1. Factors to Be Considered
4. To decide whether art. 35 *C.C.P.* removes from the Quebec Superior Court its substantial jurisdiction in civil matters, the Court of Appeal focused its analysis on two monetary factors: the updated value of the $100 ceiling that applied in 1867, and the monetary threshold for appeals as of right.
5. With regard to the first factor, the Court of Appeal updated the 1867 ceiling of $100 on the inferior courts’ monetary jurisdiction over certain civil matters in order to determine the maximum limit of the Court of Québec’s monetary jurisdiction in civil matters. Primarily on the basis of this factor, the Court of Appeal found that art. 35 *C.C.P.* has the effect of infringing on “the core jurisdiction of the Quebec Superior Court to adjudicate certain substantial civil disputes” (para. 188).
6. With respect, I do not think that an amount like this can be of such decisive importance in assessing the impact of this article on the exercise of the Quebec Superior Court’s core jurisdiction in the civil law. In my opinion, the Court of Appeal’s approach was not sufficiently holistic given that, as indicated above, the Superior Court’s power to resolve disputes between individuals and decide questions of private law must be significant enough to enable it to state and develop the law in this area. The question is therefore not whether the Superior Court can still adjudicate substantial civil disputes, but rather whether its jurisdiction in this regard is substantial enough that it is capable of ensuring this development.
7. I believe that three quantitative and qualitative factors are relevant in determining whether art. 35 *C.C.P.* (or any other statutory provision) removes from the Superior Court part of its core jurisdiction in matters of private law: (a) the impact on the number of cases that the Superior Court continues to deal with; (b) the impact on the proportion of cases within the Superior Court’s jurisdiction compared with those within the jurisdiction of a provincially constituted court; (c) the impact on the nature and importance of the cases within the Superior Court’s jurisdiction.
8. As long as the superior courts continue to hear a volume of cases that is sufficient in number and proportion and varied enough in nature and importance that they are able to state and develop the civil law in Quebec and the common law in the other provinces, they will, as a result, continue to play their unifying role in Canada’s constitutional and judicial system. Under such conditions, the legislatures can, without infringing on the superior courts’ core jurisdiction in matters of private law, confer subject‑matter jurisdiction on provincially constituted courts to empower them to hear a certain number of civil claims.
9. In this regard, Professor Daly writes that “[t]he question . . . is how to preserve the s. 96 courts as central pillars of the Canadian legal order, their ‘prime importance in the constitutional pattern,’ while also preserving space for institutional and interpretive pluralism by maintaining a favourable constitutional climate for legislative experimentation” (p. 98, citing *Law Society of British Columbia*, at p. 327). In my view, the three factors set out above ensure an appropriate balance in seeking, on the one hand, to have a plurality of provincial or territorial justice system models that can increase access to justice by means of various initiatives and, on the other, to have the superior courts play their unifying role in the Canadian legal order.
10. A number of appellants and interveners pointed out the various initiatives introduced by provincial legislatures that have recognized the need to reform some aspects of the operations of their private law courts in order to enhance access to justice in their province. Protection of the superior courts’ core jurisdiction in this field should certainly not have the effect of deterring the provinces and territories from making essential efforts to this end. As Brandeis J. stated in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), at p. 311, “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” In this sense, for the reasons set out above, the approach I am suggesting here does not interfere with the ability of the provinces and territories to experiment with new forms of access to civil justice.
11. Moreover, it goes without saying that the application of the three factors is highly factual in nature, which does not mean that it calls for a cyclical re‑examination of the impact of a statutory provision on the specific exercise of this jurisdiction. In the words of Laskin C.J. in *R. v. Zelensky*, [1978] 2 S.C.R. 940, at p. 951, it is true that “[n]ew appreciations thrown up by new social conditions . . . make it appropriate for this Court to re‑examine courses of decision on the scope of legislative power . . . always remembering, of course, that it is entrusted with a very delicate role in maintaining the integrity of the constitutional limits imposed by the *British North America Act*”(see also *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680, at p. 703; *Big M Drug Mart*, at p. 335).
12. The burden of proving on a balance of probabilities that a statutory provision impairs a superior court’s ability to state and develop private law strikes me as a particularly onerous one. This is the case, it seems to me, because of the extensive evidence required for this purpose, which must be quantitative, qualitative and comprehensive.
    1. Article 35 C.C.P. Does Not Infringe on the Superior Court’s Core Jurisdiction in Civil Matters
13. In this case, I conclude from the application of the three factors set out above that art. 35 *C.C.P.*does not have the effect of removing from the Superior Court part of its core jurisdiction.
14. First, with regard to the impact of the grant of jurisdiction on the number of cases heard by the Superior Court, that court continues to deal with a large number of civil cases. Specifically, the data for 2017‑18, after art. 35 *C.C.P.*came into force, show that about 45 percent of civil cases were opened at the Superior Court (63,807 cases in the Civil, Commercial and Family Chambers, compared with 77,021 cases in the Court of Québec’s Civil Division, including the Small Claims Division, except appeals in administrative matters) (Ministère de la Justice, *Nombre de dossiers ouverts à la Cour supérieure et à la Cour du Québec (2012‑13 à 2017‑18)*, January 28, 2019, reproduced in A.R. (AGQ), vol. VII, at pp. 179‑80). After the maximum limit of the Court of Québec’s civil jurisdiction was increased in 2016, the number of cases heard by the Superior Court fell slightly (A.R. (AGQ), vol. IV, at p. 131). The fact remains that a large number of civil cases come before the Superior Court, which suggests that its power to state and develop private law has been preserved.
15. Second, the impact of art. 35 *C.C.P.*on the proportion of civil cases heard in the Superior Court must be considered. The number of cases opened at the Superior Court in comparison with those opened at the Court of Québec remains relatively stable. More specifically, this has been so since 2005‑6 (A.R. (AGQ), vol. IV, at p. 223). In fact, the proportion of civil cases opened at the Court of Québec has decreased since the 1980s — approximately 68 percent in 1980‑81 and 1985‑86, and 60 percent in 2005‑6, 2010‑11 and 2016‑17 — despite the fact that the monetary ceiling of the Court of Québec’s jurisdiction was less than $10,000 in the early 1980s (p. 223). Moreover, the proportion of cases heard by the Quebec Superior Court today is much higher than the proportion of cases heard by the superior courts of Upper Canada, New Brunswick and Nova Scotia at the time of Confederation, which was less than 20 percent (Fyson Report, at pp. 183, 192 and 198). This evidence shows that neither art. 35 *C.C.P.* nor the other statutory provisions that increased the monetary ceiling of the jurisdiction of the Court of Québec (or its predecessors) removed the power to state and develop private law from the Superior Court.
16. Finally, with regard to the impact of art. 35 *C.C.P.* on the nature of the cases heard by the Superior Court, it can be said without a doubt that that court continues to hear claims on a variety of subjects as well as the judicial applications that are the most substantial in monetary terms. First of all, the Superior Court has exclusive jurisdiction to state and develop the law with respect to class actions, injunctions, and wills and successions, as well as family law and insolvency law. In addition, where there is shared jurisdiction in a field of law, the Superior Court continues to have jurisdiction over civil claims in which the amount in issue is substantial. Although art. 35 *C.C.P.* sets the Court of Québec’s monetary ceiling at less than $85,000, the vast majority of the cases opened at that court involve claims not exceeding $40,000 (A.R. (AGQ), vol. V, at p. 40). Moreover, in 2016‑17, only 3.3 percent of the civil cases opened at the Court of Québec (other than in the Small Claims Division) involved an amount between $70,001 and $85,000 (p. 40). On the other hand, in all civil claims before the Superior Court relating to areas of shared jurisdiction where an amount is in issue, that amount is $85,000 or more. Despite art. 35, the Superior Court retains its power to decide civil cases on a wide range of subjects, includes cases in which the monetary claims are substantial.
17. In short, art. 35 *C.C.P.* does not have the effect of removing from the Quebec Superior Court its jurisdiction over substantial civil claims. Its core jurisdiction in this regard remains intact. It should be noted that both the Attorney General of Quebec and the Attorney General of Canada, relying on the above factual evidence, also come to the same conclusion.
18. This conclusion, and the holistic three‑factor approach on which it is based, aligns readily with that of my colleagues as regards the application of the analytical framework from *Re Residential Tenancies Act, 1979*. At the time of Confederation, Upper Canada, New Brunswick and Nova Scotia gave the “inferior” courts a leading role in implementing various civil matters, whereas in Lower Canada, the superior courts played that role instead. The fact remains that in the first three provinces mentioned, the superior courts — as courts of original general jurisdiction — were able to state and develop the common law even though the inferior courts heard at least 80 percent of civil cases (Fyson Report, at pp. 183, 192 and 198). The same conclusion applies equally today with respect to the Superior Court’s role in Quebec civil law, despite the fact that the Court of Québec now plays a major role in this area. This is one of the things that the application of the analytical framework established in *Re Residential Tenancies Act, 1979* demonstrates retrospectively. Since Confederation, Ontario, Nova Scotia, New Brunswick and Quebec have made different choices in the administration of justice in their province with regard to the role of “provincial” courts. History thus shows that the role of these courts cannot be considered immutable and that, in accordance with the constitutional limits established by s. 96, the provinces could in the past — just as they still can today — make different choices in this regard without any detrimental effect on the central and unifying role played by the superior courts in our judicial system.
19. Conclusion
20. For the reasons given above, I would answer the first question referred to the Court of Appeal in the affirmative and I would allow the appeals of the Conférence des juges de la Cour du Québec, the Attorney General of Quebec, the Conseil de la magistrature du Québec and the Canadian Association of Provincial Court Judges.
21. As for the second question referred to the Court of Appeal, I defer to the majority’s analysis and I would dismiss the appeal of the Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec.

The following are the reasons delivered by

1. Abella J. (dissenting) — This is a dispute brought by the Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec over the constitutional impact of a $15,000 increase in the jurisdiction of provincial court judges. It is before this Court in the third decade of the 21st century and over 150 years since Confederation, yet some of the old hierarchal attitudes towards “inferior” courts linger despite progressive Copernican revolutions in almost every aspect of Canada’s approach to law since our country was founded.
2. The atavistic suggestion that this $15,000 increase adversely affects the very constitutional foundation of superior courts in Quebec, let alone the rule of law and national unity, is neither constitutionally mandated, historically accurate, nor desirable, and ignores what this Court has said about the importance, independence and impartiality of provincial court judges. It would also come as a surprise to the millions of people who have appeared before provincial court judges over the years in criminal, family and civil cases whose outcomes, to those people, have no less serious consequences than what occurs in superior courts.

Background

1. In 2016, the legislature of Quebec increased the exclusive civil jurisdiction of the provincially appointed Court of Québec from $70,000 to $85,000. This jurisdiction has been subject to a number of increases since the mid-1960s, set out in the following table:

|  |  |
| --- | --- |
| **Year** | **Monetary Jurisdiction** |
| 1965 | $1,000 |
| 1969 | $3,000 |
| 1979 | $6,000 |
| 1982 | $10,000 |
| 1984 | $15,000 |
| 1995 | $30,000 |
| 2002 | $70,000 |
| 2014 | $85,000 |

1. The most recent increase, however, was seen by the Superior Court of Quebec as a trespass on its jurisdiction, thereby violating s. 96 of the *Constitution Act, 1867*. As a result, the Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec instituted proceedings seeking a declaration that the increase was unconstitutional.
2. The increase is set out in art. 35 para. 1 of the *Code of Civil Procedure*, CQLR, c. C-25.01 (“*C.C.P.*”):

**35.** The Court of Québec has exclusive jurisdiction to hear and determine applications in which the value of the subject matter of the dispute or the amount claimed, including in lease resiliation matters, is less than $85,000, exclusive of interest; it also hears and determines applications ancillary to such an application, including those for the specific performance of a contractual obligation. However, it does not have such jurisdiction in cases where jurisdiction is formally and exclusively assigned to another court or adjudicative body, or in family matters other than adoption.

1. The Government of Quebec referred the question to the Court of Appeal of Quebec. There were two reference questions. The first is the only one at issue before us, namely:

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

(Décret 880-2017, (2017) 149 G.O. II, 4495)

1. The Court of Appeal held that the constitutionally guaranteed role of superior courts would be undermined by the $15,000 increase since it encroached on and eroded the traditional jurisdiction of superior courts over “substantial civil disputes” (2019 QCCA 1492). In its view, the previous exclusive monetary jurisdiction of $70,000 was constitutional, but raising it from $70,000 to $85,000 impermissibly altered the jurisdiction of the Superior Court.

Analysis

1. The relevant constitutional provisions are ss. 92(14), which sets out the provincial government’s authority to create courts, and 96 of the *Constitution Act, 1867* which constrains it:

**92** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

. . .

**14.** The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

. . .

**96** The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

1. Although the text of s. 96 suggests the existence of only a simple appointment power, this Court has recognized that implicit in this provision are protections for the historical jurisdiction of the superior court, the role of its judges and the protection of the superior courts’ independence. This has led this Court in its jurisprudence to attempt to balance the provinces’ authority under s. 92(14) to create provincial courts and to appoint their judges, with s. 96’s guarantee that some jurisdiction must remain in the hands of federally appointed superior courts.
2. In the *Reference re* *Adoption Act*, [1938] S.C.R. 398 (“*Adoption Reference*”), this Court was asked to determine the validity of provincial laws empowering provincial courts to rule on a number of family law issues. Chief Justice Duff, for a unanimous Court, upheld the grant of jurisdiction. He noted that s. 92(14) provides for the existence of provincial courts as well as for the provinces’ control over their administration. For him, the Constitution had to be understood in a way that provides leeway for provincial governments to expand the jurisdiction of their provincial courts.
3. This expansive provincial power was to be limited only by the principle that the jurisdiction granted must “broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of s. 96” (p. 421). Notably, Chief Justice Duff could not “accept the view that the jurisdiction of inferior [*sic*] courts” was“fixed forever as it stood at the date of Confederation” (p. 418).
4. And in *Re* *Cour de Magistrat de Québec*, [1965] S.C.R. 772, the Court decided that an increase from $200 to $500 in the provincial court’s monetary jurisdiction did not impermissibly turn it into a s. 96 court. Any tension between the powers set out in ss. 92(14) and 96 was to be resolved not by enshrining provincial court jurisdiction at pre-Confederation levels, but by ensuring that s. 92(14) does not undermine s. 96.
5. In later years, the Court was asked to determine the constitutional parameters of provincial administrative tribunals and assess whether their jurisdiction trespassed on that of s. 96 courts. In *Tomko v. Labour Relations Board (N.S.)*,[1977] 1 S.C.R. 112, and *Mississauga (City) v. Peel (Municipality)*, [1979] 2 S.C.R. 244, this Court held that neither a provincial labour board’s power to make cease and desist orders, nor a provincial administrative board’s power to adjudicate certain disputes between municipalities, trespassed on the jurisdiction of superior courts. On the other hand, a transport tribunal’s power to hear appeals from the transport commission was found to be unconstitutional (*Attorney General of Quebec v. Farrah*, [1978] 2 S.C.R. 638).
6. In an attempt to operationalize the jurisprudence’s approach to resolving the tension between ss. 92(14) and 96, this Court developed a three-stage test in *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 (“*Residential Tenancies*”), for analyzing the validity of a provincial grant of jurisdiction. The purpose of the test is to balance the provinces’ authority to develop courts, with the recognition that some areas of jurisdiction, by virtue of s. 96, must remain in the jurisdiction of superior courts. It aims to prevent legislatures from creating “shadow courts” which could usurp the jurisdiction of superior courts, undermining s. 96 courts’ ability to serve their function within the Canadian judicial system. It is essentially an historical inquiry.
7. The first stage of the test asks whether superior, district or county courts at the time of Confederation had exclusive jurisdiction over the subject matter now being given to the provincial “court”. If provincial courts in a majority of the four original provinces had a “practical involvement” in adjudicating cases related to the particular subject matter at Confederation, there could be no finding of exclusive jurisdiction for s. 96 courts, since the jurisdiction was shared at the time. There was therefore no basis for preventing the province from giving the jurisdiction, even exclusively, to its own courts or tribunals.
8. In *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*,[1989] 1 S.C.R. 238,Justice Wilson clarified that at the first stage, the “purposes of s. 96 require a strict, that is to say a narrow, approach to characterization” (p. 254). In her view, because the purpose of the analysis is to find “broad conformity” with a jurisdiction exercised at Confederation, the focus should be on the type of case at issue, not on an analysis that would “freeze” the ability of both provincial and superior courts to operate within genuinely appropriate, as opposed to technically mandated, constitutional spheres (p. 255).
9. If the jurisdiction at issue was exclusively held by a s. 96 court at Confederation, the second stage of the analysis asks whether the provincial body is acting in a judicial capacity. If not, the inquiry does not proceed further since it is not within the jurisdiction exercisable by a s. 96 court. If it is, the third stage of the analysis is triggered.
10. The assessment at the third stage is of the provincial court or tribunal in its institutional context in order to determine whether it is exercising a judicial power that is merely subsidiary or ancillary to general administrative functions, orone that is necessary to achieve a broad policy goal. In either of these circumstances, the grant is constitutionally permissible. As Chief Justice Laskin wrote for the majority in *Tomko*, in upholding a labour board’s authority, “it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangements in which it appears and is exercisable under the provincial legislation” (p. 120).
11. Almost 15 years later, a layer was added to the test in *MacMillan Bloedel Ltd. v. Simpson*,[1995] 4 S.C.R. 725, when the Court concluded that the legislature may not, even if its grant of jurisdiction passed the *Residential Tenancies* test, reduce or impair “the core” of superior court jurisdiction. The focus of this new requirement was determining whether a grant of *exclusive* jurisdiction to a provincial body frustrated the ability of superior courts to execute their functions.
12. The case involved a young person who was charged with contempt of court after violating a superior court’s order. The legislative scheme in effect at the time stipulated that a youth court had exclusive jurisdiction to try criminal offences committed by young offenders. The Court held that although the jurisdiction granted to the provincial court had been exclusively held by s. 96 courts at Confederation and was clearly judicial in nature, the third stage of the *Residential Tenancies* test was nonetheless met because the youth court served a “clear and laudable” policy goal as mandated by *Tomko*.
13. Even though it passed the *Residential Tenancies* test, the Court held that giving exclusive jurisdiction to the youth court to try a contempt charge based on a breach of a superior court order was a violation of that court’s core jurisdiction because it removed from the core power of s. 96 courts the jurisdiction to prosecute contempt.
14. Chief Justice Lamer conceded that core jurisdiction is “difficult to define” (paras. 30 and 33). But it was unnecessary in his view to offer a comprehensive definition because “the power to punish for contempt *ex facie* is obviously within that jurisdiction” (para. 38). He did, however, offer some guidance by stating that the core powers guaranteed by s. 96 were those that formed the “essential character” of superior courts, the removal of which would “emasculat[e] the court, making it something other than a superior court” (para. 30). He added that the core is comprised of “powers which are essential to the administration of justice and the maintenance of the rule of law” (para. 38). The power to prosecute contempt was a core power because in order to function properly, a s. 96 court must be able to “ensure its orders are enforced and its process respected” (para. 37).
15. In the 1996 *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 (“*Residential Tenancies* *(1996)*”),the Court upheld a grant of jurisdiction over residential leases to a provincial administrative tribunal, confirming that s. 96 is primarily concerned with entrenching the powers that were essential to preserving the judicial role of s. 96 judges. While the case was not decided on the basis of core jurisdiction, Chief Justice Lamer in concurring reasons, further explained the concept of the “core”, characterizing it as “very narrow” so that “only critically important jurisdictions which are *essential* to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system” fall within the constitutionally protected core of s. 96 courts (para. 56 (emphasis added)).
16. The purpose of this new core doctrine was to identify which powers could not be *removed* from superior courts, supplementing the *Residential Tenancies* test which delineates the jurisdictions which may be *given* to provincial courts or tribunals. A grant of jurisdiction to a provincial court or tribunal which respects the *Residential Tenancies* test may be exclusive, as long as the exclusivity does not engender a correlative loss of jurisdiction to the superior court’s narrowly defined core jurisdiction (*Residential Tenancies (1996)*, at paras. 71 and 75). As Prof. Hogg noted, the only “constitutional restrictions on the jurisdiction that can be *withdrawn* from a superior court” are those which fall within the narrow category of “core” jurisdiction, apart from which “the nature and scope of superior-court jurisdiction are simply issues of policy to be resolved and enacted by . . . competent legislative bod[ies]” (Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at p. 7-43 (emphasis in original)).
17. Identifying the core of a s. 96 court’s jurisdiction is therefore an exercise in identifying those aspects of the superior court’s power that are essential to its character and to its ability to deal effectively with the cases properly before it. That is why this Court said in *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, at para. 60, that a rule prohibiting courts from compelling documents covered by Cabinet confidences did not violate s. 96 because the rule “ha[d] not substantially altered the role of the judiciary from their function under the common law regime” (see also *Ontario v. Criminal Lawyers’ Association of Ontario*, [2013] 3 S.C.R. 3, at para. 22; *Crevier v. Attorney General of Quebec*,[1981] 2 S.C.R. 220; *Noël v. Société d’énergie de la Baie James*, [2001] 2 S.C.R. 207, at para. 27).
18. The latest case that addressed the core of s. 96 jurisdiction was *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*,[2014] 3 S.C.R. 31, where the Court found that constraints on the superior court’s ability to waive hearing fees which were too burdensome for litigants violated s. 96 because they left some individuals without *any* access to a court or tribunal. Chief Justice McLachlin explained the rationale as follows:

The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act,* *1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts. [para. 32]

The applicants who could not access the superior court had no alternative, competent public forum in which to resolve their disputes, leading Chief Justice McLachlin to conclude that the superior court must preserve its inherent jurisdiction to hear claims that would otherwise go unresolved.

1. As all of this jurisprudence shows,the first step of the analysis is to characterize the grant of jurisdiction to the provincial court.
2. This Court’s jurisprudence confirms that the boundaries of provincial court jurisdiction need not be drawn along the precise borders that existed at Confederation; rather, the inquiry centers on the type of case being heard. It is a functional approach which examines the purpose of the grant of jurisdiction.
3. The operative question in the appeal before us is whether, at Confederation, superior courts in the four original provinces had *exclusive* jurisdiction over the type of monetary claims which were granted to the Court of Québec in art. 35. If they did not, the first stage of the *Residential Tenancies* test is met, which essentially means that it passes the *Residential Tenancies* test, period. In my view, the evidence is clear that the superior courts did not have exclusive jurisdiction at Confederation over what the Court of Appeal identified as “substantial claims”. It is true that they had jurisdiction beyond a certain monetary threshold, but that does not mean that theirs was a more substantial jurisdiction.
4. Currently, the jurisdiction granted to the provincial court by art. 35 is the power to adjudicate civil claims worth up to $85,000. The monetary cap is indicative of an inflection point, chosen by the legislature, to balance the jurisdiction of the provincial and the superior court. For the purpose of the *Residential Tenancies* test, the question is whether this point reflects the historical balance between provincial and superior courts. As Justice McLachlin wrote in *Residential Tenancies (1996)*,at para. 75,“If the inferior [*sic*] courts before Confederation alone exercised the power, or shared it in a practical way with the future superior courts, s. 96 is not engaged and *no further enquiry is required*” (emphasis added).
5. In determining the historical involvement of provincial courts in deciding civil claims, it is instructive to look at the proportion of cases that were heard by different courts at Confederation (*Residential Tenancies (1996)*,at para. 77; *Sobeys Stores*,at p. 260). At the time, in most provinces, a majority of civil claims were heard by provincial courts. Each of the original provinces had slightly different systems of civil justice.
6. The provincial courts with the most civil jurisdiction at Confederation were the division courts, which had broad civil jurisdiction subject to a monetary limit. The division courts in Upper Canada had a $40 limit on their jurisdiction in tort and a $100 limit on their jurisdiction for debt, or breach of contract (Donald Fyson, *Civil Justice in Mid-Nineteenth-Century British North America: Court Structure, Judges and Recourse to the Courts in Lower Canada, Upper Canada, New Brunswick and Nova Scotia*, April 10, 2018, at p. 28). In New Brunswick, the justices of the peace had jurisdiction over tort claims worth $8 and debt claims worth $20 but the City Court of Saint John could hear cases from within the city which were worth up to $80 (pp. 36 and 39). In Nova Scotia, justices of the peace could hear cases of debt worth up to $80 and the City Court of Halifax could hear cases worth up to $80 (pp. 43 and 46).
7. In Upper Canada the division courts heard 83 percent of cases, in New Brunswick the justices of the peace and City Court together heard 81 percent of cases, and in Nova Scotia the justices of the peace and City Court also heard 81 percent of cases (pp. 85, 94 and 100). In Lower Canada, in 1866, the more local rural circuit courts themselves s. 96 courts, heard approximately 55 percent of cases, whereas the Superior Court heard approximately 5 percent of cases and the remaining 40 percent of cases were heard by various provincial courts (p. 72).
8. Comparing the proportion of cases heard then with today’s distribution shows that a grant of $85,000 of civil jurisdiction, like the grant of $70,000 in 2002, not only continues to respect the balance struck at the time of Confederation, but leaves superior courts with more civil jurisdiction than they had at that time. In three of the four original provinces, superior courts heard less than 20 percent of civil claims. Today, the Superior Court of Quebec hears about 28 percent of civil claims (Ministère de la Justice, *Nombre de dossiers ouverts à la Cour supérieure et à la Cour du Québec (2012‑13 à 2017-18)*). This represents a proportionally greater involvement for the Superior Court today than that of s. 96 courts across the colonies in the 1860s.
9. Clearly, the superior courts at Confederation did *not* have exclusive jurisdiction over civil claims in general. Any exclusive jurisdiction was limited to a small proportion of civil claims above a certain monetary threshold. This threshold was not, however, a marker which indicated when claims became substantial, it simply aimed to maintain a balance between the different types of courts in operation at the time. While the superior courts had jurisdiction over amounts above $100, as Justice Wilson noted in *Sobeys Stores* this did not mean that the provincial courts did not *also* have jurisdiction over “substantial” claims:

An examination of the court system in pre-Confederation Upper Canada reveals . . . that inferior courts had sufficient shared involvement in the area of unjust dismissal. The Division Courts, of which there could be as many as twelve per district, were the forerunners of today’s Small Claims Courts, and their civil jurisdiction was defined in*An Act respecting the Division Courts*, C.S.U.C. 1859, c. 19, s. 55:

**55.** The Judge of every Division Court may hold plea of, and may hear and determine in a summary way, for or against persons, bodies corporate or otherwise:

. . .

2. All claims and demands of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed one hundred dollars, and except in cases in which a jury is legally demanded by a party as hereinafter provided, he shall be sole judge in all actions brought in such Division Courts, and shall determine all questions of law and fact in relation thereto, and he may make such orders, judgments or decrees thereupon as appear to him just and agreeable to equity and good conscience, and every such order, judgment and decree, shall be final and conclusive between the parties.

Given inflation, a contract *jurisdiction of up to $100 in 1867 must be considered the equivalent of quite a substantial monetary jurisdiction today*. Since the Division Court system also covered the entire colony, I would conclude that at Confederation jurisdiction in the area of unjust dismissal was shared by superior and inferior courts to an extent sufficient to pass the historical test. [Emphasis added; pp. 269-70.]

1. Since, as this passage from *Sobeys Stores* confirms, both courts shared jurisdiction over “substantial” monetary claims, the superior courts did not have exclusive jurisdiction over civil claims at Confederation, nor were they ever the only court entrusted with deciding substantial cases. This means that art. 35 *C.C.P.* is a *prima facie* valid grant of exclusive jurisdiction to the provincial court under the *Residential Tenancies* test.
2. The Court of Appeal, however, reframed the reference question as follows: “By limiting the jurisdiction of the Superior Court of Quebec to adjudicate disputes in civil matters to cases in which the value in dispute is $85,000 and more, is the legislature infringing on the core jurisdiction of the Superior Court of Quebec to adjudicate private law disputes?” As a result, it did not apply the *Residential Tenancies* test at all, relying exclusively on finding a violation of the Superior Court’s core jurisdiction. It acknowledged Justice Wilson’s quote in *Sobeys Stores* that provincial courts enjoyed“quite a substantial monetary jurisdiction” at Confederation but nonetheless drew the inference that since superior courts had exclusive jurisdiction over claims worth more than $100, they had jurisdiction over “substantial civil disputes”.
3. Its argument for creating a new core of “substantial civil disputes” amounts to this: since the provincial court had jurisdiction over what were deemed to be “quite substantial” claims of $100, and since the superior courts had jurisdiction over claims of more than $100, the superior court’s jurisdiction was over “more substantial” claims and therefore the superior courts had jurisdiction over *all* substantial claims.
4. How do we calculate the difference between what Justice Wilson called “quite substantial” civil claims heard by the provincial court, and the “substantial” civil claims arrogated to the superior courts by the Court of Appeal, let alone for the purpose of constitutional analysis? The artificiality of the exercise is reinforced by the Court of Appeal’s conclusion that claims worth up to $70,000 were not substantial but that anything more is. How much money does it take to qualify for “substantial” status? After all, one litigant’s substantial amount may be another litigant’s spare change, as George Bernard Shaw wryly demonstrated through the following exchange in *Pygmalion* between Professor Henry Higgins and his friend Colonel Pickering, where Higgins explains to Pickering why he is prepared to accept Liza Doolittle’s few coins instead of his normal rates for language instruction:

HIGGINS . . . You know, Pickering, if you consider a shilling, not as a simple shilling, but as a percentage of this girl’s income, it works out as fully equivalent to sixty or seventy guineas from a millionaire.

PICKERING How so?

HIGGINS Figure it out. A millionaire has about 150 pounds a day. She earns about half-a-crown. She offers me two-fifths of her day’s income for a lesson. Two-fifths of a millionaire’s income for a day would be somewhere about 60 pounds. It’s handsome. By George, it’s enormous! [I]t’s the biggest offer I ever had.

LIZA [*rising, terrified*] Sixty pounds! What are you talking about? I never offered you sixty pounds. Where would I get —

(1913 (reprinted 2008), at pp. 43-44)

1. The Court of Appeal asserted that superior courts have an untouchable core over civil matters and that this core guarantees litigants the right to have their matters adjudicated by a s. 96 court. It concluded that the power of superior courts to hear civil cases was part of the integral functions of superior courts and that to remove this power would emasculate the courts or fundamentally alter their nature. In support of this proposition, it relies on a single statement from *B.C. Trial Lawyers*, at para. 32, indicating that the core jurisdiction of superior courts involves the power to “resolve disputes between individuals and decide questions of private . . . law”.
2. In my respectful view, *B.C. Trial Lawyers* did not broaden the core monetary jurisdiction of superior courts. The casestands for the proposition that when hearing fees leave litigants without the opportunity to access a public, independent and impartial tribunal, superior court judges must have discretion to waive those fees. It does not stand for the principle that litigants have an unfettered constitutional right to bring all civil disputes to a superior court.
3. My colleagues Justices Côté and Martin conclude that absent protections for a core jurisdiction over civil claims, the superior courts will no longer be able to provide “jurisprudential guidance on private law” (at para. 86), jeopardizing the “rule of law” in this country. While it is clear that this Court has recognized a link between core jurisdiction and the rule of law, my colleagues have, with respect, vastly overstated the reach of that concept. In the s. 96 context, “the rule of law” means that superior courts must have the autonomy to enforce their own judgments, that courts must be impartial and independent and that superior courts must maintain residual jurisdiction over cases which otherwise have not been assigned to a competent forum (*MacMillan Bloedel*; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“*P.E.I. Reference*”); *B.C. Trial Lawyers*). The rule of law does not mean that if some questions of private law are determined in one independent and impartial forum rather than another, Canada’s “actual order of positive laws” will be impermissibly altered (Côté and Martin JJ.’s reasons, at para. 85).
4. There is no doubt that legislation cannot have the effect of taking away the authority superior courts need in order to make sure that they can effectively adjudicate the claims which are properly before them and to enforce their orders in those cases, but “core” jurisdiction has been held to be a narrow concept, not a malleable one. It is intended to protect only the essential role and function of superior courts. As long as the “essential character” of superior courts is neither undermined nor impaired, provincial legislatures are constitutionally entitled to exercise their jurisdiction under s. 92(14) by creating and authorizing provincial courts, even exclusively, to respond to local justice needs, not as those needs existed at Confederation, but as they exist now.
5. There is no evidence that reducing the civil jurisdiction of the Superior Court of Quebec by $15,000 has impaired the ability of the Superior Court to perform any of its recognized core functions. In fact, art. 35 *C.C.P.* does not alter *any* of the characteristics or attributes of the Superior Court of Quebec, let alone materially. The notion that our superior courts have inherited some core power over the development of private law from the pre-Confederation English courts of inherent jurisdiction is irreconcilable with the fact that superior courts, since Confederation, have shared that role with a number of provincial courts. In other words, superior courts have never had the exclusive responsibility of guiding the development of private law. This role, therefore, cannot be part of superior courts’ core jurisdiction. The “core” test from *MacMillan Bloedel*, no matter how it is applied, results in the conclusion that reducing the exclusive jurisdiction of the Superior Court by $15,000 does not impair the core of that court in any way.
6. Although the classic application of the *Residential Tenancies*/*MacMillan Bloedel* test is dispositive of the appeal, this case reveals some of the fault lines of that approach. It may be time to consider replacing the test in a way that updates the law on the relationship between ss. 92(14) and 96 and synchronizes it with this Court’s approach to constitutional interpretation generally and, in particular, with Chief Justice Lamer’s observations in *Residential Tenancies (1996)* where he invoked Lord Sankey’s famous admonition in the 1929 “Persons” case (*Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.)) that the Constitution is a “living tree” to be interpreted flexibly:

Notwithstanding the importance of s. 96 in its institutional context (i.e. the protection of the independence and the “core” jurisdiction of superior courts), we have recognized that *a constitution is a “living tree”* which must be capable of accommodating new areas and new interests. Consequently, a flexible approach has been adopted in determining when judicial power may be transferred to inferior courts and tribunals.

Consistent with this flexible approach, this Court, on occasion, has expressed sympathy for the proposition that s. 96 should not be interpreted so as to thwart or unduly restrict the future growth of provincial administrative tribunals. We have acknowledged that *“[a]daptations must be permitted to allow the legislatures scope to deal effectively with emerging social problems and concerns, and to develop new techniques of dispute resolution and the expeditious disposition of relatively minor disputes” for the benefit of its citizenry*. After all, the Constitution is a document for the people and one of the most important goals of any system of dispute resolution is to serve well those who make use of it. For most civil matters, individual litigants are largely concerned with obtaining access to inexpensive and expedient adjudication.

The challenge for this Court is to balance these institutional and individual concerns while ensuring that s. 96 continues to play an important and meaningful role in Canadian society. [Emphasis added; citations omitted; text in brackets in original; paras. 27-29.]

1. That living tree has been well watered by this Court, not only to protect both provincial and federal spheres of jurisdiction, but also to give them flexibility when doing so does not materially impair the other’s ability to exercise its constitutional mandate. This has come to be known as flexible or cooperative federalism and has been used by this Court as an aid in interpreting the Constitution and resolving tensions between federal and provincial heads of power (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32; *R. v. Comeau*,[2018] 1 S.C.R. 342, at para. 77).
2. In *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, for example, this Court held that a provincial Act aimed at protecting heritage objects could apply to the artifacts of Indigenous people, even though the Act had a disproportionate effect on the people regulated by federal jurisdiction over aboriginal affairs under s. 91(24). Cooperative federalism is also why this Court’s jurisprudence on the division of powers recognizes that the provincial and federal powers are not watertight compartments, and that both levels of government can legislate over the same subject matter so long as there is no operational conflict (*Multiple Access Ltd. v. McCutcheon*,[1982] 2 S.C.R. 161). Provincial laws will not be invalid simply because they *affect* an area that could have been federally regulated, there must be some form of impairment or frustration of purpose (Hogg, at pp. 15-28 to 15-29 and 16-4 to 16-10.6). It is an approach that recognizes that “[i]t is . . . fundamental . . . that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another” (*Reference re Securities Act*, [2011] 3 S.C.R. 837, at para. 7). And in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, this Court stated that a “legitimate interplay between federal and provincial powers” should be favoured to doctrines which strictly limit provincial authority (paras. 36-37).
3. This approach to federalism not only accepts that overlap between federal and provincial powers is “inevita[ble]”, but that it is useful because it allows governments to respond to a complex interplay of issues (*NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, [2010] 2 S.C.R. 696, at paras. 42‑43). It also explains this Court’s permissive approach to paramountcy, a doctrine which invalidates provincial laws which *interfere* with federal laws (*Chatterjee v. Ontario (Attorney General)*, [2009] 1 S.C.R. 624, at para. 53). In *Orphan Well Association v. Grant Thornton Ltd.*, [2019] 1 S.C.R. 150, this Court said: “Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority” (para. 66). Similarly, in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] 3 S.C.R. 419, the Court explained that a “restrained approach” to paramountcy was in order and that a harmonious approach favouring compatibility should be taken (para. 21).
4. Most recently, in *Comeau*, the Court decided that provincially enacted prohibitions on owning liquor purchased from an entity other than the provincial commission did not violate s. 121 of the Constitution which protects the free transfer of goods throughout the country. The Court explained that

s. 121 prohibits the imposition of charges on goods crossing provincial boundaries — tariffs and tariff-like measures. At the same time, the historical *evidence nowhere suggests that provinces, for example, would lose their power to legislate under s. 92 of the Constitution Act, 1867 for the benefit of their constituents even if that might have impacts on interprovincial trade*. [Emphasis added; para. 67.]

It called for “provisions like s. 121” being “interpreted in a way that does not deprive Parliament and provincial legislatures of the powers granted to them to deal effectively with problems that arise” (para. 72). Moreover, it explained:“An expansive interpretation of federal powers is typically met with calls for recognition of broader provincial powers, and vice versa; the two are in a symbiotic relationship” (para. 79).

1. There is no reason why such an approach should not be extended to our understanding of the relationship between s. 92(14), which allows provinces to create courts of civil or criminal jurisdiction, and s. 96.
2. As Prof. Hogg noted, this Court’s approach to s. 96 has been “regrettable” and an “impediment to much new regulatory or social policy” (p. 7-38.1). He also criticized the parochialism of the *Residential Tenancies* test:

. . . [The *Residential Tenancies* test] is not satisfactory as constitutional‑law doctrine. Each of the three steps is vague and disputable in many situations, and small differences between the provinces in their history or institutional arrangements can spell the difference between the validity and invalidity of apparently similar administrative tribunals . . . . The courts are unlikely to abandon doctrine which has been built up over a long time; nor are they likely to abandon their concern (which I regard as extravagant) to prevent the erosion of superior-court jurisdiction. [pp. 7-49 to 7-50]

1. Other scholars have argued that the test itself is unduly technical and history-based, making it antithetical to this Court’s practice of applying purposive constitutional interpretation. In their view, too rigorous an application of the test may lead to institutions being frozen in time in a way that makes them [translation] “outdated and inefficient” (Gaétan Migneault, “L’administration de la justice et la structure judiciaire canadienne” (2006), 37 *R.D.U.S.* 41, at p. 43; see also J. Gareth Morley, “Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada” (2016), 53 *Osgoode Hall L.J.* 745).
2. The principles of regional diversity and subsidiarity add philosophical oxygen to the need for the generous approach to the authority of provincial governments to make jurisdictional grants to provincial adjudicative bodies called for by Chief Justice Duff in the *Adoption Reference*, Justice Wilson in *Sobeys Stores* and Chief Justice Lamer in *Residential Tenancies (1996)*. In *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, at para. 3, Justice L’Heureux-Dubé explained that subsidiarity is based on the principle that decisions “are often best [made] at a level of government that is not only effective, but also closest to the citizens affected” (see also *Canadian Western Bank*, at para. 45). Justices LeBel and Deschamps in *Reference re Assisted Human Reproduction Act*,[2010] 3 S.C.R. 457, at para. 183, confirmed the significance of the approach when they said that the notion of subsidiarity recognizes that the level of government “closest to the citizen” is in “the best position to respond to the citizen’s concerns”. Ensuring the ability of local governments to more freely address local concerns in turn “facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective” (para. 183, quoting *Reference re Secession of Quebec*, at para. 58).
3. Provincial governments are closer to the issues affecting most people who use the courts and to the realities of local issues. They are therefore better placed to recognize and address local concerns with the justice system. Provincial legislatures must be able to facilitate access to justice by empowering courts and tribunals which are responsive to those needs of the justice system.
4. This Court’s judgment in the first *Residential Tenancies* reference was not particularly concerned with the benefits of flexible federalism. Rather, it was animated by a number of protective aspirations for s. 96 courts. The first was the desire to promote national unity through the preservation of a unitary court system. As this Court explained in *Residential* *Tenancies*:

. . . the intended effect of s. 96, would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts. *What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined.* [Emphasis added; p. 728.]

1. The second was ensuring that disputes are adjudicated by impartial and independent courts. The close relationship between the preservation of s. 96 jurisdiction and the need for an independent judiciary was explained in *McEvoy v. Attorney General for New Brunswick*,[1983] 1 S.C.R. 704, at p. 720, where the Court said:

The traditional independence of English Superior Court judges has been raised to the level of a fundamental principle of our federal system by the *Constitution Act, 1867* and cannot have less importance and force in the administration of criminal law than in the case of civil matters. Under the Canadian constitution the Superior Courts are independent of both levels of government. The provinces constitute, maintain and organize the Superior Courts; the federal authority appoints the judges. The judicature sections of the *Constitution Act, 1867 guarantee* *the* *independence of the Superior Courts*; they apply to Parliament as well as to the Provincial Legislatures. [Emphasis added.]

1. The link between judicial independence and the imposition of constraints on provincial court jurisdiction was explained by Justice Wilson in *Sobeys Stores* when she observed that much of the s. 96 jurisprudence “establishes the proposition that, while the jurisdiction of the inferior [*sic*] courts will not be frozen as of the date of Confederation, neither will it be substantially expanded *so as to undermine the independence of the judiciary which s. 96 protects*” (p. 253 (emphasis added)).
2. In this way, the Court’s approach to s. 96 was said to reinforce Prof. W. R. Lederman’s theory that certain cases *must* be heard by superior courts because they must be decided by *independent* courts (“The Independence of the Judiciary” (1956), 34 *Can. Bar Rev.* 769 and 1139). The rationale for narrowly circumscribing the provincial power over courts and tribunals was not that there is some inherent value in the judiciary being appointed by the federal government, it was in ensuring that the independence of the country’s judiciary was not eroded through the creation of “shadow courts”. Chief Justice Lamer reiterated this point in *Residential Tenancies (1996)* when he explained that the s. 96 jurisprudence is concerned with protecting the “independence and the ‘core’ jurisdiction of superior courts” (para. 27).
3. But the assumption that the Constitution protected the independence only of superior courts disintegrated in the 1997 *P.E.I. Reference* dealing with the constitutionality of different provincial schemes for remunerating provincial court judges. The specific issue was determining whether the Constitution ensured the independence and impartiality of *provincially* appointed judges and whether legislative modifications to those judges’ pay structure undermined that independence.
4. Chief Justice Lamer concluded that the time had come to recognize that the Constitution’s preamble recognized that *all* courts, including provincial courts, enjoyed constitutionally protected independence. In his view, the maintenance of strong judicial institutions was so fundamental to the maintenance of our constitutional order that the provincial power to create courts under s. 92(14) “implie[s]” those protections (para. 108). In turn, the constitutionalization of the independence of provincial courts helps maintain “the rule of law”. Of particular significance in the appeal before us, Chief Justice Lamer concluded that the purpose of s. 96 could now shift away from the protection of national unity and toward “the maintenance of the rule of law through the protection of the judicial role” (para. 88). But the rule of law that requires that competent and independent adjudicators decide questions of law “should be indifferent as to which independent court or tribunal is entitled to ensure that enforcement” (Peter W. Hogg and Cara F. Zwibel, “The rule of law in the Supreme Court of Canada” (2005), 55 *U.T.L.J.* 715, at p. 731).
5. By guaranteeing the same constitutional protection for judicial independence to both superior and provincial courts, and their joint designation as defenders of the rule of law, the *P.E.I. Reference* represented a fundamental change in the constitutional attributes of the Canadian judiciary, a change which, in my respectful view, made the utility and legitimacy of a strict approach to s. 96, especially through the *Residential Tenancies* test, wobblier.
6. Since the original purpose of the *Residential Tenancies* test was ensuring that provinces did not establish courts or administrative tribunals with adjudicative jurisdiction over matters which would remove the jurisdiction of an *independent* court to adjudicate justiciable disputes, the concern was no longer relevant after the *P.E.I. Reference* (see Patrick Healy, “Constitutional Limitations upon the Allocation of Trial Jurisdiction to the Superior or Provincial Court in Criminal Matters” (2003), 48 *Crim. L.Q.* 31, at p. 35). As Prof. Healy observed, this Court’s approach to the legislative allocation of jurisdiction “over-states the significance of the superior court and understates the significance of the provincial court” (p. 67).
7. Given the constitutionally enshrined independence of the provincial courts, they are as well placed to uphold the rule of law independently as the superior courts. Appeals to the rule of law and independence, therefore, can no longer serve to narrow the jurisdiction of provincial courts.
8. As the *P.E.I. Reference* suggests, this newly articulated acknowledgment of the independence of provincial courts makes them a partner in protecting national unity. The principle of national unity was detailed by Justice McLachlin in her dissent in *MacMillan Bloedel*:

The result is a network of related Canadian courts ensuring judicial independence, interprovincial uniformity, and minimum standards of decision making throughout the country. This in turn provides “a strong constitutional base for national unity”. [Citation omitted; para. 51.]

1. This confirms that there is not some inherent quality in superior court judges which makes them uniquely capable of ensuring minimum standards of justice. The constitutionalization of the independence and impartiality of provincial courts dispels this notion. Increased constitutional recognition of the important role of provincially appointed judges within the Canadian judiciary does nothing to diminish the independence and impartiality of our courts. On the contrary, it enhances the judiciary as a whole and the public’s perception that the provincial court judges they appear before to have their liberty or livelihood or support and custody rights determined are no less judicial because they are appointed by a different level of government. To paraphrase Gertrude Stein, to them a judge is a judge is a judge.
2. As Prof. Hogg explained, the unitary nature of our court system stems from the fact that provincially and federally administered courts apply both federal and provincial law and are slotted into a judicial hierarchy which ultimately culminates at the Supreme Court of Canada:

The administration of justice in Canada has important unitary as well as federal characteristics.Of course, as one would expect in a federal country, there is a separate hierarchy of provincial courts in each province. But these courts, whether they were in existence at the time of Confederation or were established later under s. 92(14), are not confined to deciding cases arising under provincial laws. *The provincial power over the administration of justice in the province enables a province to invest its courts with jurisdiction over the full range of cases, whether the applicable law is federal or provincial or constitutional. Then, there is an appeal from the provincial court of appeal, which stands at the top of each provincial hierarchy, to the Supreme Court of Canada.* Although the Supreme Court of Canada is established by federal legislation, it is more of a national than a federal court, because it is a “general court of appeal for Canada”, with power to hear appeals from the provincial courts (as well as from the federal courts, which are described later) in all kinds of cases, whether the applicable law is federal or provincial or constitutional. *The position of the Supreme Court of Canada, with its plenary jurisdiction, at the top of each provincial hierarchy, has the effect of melding the ten provincial hierarchies into a single national system.* [Emphasis added; p. 7-3.]

1. Relatedly, Justice La Forest offered the following comments on our unitary court system in *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*,[1989] 1 S.C.R. 206, a case about whether a provincial small claims court had jurisdiction over claims arising from federal matters:

In assessing the constitutional issues, it is well to remember that the court system in Canada is, in general, a unitary one under which provincially constituted inferior and superior courts of original and appellate jurisdiction apply federal as well as provincial laws under a hierarchical arrangement culminating in the Supreme Court of Canada established by Parliament under s. 101 of the *Constitution Act, 1867*.

. . .

I have already referred to my view that a province may, in the exercise of its powers under s. 92(14), confer general jurisdiction on its courts, and that I saw no reason why this power did not extend to courts of inferior jurisdiction. Indeed, it seems to me that the essentially unitary structure of the Canadian judicial system invites this conclusion. From Confederation to this day, the courts in the provinces, barring inconsis­tent federal laws, have decided every type of dispute imaginable. As Hogg, has put it: “It did not matter whether a dispute raised a question of constitutional law, federal law, provincial law, or a mixture of the three, the provincial courts still had jurisdiction.” They may not, in strictness, be national courts, but they are the ordinary courts of the land to which the citizen customarily turns when he has need to resort to the administration of justice. [Citation omitted; pp. 215 and 225.]

1. Moreover, in *Paul v. British Columbia (Forest Appeals Commission)*,[2003] 2 S.C.R. 585, Justice Bastarache held that a provincial administrative tribunal could hear cases dealing with aboriginal law in carrying out its otherwise valid provincial mandate. He offered a few comments on the notion of a unitary court system, explaining that our unitary system of justice “encompasses the ordinary courts, federal courts, statutory provincial courts and administrative tribunals” (para. 22).
2. Article 35 *C.C.P.* does not create a dualist justice system, nor does it threaten to do so. Decisions of the Court of Québec are subject to appeals before the Court of Appeal and the Supreme Court of Canada. Just as judicial review “integrates provincial tribunals into the unitary system of justice”, the possibility of appeals culminating before this Court draws the Court of Québec into our unitary system (*Paul*,at para. 22). In addition, the Court of Québec regularly deals with matters of federal law through its expansive criminal jurisdiction. This adjudication of federal and provincial claims, which exists and has long existed throughout Canada, does nothing to fragment our court system and in fact reinforces its integrated character.
3. I accept that the notion of core jurisdiction protects “critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system”. These are the jurisdictions which are essential to the maintenance of our Constitution and which ensure that superior courts are not rendered ineffective. More generally, it must also be recognized that wholesale transfers of jurisdiction which deprive superior courts of a meaningful involvement in the types of cases over which they have traditionally held *exclusive* jurisdiction will violate s. 96.
4. But the fact that an exercise of provincial authority under s. 92(14) has an impact on the jurisdiction of superior courts should not, on its own, mean that the grant is unconstitutional. As Justice McLachlin explained in her dissent in *MacMillan Bloedel*,“short of *impairing* s. 96 courts, nothing in the Constitution suggests that Parliament should not be able to clothe inferior [*sic*] tribunals with s. 96 powers” (para. 54 (emphasis added)). This impairment will occur when provincial courts “usur[p] the functions of superior courts” (*Residential Tenancies (1996)*,at para. 73). This leads, it seems to me, to an approach not unlike the one this Court applies in any case of apparent tension between ss. 91 and 92, namely a focus on whether the impugned legislative action has materially impaired or frustrated another head of power, *not* on whether it has simply had an incidental effect on it.
5. Unlike the multi-factored test proposed by my colleagues, this more flexible approach is in line with Chief Justice Duff’s proscription in the *Adoption Reference* against “fixing” provincial court jurisdiction in time as well as Chief Justice Lamer’s recognition in *Residential Tenancies* *(1996)* that s. 96 must be interpreted in accordance with the notion that our Constitution is a living tree. It also accounts for Prof. Hogg’s argument that it is “unwise” to introduce stringent restrictions on the legislatures’ ability to create provincial courts to address a vague, often “extravagant” concern that provinces will erode the jurisdiction of superior courts (pp. 7-50 and 7‑51).
6. The focus should be on ensuring that s. 96 is not rendered “*meaningless* through . . . the provincial competence to constitute, maintain and organize provincial courts” (*Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252, at p. 264 (emphasis added)). As Chief Justice Lamer stated in *Residential Tenancies (1996)*, the provinces’ power under s. 92(14) may be freely exercised so long as “s. 96 continues to play an important and meaningful role in Canadian society” (para. 29).
7. As such, it seems to me that in essence, the only relevant question in determining whether a grant of jurisdiction to a provincial court violates s. 96 is whether the grant materially impairs the “essential character” and functions of superior courts. In other words, what can the superior court no longer do because of the grant of jurisdiction to the provincial court or tribunal, and how does this loss represent a “critically important jurisdiction” that is essential to its existence as a superior court of inherent jurisdiction?
8. In this appeal, despite the $15,000 increase in exclusive provincial court jurisdiction under art. 35 *C.C.P.*, the jurisdictional loss of this amount by the Superior Court of Quebec has not prevented it in any material way from playing its usual role in deciding the kind of civil cases it has always heard. In fact, it now hears a higher proportion of civil cases than superior courts did in three of the four provinces at the time of Confederation. On that finding alone, the proposition that the essential character of s. 96 courts in Quebec has been impaired is untenable. Even if, as Justice Wilson suggests in *Sobeys Stores*, the balancing act between ss. 92(14) and 96 aims to preserve “the original bargain [of Confederation]”, it cannot be that the “bargain” is breached by an exercise of provincial power which leaves provincial courts with proportionally *less* civiljurisdiction than they had in 1867 (p. 263).
9. No matter the approach taken in analyzing art. 35 *C.C.P.*, it is a valid exercise of the province’s right under s. 92(14) to administer justice and to constitute courts of civil jurisdiction in Quebec. I see nothing in the grant of jurisdiction at issue here that trespasses on or materially impairs the jurisdiction of Quebec’s superior court judges. There is no evidence that the exercise of this power has materially impaired the ability of superior courts to exercise their constitutional functions or that it has had *any* meaningful adverse impact on the jurisdiction protected by s. 96. Consequently, the answer to the reference question is that art. 35 is “valid with regard to section 96 of the Constitution Act, 1867”.
10. The system of civil justice enacted by the provincial legislature respects the balance between ss. 92(14) and 96 by ensuring that both provincially and federally appointed courts have a meaningful role in providing access to justice. The Court of Québec today is, as provincial courts have always been, an important court which combines with the Superior Court to form a strong network of courts for litigants across the province. As Chief Justice Lamer remarked in *Residential Tenancies (1996)*,it is important to recall that “the Constitution is a document for the people and one of the most important goals of any system of dispute resolution is to serve well those who make use of it” (para. 28). A mature constitutional relationship between these two important judicial partners in delivering access to justice goes a long way towards serving well “those who make use of it”, namely, the public.
11. I would allow the appeal. Raising the exclusive jurisdiction of the Court of Québec by $15,000, to an $85,000 limit, is constitutional.

Appendix

*Constitution Act, 1867*

Exclusive Powers of Provincial Legislatures

**92**In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

. . .

**14.**The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

. . .

**VII. Judicature**

**96**The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

. . .

**98** The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

**99 (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.**

. . .

**100**The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

**101**The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

. . .

**IX.** **Miscellaneous Provisions**

. . .

**129**Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

*Appeals dismissed without costs,* Wagner C.J. *and* Rowe J. *dissenting in part and* Abella J. *dissenting.*

Solicitors for Conférence des juges de la Cour du Québec: Borden Ladner Gervais, Montréal.

Solicitor for the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitors for Conseil de la magistrature du Québec: Fasken Martineau DuMoulin, Montréal.

Solicitors for the Canadian Association of Provincial Court Judges: Power Law, Ottawa.

Solicitors for the Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec: Langlois avocats, Montréal; William J. Atkinson, avocat, Montréal.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

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Solicitor for the intervener the Attorney General of Alberta: Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Edmonton.

Solicitors for the intervener the Canadian Council of Chief Judges: Field, Edmonton.

Solicitors for the intervener the Trial Lawyers Association of British Columbia: Hunter Litigation Chambers, Vancouver.

Solicitors for the intervener the Canadian Superior Courts Judges Association: Norton Rose Fulbright Canada, Montréal.

1. For the sake of readability of these reasons, references only to the provinces will be understood to include Canada’s territories. [↑](#footnote-ref-1)
2. The constitutional provisions reflecting this compromise reached at Confederation are reproduced in the Appendix. [↑](#footnote-ref-2)