ARTICLE

A JUDICIALLY NOURISHED PROVISION: HAS SECTION 96 ONCE AGAIN BECOME A BARRIER TO JUSTICE?

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ABSTRACT

Pursuant to section 96 of the *Constitution Act, 1867*, the federal executive is responsible for appointing judges to the superior courts. While this provision may seem straightforward, its interpretation has has elevated the status of section 96 courts and confers on them a "core jurisdiction" that is protected from interference by Parliament and legislatures, sometimes at the expense of tribunals and other innovative adjudicative forums.

This paper begins by examining the evolution of section 96 jurisprudence. It then focuses on two recent cases: *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27 and *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2022 BCCA 163. This paper argues for a return to a narrower conception of the core jurisdiction of superior courts, emphasizing their role as guardians of the rule of law through robust judicial review. This approach seeks to strike a balance between preserving the rule of law and enhancing access to justice while avoiding the marginalization of section 96.

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INTRODUCTION

Section 96 of the *Constitution Act*, 1867, a "seemingly innocuous provision,"[1] has generated significant controversy and litigation. The text plainly states "[t]he 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."[2] On the surface, this provision is merely an appointing power that "means "[l]ittle, if anything… to an uninstructed"[3] reader, but "there is much more to section 96 than first meets the eye."[4]

Over a century of jurisprudence and "judicially-nourished luxuriance,"[5] section 96 courts have attained a "rather extravagant position" in relation to other courts and administrative tribunals.[6] It is now well-established that section 96 prevents both Parliament and the provincial legislatures from removing certain decision-making authority from superior courts. Essentially, section 96 guarantees a "core jurisdiction"[7] of the superior courts, ensuring that no inferior court or administrative tribunal may operate as "a shadow court."[8] Historically, the core was construed narrowly comprising only those "powers which are *essential* to the administration of justice and the maintenance of the rule of law."[9] Accordingly, the Constitution "confers a special and inalienable status on what have come to be called the 'section 96 courts'."[10]

Much ink has been spilled on the court's interpretation of section 96. According to John Willis, the courts have interpreted the provision "oddly,"[11] while Roderick MacDonald describes the judicial interpretation as "frequently erratic."[12] Others have referred to the section 96

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1 Peter B Adams & Paul J Murphy, "Section 96 Judges: Whether Ontario Residential Tenancies Commission Exercises S. 96 Functions. Reference Re: Residential Tenancies Act, 105 D.L.R. (3rd) 193" (1980) 6:1 Queen's LJ 282 at 282.

2 (UK), 30 & 31 Vict, c 3. I refer only to the Superior Courts as the District and County Courts no longer exist.

3 John Willis, "Section 96 of the British North America Act" (1940) 18:7 Can Bar Rev 517 at 518 [Willis, "Section 96"]; John Willis "Administrative Law and the British North America Act" (1939) 53:2 Harv L Rev 251 at 277 [Willis, "Administrative Law"].

4 *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2022 BCCA 163 at para 4, leave to appeal to SCC refused, 40291 (22 December 2022) [*Trial Lawyers* 2022].

5 Bora Laskin, "Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case" (1955) 33:9 Can Bar Rev at 993.

6 *Ibid* at 995.

7 *MacMillan Bloedel Ltd. v Simpson*, 1995 CanLII 57 (SCC) at para 15 [*MacMillan Bloedel*]; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC) [*Provincial Judges Reference*].

8 *Reference re Amendments to the Residential Tenancies Act (NS),* 1996 CanLII 259 (SCC) at para 73 [*Residential Tenancies* 1996].

9 *MacMillan Bloedel*, *supra* note 7 at para 38 [emphasis added].

10 *Ibid* at para 52.

11 Willis, "Administrative Law", *supra* note 3 at 256.

12 Roderick A MacDonald, "The Proposed Section 96B: An Ill-Conceived Reform Destined to Failure" (1985) 26:1 C de D 251 at 253.

jurisprudence as "arcane"[13] and "murky."[14] The primary point of contention raised by critics revolves around the expansive interpretation of section 96. Critics argue that the judiciary has failed to recognize the rationale behind the preference for administrative tribunals as a mechanism for applying certain provincial laws and, as a result, has fettered the ability of provinces to create and shape their justice system as they please.[15] Consequently, in 1984, David Matas characterized the justice system as being in a "state of crisis [as] [t]he courts have struck down one administrative tribunal after another as being unconstitutional."[16] Importantly, section 96 constrains not only tribunals but the role of provincial and federal courts as well. The disputes arising from the apparently harmless provision have come to be known as the "section 96 problem."[17]

Entering the early twenty-first century,[18] there was a "relative lull"[19] in successful section 96 cases, leading Ronald Ellis to write in 2003 that section 96 was "no longer a practicable concern for tribunal proponents."[20] Ellis observed that the Supreme Court had begun to embrace flexibility when analyzing the transfer of functions to tribunals.[21] However, recent developments challenge Ellis' assertion. In 2014, the Supreme Court used section 96 to invalidate hearing fees that would deny people access to superior courts.[22] Furthermore, as will be discussed at length in Part II, the Court ruled that section 96 invalidates Québec legislation granting exclusive jurisdiction over civil claims below $85,000 to an inferior court.[23] In the former case, *Trial Lawyers v BC 2014*, the Court arguably expanded section 96[24] as there was no transfer of core jurisdiction from the superior court to another decision-making body, a fact accepted by the Court.[25] In the latter case, *Article 35,* the majority articulated a broad interpretation of the protected core jurisdiction as encompassing "general private law jurisdiction."[26] Notably, the majority introduced a multi-factored analysis with six guiding factors.

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13 Peter W Hogg & Cara Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 UTLJ 715 at 731.

14 David Matas, "Validating Administrative Tribunals" (1984) 14:2 Manitoba LJ 245 at 245.

15 The Canadian Bar Association, "A Response to the Suggested Amendment Relating to Provincial Administrative Tribunals" (1985) 26:1 C de D 223 at 226; Willis, "Administrative Law", *supra* note 3 at 256.

16 Matas, *supra* note 14 at 245. Matas provides six examples spanning from 1972 to 1982 where the courts found tribunals unconstitutional and therefore invalid.

17 David Phillip Jones, "A Constitutionally Guaranteed Role for the Courts" (1979) 57 Can Bar Rev 669 at 676; Macdonald, supra note 12 at 252; Matas, *supra* note 14 at 257.

18 After *MacMillan Bloedel*.

19 Peter W Hogg & Wade Wright, *Constitutional Law of Canada,* 5th ed (Toronto: Thomson Reuters, 2022) at 7:15.

20 S Ronald Ellis, "The Justicizing of Quasi-Judicial Tribunals Part I" (2006) 19 Can J Admin L & Prac 303 at 320.

21 *Ibid*.

22 *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2014 CanLII 59 (SCC) [*Trial Lawyers* 2014].

23 *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27 [*Article 35*].

24 Gareth Morley observes that "[p]erhaps this holding will make very little difference outside the context of hearing fees. But it is possible to imagine it leading to a broad constitutionalization of civil procedure. Section 96 … has been turned into an individual right of access to courts": Gareth J Morley, "*Trial Lawyers of British Columbia v British Columbia*: Section 96 Comes to the Access to Civil Justice Debate" (2016) 25:2 Const F 61 at 65.

25 *Supra* note 22 at para 31.

26 *Supra* note 23 at paras 80, 82.

Using this analysis, the British Columbia Court of Appeal, in *Trial Lawyers 2022,* upheld the transfer of jurisdiction to a tribunal over the resolution and disposition of minor injury claims.[27]

Could these cases signify a "regrettable resurgence" of section 96 litigation, as previously characterized by renowned constitutional scholar Peter Hogg? [28] In my view, there is a significant likelihood that this will be the case. The split decisions in *Article 35* and *Trial lawyers 2022* suggest that the boundaries of section 96's application will continue to be contested and debated. In any event, these two cases provide interesting developments in the administrative law sphere.

This paper examines section 96 jurisprudence, focusing on the expanded "core jurisdiction" test in *Article* 35, and its subsequent application in *Trial Lawyers 2022* within a tribunal context, to shed light on the limitations it imposes on government actions. Current barriers to access to justice have been referred to as a "crisis,"[29] a "democratic issue,"[30] and a "human rights issue,"[31] so it is crucial to critically assess the broad interpretation of section 96 as articulated by the Court in *Article 35.* I argue that this reinterpretation may unduly restrict legislative authority over the administration of justice and the freedom to opt for alternative avenues of dispute resolution.

Inextricably linked to the "core jurisdiction" analysis is the unwritten constitutional principle of the rule of law, often invoked to safeguard the superior courts' domain. A tension arises between those advocating for upholding superior courts' core jurisdiction and those supporting alternative forums to address access to justice issues. Chief Justice Lamer stands out as one jurist who opposed the expansion of tribunal powers, as illustrated by his statement in *MacMillan Bloedel* where he asserted that "[g]overnance by *rule of law requires a judicial system* that can ensure its orders are enforced and its process respected."[32] However, as aptly observed by Justice Strayer in *Singh v Canada,* and subsequently endorsed by the Supreme Court, "[a]dvocates tend to read into the principle of the rule of law anything which supports

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27 *Supra* note 4.

28 Hogg & Wright, *supra* note 19 at 7:15.

29 Andrea A Cole & Michelle Flaherty, "Access To Justice Looking For A Constitutional Home: Implications For The Administrative Legal System" (2016) 94:14 Can Bar Rev 13; The Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "The Challenges We Face" (Remarks delivered to the Empire Club of Canada, Toronto, 8 March 2007), online <scc-csc.ca/judges-juges/spe-dis/bm-2007-03-08-eng.aspx> [perma.cc/U7A2-HR42].

30 Supreme Court of Canada, "Remarks of the Right Honourable Richard Wagner, PC Chief Justice of Canada" (5 February 2018), online: <scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx?pedisable=true> [perma.cc/CN7K-BEKF].

31 *Ibid*.

32 *Supra* note 7 at para 37 [emphasis added]. Justice Lamer emphasized this point again in a concurring opinion in *Cooper v Canada (Human Rights Commission),* 1996 CanLII 152 (SCC) at para 11 [*Cooper*]. Extrajudicially Lamer J noted that for Canada to commit to the rule of law "there must be an institution charged with the responsibility of ensuring that it is the law that rules…that institution is the judicial branch of government": Antonio Lamer, "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996), 45 UNB LJ 3 at 6.

their particular view of what the law should be."[33] A broader interpretation of the rule of law is merited — one that accommodates "access to a fair and efficient dispute resolution process, capable of dispensing timely justice."[34]

The proposition put forth in this paper advocates a return to a narrower conception of superior courts' core jurisdiction while preserving their role as guardians of the rule of law, particularly through judicial review. It further asserts the necessity of circumscribing superior courts' jurisdiction to what is essential for them to effectively function as a "unifying force"[35] in the judicial system. Such an approach respects legislative authority with respect to the administration of justice, pursuant to section 92(14) of the *Constitution Act, 1867*, and affords them the latitude to opt for alternative avenues for dispute resolution.[36] Importantly, it is not my goal to marginalize section 96 to such an extent that superior courts become "empty institutional shells"[37] or comprehensively dissect the vast literature concerning access to justice and the rule of law. While acknowledging that the potential constraints posed by section 96 on government choices may be overshadowed by other access to justice hurdles, such as the scarcity of information available to litigants and the financial burdens they encounter, I maintain that the interpretation of section 96 remains an integral component of the discourse on access to justice.

This analysis unfolds across three sections. Part I outlines the emergence of administrative tribunals and the evolving interpretation of section 96. It highlights the shift from safeguarding judicial independence and shielding superior courts from external encroachment to a focus on upholding the rule of law and national unity. This section also directs attention to the perceived purpose underlying the inclusion of section 96 in the Constitution, coupled with historical calls for reform. The history of section 96 is extensive, yet understanding it is essential for appreciating the significance of the recent changes introduced by the Supreme Court's decision in *Article 35.* Part II examines two key decisions: *Article 35* and *Trial Lawyers 2022*. Finally, Part III proposes a balanced approach to the core jurisdiction analysis, aiming to reconcile the superior courts' role in protecting the rule of law with the need to enhance access to justice through alternative dispute resolution mechanisms. Through this exploration, this paper contributes to a deeper understanding of the intricate dynamics of section 96 and its implications for the Canadian legal landscape.

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33 *Singh v Canada (Attorney General) (CA),* 2000 CanLII 17100 (FCA) at para 33. The Supreme Court unanimously endorsed this comment in *R v Imperial Tobacco Canada Ltd*., 2011 SCC 42 at para 62 [*Imperial Tobacco*].

34 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 CanLII 65 (SCC) at para 242, Abella and Karakatsanis JJ, dissenting [*Vavilov*].

35 *MacMillan Bloedel, supra* note 7 at para 11.

36 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 [*Constitution Act*].

37 W R Lederman, "The Independence of the Judiciary" (1956) 34:10 Can Bar Rev 1139 at 1172.

I. SECTION 96: NOT JUST AN APPOINTING POWER

A. Access to Justice and the Rise of the Administrative State

Canada's administrative state evolved significantly throughout the 20th century, marked by the creation of the Board of Railway Commissioners in 1903 under the federal *Railway Act*.[38] The administrative state, which "describes a system of governance [in] which public policies and programs… are influenced by the decisions of public officials," emerged as a response to societal changes, particularly after the two world wars and the Great Depression.[39] The public's demand for state intervention in regulating societal interests led to the rapid growth of the regulatory state.[40] Various areas, including agricultural products, working conditions, occupational licensing, and social welfare, witnessed substantial regulation.[41] As John Willis noted, the state's character transformed from being a "soldier and policeman" to a "protector and nurse"[42] as it adapted to changing social conditions.

This shift prompted federal and provincial governments to innovate in service delivery and delegate regulatory adjudication to administrative tribunals. In the early 20th century, section 96 remained relatively insignificant, imposing minimal constraints on the delegation of power from legislatures to regulatory agencies.[43] Nonetheless, concerns were raised by Chief Justice Sir William Mulock of the Supreme Court of Ontario (as it then was) in 1934, who criticized the growing practice of "vesting in autocratic bodies the power to arbitrarily deal with matters affecting our liberties and other rights" without court intervention.[44] He viewed this practice as "depriving" Canadians of protection under the law and undermining the rule of law itself, emphasizing the fundamental role of access to justice through the *courts*.[45]

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38 *An Act to Amend and Consolidate the Law Respecting Railways*, SC 1903, c 58. See also Law Reform Commission of Canada, *Working Paper 25: Independent Administrative Agencies* (Ottawa: Minister of Supply and Services Canada, 1980) at 21–23 online: <lareau-legal.ca/LRCWP25.pdf> [perma.cc/W38C-Y4YY].

39 Alan C Cairns, "The Past and Future of the Canadian Administrative State" (1990) 40:3 UTLJ 319 at 322 citing Introduction' in OP Dwivedi, ed, *The Administrative State in Canada: Essays in Honour of J.E. Hodgetts* (Toronto: University of Toronto Press, 1982) at 5; Paul Daly, "The Ages of Administrative Law" (2022) Ottawa Faculty of Law Working Paper No 2022-16 at 9.

40 Cairns, *supra* note 39 at 327.

41 RCB Risk, "Lawyers, Courts, and the Rise of the Regulatory State" (1984) 9:1 Dal LJ 31 at 33; Law Reform Commission of Canada, *supra* note 38 at 21.

42 John Willis, *The Parliamentary Powers of English Government Departments* (Cambridge: Harvard University Press, 1933) at 13. Willis was referring to the British apparatus in the late 19th century; however, the same changes occurred in Canada, albeit a little later.

43 Risk, *supra* note 41 at 36.

44 Sir William Mulock, "Address of the Chief Justice of Ontario" (1934) 12:1 Can Bar Rev 35 at 38.

45 *Ibid* at 36–38.

In contrast, academics like Felix Frankfurter and his student John Willis advocated for "a strong executive and an elaborate administrative apparatus."[46] Willis argued the modern Canadian state required tribunals as a means of policy implementation. He believed that using administrators' specialized expertise could alleviate the economic challenges faced by the state, particularly during the Great Depression.[47] By appointing individuals with specific qualifications, tribunals can serve as specialist bodies dedicated to overseeing complex regulatory issues. Tribunals also tend to have certain advantages over the traditional court system including speed, procedural informality, and flexibility. More recently, they have been chosen to improve access to justice by addressing challenges faced by the court system, such as slow processes, prohibitive costs, and the need for legal professionals to guide individuals through the system. For instance, the British Columbia Civil Resolution Tribunal ("CRT"), established in 2016, emerged as Canada's inaugural online tribunal designed to assist individuals navigate dispute resolution independently without legal representation.[48] Tribunals can also create procedures to manage the caseload "that would choke the ordinary court system."[49]

However, Willis acknowledged that conferring power to commissions (i.e., tribunals) raised challenges related to the separation of powers doctrine.[50] While the "Canadian Constitution does not insist on a *strict* separation of powers,"[51] "it does "sustain some notion" of it.[52] Empowering tribunals with both executive and judicial functions blurs these lines.

B. Section 96 Caselaw: From *Toronto v York to MacMillan Bloedel v Simpson*

Despite some concerns regarding the conferral of judicial matters to tribunals in the early twentieth century, the "courts did not demonstrate any general hostility" towards the regulatory state and the creation of tribunals.[53] However, *Toronto v York* marked a pivotal shift when Lord Atkin of the Privy Council described section 96 as one of the "principal pillars in the temple of justice ... not to be undermined.""[54] The Privy Council ruled the

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46 Graeme A Barry, "Spectrum of Possibilities: The Role of the Provincial Superior Courts in the Canadian Administrative State" (2005) 31:1 Man LJ 149 at 151. See also Michael Taggart, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43:3 Osgoode Hall LJ 223 at 238.

47 Barry, *supra* note 46 at 167.

48 Civil Resolution Tribunal, "About the CRT" (last visited July 21, 2023), online: <civilresolutionbc.ca/about-the-crt> [perma.cc/NU58-63AQ].

49 Hogg & Wright, *supra* note 19 at 7:19.

50 John Willis, "Three Approaches to Administrative Law: The Judicial, The Conceptual, and the Functional" (1935) 1:1 UTLJ 53 at 56. While Willis employed the term "commissions" and observed that "[n]ot all commissions are administrative tribunals," his primary focus was to address the concerns related to commissions exerting "judicial power" and potentially encroaching upon the role of the courts (*ibid* at 57).

51 *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) at para 15 [emphasis added].

52 *Cooper, supra* note 32 at para 11.

53 Risk, *supra* note 41 at 37.

54 *Toronto (City) v York (Township)*, 1938 CanLII 252 (UK JCPC) at 594. The other two "pillars" are section 99 (guarantee of superior court judges' tenure until seventy-five) and section 100 (Parliament fixes and provides for the salaries of superior court judges).

Ontario government could not "clothe the [Municipal] Board with the functions of a court."[55] Despite acknowledging the provincial legislature's authority over the administration of justice under section 92(14), the Privy Council decided against the conferment of judicial powers on the Board.[56] Scholars have since questioned the foundation of this ruling and the notion of a rigid separation of powers doctrine within Canada's constitution.[57]

The disquiet caused by the "sweeping interpretation" of section 96[58] and the restrictive view of provincial authority under section 92 was partly alleviated a few months later in *Reference re Adoption Act*.[59] Chief Justice Duff clarified that specialized courts with limited jurisdiction fell within the province's legislative competence and emphasized that the jurisdiction of lower courts was not "fixed forever as it stood at the date of Confederation."[60] The focus shifted from a rigid interpretation of section 96 to assessing whether a statute "broadly conform[ed] to a type of jurisdiction generally exercisable by" lower courts rather than superior courts.[61] Initially, this more liberal interpretation of section 96 was limited to situations where jurisdiction was transferred from a superior court to an inferior court.[62]

Uncertainty about the authority of provinces to establish administrative tribunals persisted until the *John East Iron Works* case.[63] The Privy Council, speaking through Lord Simonds, observed that the exercise of judicial power did not necessarily signify a section 96 court.[64] This ruling provided the "green light" for the establishment of administrative tribunals, as long as they did not seek to replace superior courts in certain functions.[65] Lord Simonds proposed a two-step test for section 96 challenges: first, determine if the impugned function was "judicial" in nature, and if so, ascertain whether the tribunal was analogous to a superior court. If both questions were answered affirmatively, assigning the function to the tribunal would be considered invalid.

Over time, the interpretation of section 96 evolved, leading to the current three-step test for addressing challenges to the powers of administrative tribunals as outlined in *Residential Tenancies 1979*.[66] This test involves examining whether the transferred power aligns with

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55 *Ibid* at 595.

56 *Ibid* at 594.

57 Willis, "Section 96", *supra* note 3 at 521.

58 *Re Residential Tenancies Act* 1979, 1981 CanLII 24 (SCC) at 729 [*Residential Tenancies* 1979].

59 *Reference Re Authority to Perform Functions Vested by Adoption Act, The Children of Unmarried Parents Act, The Deserted Wives', and Children's Maintenance Act of Ontario,* 1938 CanLII 2 (SCC) [*Reference re Adoption Act*].

60 *Ibid* at 418.

61 *Ibid* at 421.

62 *Residential Tenancies* 1979, *supra* note 58 at 729.

63 *Saskatchewan (Labour Relations Board) v John East Iron Works Limited*, 1948 CanLII 266 (UK JCPC). The case set out a test which involved asking two questions: 1) whether or not the impugned function was a "judicial" one; and 2) if so, whether or not, the tribunal was analogous to a superior court. If both questions were answered in the affirmative, the assignment of a function to a tribunal was unconstitutional.

64 *Ibid* at 676.

65 Noel Lyon, "Is Amendment of Section 96 Really Necessary" (1987) 36 UNBLJ 79 at 81.

66 *Supra* note 58. As will be discussed this test is merely one aspect to consider in section 96 challenges. There is now the "core jurisdiction" test.

that exercised by superior courts at the time of Confederation.[67] If the inferior courts in a majority of the founding provinces "enjoyed a meaningful concurrency of power"[68] or a "shared involvement"[69] in the jurisdiction at issue, section 96 is not engaged. If the jurisdiction was exclusive to section 96 court, the next step evaluates whether the tribunal's function is "judicial" in nature. If it is, the last step assesses whether the jurisdiction is merely subsidiary or ancillary to an administrative function or inherently necessary to achieving a broader policy objective set by the legislature. If so, the transfer of power m*eets the Residential T*enancies test, allowing tribunals to assume authority previously held by section 96 courts.

Critics like Mary Hatherly have raised concerns about the subjectivity of this test which leads to different classifications of tribunals with "identical functions" and unwarranted inconsistencies in the application of laws across provinces.[70] Constitutional scholar Peter Hogg voiced similar apprehensions, calling each step "vague and disputable in many situations," as even minor discrepancies in the historical context or institutional structures among provinces can determine the validity or invalidity of seemingly comparable administrative tribunals.[71] The concern over conducting a historical inquiry holds some validity, considering the framers of the Constitution could not have anticipated the significant economic and social transformations that have taken place since then. The "largely frozen" historical approach to section 96 has also been criticized for not plainly identifying superior court functions.[72]

Thirteen years after the *Residential Tenancies* test, the Supreme Court introduced the "core jurisdiction" test in *MacMillan Bloedel*.[73] This case involved legislation granting exclusive jurisdiction to provincial youth courts over the offence of contempt of court committed by young offenders. Chief Justice Lamer, for a "bare five-four majority,"[74] concluded that the *Residential Tenancies* test exhausted the inquiry only when the challenged jurisdiction was *concurrent* with that of superior courts. As Lamer CJ explained, "the true problem in this case is the exclusivity of the grant,"[75] necessitating an inquiry into whether the legislation removed the superior court's *core* jurisdiction. The majority found that while the creation of a youth court system was "laudable" and the powers granted met the *Residential Tenancies* test,[76] the grant would remove one of the attributes of the superior courts' core jurisdiction and "maim the institution … at the heart of our judicial system."[77]

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67 *Ibid* at 734–35. The case uses the wording "at the time of confederation." Using a strict literal interpretation would mean focusing on the jurisdiction as it were at the date of confederation. However, in the *Residential Tenancies* 1996 case, Justice McLachlin for the majority advocated for a "flexible" approach, *supra* note 8 at para 79.

68 *Residential Tenancies* 1996, *supra* note 8 at 77. The four provinces at Confederation were: Nova Scotia, New Brunswick, Quebec, and Ontario.

69 *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal (NS),* 1989 CanLII 116 (SCC) at 260 [*Sobeys*].

70 Mary Hatherly, "The Chilling Effect of Section 96 on Dispute Resolution" (1988) 37 UNBLJ 121 at 137.

71 Hogg & Wright, *supra* note 19 at 7:19.

72 Lyon, *supra* note 65 at 79–80.

73 *Supra* note 7.

74 Hogg & Wright, *supra* note 19 at 7:19.

75 *MacMillan Bloedel, supra* note 7 at para 27 [emphasis removed].

76 *Ibid* at para 26.

77 *Ibid* at para 37.

The addition of the core jurisdiction test has been met with strong criticism, as it was seen as "an unfortunate and unnecessary supplement to what is already a complex body of law under [section] 96."[78] After tracing the jurisprudential history of the core jurisdiction, Alyn Johnson found that the doctrine was "built on a surprising series of mistakes and missteps, and a surprising disregard for sources and contexts."[79] Notably, the path from the *Residential Tenancies* test to *MacMillan Bloedel* "lacks any stable point of reference," complicating the interpretation of section 96.[80] To better understand this assessment, it is useful to briefly consider four decisions that occurred prior to *MacMillan Bloedel: Crevier*,[81] *Jabour,*[82] *McEvoy,*[83] and *Reference re Young Offenders Act.*[84]

In *Crevier,* the Court addressed whether a statutory provision preventing any review of decisions made by a provincial adjudicative tribunal violated section 96.[85] The Court held that legislation shielding a statutory tribunal from judicial review of its adjudicative functions was unconstitutional as it effectively transforms the tribunal into a section 96 court.[86] Consequently, the affected party retains the ability to directly challenge a tribunal's decision based on jurisdictional grounds.[87] The Court underscored the significance of judicial review for superior courts and noted that questions of jurisdiction rise above and differ from errors of law:

> It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. However, given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, *I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review*.[88]

In *Jabour,* the Court unanimously ruled that federal legislation seeking to confer exclusive powers on the federal courts to review the constitutionality of legislation was invalid.[89] While section 101 of the *Constitution Act* allows Parliament to establish courts for the "better administration of the laws,"[90] it cannot oust the superior court's ability to declare federal statutes beyond Parliament's competence. Justice Estey cautioned that such an exclusion "would strip the basic constitutional concepts of judicature of this country, namely the

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78 Hogg & Wright, *supra* note 19 at 7.16, 7:19.
79 Alyn James Johnson, "The Genealogy of Core Jurisdiction" (2021) 54:3 UBC L Rev 815 at 815.
80 *Ibid* at 825.
81 *Crevier v Attorney General of Quebec*, 1981 CanLII 30 (SCC) [*Crevier*].
82 *Attorney General of Canada v Law Society of British Columbia,* 1982 CanLII 29 (SCC) [*Jabour*].
83 *McEvoy v Attorney General for New Brunswick et al*, 1983 CanLII 149 (SCC) [*McEvoy*].
84 *Reference re Young Offenders Act (PEI),* [1991] 1 SCR 252 [*Young Offenders* 1991].
85 *Supra* note 81.
86 *Ibid* at 234.
87 *United Nurses of Alberta v Alberta (Attorney General*), 1992 CanLII 99 (SCC) at 936, 1992 CanLII 99 (SCC).
88 *Crevier, supra* note 81 at pages 236-37 [emphasis added].
89 *Supra* note 82.
90 *Constitution Act, supra* note 36.

superior courts of the provinces, of a judicial power *fundamental* to a federal system as described in the *Constitution Act*."[91]

The *McEvoy* case originated in New Brunswick and addressed a proposal to establish a provincially appointed unified criminal court with jurisdiction over all indictable offenses.[92] In a unanimous decision, the Court determined that section 96 precludes Parliament, the legislature, or both together from establishing such a court since trying indictable offences fell within the superior court's jurisdiction in 1867.[93] The Court described the proposal as a "complete obliteration" of the superior court's criminal law jurisdiction, stating that "Parliament can no more give away federal constitutional powers than a province can usurp them."[94] Even though the proposal sought to provide concurrent jurisdiction to the unified criminal court, the Court deemed it insufficient to save the scheme:

> The theory behind the concurrency proposal is presumably that a Provincial court with concurrent rather than exclusive powers would not oust the Superior Courts' jurisdiction, at least not to the same extent; since the Superior Courts' jurisdiction was not frozen as of 1867, it would be permissible to alter that jurisdiction so long as the essential core of the Superior Courts' jurisdiction remained; s. 96 would be no obstacle because the Superior Court would retain jurisdiction to try indictable offences. With respect, we think this overlooks the fact that *what is being attempted here is the transformation by conjoint action of an inferior court into a superior court*. Section 96 is, in our view, an insuperable obstacle to any such endeavour.[95]

Finally, in *Reference re Young Offenders Act* 1991,[96] the Supreme Court examined the constitutional validity of assigning jurisdiction over criminal offences to provincially appointed youth courts. Chief Justice Lamer, writing for two other justices, concluded that "jurisdiction over young persons charged with a criminal offence" was a novel concept that did not exist at Confederation.[97] Consequently, the allocation was valid under the *Residential Tenancies* test. Justice Wilson, with Justice McLachlin concurring, also applied the *Residential Tenancies* test, leading Johnson to comment that "[t]his decision is from start to finish a *Residential Tenancies* decision. There is no deliberate attempt to modify the three-part test with a 'guaranteed core' refinement."[98]

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91 *Jabour, supra* note 82 at page 328.

92 *Supra* note 83.

93 *Ibid* at 717.

94 *Ibid* at 719–720.

95 *Ibid* at 721. Reconciling this statement, which suggests that concurrent jurisdiction does not shield a transfer of power from a section 96 challenge, with other jurisprudence presents a challenge. For instance, in *Jabour*, the Court centered its attention on the invalidity of conferring *exclusive* jurisdiction upon an inferior court. A similar stance was adopted in *Northern Telecom v Communication Workers*, 1983 CanLII 25 (SCC), where it was established that the Federal Courts could concurrently exercise jurisdiction over constitutional challenges to federal legislation and administrative actions. As elaborated further in Part III-A, the majority opinion in *MacMillan Bloedel* also identified the issue as the exclusive nature of the powers being delegated to an inferior court. It is possible this aspect of *McEvoy* is no longer good law.

96 *Supra* note 84.

97 *Ibid at* 268.

98 Johnson, *supra* note 79 at 832.

Johnson's observation that the Court made no attempt to modify the *Residential Tenancies* test applies to all four decisions. Nevertheless, the Court in *MacMillan Bloedel* drew upon these cases (except *McEvoy)* to establish the concept of an unassailable core jurisdiction, albeit with varying degrees of success. Surprisingly, Lamer CJ did not rely on *McEvoy* to support the idea of core jurisdiction, despite indications that the Court believed in the existence of an unremovable criminal core.[99] Instead, Lamer CJ heavily relied on his decision in *Reference Young Offenders*, although its relevance to the matter was tenuous at best.

In the *Reference Young Offenders Act* decision, Lamer CJ repeatedly employed the term "core," asserting that section 96 protected "the jurisdiction conferred on Youth Courts by Parliament is within the *core* of jurisdiction of superior courts"[100] However, Johnson points out that in *MacMillan Bloedel,* Lamer selectively quoted his previous statements, intentionally omitting references to *Residential Tenancies*.[101] When read in the context of *Residential Tenancies*, *Reference Young Offenders Act "*has nothing to do with a protected subset of superior court powers that can never be transferred."[102] Justice McLachlin's dissent in *MacMillan Bloedel* supports Johnson's interpretation, criticizing Lamer CJ's modification of the section 96 analysis as "needlessly derogat[ing]" from the *Residential Tenancies* test and highlighting the historical revision that occurred.[103] Justice McLachlin stressed that Lamer CJ's comment must be considered in conjunction with the paragraph following it. In its proper context, Lamer CJ's use of the term "core" in *Reference Young Offenders Act "*might have been seen simply as a shorthand reference to impermissible transfers under the *Residential Tenancies* test — i.e., transfers where the adjudicative function 'is a sole or central function of the tribunal [and] the tribunal can be said to be operating 'like a s. 96 court' (per Dickson J., in *Residential Tenancies* 1979...)."[104]

There is reason to believe then that section 96 has been shaped by "a misreading of *Young Offenders*"[105] leading the Court to "manufacture an unassailable core."[106] However, Lamer CJ finds stronger support for the notion of an unassailable core in *Crevier* and *Jabour*. This is because both cases deal with judicial review which is grounded in preserving the rule of law. The Supreme Court has recognized the rule of law as a fundamental constitutional principle inherited from the British from the preamble of the *Constitution Act, 1867* and explicitly from the preamble to the *Canadian Charter of Rights and Freedoms*.[107] The rule of law generally necessitates an independent judiciary to ensure that official actions are justified

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99 Patrick Healy, "Constitutional Limitations upon the Allocation of Trial Jurisdiction to the Superior or Provincial Court in Criminal Matters" (2003) 48:1 Crim LQ 31. Healy interprets the *McEvoy* decision as incorrectly affirming the concept of an irreducible core jurisdiction in criminal matters.

100 *Young Offenders* 1991, *supra* note 84 at page 264.

101 *Supra* note 79 at 871.

102 *Ibid* at 836.

103 *Supra* note 7 at para 71.

104 *Ibid* at para 72.

105 Johnson, *supra* note 79 at 837.

106 *Ibid* at 841.

107 *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC) [*Manitoba Language Rights*]; *Provincial Judges Reference, supra* note 7.

by law and that decision-makers operate within their granted powers.[108] Judicial review thus serves as a mechanism to uphold the rule of law and possesses a constitutional basis for being considered part of the core jurisdiction of superior courts.[109] Chief Justice Lamer leveraged the rule of law principle, supported by the judicial review decisions, to "establish the existence of superior court core jurisdiction."[110] He connects this back to the issue at hand in *MacMillan Bloedel*, the transfer of exclusive jurisdiction over contempt *ex facie* committed by youth, and asserts that the "rule of law requires a judicial system that can ensure its orders are enforced and its process respected."[111] In sum, Lamer CJ's rationale for the *MacMillan Bloedel* decision is solidly rooted in the rule of law. Building on this foundation, he advanced the notion of an inviolable core jurisdiction — one that cannot be stripped away from superior courts, which serve as protectors of the rule of law. This case firmly established the core jurisdiction test.

Another important aspect of the caselaw, starting with *MacMillan Bloedel*, pertains to the Court's narrow conception of the core. Similar to the historical inquiry from *Residential Tenancies*, the Court refrained from providing a comprehensive definition of the core powers of superior courts. Chief Justice Lamer recognized the challenges in delineating the core and deemed it "unnecessary … to enumerate the precise powers" in that particular case, as the power to try young individuals for contempt *ex facie* was "obviously" within the jurisdiction of superior courts. [112] The failure of the Court to specify the core powers implies that "only a series of cases" reaching the Court will establish the boundaries of this untouchable core.[113]

Nevertheless, various indications suggest that the core jurisdiction is restricted. A year after *MacMillan Bloedel,* Lamer CJ, in the concurring opinion from *Residential Tenancies* 1996, described the core as a "very narrow one which includes 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."[114] The Court has elsewhere emphasized that the superior courts occupy a "position of prime importance in the constitutional pattern of Canada."[115] Consequently, section 96 prohibits provinces and the federal government from removing any features that are "fundamental" to the federal system,[116] or any powers that are the "hallmark of a superior court"[117] and "integral" to its operation.[118] The historical approach to section 96 unequivocally portrays the core as narrow, focused on upholding the rule of law. However, as will be explored in part III, the Supreme Court has recently expanded the core to include "general private law jurisdiction."[119]

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108 Hogg & Zwibel, *supra* note 13 at 727.
109 Johnson, *supra* note 79 at 848.
110 *Ibid* at 850.
111 *Supra* note 7 at para 37.
112 *Ibid* at para 38.
113 Hogg & Wright, *supra* note 19 at 7:19.
114 *Supra* note 8 at para 56, Lamer CJ, concurring [emphasis added].
115 *Jabour, supra* note 82 at 328.
116 *Ibid* at 328.
117 *Crevier, supra* note 81 at 237.
118 *MacMillan Bloedel, supra* note 7 at para 15.
119 *Article 35*, *supra* note 23 at para 6.

C. Section 96's Purpose: From Independence to Unity

Several rationales have been proposed for the inclusion of section 96 in the Constitution. Historically, it was seen as a means to uphold judicial independence by removing judicial appointments from local pressures.[120] The Privy Council accepted this view, describing section 96 as "at the root of the means adopted by the framers of the [*Constitution*] … to secure the impartiality and independence of the Provincial judiciary."[121] This theory is most famously found in Professor William Lederman's extensive piece entitled "The Independence of the Judiciary." Yet, Lederman posited that it was the *cumulative* effect of sections 96-100 of the *Constitution* (the "Judicature Provisions"), not just section 96 alone, that safeguards the independence of the superior court judges. As only superior courts provided the qualities of an independent judiciary in Canada, through the guarantee of tenure until age seventy-five[122] and a fixed salary,[123] those courts possessed an "irreducible core of substantive jurisdiction assured to them."[124] However, doubts were cast on the independence theory by Justice Estey in *Re BC Family Relations Act*:

> [t]he generally accepted theory has been that the national appointment of superior ... court judges was designed to ensure a quality of independence and impartiality in the courtroom .... Duff CJ. reviewed the same argument in *the Adoption Refe*rence ... but evidently did not find it compelling .... Whatever [section 96's] purpose its presence has raised difficulties of application since Confederation.[125]

Historical records like the Confederation debates, which grounds the "equation of section 96 with judicial independence"[126] have "limited value in [contemporary] constitutional interpretation."[127] Some argue that section 96 aimed to ensure the selection of more qualified candidates and save provincial funds, not solely protect judicial independence.[128] Roderick MacDonald suggests section 96 may have "served to consolidate political authority by ensuring the ideological commitment of the senior judiciary to traditional values such as private property, fault-based liability and markets."[129] Hogg contends that section 96 exists because superior courts are courts of general jurisdiction handling matters concerning both federal

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120 Laskin, *supra* note 5 at 998; Hogg & Wright, *supra* note 19 at 7:16.

121 *O'Martineau & Sons Ltd v Montreal,* 1931 CanLII 387 (UK JCPC) at page 120.

122 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 99.

123 *Ibid*, s 100.

124 Lederman, *supra* note 37 at 1170–71.

125 *Re BC Family Relations Act*, 1982 CanLII 155 (SCC) at 93–94. Seven justices presided over this case; notably, Dickson J was absent.

126 Hatherly, *supra* note 70 at 130.

127 Laskin, *supra* note 5 at 999.

128 Hatherly, *supra* note 70 at 126–27; see also Matas, *supra* note 14 at 245 citing Paul Weiler, "Judges and Administrators: An Issue in Constitutional Policy" in *Proceedings of the Administrative Law Conference held at the University of BC, Faculty of Law on Oct 18-19, 1979* (P Gall ed 1981) 379 at 381.

129 Macdonald, *supra* note 12 at 261.

and provincial law, which necessitates some federal involvement in their establishment.[130] Others believe that sections 92(14) and 96 create a "dual regime"[131] reflecting and promoting federalism values,[132] although MacDonald refers to this idea as an "[in]sincere claim."[133] He questions why these virtues do not equally warrant protection from the lowest provincial courts to the highest federal court, if the regime is supposed to enhance the principles of federalism and the sharing of political power.[134]

In *Residential Tenancies* 1979, Justice Dickson (as he then was), without providing a source, embraced the view that the appointing power is part of a "historic compromise" reflecting the framers' intent to establish a "strong constitutional base for national unity, through a unitary judicial system."[135] In essence, section 96 contributes to national unity by establishing a court system with uniform jurisdiction across the country "and by the fact that appeals lie from all to the Supreme Court of Canada, which exercises a unifying influence."[136]

Despite different rationales, the courts ultimately upheld the judicial independence theory after *Residential Tenancies* 1979. A unanimous Court in *McEvoy* 1983 held "the judicature sections … guarantee the independence of the superior courts."[137] In *Sobeys Store* 1989, Justice Wilson for the majority (which included then Chief Justice Dickson) wrote "the jurisdiction of the inferior courts … [cannot] be substantially expanded so as to undermine the independence of the judiciary which s. 96 protects."[138] Chief Justice Lamer echoed this point in *MacMillian Bloedel* 1995 where he wrote section 96 "has come to stand for" the guarantee of judicial independence[139] and again in *Residential Tenancies* 1996 where he noted that "section 96 … [was] designed by the framers to ensure the independence of the judiciary."[140]

In *Provincial Judges Reference* 1997, Lamer CJ concluded that the rationale behind section 96 had shifted "away from the protection of national unity to the maintenance of the rule of law through the protection of the judicial role."[141] Nevertheless, the Court returns to

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130 Hogg & Wright, *supra* note 19 at 7:2; but see Peter Russell who argues that federal control over appointments to provincial courts is "surely not the right way to attend to this legitimate federal concern." Rather, if the way in which provincial judges interpret federal laws causes embarrassment to federal interests, the appropriate means for rectification are the federal Supreme Court's review of provincial court rulings pertaining to federal matters or legislative measures taken by the federal parliament: Peter Russell, "Constitutional Reform of Judiciary" (1969) 7:1 Alta L Rev 103 at 122.

131 Canada, Department of Justice, *The Constitution of Canada: A Suggested Amendment Relating to Provincial Administrative Tribunals: A Discussion Paper,* by The Honourable Mark MacGuigan, Catalogue No J2-47/198 (August 1983) at 1 online: <publications.gc.ca/collections/collection_2022/jus/J2-506-1983-eng.pdf> [perma.cc/3FLX-CK4T].

132 Macdonald, *supra* note 12 at 262.

133 *Ibid*.

134 *Ibid.*

135 *Supra* note 58 at 728.

136 *MacMillan Bloedel, supra* note 7 at para 51, McLachlin J, dissenting; *Article 35*, *supra* note 23 at para 89.

137 *Supra* note 83 at 720.

138 *Supra* note 69 at page 523.

139 *Supra* note 7 at para 11.

140 *Supra* note 8 at para 26.

141 *Supra* note 7 at para 88.

national unity alongside the rule of law as a justification for the inclusion of section 96, as will be explored in Part II.[142]

D. The "Section 96 Problem" and Proposed reforms

A brief overview of the case law leading up to the present reveals that section 96 has been a subject of considerable litigation, giving rise to what is referred to as the "section 96 problem."[143] Critics argue that section 96 was not intended to entrench the jurisdiction of superior courts.[144] Some provinces have found the provision to be "unduly restrictive,"[145] limiting their ability to assign functions to tribunals and provincial courts.[146]

Various proposals for constitutional amendments emerged in response to this "section 96 problem." In 1979, the Task Force on Canadian Unity proposed granting provincial governments the authority to appoint superior court judges after consulting with the federal government.[147] Alternatively, the MacGuigan Proposal suggested allowing provinces to confer jurisdiction analogous to that of a superior court on tribunals,[148] subject to review by a superior court "for want or excess of jurisdiction."[149] This approach aimed to preserve the vital supervisory role of superior courts in upholding the rule of law.[150] However, the MacGuigan Proposal faced criticism for being incomplete and "ill-conceived"[151] as it failed to fully address the impact of section 96 on federal tribunals and lacked a comprehensive understanding of the underlying disputes.[152] According to MacDonald,

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142 It should be noted that there is a principled distinction in the application of the independence rationale concerning the limitations that section 96 imposes on the functions of courts compared to those on administrative tribunals. Notably, subsequent to the *Provincial Judges Reference* case, both provincial and federal courts benefit from the safeguard of the unwritten constitutional principle of judicial independence. However, this is not the case for administrative tribunals, as explained in the following rulings: *Ocean Port Hotel Ltd v British Columbia* (*General Manager, Liquor Control and Licensing Branch)* 781, 2001 SCC 52; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4; *Walter v British Columbia (Attorney General*), 2019 BCCA 221. It could be argued that upholding a robust framework for judicial review serves as a sufficient substitute for the absence of constitutional safeguards regarding the independence of administrative tribunals.

143 Jones, *supra* note 17 at 676; Macdonald, *supra* note 12 at 152.; Matas, *supra* note 14 at 257.

144 E Robert A Edwards "Section 96 of the Constitution Act, 1867 - The Call for Reform" (1984) 42:2 The Advocate (Vancouver Bar Association) 191 at 191. See also Macdonald, *supra* note 12.

145 Department of Justice, *supra* note 131 at 2.

146 Lyon, *supra* note 65 at 79; Peter B Adams & Paul J Murphy, "Section 96 Judges: Whether Ontario Residential Tenancies Commission Exercises S. 96 Functions. Reference Re: Residential Tenancies Act, 105 D.L.R. (3rd) 193" (1980) 6:1 Queen's LJ 282 at 294.

147 Privy Council Office, The Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services Canada, January 1979) at 102 online <publications.gc.ca/collections/collection_2014/bcp-pco/CP32-35-1979-eng.pdf> [perma.cc/MVT3-DXC6].

148 Department of Justice, *supra* note 131 at 7. This proposal advocated for a new provision, "Section 96B," which would have granted provinces the authority to confer jurisdiction on "any tribunal, board, commission, or authority, other than a court…. in respect of any matter within the legislative authority of the Province".

149 *Ibid* at 7–8.

150 *Crevier, supra* note 81; *MacMillan Bloedel*, *supra* note 7 at para 37.

151 Macdonald, *supra* note 12 at 280.

152 Macdonald, *supra* note 12 at 256.; Canadian Bar, *supra* note 15 at 231; Matas, *supra* note 14 at 250–52.

the failure to clearly articulate the problem of section 96 hindered the proposal's ability to offer a viable solution and inadvertently invited provinces to try and exploit the superior courts.[153]

Former Professor of Law Noel Lyon opposed the call for a constitutional amendment and criticized the proposal as "fundamentally misconceived" for treating the issue as one concerning the federal division of powers, rather than acknowledging that the "primary value to be secured is not federalism but the rule of law" which can only be ensured by an independent judiciary.[154] Lyon recommended reserving only functions "essential to our system of government" exclusively for judges with constitutionally secured independence[155] rather than treating "all functions exercised by superior courts in 1867 as having a rational constitutional basis for exclusive reservation to those courts."[156]

Ultimately, the proposed amendments were abandoned, leaving the section 96's problem unresolved. Yet, some scholars have commented that the problem has been resolved. Ellis, drawing on cases from the late 1980s to the early twenty-first century, observed that the Supreme Court has made "ample constitutional room" for tribunals.[157] Apprehensions concerning section 96 seemed to recede as the courts, for some time, embraced a broad interpretation of the third branch of the *Residential Tenancies* test while maintaining a restrictive stance on the core jurisdiction test. Nevertheless, with the Supreme Court adopting a more expansive interpretation of the core jurisdiction in *Article 35,* the issue of section 96 has resurfaced.

II. GUARDIANS OF THE CONSTITUTION: RECENT SECTION 96 CASES

In both *Article 35* and *Trial Lawyers 2022,* the Supreme Court of Canada grappled with provinces transferring jurisdiction from superior courts to an inferior court and tribunal, respectively. *Article 35* involved an exclusive transfer of jurisdiction, while *Trial Lawyers 2022* dealt with a combination of exclusive and non-exclusive powers granted to a tribunal. The fact that both verdicts were split decisions highlights the ongoing debates and controversies surrounding the scope and implications of section 96. This section provides an overview of these cases and the recent judicial perspectives on section 96.

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153 Macdonald, supra note 12 at 281. See also Matas who raises an important concern regarding the broad scope of the proposal. He points out that by permitting provincially appointed tribunals to handle *any* matter falling within provincial legislative authority, there is a risk of creating a dual system of courts that goes against the intended purpose of the Constitution: Matas, *supra* note 14 at 253.

154 *Supra* note 65 at 80.

155 *Ibid* at 86.

156 *Ibid* at 82. Lyon argues that, assuming that the judiciary is willing to "refine" its section 96 interpretation to allow provinces to "enjoy the benefit of … flexibility," reform is unnecessary (*ibid* at 85).

157 *Supra* note 20 at 320. For support that the Supreme Court has made space for tribunals, Ellis refers to the following: *Reference re Residential Tenancies* 1996, *supra* note 8; *MacMillan Bloedel*, *supra* note 7; *Sobeys*, *supra* note 69.

A. Article 35 Reference: Section 96 and Exclusive Jurisdiction

i. The Basics

In 2016, the Québec National Assembly amended Article 35 of their *Code of Civil Procedure,* raising the monetary threshold for civil disputes exclusively under the jurisdiction of the Court of Québec (an inferior court) from $70,000 to $85,000. Judges from the Superior Court of Québec opposed this change, arguing that it ran afoul of section 96 as it could potentially limit the superior court's capacity to state and advance the law regarding civil claims. In response, the Québec government sought clarification through a reference question at the Court of Appeal. The Court of Appeal ruled that, while ensuring access to justice remains a significant challenge within the judicial system, the monetary limit imposed lacked justification in light of section 96.[158]-

The majority of the Supreme Court of Canada (per Justices Côté and Martin) agreed the monetary limit was too high.[159] Characterizing the matter as the transfer of civil disputes concerning contractual and extracontractual obligations to the inferior court, they described the allocation as "broad" and encompassing a "vast area at the heart of private law."[160] They noted that Article 35 granted the inferior court exclusive jurisdiction over civil matters under $85,000, with few exceptions.[161] This effectively created a "prohibited parallel court" that "impermissibly infringe[d] upon the core jurisdiction" of the superior court.[162] The Supreme Court of Canada observed that Article 35 facilitated a "wholesale court-to-court transfer of jurisdiction" instead of conferring a specific narrow power.[163]

As discussed in Part I-C, two tests are used to assess the validity of a jurisdiction grant under section 96. First, the *Residential Tenancies* test examines whether the law usurps the historical jurisdiction of section 96 courts. The Court found that Article 35 satisfied the historical inquiry since, at the time of Confederation, three out of the four founding provinces' inferior courts were sufficiently involved in resolving disputes relating to contractual and extracontractual obligations.[164] Accordingly, the superior courts did not possess exclusive jurisdiction over such matters, satisfying the *Residential Tenancies* test. Second, the core jurisdiction test questions whether legislation improperly delegates the essential characteristics of the superior courts to other adjudicative bodies. Here, the majority revised the analytical approach and adopted a multifaceted method that considers six

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158 In the matter: Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the Code of Civil Procedure which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec, 2019 QCCA 1492 at paras 148, 185.

159 *Article 35, supra* note 23 at para 8.

160 *Ibid* at para 3.

161 The exclusions encompassed family matters other than adoption, as well as any other jurisdiction exclusively assigned to another adjudicative body, such as cases relating to immovable property, successions, and wills (*ibid* at paras 12–15).

162 *Article 35*, *supra* note 23 at paras 7, 71, 135, 138.

163 *Ibid* at para 3.

164 *Ibid* at paras 5, 75–76.

non-exhaustive factors when assessing potential infringements on section 96. This approach became a focal point of disagreement among the three opinions, highlighting the complex and evolving nature of interpreting section 96. The six factors are as follows:

1. The scope of the jurisdiction being granted;
2. Whether the grant is exclusive or concurrent;
3. The monetary limits to which it is subject;
4. Whether there are mechanisms for appealing decisions rendered in the exercise of the jurisdiction;
5. The impact on the caseload of the superior court of general jurisdiction; and
6. Whether there is an important societal objective.[165]

These factors are then weighed to achieve an appropriate balance between recognizing the provinces' authority over the administration of justice and safeguarding the nature, constitutional role, and core jurisdiction of the superior courts.[166] The majority viewed the constitutional role of superior courts as the "cornerstone of the unitary justice system and the primary guardians of the rule of law."[167] Under the majority's approach, the legislature has *some* flexibility in redefining the jurisdiction of the Court of Québec and exceeding the historical monetary ceiling, at least when the granted scope of jurisdiction remains limited.[168] However, this flexibility introduces uncertainty regarding the specific measures the province must take to limit the Court of Québec's jurisdiction in a manner that aligns with the new multifaceted approach. For instance, questions arise regarding the permissibility of restricting appeals to certain questions and the criteria for defining important societal objectives. As Professor of Law Paul Daly observed, "Québec legislators will have some work to do."[169]

ii. Safeguarding the Uniformity of the Canadian Judicial System

In *Provincial Judges Reference* 1997, Lamer CJ noted that the rationale behind section 96 evolved from protecting national unity to safeguarding the rule of law by preserving the judicial role.[170] Chief Justice McLachlin endorsed Lamer's observation in *Trial Lawyers 2014*, emphasizing section 96's "judicial function and the rule of law are inextricably intertwined."[171] There was. no discussion of the role of national unity in McLachlin's decision; nevertheless, the full Court in *Article 35* returned to the unity rationale alongside the rule of law, describing

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165 *Article 35*, *supra* note 23 at para 88.
166 *Ibid* at para 132.
167 *Ibid* at para 63.
168 *Ibid* at para 97.
169 Paul Daly, "Protecting the Core: Reference re Code of Civil Procedure (Que.), art. 35, 2021 SCC 27" (30 June 2021), online (blog): *Administrative Law Matters,* <administrativelawmatters.com/blog/2021/06/30/protecting-the-core-reference-re-code-of-civil-procedure-que-art-35-2021-scc-27> [perma.cc/7JDH-2MRL].
170 *Supra* note 7 at para 88.
171 *Supra* note 22 at para 39.

them as the two "key principles."[172] Accepting the idea of national unity as one of the roles of the superior court, it is crucial to grasp *what* that means.

This notion of national unity is not exactly what one might assume. National unity, in the context of section 96, does not refer to fostering a common purpose to bind Canadians together despite their provincial, ethnic, linguistic, religious, or other differences. Instead, the national unity rationale originated from Justice Dickson's comments in *Residential Tenancies* 1979 where he explained that section 92(14) and sections 96 to 100 "represent one of the important compromises of the Fathers of Confederation … [to effect] a strong constitutional basis for national unity, through a unitary judicial system."[173] National unity, as interpreted by the courts, focuses on maintaining a "strong unified judicial presence throughout the country."[174] Superior courts, established and administered by the provinces, exert a unifying influence by virtue of the similarities in jurisdiction, the presence of federally appointed and paid judges, and the avenue for appeals to the Supreme Court.[175] In this context, national unity does not refer to the uniformity of laws but rather emphasizes the necessity for superior courts throughout the country to possess a comparable core of authority.

Underlying the concept of national unity is the assumption of a unitary judiciary, wherein superior courts hold a dominant adjudicative position, while specialized provincial and federal courts occupy peripheral roles. However, this perspective is misleading. The distinguishing feature of superior courts resides in their possession of inherent jurisdiction. This inherent jurisdiction can be characterized as a "reserve or fund of powers, a residual source of powers, which the [superior] court may draw upon as necessary whenever it is just or equitable to do so."[176] Thus, the central inquiry within the realm of section 96 jurisprudence revolves around the extent to which the erosion of a superior court's inherent jurisdiction can occur without compromising the pivotal role played by these courts.

In this context, it is critical to assess *how* superior courts can maintain their responsibility for ensuring uniformity in the Canadian judicial system. The majority in *Article 35* posited that this involves examining the six factors outlined earlier. Once today's equivalent monetary ceiling is found (using the 1867 ceiling of $100), the multi-factored analysis guides how much flexibility a government has when seeking to exceed those ceilings.[177] The analysis offers a continuum. Grants of vast and exclusive jurisdiction without an accessible appeal mechanism or an important societal objective will limit the legislature's freedom and be deemed unconstitutional.[178] Conversely, concurrent grants of more limited jurisdiction, with an appeal mechanism and that serve an important societal objective, offer greater

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172 *Supra* note 23 at paras 42, 202, 322.

173 *Supra* note 58 at 728.

174 *MacMillan Bloedel*, *supra* note 7 at para 51, McLachlin J, dissenting but not on this point.

175 *Ibid.*

176 I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23:1 Current Leg Probs 23 at 51. Cited with approval in *Endean v British Columbia,* 2016 SCC 42 (CanLII) at para 23, 2011 SCC 5 (CanLII) at para 24, and *MacMillan Bloedel, supra* note 7 at paras 29-30.

177 *Supra* note 23 at paras 118, 132.

178 *Ibid* at para 133.

legislative flexibility. The majority in *Article 35* contended that the Québec government's grant of exclusive and "vast" jurisdiction to the inferior court over civil claims under $85,000, without an appeal mechanism,[179] undermines the superior courts' ability to resolve disputes. Consequently, this jeopardizes their status as the "cornerstone" of a unitary justice system.[180]

iii. Superior Courts: Primary Guardians of the Rule of Law

The importance of the superior courts to the rule of law is recognized in case law and all three opinions in *Article* 35. The majority in *Article* 35 characterized the rule of law as a "central" principle of section 96,[181] emphasizing that superior courts are best suited to preserve various facets of the rule of law due to Canada's constitutional architecture. This includes equality before the law, the creation and maintenance of an actual order of positive laws, and overseeing public powers.[182] While provincial courts also contribute to upholding the rule of law,[183] the constitutionally guaranteed independence of superior courts positions them as "*primary* guardians."[184] Provincial court independence is subject to constitutional guarantees but legislatures retain the authority to abolish or significantly constrain courts without violating the Constitution. In contrast, superior courts enjoy constitutional protection against such legislative interference. The majority contended that failing to preserve their core jurisdiction over civil claims would undermine the superior court's capacity to offer "jurisprudential guidance on private law," thereby endangering the rule of law in Canada.[185]

Justice Abella concurred with the connection between core jurisdiction and the rule of law but cautioned against an exaggerated scope of the concept.[186] She confined the rule of law to mean that superior courts must retain autonomy in enforcing their judgments, maintain impartiality and independence, and possess residual jurisdiction over cases not assigned to other competent forums. She challenged the notion that the rule of law requires resolving specific private law issues in one independent forum rather than another; instead, it "requires that competent and independent adjudicators decide questions of law."[187]

Chief Justice Wagner also discussed the rule of law's link to core jurisdiction. He emphasized that superior courts' core jurisdiction is narrowly defined, encompassing only critically important areas. Depriving them of these powers would impede their vital role in maintaining

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179 A notable aspect lies in the fact that the revised Article 35 code maintains the absence of an appeal mechanism to the superior courts, compelling litigants to exclusively pursue appeals through the Québec Court of Appeal. Nonetheless, as will be explored, *Crevier* continues to uphold a certain degree of judicial review, thereby enabling the superior courts to maintain their role in safeguarding the rule of law.

180 *Article 35*, *supra* note 23 at paras 101–02, 120.

181 *Ibid* at para 4.

182 *Ibid* at para 47; citing *Reference re Manitoba Language Rights, supra* note 107, *Imperial Tobacco, supra* note 33 at para 58*; Cooper, supra* note 32 at para 16.

183 *Provincial Judges Reference*, *supra* note 7.

184 *Article 35*, *supra* note 23 at para 50.

185 *Ibid* at para 86.

186 *Ibid* at para 300, Abella J, dissenting.

187 *Ibid* at para 318, Abella J, dissenting.

the rule of law and the unity of the constitutional and judicial system.[188] Wagner CJ concluded that while superior courts must have "substantial jurisdiction in private law" matters to state and develop the law, "their jurisdiction need not be exclusive."[189] To adequately develop the law requires ensuring that the superior courts oversee an adequate volume of cases in terms of number, proportion, and variety.[190]

B. *Trial Lawyers 2022*: Weighing the Factors

In 2019, the government of British Columbia granted the CRT jurisdiction to determine whether an injury qualifies as a "minor injury" and to handle personal injury claims up to $50,000.[191] This was in response to rising auto insurance costs and the financial burden on the province's public insurer. Notably, the CRT received exclusive jurisdiction in determining minor injury, thereby necessitating the British Columbia Supreme Court to dismiss any such proceeding brought before it. Any potential judicial review of injury categorizations is subject to the patent unreasonableness standard. For liability and damage claims within the monetary limit, the CRT is considered to have "specialized expertise" but not exclusive jurisdiction.[192] In such instances, the British Columbia superior court must dismiss the proceedings unless it finds that it is not "in the interests of justice and fairness" for the tribunal to adjudicate the claim.[193] The legal provisions in force during the legal challenge imposed different standards of review, with findings of fact and law concerning damages subjected to a correctness standard and liability-related findings subject to a correctness standard for legal questions and reasonableness for questions of fact.[194]

At the British Columbia Supreme Court, the Trial Lawyers Association of British Columbia argued that this transfer of jurisdiction amounted to an "impermissible derogation" of superior court jurisdiction and thus ran afoul of section 96.[195] Chief Justice Hinkson decided he would have invalidated the legislation based solely on the application of the *Residential Tenancies* test. Although the core jurisdiction test was presented during the case, the Chief Justice chose not to address it, asserting that "such an analysis is not warranted" in cases where a transfer or jurisdiction "does not survive the *Residential Tenancies* test."[196]

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188 *Ibid* at para 239, Wagner CJ, dissenting.

189 *Ibid* at para 240, Wagner CJ, dissenting.

190 *Ibid* at para 246, Wagner CJ, dissenting.

191 For the purposes of the *Insurance (Vehicle) Act*, RSBC 1996, c 231.

192 *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 133 [*CRTA*].

193 *Ibid*, s 16.1(2)(b).

194 Since 2021, the standard of review for questions of fact relating to damages are now evaluated under the reasonableness standard (*CRTA, supra* note 192, s 56.8).

195 *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348 at para 8.

196 *Ibid* at para 394.

Conversely, in *Trial Lawyers 2022*, the British Columbia Court of Appeal reached a consensus regarding the legislation's compliance with the *Residential Tenancies* test. They found that the powers granted were not exclusively exercised by the superior courts at the time of Confederation.[197] Considering the six factors from *Article 35*, the majority concluded that the superior court's core jurisdiction remained intact despite the new scheme. While the majority acknowledged that giving priority to any single factor is "likely [an] error,"[198] they emphasized factor number six: whether there was an important societal objective behind granting jurisdiction. The majority reviewed evidence indicating that the existing system of compensating for minor personal injuries was affecting the public insurer's sustainability and the actual compensation received by victims.[199] This prompted a need for innovative solutions to improve access to justice, leading to the development of the CRT. The majority emphasized that there was a clear link between the legislative goal of enhancing access to justice and the delegation of jurisdiction to the CRT.[200]

Together with the other factors, the Court concluded that the superior courts would continue to play a "robust role in the development of the law" in this particular domain, aligning with the underlying objectives envisioned by section 96.[201]

In her dissent, Justice Bennett employed the six-factor analysis, but her approach at times more closely resembled Chief Justice Wagner's perspective from *Article 35*. Specifically, in examining the "scope of the jurisdiction granted" factor, Bennett J drew on Wagner CJ's emphasis on the impact on the number of cases and the proportion of cases falling within superior court jurisdiction. Justice Bennett analysed the motor vehicle collision-related cases filed at the British Columbia superior court in 2019, noting that the "sheer number of cases commenced each year" suggested that the CRT will assume jurisdiction over a significant number of cases that are currently handled, tried, and managed by the superior court.[202] In her view, this "serious transfer" of superior court jurisdiction, amounted to the establishment of "an impermissible parallel court."[203]

Trial Lawyers 2022, decided shortly after *Article 35,* highlights the challenges arising from the Supreme Court's new six-factor analysis. While the majority in *Article 35* emphasized the importance of balancing the factors to achieve equilibrium between recognizing the province's authority over the administration of justice and preserving the constitutional role and core jurisdiction of the superior courts,[204] the majority in *Trial Lawyers 2022* placed particular emphasis on one factor: the societal objective.[205] Furthermore, in her dissent, Justice Bennett introduced a seventh

197 *Trial Lawyers* 2022, *supra* note 4 at paras 130, 186.
198 *Ibid* at para 147.
199 *Ibid* at para 148.
200 *Ibid* at paras 147–59.
201 *Ibid* at para 180.
202 *Trial Lawyers* 2022, *supra* note 4 at paras 214-15.
203 *Ibid* at paras 216-17.
204 *Article 35*, *supra* note 23 at para 132.
205 *Trial Lawyers* 2022, *supra* note 4 at para 147.

factor: "the issue of judicial independence."[206] Although the majority in *Article 35* acknowledged that the six-factor list was not exhaustive, the crucial takeaway here is that the two opinions in *Trial Lawyers 2022* assign varying degrees of weight to different factors, resulting in divergent conclusions. This divergence further complicates the task of legal advisors when attempting to predict the outcome of challenges to schemes transferring jurisdiction to other administrative bodies.

III. AN EXAMINATION OF THE NEW CORE JURISDICTION TEST

This section addresses three issues. First, it presents the limitations of the Supreme Court's modified core jurisdiction test with a focus on how *Article 35* risks unduly restricting the use of alternative forums for dispute resolution. Second, it presents an alternative approach for future section 96 cases, which aims to balance the safeguarding of the rule of law by superior courts with the imperative of enhancing access to justice through alternative dispute resolution mechanisms. In navigating the evolving landscape of new adjudicative mechanisms and access to justice issues, an essential objective of courts should be to remain true to the original intent of the Fathers of Confederation while accommodating the contemporary demands of justice administration. Third, this section underscores the importance of avoiding an overly expansive interpretation of the core jurisdiction attributed to superior courts by touching on the access to justice crisis.

Article 35 raises concerns about the undue restriction of alternative dispute resolution forums without adequate justification in two ways. Firstly, the majority opinion expands the protected core by incorporating "general private law jurisdiction," which jeopardizes future grants of jurisdiction over civil law. While the majority's emphasis on "important societal objectives" in *Trial Lawyers 2022* somewhat mitigates this risk, the potential for future courts to prioritize different factors might obstruct government efforts to establish alternative forums. Secondly, the existence of multiple tests governing the transfer of jurisdiction from superior courts to alternative forums complicates the process of adapting and establishing adjudicative bodies, potentially constraining both Parliament and provincial legislatures in their pursuit of innovative solutions to improve access to justice.

A. Core Confusion: Narrow No More

Amid discussions about the risks to alternative dispute resolution forums, a significant concern emerges regarding the departure from the traditional narrow understanding of the core. The majority's assertion in *Article 35* that the core jurisdiction of superior courts now encompasses "general private law jurisdiction" marks a noteworthy shift. [207] Supreme Court of Canada Chief Justice Wagner, following *Trial Lawyers 2014,* accepted that the core jurisdiction of superior courts extends to "resolve disputes between individuals and decide questions of private and public law."[208] In contrast, Abella J firmly challenged this interpretation arguing that "superior courts have never had the exclusive responsibility of guiding the development of private law," rather it has been shared since Confederation.[209]

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206 *Ibid* at para 210.
207 *Article 35*, *supra* note 23 at paras 80, 82.
208 *Ibid* at para 229, Wagner CJ, dissenting.
209 *Ibid* at para 302, Abella J, dissenting.

Delineating the superior courts' core powers has been an enduring challenge. Previously, the Supreme Court of Canada limited the core to powers considered "essential attribute[s]," [210] "integral to their operation," [211] or "the hallmark of superior courts." [212] Introducing private law jurisdiction as part of the core seemingly contradicts the Court's prior emphasis on core jurisdiction covering only "critically important" areas "essential to the existence of superior courts." [213] Under the earlier core formulation, an act would only be deemed invalid if it significantly undermined or weakened the superior court's status as the cornerstone of Canada's judicial system, thereby safeguarding the compromise of the Fathers of Confederation. [214]

Considering the matter at hand, civil claims related to contractual and extracontractual obligations hardly seem "*essential to the existence* of a superior court" and its foundational role within our legal system. [215] The majority and Wagner CJ appear to have incorrectly imported the idea from *Trial Lawyers 2014* that superior courts "resolve disputes between individuals and decide questions of public and private law" into the core analysis from *MacMillan Bloedel*. [216] However, it is crucial to contextualise this statement. *Trial Lawyers 2014* did not involve a transfer of jurisdiction from a superior court to another judicial body; it concerned a litigant's ability to "access a public, independent, and impartial tribunal." [217] This leads Johnson to describe the presence of any discussion of the core jurisdiction in *Trial Lawyers 2014* as "somewhat discordant." [218]

In *Trial Lawyers 2014,* the majority ruled that imposing hearing fees unduly burdened economically disadvantaged litigants and effectively denied them access to the superior courts. Accordingly, Chief Justice McLachlin found that there must be sufficient judicial discretion to waive hearing fees where they would prevent access. [219] The key takeaway from *Trial Lawyers 2014* is that governments cannot obstruct court access.

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210 *MacMillan Bloedel*, *supra* note 7 at para 40.

211 *Ibid* at para 15.

212 *Crevier*, *supra* note 81.

213 *Residential Tenancies* 1996, *supra* note 8 at para 56, Lamer CJ, concurring; *MacMillan Bloedel*, *supra* note 7 at paras 30, 38; *Babcock v Canada (AG)*, 2002 SCC 57 at para 59; *R v Ahmad*, 2011 SCC 6, at para 61.

214 *Article 35*, *supra* note 23 at paras 36, 40. See also Abella J's discussion at paras 302-28.

215 *Residential Tenancies* 1996, *supra* note 8 at para 56, Lamer CJ, concurring [emphasis added].

216 *Trial Lawyers* 2014, *supra* note 22 at para 32.

217 *Article 35*, *supra* note 23 at para 299.

218 *Supra* note 80 at 880.

219 *Trial Lawyers* 2014, *supra* note 22 at paras 48, 57.

While this assertion may not seamlessly align with previous case law,[220] the case does not protect any core jurisdiction over civil claims. Interpreting *Trial Lawyers 2014* as recognizing the core jurisdiction to encompass "disputes between individuals and decide questions of private and public law" would imply that *any* exclusive grant of jurisdiction over civil law would be considered invalid. This would contradict the jurisprudence established by the Court over several decades.

The decisions in *Article 35* and *Trial Lawyers 2022* assume that superior courts *must* play a role in handling contractual and personal injury matters to ensure uniformity of justice and the rule of law. However, this raises a critical question: is it truly essential for superior courts to adjudicate contractual matters above a specific threshold? Should our focus not be on the manner in which the law is applied, rather than fixating on which specific institution applies it?[221] As Canadian political scientist Peter Russell observes, "[t]he real value that we should attempt to secure is that, where a person's rights and interests are affected … this decision is made as fairly and as impartially as possible."[222]

Moreover, the basis for distinguishing jurisdiction over contractual and minor injury disputes from any other historical artefact of superior court jurisdiction remains unclear.[223]

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220 This case has been criticized by academics and lawyers. Asher Honickman commented that the Court "fashioned a new individual right out of whole cloth and … anchored that right in the strangest of places – not in the *Charter of Rights and Freedoms*, but in section 96 ... "; Asher Honickman, "Looking for Rights in the All the Wrong Places: A Troubling Decision from the Supreme Court" (30 October 2014), online (blog): *Advocates for the Rule of Law* <ruleoflaw.ca/looking-for-rights-in-the-all-the-wrong-places-the-supreme-courts-troubling-decision-in-trial-lawyers-association> [perma.cc/V6NQ-YKWV]; Recently the Federal Court of Appeal rebuked the decision observing that "starting around the turn of this century, the Supreme Court began toying with a looser approach, one that has now been discredited and rejected. Under that approach … the text was not so much a constraint or an expression of the meaning of constitutional provisions. Rather, it was a cue, prompt, or springboard for the Court to fashion a much broader underlying feel, spirit, or vibe to widen the scope of the provisions. As a result, sometimes new unwritten constitutional rights, far removed from the constitutional text, were 'discovered': see, e.g., *Trial Lawyers* 2014 SCC 59"; *Canada v Boloh* 1(a), 2023 FCA 120 (CanLII) at para 20.

221 Russell, *supra* note 130 at 109.

222 *Ibid*.

223 In the event that private law *must* form part of the core, the better approach, in my opinion, is Wagner CJ's focus on ensuring that the superior courts handle an adequate volume of cases in terms of number and proportion in order to state and develop the law. Embracing this quantitatively focused interpretation of factors affecting superior court capacity to develop the law leads to the conclusion that *Article 35* did not impair section 96. While data on court caseloads is scarce, Wagner CJ notes that the proportion of civil cases before the superior courts has significantly increased, preserving their ability to play "a meaningful role in the development of the law" and protect the rule of law. Specifically, the data from 2017-18 reveals that approximately 45 percent of civil cases were opened at the superior court, a considerably higher proportion compared to the cases heard by the superior courts during Confederation, which was less than 20 percent. Furthermore, despite the increase in the monetary ceiling for the lower court to $85,000, the majority of cases opened at that court involve claims that do not exceed $40,000. A small fraction, approximately 3.3 percent of the civil cases opened at the Court of Québec in 2016-17 involved amounts ranging $70,001 and $85,000 (*Article 35, supra* note 23 at paras 142, 252-54).

For instance, consider condominium disputes. These conflicts were previously resolved solely by the British Columbia Supreme Court but are now mostly adjudicated by the British Columbia CRT.[224] Yet, the rationale behind accepting this differentiation remains elusive.

The issue of exclusivity in the original establishment of the core jurisdiction test in *MacMillan Bloedel* also merits consideration. In *MacMillan Bloedel,* Lamer CJ observed that the problem lay in the exclusive nature of powers transferred to the inferior court.[225] Accordingly, the *Residential Tenancies* test concluded the section 96 analysis when the challenged power of the inferior court or tribunal was concurrent. This suggested that the core doctrine would only apply when *exclusive* jurisdiction was granted to an inferior court or tribunal. However, the majority in *Article 35* departs from this limitation asserting that while a grant of jurisdiction may pass the *Residential Tenancies test,* this does not guarantee its constitutionality. An evaluation of its effects on the core jurisdiction of superior court is still necessary, even if the grant is concurrent.[226] Before *Article 35,* the *Residential Tenancies* test permitted jurisdiction transfers to inferior courts and tribunals when there existed a "meaningful concurrence of power" at Confederation.[227] Once this threshold was met, the section 96 analysis ended. Now, *Article 35* requires courts to consider the doctrine of the core when jurisdiction was *concurrent* during Confederation. This change marks a significant departure from the restricted approach to the usage of the core jurisdiction test. Importantly, does *Article 35* render the *Residential Tenancies* test redundant? Deciphering which elements of the *Residential Tenancies* test will persist in the new landscape becomes a challenging endeavour.

The majority in *Article 35* asserted that the new factors offer governments "clear guidance to determine what latitude it has under [section] 96 when it wishes to grant" another adjudicative forum "a significant portion of the common law without creating a parallel court."[228] However this latitude may yield contrary outcomes. Let us again consider condominium disputes in British Columbia where the CRT functions as the primary adjudicating body. Unlike in other areas, such as accident claims, the CRT's monetary jurisdiction in condominium disputes is unlimited[229] and its decisions cannot be appealed to the British Columbia Supreme Court.[230] Instead, they are subject to judicial review. Evaluating this transfer of jurisdiction today under the new modified core framework, it becomes challenging to determine its constitutional validity. If one were to emphasize the absence of a monetary ceiling and an appeal mechanism, as the majority did in *Article 35*, the transfer appears to violate section 96. However, if the focus shifts to the important societal objective of resolving

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224 *CRTA*, *supra* note 193 at Division 4 of Part 10.

225 *Macmillan Bloedel, supra* note 7 at para 27.

226 *Article 35*, *supra* note 23 at para 80 [emphasis added].

227 *Residential Tenancies* 1996, *supra* note 8 at 77.

228 *Article 35*, *supra* note 23 at para 144.

229 *Ibid*; *Yas v Pope*, 2018 BCSC 282 at para 46.

230 The appeal provision, formerly section 56.5, was repealed in 2018. See *Civil Resolution Tribunal Amendment Act*, 2018, SBC 2018, c 17.

disputes "in a timely and cost-effective manner," as emphasized by the majority in *Trial Lawyers 2022,* it may not be in conflict with the constitution.[231]

The fact that CRT condominium decisions cannot be appealed to the British Columbia Court of Appeal may also be detrimental to its constitutional validity. In *Article 35*, the majority's discussion on appeal mechanisms revolved around whether there existed a "hierarchical distinction" between the Quebec superior court and the institution granted jurisdiction.[232] In that case, the inferior court decisions could not be appealed to the superior court, and there was a $60,000 threshold to appeal as of right to the Court of Appeal. In light of these considerations, the majority determined that the inferior court had transformed into a prohibited parallel court, thereby undermining the role of the superior court. However, in the CRT condominium scenario, there is no avenue for appeal whatsoever, whether to the superior or appellate courts. How much weight a court should attribute to the absence of an appeal mechanism is uncertain under the new core framework. The challenge lies in this ambiguity.

By advancing a test grounded in various qualitative factors, such as whether the scope assigned is vast and the significance of any societal objective, the Court has sanctioned an "undesirable level of subjectivity."[233] Perhaps most importantly, the Court missed an opportunity to delineate the specific judicial functions which merit constitutional protection. Instead, the Court provides governments and legal advisors with non-exhaustive factors when assessing section 96 in the context of government power transfers and the implementation of new adjudicative mechanisms. Some of these factors require an unacceptable degree of subjectivity. This lack of clarity makes it hard to appropriately support the adjudicative capacities of tribunals and alternative dispute resolution forums, while effectively eliminating section 96 shadow courts. As a result, the words of Noel Lyon continue to resonate even 37 years after publication: Noel Lyon writes, "[w]hen we know what judicial functions require the special protection of entrenchment, we will no longer see a threat to the constitution in every arrangement that seems to transfer authority from judges to administrators."[234]

B. Reimagining Section 96: The Quest for Clarity

The examination of *Article 35* unveils another significant issue: the existence of multiple tests for assessing section 96 infringements. Currently, there are three tests in play: the *Residential Tenancies* test, the core test, and the modified core test. Interestingly, the majority in *Article 35* stated that the multi-factored analysis was "*not* intended to replace the current law."[235] To be more precise, the Court held that the six factors must be considered "[w]here a transfer to a *court* with provincially appointed judges has an impact on the general private law jurisdiction

231 Government of British Columbia, "The Civil Resolution Tribunal and strata disputes" (last visited 3 January 2024), online: <gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal> [perma.cc/7RLX-S9TM].

232 *Article 35*, *supra* note 23 at paras 119-23.

233 Hatherly, *supra* note 70 at 140.

234 Lyon, *supra* note 65 at 83.

235 *Article 35* at para 144 [emphasis added].

of the superior courts."[236] Some scholars questioned whether this ruling intended to limit the new test to cases involving courts only.[237] The application of the modified core test in *Trial Lawyers 2022* introduced a degree of uncertainty. The Supreme Court's refusal to grant leave to appeal means that the applicability of the modified core test to all section 96 challenges is yet to be definitively established.

Even if we assume that the modified core test applies to jurisdictional transfers to both courts *and* tribunals, the question remains: is there a need to maintain two separate tests, each with multiple factors to consider (i.e., the *Residential Tenancies* test and the core test)? It is time for the judiciary to contemplate simplifying the test for assessing section 96 infringements. Employing two tests unduly complicates the section 96 analysis and impedes the ability of Parliament and provincial legislatures to establish adjudicative bodies. Rather than providing a clear framework for government decisions on legislative and adjudicative initiatives, the current system presents a labyrinthine challenge for legal advisors.

Hogg and Professor of Law Wade Wright aptly point out that the transfer of powers, historically reserved for superior courts, is contingent upon satisfying the third step of the *Residential Tenancies*, and any exercise of those powers remains subject to superior court review.[238] This indicates that exclusivity alone is insufficient to eliminate superior court review based on administrative law principles. Consequently, the justification for retaining the core doctrine becomes challenging. Mark Mancini, a PhD student at University of British Columbia, offers an alternative approach of categorizing the core jurisdiction recognized in prior case law. He posits that this could accomplish much of the analytical work and potentially serve as a substitute for the *Residential Tenancies* test to safeguard the historical jurisdiction of superior courts.[239] This approach entails expanding the content of the core to encompass "substantive considerations (such as judicial review jurisdiction, private law jurisdiction, etc.) rather than simply procedural powers concerning the management of [the] inherent process."[240] The core jurisdiction test can effectively protect section 96's role on its own. Eliminating the *Residential Tenancies* test and focusing directly on the core analysis will bring more clarity and enable superior courts to preserve their vital role in upholding the rule of law.

However, Mancini's suggestion to broaden the core jurisdiction to include "private law" is not as sound. The challenge with incorporating the expansive jurisdiction of private law into the superior courts' core stems from the reality that this realm of authority, both historically

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236 *Ibid* [emphasis added].

237 Mark Mancini, "The Core of It: Quebec Reference and Section 96" (23 July 2021), online (blog): <doubleaspect.blog/2021/07/23/the-core-of-it-quebec-reference-and-section-96/#:~:text=In%20administrative%20law%2C%20s.,favour%20of%20administrative%20decision%2Dmakers> [perma.cc/ZX9F-7N73]; Paul Daly, "Life After Vavilov? The Supreme Court of Canada and Administrative Law in 2021" (Paper delivered at the CLEBC Administrative Law Conference, November 2021), online <administrativelawmatters.com/blog/2021/11/12/life-after-vavilov-the-supreme-court-of-canada-and-administrative-law-in-2021> [perma.cc/D5BA-5EDV].

238 Hogg & Wright, *supra* note 19 at 7,19.

239 Mancini, *supra* note 239.

240 *Ibid*.

and in the present, demonstrates the most pronounced demand for alternative avenues to facilitate prompt and cost-effective dispute resolution. Consequently, the courts should ensure the purpose of section 96 is met, that is that courts of inherent jurisdiction retain a key role in safeguarding the rule of law while avoiding unduly limiting the ability of legislatures to adopt alternative dispute resolution mechanisms. This approach necessitates a return to a narrow conception of the core.

Before *Article 35,* the core powers of superior courts encompassed crucial functions such as hearing constitutional challenges to federal and provincial administrative actions,[241] conducting judicial reviews of provincial (though not federal) administrative actions,[242] presiding over the most serious criminal cases,[243] and the authority to "control its process and enforce its orders."[244] With the exception of *McEvoy,* a common purpose of these constitutionally protected elements of inherent jurisdiction is that they are critical to upholding the rule of law. Among these powers, judicial review assumes particular significance, aligning closely with the foundational tenet of the rule of law — preventing arbitrary exercise of power.[245] Recently, in *Vavilov,* the majority of the Court acknowledged that "judicial review functions to maintain the rule of law while giving effect to legislative intent."[246] A narrower interpretation of the core, grounded in the preservation of the superior courts' supervisory role and resistant to scope expansion, aligns more cohesively with the historic compromise between superior court authority and the government jurisdiction over the administration of justice.[247] By maintaining a robust judicial review function, courts can ensure the preservation of superior court jurisdiction to state and advance the law, thereby upholding the "key principles" of uniformity of justice and the rule of law.[248] There is no need to further expand the scope by encompassing broader fields such as the "general private law jurisdiction."[249] Otherwise, the provinces' authority over the administration of justice is compromised.

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241 *Jabour*, *supra* note 82.

242 *Crevier*, *supra* note 81; *Federal Courts Act,* RSC 1985, c F-7 s 18: states that "the Federal Court retains exclusive judicial review jurisdiction over "any federal board, commission, or other tribunal."

243 *McEvoy*, *supra* note 83.

244 *MacMillan Bloedel*, *supra* note 7 at para 33.

245 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 27; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 13.

246 *Vavilov*, *supra* note 34 at para 2; One thing that the judiciary will have to work out is how to reconcile *Vavilov* and *Crevier. Crevier* asserts that jurisdictional review, as distinct from judicial review of questions of law more generally, is constitutionally guaranteed. In contrast, *Vavilov* critiques the utility of jurisdictional review as a concept and eliminated jurisdictional error as a distinct category requiring a correctness standard of review. Consequently, there is no separate classification of "jurisdictional" error that would allow a reviewing court to oversee, based on a correctness standard, the defined boundaries of an administrative decision maker's jurisdiction. The eventual alignment of these two approaches will be necessary.

247 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(14), reprinted in RSC 1985, Appendix II, No 5.

248 *Article 35*, *supra* note 23 at para 42.

249 *Article 35*, *supra* note 23 at paras 6, 71.

This is not to advocate for an overly restrictive interpretation of section 96 that would "maim"[250] the superior courts or reduce the provision to a mere appointing power, as suggested by the plain language of the text. The recognition of section 96 as "one of the important compromises of the Fathers of Confederation,"[251] must be balanced with respecting the provincial powers under section 92(14). For the superior courts to effectively serve as a "unifying force"[252] within the judicial system and to uphold the rule of law, the scope of their jurisdiction should be confined "to what is *necessary.*"[253] In this context, what is necessary encompasses a robust judicial review power.

C. Final Thoughts: Creating Space for Alternatives

The Constitution grants superior courts a "special and inalienable status," but it does not prohibit the creation of other courts and tribunals by Parliament or the legislatures.[254] When interpreting section 96, the Supreme Court should exercise caution to avoid stifling the creation of effective dispute resolution forums. Chief Justice McLachlin recognized the importance of tribunals and their need to "be clothed with powers" once exclusive to section 96 courts to fulfil their functions.[255] With this in mind, a sensitive approach is warranted in interpreting section 96, one that considers institutional pluralism and the value of legislative ingenuity and institutional design which has facilitated the emergence of innovative bodies like the CRT.[256]

This approach is crucial considering the growing consensus that access to justice in Canada has reached crisis levels,[257] although the problem is not new.[258] Chief Justice McLachlin stressed that a justice system fails if it does not deliver justice to the people it serves [259]Presently, financial constraints hinder many Canadians from accessing the justice system, leaving unrepresented litigants grappling with sometimes complex legal and procedural demands while others "simply give up" their pursuit of justice.[260] Chief Justice Wagner echoed McLachlin's sentiment, acknowledging

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250 *MacMillan Bloedel Ltd, supra* note 7 at para 37.

251 *Residential Tenancies* 1979, *supra* note 58 at 728.

252 *MacMillan Bloedel, supra* note 7 at para 11.

253 *Article 35*, *supra* note 23 at para 239, Wagner CJ, dissenting [emphasis added].

254 *MacMillan Bloedel Ltd, supra* note 7 at para 52.

255 *Ibid* at para 53.

256 Paul Daly, "Section 96: Striking a Balance between Legal Centralism and Legal Pluralism", in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) at 96 [Daly, "Pluralism"].

257 Cole & Flaherty, *supra* note 29; Olivia Stefanovich, "'We're in Trouble': Advocates Urge Ottawa to Help Close the Access to Justice Gap", *CBC News* (18 April 2021), online: <cbc.ca/news/politics/access-to-justice-federal-budget-2021-requests-1.5989872> [perma.cc/6GLZ-LGM2]; Canadian Bar Association, "Canada's Crisis in Access to Justice", (April 2006), online: <cba.org/CMSPages/GetFile.aspx?guid=0bca7740-5d06-4435-8b4d-9d0603ecb429> [perma.cc/XXN3-YF7M].

258 Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil & Family Justice: A roadmap for Change" (October 2013), online: <cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf at 4> [perma.cc/45EU-597S][Action Committee]; Andrew Pilliar, "Filling the Normative Hole at the Centre of Access to Justice: Toward a Person-Centred Conception" (2022) 55:1 UBC L Rev 149 at 201: Andrew Pilliar refers to the access to justice problems as "less a crisis than a chronic condition".

259 McLachlin, *supra* note 29.

260 *Ibid.*

that denying access to justice also "reinforces existing inequities."[261] Interestingly, while relying on section 96 to protect the jurisdiction of the superior courts, judges also express concerns about the overwhelming caseloads, unacceptable delays, and high litigation costs.

For instance, a two-day civil trial in 2015 averaged over $30,000, with a five-day trial costing approximately $56,439.[262] These figures have likely increased since then. The time to reach a judgment poses another significant challenge. An analysis of civil judgments from superior courts in Ontario and British Columbia from 2014 to 2019 revealed an average trial duration of seven days in Ontario and eight days in British Columbia.[263] Additionally, the average "time-to-judgment in civil non-jury, non-family trials" was 98.3 days in Ontario and 127.4 days in British Columbia's superior courts.[264] The extended duration for courts to dispose of civil cases is also troubling and exemplified by the thirty-seven percent increase in the average time to dispose of a civil case in Ontario from 2014/15 to 2018/19.[265] Reports further indicate that over one-fifth of the Canadian population take "no meaningful action" regarding their legal problems, while over sixty-five percent feel uncertain about their rights, lack knowledge of what to do, anticipate significant time and cost, or simply feel afraid.[266] In this context, it is unsurprising that litigants "simply give up on justice."[267] These alarming statistics indicate the urgency of addressing the crisis of limited access to justice in Canada.

While traditional judicial courts have long been the bedrock of the justice system, they grapple with ongoing challenges such as overwhelming caseloads, delays, and limited resources. As a response, alternative dispute resolution mechanisms, including tribunals, have emerged over the past century. These forums often offer an efficient and effective means of resolving disputes, particularly in areas that demand specialized expertise.[268] By facilitating access to fair and competent adjudicators beyond the confines of traditional courts, alternative forums promote inclusivity and efficiency within the justice system while upholding the rule of law. The rule of law, in the contemporary legal landscape, need not be narrowly confined to the traditional judicial system. Rather, the rule of law encompasses more broadly "access to a fair and efficient dispute resolution process, capable of dispensing timely justice."[269]

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261 The Right Honourable Richard Wagner, P.C Chief Justice of Canada, "Access to Justice: A Societal Imperative" (remarks on the occasion of the 7th Annual Pro Bono Conference, Vancouver, 4 October 2018), online <scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx?pedisable=true> [perma.cc/4TQN-SXGP].

262 Michael McKiernan, "The Going Rate", *Canadian Lawyer* (June 2015), online: <canadianlawyermag.com/staticcontent/images/canadianlawyermag/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf> [perma.cc/FQL5-CC9T].

263 Kevin LaRoche, M Laurentius Marais & David Salter, "The Length of Civil Trials and Time to Judgment in Canada: A Case for Time-Limited Trials" (2021) 99:2 Can Bar Rev 286 at 295.

264 *Ibid* at 302–09.

265 Office of the Auditor General of Ontario, *Annual Report 2019: Reports on Correctional Services and Court Operations, vol 3* (Ontario: Queen's Printer for Ontario, 2019) at 98, online: <auditor.on.ca/en/content/annualreports/arreports/en19/2019AR_v3_en_web.pdf>.

266 Action Committee, *supra* note 258 at 4.

267 *Hryniak v Mauldin*, 2014 SCC 7 at para 25.

268 Hatherly, *supra* note 70 at 124.

269 *Vavilov, supra* note 34 at para 242, Abella and Karakatsanis JJ, dissenting.

The emphasis on superior courts in the formulation of the rule of law, as exhibited by the majority in *Article 35*, compromises the overarching societal objective of advancing access to justice.

This article's endorsement of alternative dispute resolution forums and a narrow interpretation of section 96 should not be misunderstood as an "aversion" to judicial decision-making.[270] An independent judiciary remains paramount in upholding the rule of law. But, as McLachlin CJ aptly observed, there is room for tribunals to function "without their activities being depicted, as somehow threatening to the rule of law. Rather, they have a critical role to play in maintaining that rule of law."[271] Promoting the use of tribunals should be viewed as a recognition of the inherent limitations of the court system in effectively addressing the growing complexity of social issues. While courts remain indispensable, preserving their jurisdiction should not impede access to justice or hinder legislative authority in administering justice under section 92(14). As Lorne Sossin rightly asserts, "[a]ccess to a *decision-maker* may make the difference between justice and injustice being done."[272]

CONCLUSION

Alas, the "section 96 problem" persists. In *Article 35,* the majority claimed the *Residential Tenancies* test was inadequate for cases where a broad transfer of jurisdiction had occurred.[273] Thus, to "better protect the constitutional status of [section] 96 courts", a modified core jurisdiction test was required.[274] This test apparently upholds the two key principles underlying section 96: national unity and the rule of law. However, in my respectful opinion, the new test needlessly derogates from the approach outlined in *MacMillan Bloedel*. First, with little support, the Court claims private law jurisdiction forms part of the superior courts' core jurisdiction. This is a significant and unjustified departure from the Court's previous descriptions of the core as "narrow," encompassing only powers "essential to the existence" of superior courts.[275] By departing from a narrow conception of the core, the majority may have created a chilling effect on the capacity of legislatures and Parliament to establish alternative dispute resolution mechanisms and, ironically, undermined the rule of law, a principle "central" to the judicial system's organization.[276] This departure from the *MacMillan Bloedel* approach becomes more pronounced since *any* transfer of power must now undergo a core test analysis even if it passes the *Residential Tenancies* test and "*even if the grant is not exclusive.*" [277]

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270 Hatherly, *supra* note 71 at 123.

271 Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (Paper delivered at the Canadian Bar Association Conference, Ontario, 19 June 1999) 12 Can J Admin L & Prac 171 at 174.

272 Lorne Sossin, "Access to Administrative Justice and Other Worries" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publishing, 2013) at 1 [emphasis added].

273 *Article 35*, *supra* note 23 at para 79.

274 *Ibid.*

275 *Residential Tenancies* 1996, *supra* note 8 at para 56, Lamer CJ, concurring [emphasis added].

276 *Article 35*, *supra* note 23 at para 4.

277 *Ibid* at para 80 [emphasis added].

Moreover, the existence of multiple tests for section 96 adds another layer of complexity to an already intricate area of law, leading to confusion and unpredictable outcomes depending on the weight placed on each factor. Although the *Trial Lawyers 2022* case upheld the expanded jurisdiction granted to the CRT using the new multi-factored analysis, this ruling does not eliminate the potential risk that future courts may apply the six factors in a manner that restricts provinces from "experiment[ing] with new forms of access to civil justice."[278] Simply put, the new multi-factored analysis introduces "considerable discretion and subjectivity"[279] which complicates the determination of the adjudicative functions that tribunals can assume without infringing upon the jurisdiction of section 96 courts.[280]

While upholding the principles of the rule of law and uniformity of justice remain pivotal, a more balanced approach, one that respects the compromise made at Confederation and acknowledges the powers of provinces under section 92(14), is required. This entails limiting the jurisdiction of superior courts to what is *necessary* for them to effectively serve as a unifying force within the judicial system and uphold the rule of law. As suggested, this requires focusing on maintaining a robust judicial review power. By adopting a more cautious and limited definition of the core, we can preserve the integrity of superior courts while leaving space for alternative forums, thereby fostering a stronger and more accessible legal landscape for all Canadians. It should not be forgotten that tribunals play a significant role in upholding the rule of law and facilitating access to justice. Any expansive interpretation of section 96 that impedes the use of tribunals threatens the efficient and accessible enforcement of rights and jeopardizes the very foundation of the rule of law. As noted by Daly, "[e]ven the Privy Council … appreciated the desirability of reading section 96 so as to permit provincial innovation in dispute resolution, thereby opening up a space for institutional pluralism."[281]

278 *Ibid* at paras 163, 205, Wagner CJ, dissenting.

279 Hatherly, *supra* note 70 at 136.

280 Barry, *supra* note 46 at 151.

281 Daly, "Pluralism", *supra* note 256 at 92–93.