No. S194533
Vancouver Registry

In the Supreme Court of British Columbia

In the matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between

GREGORY CROWDER and
TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA

Petitioners

and

ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent

and

THE ADVOCATES' SOCIETY

Intervenor

WRITTEN SUBMISSIONS OF THE INTERVENOR THE ADVOCATES' SOCIETY

The Advocates' Society

Craig P. Dennis, Q.C.

McEwan Cooper Dennis LLP
900 – 980 Howe Street
Vancouver, B.C. V6Z 0C8

Gregory Crowder and Trial Lawyers Association of British Columbia

Ryan D. W. Dalziel
John M. Rice
Scott Silver

Norton Rose Fulbright Canada LLP
1800 – 510 West Georgia Street
Vancouver, B.C. V6B 0M3

and

Rice Harbut Elliott LLP
820 – 980 Howe Street
Vancouver, B.C. V6Z 0C8

Attorney General of British Columbia

Jacqueline D. Hughes
Karrie Wolfe

Ministry of Attorney General
1301 – 865 Hornby Street
Vancouver, B.C. V6Z 2G3

I. Introduction

1. The Advocates' Society ("TAS") intervenes in this petition which challenges the validity of Rule 11-8 of the *Supreme Court Civil Rules*. TAS is a 6000-member national organization of lawyers whose members appear before courts and administrative tribunals across the country on all sides of civil, criminal and regulatory matters. TAS is Canada's only national association dedicated to advocates.

2. Rule 11-8 purports to limit, to a maximum of three, the number of experts that a party may tender at trial on the issue of damages arising from personal injury or death.

3. In so doing Rule 11-8 reflects a pre-determination by the Lieutenant Governor in Council, to the exclusion of the trial judge, on what is sufficient by way of evidence on an issue at trial: the trial judge may permit a party to tender opinion evidence from no more than three experts on the issue of damages arising from personal injury or death. As developed below, the practical effect is that the executive branch will have denied to the superior court evidence that the court may need, and heretofore has relied upon, to decide complex and difficult cases.

4. TAS will make submissions on two of the three ways in which the petitioners submit that Rule 11-8 is invalid (see "Submissions of the petitioners ("PS"), paras. 7 – 9): (1) Rule 11-8 is contrary to the principle emanating from s. 96 of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3 and (2) Rule 11-8 is not authorized by the *Court Rules Act*, R.S.B.C., 1996, c. 80.

5. TAS will address the administrative law issue before the constitutional one. In summary, the position of TAS is as follows:

   a) Rule 11-8 is *ultra vires* because it is not authorized by the *Court Rules Act*. There is a line of cases from across Canada invalidating rules of civil procedure on the ground that they exceed the statutory authority conferred on the rule-maker. The reasoning in those cases applies here. Whereas the petitioners refer in their argument on this issue to "regulatory purpose" and other "external

contextual factors" (PS, para. 122 and following), those are not necessary to TAS' argument.

b) Precisely because Rule 11-8 reflects a pre-determination on the sufficiency of evidence for an issue at trial, it invades the core jurisdiction, and interferes with the adjudicative role, of the superior courts. Rule 11-8 thereby contravenes s. 96 of the *Constitution Act 1867*. The effect of Rule 11-8 is not limited to vehicle actions. TAS differs from the petitioners in that TAS' argument addresses the operation of Rule 11-8 in a wider context.

6. As intervenor, TAS takes no position on the specific effect of Rule 11-8 on the case of the petitioner, Mr. Crowder.

II. Rule 11-8

7. The history and terms of Rule 11-8 are set out in the Submissions of the Petitioners at paragraphs 14 to 21.

8. In sum, Rule 11-8 is the product of Order-in-Council No. 40, approved on February 11, 2019. Order-in-Council No. 40 states that it is made under the authority of the *Court Rules Act*.

9. The *Court Rules Act* states, in material part:

> 1(1) The Lieutenant Governor in Council may, by regulation, make rules that the Lieutenant Governor in Council considers necessary or advisable governing the conduct of proceedings in the Court of Appeal, the Supreme Court and the Provincial Court.
>
> (2) Without limiting subsection (1), the rules may govern one or more of the following:
>
> (a) practice and procedure in each of those courts;
>
> (b) the means by which particular facts may be proved and the mode by which evidence may be given,

10. As of February 1, 2020, Rule 11-8(3) will provide as follows:

> Limitation on Expert Opinion Evidence
>
> (3) Except as provided under this rule, a party in an action may tender, at trial, only the following as expert opinion evidence on the issue of damages arising from personal injury or death:
>
> (a) expert opinion evidence of up to three experts;
>
> (b) one report from each expert referred to in para. (a).

11. Rule 11-8 appears to be unique in Canada in two respects.

12. First, as the petitioners note, it appears to have no counterpart in Canada (PS, paras. 91 to 94). Where other Canadian jurisdictions place limits on expert evidence, those limits are legislative and subject to judicial override. Evidence statutes federally and in Saskatchewan, Manitoba, Ontario, New Brunswick and the three territories place numerical witnesses on the number of expert witnesses. But all empower the court to grant leave to exceed that limit.[1] Two provinces, Alberta and Saskatchewan, have court rules which, presumptively, allow only one expert to give opinion evidence on any one subject. But those provisions again provide that the court may otherwise permit.[2]

13. The second distinguishing feature of Rule 11-8 is that the limits it places operate in a discrete sphere: claims for damages arising from personal injury or death.

14. As observed in *Hall v. Hebert*, [1993] 2 S.C.R. 159, 200, damages for personal injury are one category of harm for which tort law compensates. *Hall* goes on to identify other categories, stating that tort law can cover damages occasioned to property, compensation for injury caused to the reputation of a business or a product, and damages for injury to honour in cases of defamation and libel. Claims to vindicate such interests, including property and corporate interests, are left untouched by Rule 11-8.

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[1] *Canada Evidence Act*, RSC 1985 c C-5, s. 7; *Evidence Act*, SS 2006, c E-11.2, s. 21; *Evidence Act*, CCSM, c E150, s. 25; *Evidence Act*, RSO 1990, c E-23, s. 12; *Evidence Act*, RSNB 1973, c E-11, s. 23; *Evidence Act*, RSY 2002, c 78, s. 9; *Evidence Act*, RSNWT 1988, c E-8, s. 9; *Evidence Act* RSNWT (Nu) 1988, c E-8, s 9

[2] *Rules of Court*, Alta Reg 124/2010, s. 8.16(1); *The Queen's Bench Rules*, Sask Gaz December 27, 2013, c 2684, s. 9-18(1)

III. Rule 11-8 is not Authorized by the *Court Rules Act*

15. TAS submits that the petition can be decided on administrative law grounds: the *Court Rules Act* does not authorize Rule 11-8. TAS relies on a line of Canadian cases where courts have invalidated a rule of civil procedure on that basis. On TAS's approach, it is unnecessary to consider the "regulatory purpose" or "external contextual factors" associated with Rule 11-8. TAS leaves those arguments to the petitioners.

16. The question is whether, in enacting Rule 11-8, the Lieutenant Governor in Council "acted in excess of the powers delegated by" the *Court Rules Act*: *Waddell v. Governor in Council* (1983), 8 Admin L.R. 266 (B.C.S.C.), cited with approval in *Katz Group Canada Inc. v. Ontario (Health and Long-term Care)*, 2013 SCC 64, para. 24. *Katz* states that a "successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate" (para. 24). The cases discussed below reflect that approach.[3]

17. That test is met here. The line of cases discussed below, invalidating rules of civil procedure as beyond the authority of their parent statute, supports the submission that Rule 11-8 is *ultra vires*.

18. Although regulations benefit from a presumption of validity, *Katz* explains (citing *Waddell*) that the test of conformity with the parent statute "is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation" (para. 24) (*Waddell*, para. 28). Rather, as Lysyk J. stated in *Waddell*:

> The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.

[3] The petitioners present an argument on the assumption that the reasonableness standard applies, citing *West Fraser Mills Ltd. v. British Columbia (Workers Compensation Appeal Tribunal)*, 2018 SCC 22. *West Fraser* concerned the review of delegated regulatory authority involving an expert administrative body. That is not equivalent to the legislative authority in issue here. *Katz/Waddell* remains authoritative post-*West Fraser* for the issue presented in this case: *Portnov v. Canada (Foreign Affairs)*, 2018 FCC 1248, para. 26, citing *Katz*. That said, TAS's argument has equal force under the *West Fraser* analysis and the result is the same.

Waddell, para. 28, quoted with approval in *Katz*, para. 24

19. TAS submits that the power to decide what will constitute sufficient evidence on an issue at trial – here, the issue of damages arising from personal injury or death – with the effect of impinging on substantive rights, is not within the authority conferred by the *Court Rules Act*. TAS develops that submission below by reference to, first, judgments from elsewhere in Canada on the validity of court rules and, second, the operation of Rule 11-8.

A. Limits on Rule-Making Authority

20. Numerous decisions from jurisdictions elsewhere in Canada are instructive on the ambit of the rule-making authority conferred by the relevant empowering legislation. The following propositions can be derived from those cases, a review of which follows:

a) a power to regulate practice or procedure cannot avail to limit the court's jurisdiction or to alter its extent or nature (*Andrews*, *Ostrowski*);

b) even where the power to make rules of court includes a power to alter substantive law, a rule of court, to be valid, must, in essence, be about practice and procedure (*Harms*);

c) the authority to make rules concerning practice and procedure does not extend into the creation and destruction of substantive rights (*Pelkey*, *Shanz*, *Morrissey*); and

d) questions as to the sufficiency or effect of evidence, and what evidence may be submitted to a court, are not merely matters of practice or procedure (*Andrews*, *Circosta*).

21. ***Andrews v. Andrews and Roberts*, [1945] 1 D.L.R. 595 (Sask. C.A.).** *Andrews* invalidated a rule of civil procedure that provided that certain admissions of a matrimonial offence could not be accepted at trial as sufficient proof of the matrimonial offence. The Court did not regard the rule as regulating practice or procedure or as

concerned with the admissibility of evidence. The Court noted the distinction between matters to do with the competency or admissibility of evidence and questions as to the sufficiency or effect of evidence. The Court regarded the rule as placing "a formidable restriction upon the exercise by the learned judge of the duty imposed upon" the judge (para. 17). The Court stated, "A power to regulate practice or procedure cannot avail to limit the [court's] jurisdiction or to alter its extent or nature... . Such limitation or alteration can only be effected by statute." (para. 22).[4]

22. ***Circosta et al v. Lilly*, [1967] 1 O.R. 398 (Ont. CA).** *Circosta* invalidated a rule of civil procedure on the basis that it abrogated a substantive right of privilege at common law. The rule in issue purported to effect changes in the substantive law governing privilege over communications and documents prepared for the use of counsel. The Court stated:

> While it may be said that the enactment is procedural in a broad sense in that it attempts to deal only with evidence and to declare whether that evidence shall be submitted to Court, nevertheless the Rule clearly purports to effect an alteration of the substantive law. ... Admittedly such a fundamental alteration of well-settled principles of law lies within the exclusive jurisdiction of the legislature and can scarcely be held to come within the limited delegated authority which the Legislature has committed to the Rules Committee.

23. ***Montreal Trust Co. v. Pelkey* (1970), 11 D.L.R. (3d) 101 (Man. C.A.).** The majority did not decide the validity of the civil procedure rule in question, but the other two judges (one concurring and one in dissent) would have invalidated the rule. The rule in question, on a motion to dismiss for want of prosecution, compelled the court to dismiss unless the plaintiff established certain things to the satisfaction of the court. The Chief Justice began by noting that the Manitoba rule in issue was unique in that, in all of the other jurisdictions reviewed, the equivalent rule was "permissive, not mandatory" (p. 111). The Chief Justice observed that the rule precluded the exercise of any discretion on the part of the court and that, "by leaving the court with no option but to dismiss, it operates without regard to the essential principle that justice be done" (p. 113).

[4] *Andrews* was cited in *Robitaille v. Vancouver Hockey Club Limited* (1979), 13 B.C.L.R. 309 (S.C.) as authority that the law of evidence is substantive law (which Esson J. (as he then was) expressed uncertainty about but did not decide), but *Andrews* neither says nor turns on that in any event.

According to the Chief Justice, the parent statute did not confer authority "to go beyond practice and procedure into the creation or destruction of substantive rights" (p. 108). The Chief Justice stated (pp. 111-112):

> Can it be said with any certainty that justice will be done by following the provisions of Rule 284A? In my view the mandatory taking away of the Court's discretion may in some cases lead to the opposite result . . . .
>
> The conclusion to which I have come is that Rule 284A (1), commendable though its purpose is, interferes with the substantive right of a plaintiff to have his action adjudicated upon by the Court, and that it does so to a substantial degree and in a manner which in some instances may, by the elimination of judicial discretion, actually prevent essential justice being done. I cannot believe that the Legislature intended, by the language employed in s. 101 (1) of the Queen's Bench Act, to confer upon the Judges the power to make such a Rule. In my view, therefore, Rule 284A (1) is invalid.

24. ***Schanz v. Richards* (1970), 72 W.W.R. 401 (Alta. M.).** *Schanz* held inoperative a rule of civil procedure that required a plaintiff undergoing an independent medical examination to deliver to the defendant any equivalent report obtained by the plaintiff. *Schanz* considered the rule *ultra vires* the Lieutenant Governor in Council on the basis that it dealt with substantive law. The parent statute did not confer authority to make, amend, alter or repeal any existing substantive law. The Court held that the "common-law privilege cannot be abrogated by the making of a procedural or practice Rule" (p. 404).[5]

25. ***Ostrowski v. Saskatchewan (Appeals Committee, Beef Stabilization Board)* (1993), 101 D.L.R. (4th) 511 (Sask. C.A.).** *Ostrowski* held *ultra vires* a rule of civil procedure purporting to place a six-month limitation period on an application for *certiorari*. The

[5] The legislation has changed since; the *Judicature Act*, R.S.A. 2000, c. J-2, in s. 28.1(2) now expressly permits alteration of substantive law. There is no equivalent provision in the *Court Rules Act*. But there is authority that, in exceptional cases, the rules of court in British Columbia may make substantive law: *Shapray Cramer LLP v. Mitschele*, 2012 BCSC 1828, para. 38.

Court held that the rule exceeded the scope of the rule-making power conferred by legislation, which power was limited to "regulating the pleading, practice and procedure in the court". The Court cited *Andrews* for the proposition that the rule-making power "does not embrace the authority to 'limit the jurisdiction' of the Court, 'or to alter its extent or nature'". The Court stated:

> Viewed from the perspective of the judge hearing such application, the rule purports, as the product of the exercise of the administrative or subordinate legislative power of the Court, to circumscribe the judge's judicial powers--discretionary, superintending powers drawn from the royal prerogative and the common law--to hear and determine such applications and to grant or withhold the remedy as the judge sees fit having regard for the whole of the circumstances, including delay and its consequences, however long or short the delay.

26. ***Morrissey v. Morrissey*, 2000 NFCA 67.** *Morrissey* considered invalid a rule of civil procedure addressed to disclosure to the opposing party of documents otherwise protected against production as documents prepared for litigation. The Court stated (paras. 31-34):

> The question then becomes whether, in doing so, the Legislature intended that the rules committee have the authority to declare that documents which by law would be subject to the litigation privilege must be provided to the other party.
>
> ...
>
> However, I am unable to conclude that the wording of s. 55(1)(e) of the ***Judicature Act*** is sufficiently clear to demonstrate an intention by the Legislature to deny the litigation privilege respecting medical reports which meet the dominant purpose test and which are not intended to be used at trial.

27. ***Canadian Reform Conservative Alliance Party Portage-Lisgar Constituency Assn. v. Harms*, 2003 MBCA 112.** Notwithstanding that the rule-making power conferred by legislation embraced the power to alter substantive law, *Harms* invalidated a civil

procedure rule which permitted an unincorporated association to sue and be sued in its own name. The Court stated that, to be effective, a rule which has the effect of altering the substantive law must, in essence, be about court practice and procedure. The Court held that the rule was in reality about substantive law and only peripherally about practice and procedure, the reverse of what it should be. The Court stated (para. 21):

> My conclusion is that sec. 92 means what it says – by its very wording it is restricted to rules of "practice and procedure." While the rules may "alter substantive law," the pith and substance of the rules must be procedural. If in fact the central point of the rule is not a matter of adjectival law but a fundamental alteration in substantive law, then it is beyond the ambit of the authority of the rules committee.

28. A consideration of the "central point" of Rule 11-8 shows that it, too, is beyond the ambit of the authority conferred by the *Court Rules Act*. The "mandatory taking away of" the court's discretion on the sufficiency of evidence for an issue at trial impermissibly limits the court's jurisdiction in a way that the terms and objects of the *Court Rules Act* do not support.

B. Operation of Rule 11-8

29. Rule 11-8 intends to change the opinion evidence that a party may tender at trial on the issue of damages arising from personal injury or death. A party will be prevented from tendering, and the court will be prevented from receiving, opinion evidence that, in all other respects, otherwise would qualify for admission. By reason alone of Rule 11-8, the court will be deprived of opinion evidence from a qualified expert, that is probative and necessary to the resolution of the case, and that is sufficiently beneficial to the trial process to warrant its admission – in other words, that otherwise satisfies all of the requirements of Rule 11 generally and meets the criteria for admissibility established in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

30. That is not merely a matter of practice or procedure or concerned merely with the means (which is to say, a method or way of doing) by which particular facts (nature and extent of injury, loss of income, loss of earning capacity, future care needs, future education or

employment prospects, life expectancy, housing adaptation requirements) may be proved at trial. Instead, Rule 11-8 actually limits or forecloses the substantive evidence that a court may consider.

31. The right to pursue justice in the courts is of primary importance in our society: *Babcock v. Canada (Attorney General)*, 2002 SCC 57, para. 15. The judicial function is unique: *Therrien (Re)*, 2001 SCC 35, para. 108. The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law: *Trial Lawyers' Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 para. 32. Resolving disputes is the hallmark of what superior courts exist to do: *TLABC*, para. 35

32. Most cases in which the issue of damages for personal injury or death arises will involve claims in tort. The law of tort provides a means whereby compensation, usually in the form of damages, may be paid for injuries suffered by a party as a result of the wrongful conduct of others: *Hall*, p. 200. That right to recover damages is a substantive right: *Sullivan and Dreidger on the Construction of Statutes* 4th ed. (Markham and Vancouver: *Butterworth Consolidated* 2002) (hereafter, "*Sullivan*"), p. 570, cited with approval in *British Columbia v. Bolster*, 2007 BCCA 65, para. 110. Thus limiting the function of tort law – to compensate through damages for injuries suffered as a result of the wrongful conduct of others – impinges on a substantive right.

33. The effect of Rule 11-8 is not limited to vehicle actions – the emphasis of the petitioners. As of February 1, 2020, Rule 11-8 will affect cases such as the following: *Leon v. Tui*, 2012 BCSC 1600 (a medical negligence suit involving traumatic brain injury); *DH, JH and E.H. v. Kline*, 2006 BCSC 1903 (the sexual assault of an infant); and *Cojucaro (guardian ad litem) v. British Columbia Women's Hospital*, 2009 BCSC 494 (a medical negligence claim as a result of negligent care over the birth of a child). All are cases where the plaintiff tendered at trial, and the court received, opinion evidence from more than three experts on the issue of damages.

34. The experts called on damages in those cases is illustrative. In *Leon* (medical negligence, traumatic brain injury), damages experts included: neurologist, neuroradiologist, psychologist, vocational experts and actuary. In *DH (infant sexual assault)*, expert evidence on damages included opinion evidence in the following areas: plaintiff's development, cost of future care, future care plans, cost of future education and development programs. In *Cojucaro* (medical negligence, compromised baby) the court heard opinion evidence from experts in the following areas: occupational therapist, future care needs, eductional prospects, current care needs and employment prospects. Taking *Cojucaro* as an example, the following cases show that *Cojucaro* was not unusual in terms of the experts used in a case of that sort: see, for example, *Crawford v. Penney*, [2003] O.J. 89 (ONSC), where the plaintiff had several damages experts; and *Bauer (litigation guardian of) v. Seager*, 2000 MBQB 113, where the plaintiff called eight experts on damages. Thus there is no basis to suggest that practice in British Columbia differs from elsewhere in Canada, at least in compromised baby cases.

35. The question that will arise after February 1, 2020 is this: because of the Lieutenant Governor in Council's pre-determination through Rule 11-8 as to what evidence will be sufficient, which of those experts must the court deny the infant victim of sexual assault, or the compromised baby, the ability to tender a report from -- and do so in pursuit of the court's historic task to resolve disputes, the hallmark of what it exists to do?

C. Conclusion on Administrative Law Issue

36. In *TLABC*, Cromwell J. held in a concurring judgment that subordinate legislation purportedly adopted pursuant to the *Court Rules Act* which is inconsistent with the common law right of access to civil justice is *ultra vires* (para. 73). Similar reasoning applies here. Subordinate legislation purportedly adopted pursuant to the *Court Rules Act* that impinges on substantive rights, limits the court's jurisdiction and pre-determines the sufficiency of evidence on an issue at trial is *ultra vires*.

37. To say that Rule 11-8 is about evidence, and therefore procedural, fails to appreciate its effect, as discussed above. It also lacks support in case law about what constitutes a

procedural provision. *Sullivan* states that, to be considered procedural, a provision must be exclusively procedural and "must not interfere with substantive rights or ... produce other unjust results" (pp. 584-584) (cited with approval in *Bolster*, para 103).

38. The power-conferring language of the *Court Rules Act*, having regard both to its terms and the purposes and objects of the statute, does not authorize Rule 11-8. Rule 11-8 is not about practice and procedure. It is not a means to prove facts. Its effect will be to change trial outcomes in British Columbia, to the detriment of those who come to the courts seeking justice.

IV. Rule 11-8 Infringes Section 96

39. Section 96 limits the legislative competence of Parliament and the provincial legislatures. *TLABC* establishes that it does so in respect of the *Court Rules Act* specifically: *TLABC*, paras. 25 – 30. Neither level of government can enact legislation that removes part of the core jurisdiction of superior courts.

40. While generally supporting the petitioners' submission that Rule 11-8 is inconsistent with s. 96, TAS makes three additional comments.

41. First, *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, para. 44 does not assist the respondent. While s. 96 is part of the Constitution's guarantee of the impartiality and independence of the courts (*Therrien*, para. 60), the provisions impugned in *Imperial Tobacco* were qualitatively different from Rule 11-8. *Imperial Tobacco* was concerned with the compellability of evidence, not with what evidence, however obtained, a party could tender at trial. *Imperial Tobacco* decides that legislatures are entitled to "shift 'certain onuses of proof or limi[t] the compellability of information that [a party] assert[s] is relevant:'" *British Columbia v. Philip Morris International Inc.*, 2018 SCC 36, para. 33. That is not what Rule 11-8 does. Thus the conclusion in *Imperial Tobacco* that the provision impugned "did not up-end the trial process so vigorously as to encroach upon the independence of the judiciary" (*Philip Morris*, para. 33) is not pertinent to Rule 11-8.

42. Second, *Babcock* likewise does not assist the respondent. *Babcock* also was concerned with compellability. The issue was disclosure of Cabinet confidences, in respect of which the superior courts operated since pre-Confederation without the power to compel. *Babcock* is clear, however, that a party who obtained the information other than through compulsion was free to tender it as evidence at trial (para. 35). Thus the problem that Rule 11-8 presents was not in issue in *Babcock.*

43. Third, while the petitioners may be correct in identifying a prime beneficiary of Rule 11-8, TAS does not rely on that alone. *Imperial Tobacco* expressly leaves open the prospect that legislation may impermissibly interfere with the judicial function (para. 54). Here, regardless of who, in a given case, gains or loses from Rule 11-8's pre-determination as to the sufficiency of evidence, the result is that the court is left to adjudicate in the absence of evidence that otherwise would be available to the court to do justice between the parties. That affront to the court's adjudicative function is the vice of Rule 11-8.

44. The contours of s. 96, as a basis for invalidating legislation, await full development. That examples are few likely says more about legislative restraint and respect for the judicial function than it suggests a lack of potency in s. 96.

45. Extending from cases such as *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 and *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, it is established that the power to punish for contempt *ex facie* (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725) and access to the superior courts (*TLABC*) fall within the core jurisdiction of superior courts. The divide appears to lie between shaping the exercise of a superior court's powers and denying those powers.

46. Here, the submissions made in connection with the administrative law issue apply equally and demonstrate that Rule 11-8 is in the latter category of denying core powers. The "mandatory taking away" (*Pelkey*) of the court's discretion "limit[s] its jurisdiction… [and] alter[s] its extent or nature" (*Andrews*). It may, "by the elimination of judicial discretion, actually prevent justice being done" (*Pelkey*). Powers "which are 'hallmarks

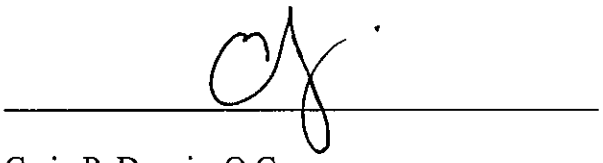
of superior courts' cannot be removed from those courts": *TLABC*, para. 34. That is what Rule 11-8 does and, in so doing, it is contrary to s. 96 (see also PS, para. 69).

V. Costs

47. As stated in TAS's notice of application, TAS does not seek costs and asks that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: July 17, 2019



Craig P. Dennis, Q.C.
McEwan Cooper Dennis LLP
Counsel for the Intervenor