

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**THE COUNCIL OF CANADIANS, and DALE CLARK, DEBORAH BOURQUE, and
GEORGE KUEHNBAUM on their own behalf and on behalf of all members of the
CANADIAN UNION OF POSTAL WORKERS**

Applicants

- and -

**HER MAJESTY IN RIGHT OF CANADA, AS REPRESENTED BY
THE ATTORNEY GENERAL OF CANADA**

Respondents

AFFIDAVIT OF ANDRÉE LAJOIE

I, Andrée Lajoie of the University of Montreal, Montreal, HEREBY AFFIRM that:

- 1. I am a graduate of the University of Montreal in law (L.L.L.) and of Oxford University in political economy (M.A). I am currently a Professor at the Faculty of Law of the University of Montreal (Center of Research in Public Law) and a member of the Québec Bar, and of the Royal Society of Canada.
- 2. I have dedicated all of my research and teaching career to constitutional law and legal theory, subjects in which I have published 15 books (in Canada, in France and in Belgium) and 88 articles and book chapters. A full list of my publications is included in my Curriculum Vitae, which is attached as Exhibit "A" to this affidavit.
- 3. I have served as a consultant to several Royal Commissions, including the Macdonald Commission, 1983-1985 (as coordinator of research on law, society and economy), and the Dussault-Erasmus Commission 1993-1996 (as constitutional consultant), and was a Commissioner of the Seguin Commission on fiscal disequilibrium, 2000-2002. I also developed constitutional arguments for several constitutional cases, the most relevant here being the Mirabel case, where I wrote various briefs for the expropriated party.

4. During my career, I have served as Director of the Center of Research in Public Law (1976-1980) and I was also Visiting Professor at the Université libre de Bruxelles and Université catholique de Louvain (2003), University of Toronto (2002), University of Athens (2000), University of Padova (1997), University of Paris I, (1994), University of Padova and Trieste (1994) and a Lansdowne Fellow at the University of Victoria (1994).
5. Among my publications I have devoted one book to the analysis of the constitutional dimension of expropriation within Canadian federalism: *Expropriation and Federalism*, (Presses de l'Université de Montréal, 1972), of which an excerpt [pp. 236-271, *Partage des compétences en matière d'administration de la justice*, from Chapter III, *Les contraintes constitutionnelles*], is attached hereto as Exhibit "B".
6. In that book, I first analyze the interaction of the provincial and federal orders of governments within the Canadian federation (with a short comparative study of other [then] federal states) in matters of expropriation: interaction with each other as to their respective constitutional competences and their respective properties, as well as with domestic and foreign corporations. This would have been the whole subject of the book if, while I was researching and writing it, the Government of Québec, having heard about my work, had not asked me to examine the question of what jurisdiction it could attribute to an administrative tribunal it intended to create precisely in the field of expropriation. And this is how I have added a third part to the book: *Les avenues constitutionnelles de la réforme administrative et judiciaire de l'expropriation*, in which I set out to find what powers could not be delegated to another tribunal because they were within the exclusive jurisdiction of the Superior Court as constitutionalized by section 96 of the B.N.A Act 1867.
7. For these reasons, I have knowledge of the matters to which I hereinafter depose.

Summary

8. I have been asked to ascertain the extent of the exclusive jurisdiction of the superior court before 1867 in relation to disputes between the Crown and aliens concerning the exercise of governmental authority effecting their proprietary and contractual interests. I have undertaken this assessment in light of the claims that may be made pursuant to the dispute procedures established by the North American Free Trade Agreement's chapter 11, Section B: Settlement of Disputes between a Party and an Investor of Another Party (referred to herein after as the "investor-state suit provisions" of NAFTA).

9. This affidavit is consequently divided in three parts:
- I the methodology I have used to determine the extent of the exclusive jurisdiction of the superior courts at the time of confederation as constitutionalized by Section 96 of the B.N.A. Act in 1867;
 - II the *ratione materiae* jurisdiction of the superior courts at the time of Confederation, especially:
 - i) its inherent jurisdiction to adjudicate matters concerning the lawfulness and constitutionality of government actions, or the determinations of inferior courts and tribunals;
 - ii) its jurisdiction with respect to claims against the Crown acting in its sovereign capacity; and,
 - iii) its jurisdiction concerning matters of expropriation.
 - III the *ratione personae* jurisdiction of the superior courts at the time of Confederation, more particularly regarding the rights of foreigners and foreign corporations.
10. The essential conclusions of my assessment are that the jurisdiction of the superior court, as constitutionalized in 1867, included:
- (a) within its *ratione materiae* jurisdiction:
 - i) the exclusive and inherent jurisdiction to determine the legality and constitutionality of the actions of governments and inferior courts and tribunals;
 - ii) the exclusive authority to decide any and all claims made against the Crown, save for those of no more than 200 dollars, which were asserted by way of petitions of right concerning the wrongful acts of the Crown in its sovereign capacity; and,

iii) the exclusive authority to decide in matters of expropriation (in addition to its power of judicial control of legality as well as of constitutionality of takings already included in its inherent jurisdiction), three elements of the award process: exemplification and enforcement, which were reserved to the trial division of the Superior Court and the hearing of appeals, which was reserved to its appeal division, the King's Bench;

(b) with regard to its *ratione personae* jurisdiction:

i) in addition to those matters noted in this paragraph, the exclusive authority to resolve disputes between aliens/foreign corporations and the Crown acting in its governmental capacity (*juri imperii*).

Part I: Methodology

11. In addition to concern for protecting the rule of law and the core jurisdiction of superior courts, Canadian courts have determined the parameters of the authority reserved to the superior courts under s. 96 of the Constitution Act, by having regard, inter alia, to the authority that was exclusively exercised by such courts at the time of Confederation.

*Crevier*¹, *Residential Tenancies*², *Sobey's*³

12. Pursuant to the test adopted by Canadian Courts the exclusive jurisdiction of the superior courts at the time of confederation may be established with reference to the situation in three pre-confederation provinces where these are the same.

*Sobey's*⁴

13. Consequently the pre-confederation statutes were reviewed for: Lower Canada, Upper Canada, the Province of Canada in which they were united in 1841, as well as Nova Scotia,

¹ *Crevier v. A.G. Québec*, [1981] 2 S.C.R. 220

² *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186.

³ *Sobeys Stores Ltd. v. Yeomans and the Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238 .

⁴ *Id.*

in order to determine which of the elements of the superior courts' jurisdiction listed in paragraph 9 (II and III) as relevant to this case were exclusive to these courts.

14. Starting with Lower Canada, the organization of the judicial system and the determination of the courts' jurisdiction were undoubtedly questions of public law. The only legislation that could validly confer any jurisdiction to the Superior Court of Lower Canada in 1867 was legislation passed under the English Regime, since under the international law as it read in the XVIIIth century, and confirmed by the Treaty of Paris in 1763⁵, conquest implied that the public law of the conquered was replaced by that of the conqueror. Therefore the research covered all statutes and ordinances issued between 1763 and 1867 and conferring to the superior court or other judicial or quasi-judicial institutions powers related to the elements of the superior courts' jurisdiction listed in paragraph 9 (II and III) as relevant to this case were exclusive to these courts.
15. In Upper Canada, the Province of Canada and Nova Scotia, the same research was done, with the following differences: dates of beginning were respectively for Upper Canada, 1791, for the Province of Canada, 1840, and for Nova Scotia 1758, and regarding the *ratione materiae* jurisdiction in matters of expropriation, only three elements of the award process were searched for: exemplification, enforcement, and appeal, since all others had been shown by the Lower Canada results to have been shared before Confederation between the superior courts and other judicial or quasi-judicial bodies.
16. The following review does not represent, nor purport to be, an exhaustive survey of the exclusive authority of the superior courts at the time of Confederation. Rather, I considered those judicial powers that are most similar, or arguably identical, to those arising under the investor-state suit provisions of NAFTA. For the purposes of ascertaining the latter, I have reviewed NAFTA's chapter 11 Section B Investor-State arbitral provisions and their analysis in the affidavit of M. Somarajah, sworn in these proceedings. I have thus ascertained that the Investor-State arbitral tribunals can be empowered to resolve claims concerning government policy, law and regulation alleging that such measures represent expropriation of the disputing investor's investment. Furthermore, the awards which may arise from such proceedings are final and binding, and are subject only to limited, and in certain cases no judicial review by Canadian courts. My review of the jurisdiction of superior courts at the

⁵ In A. SHORTT and A.G. DOUGHTY, *Documents relating to the Constitutional History of Canada, 1759-1791*, 2nd ed., Ottawa, printed by J. de L. Taché, 1918, p. 136 and following, s. 4.

time of Confederation focuses therefore on the question of expropriation claims by aliens arising from the actions of government, or other authorities.

Part II: The *ratione materiae* jurisdiction of the superior courts at the time of Confederation

17. My review of the jurisdiction of the *ratione materiae* of the superior courts was limited to the three areas of judicial authority noted in paragraph 9, namely: inherent jurisdiction to adjudicate matters concerning the lawfulness and constitutionality of government actions, or the determinations of inferior courts and tribunals; jurisdiction with respect to claims against the Crown acting in its sovereign capacity; and jurisdiction concerning matters of expropriation.

The inherent jurisdiction of judicial review to adjudicate matters concerning the lawfulness and constitutionality of government actions, or the determinations of inferior courts and tribunals.

18. At the time of Confederation, the Superior Court had inherent authority to determine the legality and constitutionality of the actions of governments and inferior courts and tribunals which was inherited from its British ancestor and attributed to it in the statute that created it.⁶
19. This superintending and reforming power, which belonged solely to a superior court whose members are appointed by the Governor General in Council, included the determination of whether a body had exceeded its jurisdiction⁷, and could not be delegated to any other adjudicative body to the exclusion of the superior courts⁸.
20. Thus in the case of expropriation, which is discussed further in Part IV, judicial control was exercised over legality as well as constitutionality of the taking. The constitutionality of the statutes authorizing expropriation was established against relevant constitutional norms, and that of the regulations and individual expropriations against the statute from which they derive their authority; and if necessary, against constitutional norms.

⁶ *An Act to amend the Laws relative to the Courts of Original Civil Jurisdiction in Lower-Canada*, S.C. 1849, c. 38.

⁷ *Crevier v. A.G. Québec*, quoted *supra*, fn. 1; *Farrah v. A.G. Québec*, [1978] 2 S.C.R. 220.

⁸ *Mac Millan Bloedel v. Simpson*, [1995] 4 S.C.R. 725.

21. The investor-state suit provisions of NAFTA's chapter 11 Section B, and the arbitral regimes upon which these rely, seek to either limit or eliminate the powers of Canadian superior courts with respect to the adjudication and resolution of claims asserted pursuant to these provisions. Moreover, this superintending and reforming power with respect to claims against the state, is not novel, but rather one that not only existed in 1867⁹, but was inherent to the jurisdiction of the pre-confederative superior courts.

The jurisdiction with respect to claims against the Crown acting in its sovereign capacity.

22. Historically, the sovereign could not be sued in his own courts and had the benefit of the presumption that "the King can do no wrong" (also known as one of the royal prerogatives).¹⁰ However, by the middle of the 19th century it was firmly established that relief could be obtained from the Crown by way of a petition of right.
23. According to G. Robertson, the author of a seminal treatise on the proceedings against the Crown, ¹¹ petition of right was a process by which recovery was made from the Crown of property of any kind, including money, to which a subject was legally or equitably entitled. It is important for present purposes to note that the authorities clearly point to the fact that the scope of petition of right encompassed the acts of the Crown in its governmental capacity.¹²
24. Another leading commentator on the subject, W. Clode, specifically states, by reference to the case law, that the petition of right was only available if the taking of property was wrongful¹³. Thus the courts considering petitions of right inevitably had to make a determination of validity or invalidity of government action. Therefore, subjects could obtain a remedy, either in the form of damages or restitution, for wrongful taking of their land by the Crown by virtue of petition of right.

⁹ *Reference re Amendments to the Residential Tenancies Act (N.S.)*, quoted *supra*, fn. 2.

¹⁰ P. HOGG and P. MONAHAN, *Liability of the Crown*, Scarborough, Carswell, 2000, p. 4-7.

¹¹ G. ROBERTSON, *The Law and Practice of Civil Proceedings and against the Crown*, London, Butterworths, 1908.

¹² *Id.*, p. 345 where the cases in which the petition of right was granted and damages or restitution were awarded for the taking of land, in particular for defense purposes, are discussed.

¹³ W. CLODE, *The Law and Practice of Petition of Right*, London, Butterworths, 1887, p. 104.

25. Statutory instruments in force in England and some of the Canadian provinces leave no doubt that it is the superior courts that had exclusive jurisdiction to adjudicate upon the petitions of right seeking relief for wrongful government action. Prior to 1867, only England had a statute on the books dealing with the procedure for submission of petitions of right. *An Act to amend the Law relating to Petitions of Right, to simplify the Proceedings, and to make Provisions for the Costs thereof*, enacted in 1860, provided in section 1 that:

A Petition of Right may, if the Suppliant think fit, be intituled in any One of the Superior Courts of Common Law or Equity at Westminster¹⁴

26. It is true that none of the statutes, in force in any of the three confederating provinces I have examined, made any specific reference to petition of right in delineating the jurisdiction of their superior courts. However, such jurisdiction was basically defined by reference to the jurisdiction of the superior courts of England at Westminster, which, as shown above, unequivocally encompassed the consideration of petitions of right.
27. In Upper Canada, an *Act respecting the Superior Courts of Civil and Criminal jurisdiction*¹⁵ provided in s. 3 under the heading "Jurisdiction" that:

The said Courts [the superior courts, i.e., the Courts of Queen's Bench and the Court of Common Pleas] shall be Courts of Record of Original and Co-ordinate jurisdiction, and shall respectively possess all such powers and authorities as by the law of England are incident to a Superior Court of Civil and Criminal jurisdiction; and shall have, use and exercise all the rights, incidents and privileges of a Court of Record, and all other rights, incidents and privileges as fully to all intents and purposes as the same are, at the time this Act takes effect, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law at Westminster, in England.

28. Similarly, the Act respecting the Court of Chancery for Upper Canada, which was a superior court, defined the jurisdiction of the Court of Chancery in s. 26 in the following terms:

¹⁴ 23 & 24 Vict., c. 34.

¹⁵ C.S.U-C. 1859, c. 10.

The court shall have the like jurisdiction and power as by the laws of England were ... possessed by the Court of Chancery in England.

29. In Nova Scotia, chapter 123 *Of the Supreme Court and its Officers* of the Revised Statutes of Nova Scotia,¹⁶ provided in section 1 in regard of the Supreme Court of Nova Scotia (the only superior court in that province) that:

The Supreme Court shall have within this province the same powers as are exercised by the courts of queen's bench, common pleas, chancery and exchequer in England...

30. While in Lower Canada the relevant statutes neither mentioned petition of right nor defined the jurisdiction of the superior courts by reference to the jurisdiction of the superior courts of England, there were express provisions in those acts conferring on the superior courts the authority to hear the claims against the Crown. More specifically, the *Act respecting the Superior Court* provided in section 2 that:

The Superior Court has original civil jurisdiction throughout Lower Canada, with full power and authority to have cognizance of, hear, try and determine in the first instance and in due course of law, all civil pleas, causes and matters whatsoever, as well those in which the Crown may be a party [emphasis added].¹⁷

31. Therefore, the superior courts in Upper Canada, Nova Scotia, and England had exclusive jurisdiction under the laws in force around the time of Confederation to decide the issues presented by petitions of right - including, as I discuss in Part III, claims by aliens - against the Crown for the wrongful acts of the Crown in its sovereign capacity. In addition, in Lower Canada, the superior court had exclusive jurisdiction over the claims against the Crown (except the claims for no more than 200 dollars, which were within the jurisdiction of the circuit courts).

¹⁶ R.S.N.S. 1859, c. 126.

¹⁷ C.S.L.-C. 1861, c. 78.

The jurisdiction regarding the adjudication of compensation for expropriation at the time of Confederation

32. After looking at the general historical background of dispute resolution mechanisms in matters of compensation for expropriation in pre-confederation times, I will delineate the exclusive powers retained by superior courts in the adjudication over the award of compensation for taking property.

General historical background of dispute resolution mechanisms in matters of compensation for expropriation in pre-Confederation times

33. One relevant example of the Crown acting in its capacity as a sovereign was the practice of expropriations or takings of property. In the decades before Confederation, most of the takings concerned land and were initiated for such purposes as public works and construction of railways. In addition, land was also appropriated for defense purposes.
34. Prior to Confederation, Upper and Lower Canada, the province of Canada and Nova Scotia had statutes on the books that authorized the Crown and its agents to expropriate land and provided for the resolution of disputes concerning such takings, with the provincial superior courts being vested with the ultimate authority to provide a remedy.
35. In the province of Canada, three statutes merit notice because they are good examples of the general regime then prevailing. An *Act respecting the Public Works*¹⁸ vested in the Commissioner of Public Works, who was to be appointed by the Governor-General, the authority to “acquire and take possession of all lands or real estate [. . .] the appropriation of which for the use, construction and maintenance of [. . .] Public Works [. . .] is in his judgment necessary [. . .]” (s. 31). Pursuant to s. 37 of the Act, all land and real property acquired by the Commissioner was to be vested and become the property of Her Majesty. The statute not only conferred on the Commissioner the authority to purchase and contract with the owners of the land subject to expropriation, but also gave the Commissioner the necessary power to effectuate a taking of private property without consent of the owner. Section 35 provided that:

18 C.S.C. 1859, c. 28.

where any . . . owner or occupier refuses or fails to agree for conveying his estate or interest in any land, real property . . . , the Commissioner may tender the reasonable value in his estimation of the same, with notice that the question will be submitted to the Arbitrators . . .

36. The first step in the dispute resolution process under the Act was submission of the dispute to arbitrators or appraisers appointed by the Governor in Council, who were authorized to “arbitrate on, appraise, determine and award the sums which shall be paid to any owner, occupier . . . for the land or real estate taken either in perpetuity or temporarily for the use of . . . public works . . .” (section 41). Under s. 46 of the Act, any person or body corporate who had a claim for property taken was to give notice to the Commissioner who was to refer the claim to arbitrators. The Act provided for a possibility of a *de novo* appeal, not review, of the arbitration award. In Lower Canada, in accordance with s. 60:

1. Any Claimant dissatisfied with any award made by the [. . .] Arbitrators in Lower Canada, may appeal from such award by petition addressed to the Superior Court, [. . .] praying such Court [. . .] to revise and re-consider the same, and to set aside and annul the same, either wholly or in part. . . .

3. The said Court may either amend or reform such award or set aside and annul the same.

37. In Upper Canada all awards and decisions of the arbitrators, in matters of public works and expropriation, were subject to the jurisdiction of the Superior Courts of Law or Equity “in like manner and to the same extent, and under the same regulations as apply to arbitrations under the submission of the respective parties.” (s. 63) These appear to have conferred on the superior courts of Upper Canada the power to hear the case *de novo*, based on the same evidence as was before the arbitrators.

38. Another relevant statute then in force in Upper Canada and Lower Canada is an *Act respecting Railways*¹⁹. Under that Act, railway companies were authorized “to purchase, hold and take of any Corporation or person any land or other property necessary for the construction, maintenance, accommodation and use of the Railway . . .”, including the lands taken without the consent of the proprietor (s. 9). In the case of the owner’s refusal to

¹⁹ C.S.C. 1859, c. 66.

convey or to accept the offered amount of compensation, the amount of compensation was to be determined by the arbitrators appointed by the parties or a Judge of the Circuit or County court. If, despite the arbitrators award, "any party to whom the compensation . . . is payable, refuses to execute the proper conveyance and guarantee", the railway company seeking to take private land could pay compensation to the superior court and, upon delivery of the arbitration award to the clerk of the court, such award was deemed to be the title of the company to the appropriated land. Once the notice of title was published, any person entitled to the land could file their claim to the compensation, all such claims were to be adjudged by one of the superior courts of Upper Canada under s. 11.24 of the Act, or by the Superior Court of Lower Canada under s. 11.27, depending on where the land was located.

39. Finally, pursuant to an *Act respecting Lands and Real Property held or required by the Imperial Government for the Military Defense of this Province*²⁰, the Principal Secretary of State could, if the owner of the land required for defense purposes, refused or declined "to sell, or demise, or to enter into . . . contract with regard to such lands or other real property . . . or refuses the price or consideration offered by [the Principal Secretary of State]," the Governor in Council had the authority to requisition the lands and put the Crown in possession of them (s. 15). Upon expropriation, the sheriff of the relevant area was required to summon a jury to "inquire of and determine the price or compensation to be paid by such Principal Secretary of State" to the aggrieved owner. In accordance with s. 16 of the Act,

If the Principal Secretary of State... or any person or party interested in the lands and other real property ... marked out and taken..., is dissatisfied with the verdict of the Jury, - he may... apply to the Superior Court in the District in which the lands and other real property lie if the same are in Lower Canada, or to the court of Queen's Bench or of Common Pleas, if the same are in Upper Canada, and he may suggest that he has reason to be dissatisfied with such verdict..., - thereupon the proceedings which have been had in the matter and the verdict of the Jury shall be returned into court, and if it appears to the Court that the application ought to be granted, then the Court shall direct the compensation payable to be assessed and ascertained by a Jury according to law and practice of the Court, and as any damages may be inquired of and ascertained by a Jury, - and the verdict of such

20 C.S.C 1859, c. 36.

Jury shall be final and conclusive, unless a new assessment of such damages is for sufficient reason granted by the Court.

40. Under s. 18 of the Act, “[a]ll lands and other real property of which possession has been given to such Principal Secretary for State..., and for the absolute property of which the compensation has been ascertained by the verdict of a Jury” were to be vested in the Principal Secretary of State, thus barring the right or claim of all interested parties.
41. In Nova Scotia, under chapter 70 *Of Provincial Government Railroads* of the Revised Statutes of Nova Scotia,²¹ both commissioners appointed by the Crown and railways companies were “authorized to enter upon and take possession of any lands required for the track of the railways or for stations”; registration of such takings was to operate as a dedication to the public of such lands (s. 11).
42. Compensation to the proprietors or possessors of the taken land was to be referred to the Jury under s. 49 which had to “examine the premises in each case, and ... value the land taken and dedicated for the railway and ... estimate the damages to the property.” Either party had the right to appeal under s. 17 to the Supreme Court of Nova Scotia (which was a superior court of the province). Section 52 detailed this process in these words:

Within 30 days after the return of any appraisement . . . any party interested who may deem himself aggrieved may apply by affidavit to the Supreme Court . . . to set the proceedings aside . . . , or to alter the valuation . . . , and the court . . . shall have power . . . to confirm, increase or reduce the damages, or otherwise rectify the finding of the Jury in substance or in form; or if such court . . . shall see fit a Jury shall be empaneled to try the disputed matters of fact with reference to such damages . . . ; the court shall make a final order touching the damages . . .

Exclusive powers retained by superior courts in the award of compensation for taking property

43. It is clear from the preceding review that the superior courts had jurisdiction to resolve the disputes regarding compensation for expropriation. However, this jurisdiction appears to have been shared with other judicial and quasi-judicial institutions in some respects. For

²¹ R.S.N.S. 1864, c. 70.

example, compensation awards were originally appraised in some cases by either arbitrators or a jury.

44. Starting with Lower Canada, and for the reasons noted in paragraph 14, I have examined all statutes and ordinances issued between 1763 and 1867, (thus including the period between 1841 and 1867, when it was part of the Province of Canada) conferring to the superior court, or other judicial or quasi-judicial institutions, powers related to the determination of the award of compensation.
45. Regarding the adjudication of the award of compensation, eight elements can be identified in that process. Five of these were not exclusive to the jurisdiction of the Superior Court, but delegated as well to various other bodies:
- i) appointment of arbitrators (1st instance) to parties²², Circuit Courts²³, other courts²⁴, municipal authorities²⁵ or the Governor-general²⁶;

²² *Acte pour amender les dispositions de l'acte d'incorporation de la cité de Saint-Hyacinthe*, S.C. 1863, c. 22, s. 73(2); *Acte pour amender de nouveau l'acte municipal refondu du Bas-Canada*, S.C. 1862, c. 14, s. 1 and following; *Acte pour refondre et régler les clauses relatives aux chemins de fer*, S.C. 1851, c. 51, s. 11 and following; *Acte concernant les chemins de sources de pétrole*, S.C. 1861, c. 88, s. 11; *Actes concernant la Compagnie hydraulique de Montréal*, S.C. 1861, c. 96, s. 21 and following; *Acte concernant les compagnies de chemins*, C.S.L.-C 1861., c. 70, s. 20; *Acte pour incorporer la ville d'Iberville*, S.C. 1859, c. 64, s. 56 and 57; *Acte pour incorporer la Compagnie du chemin d'Iberville, Brome, Sheffield et Missisquoi*, S.C. 1857, c. 150, s. 23 and following; *Acte pour amender les actes qui incorporent la Compagnie de télégraphe de Montréal et pour étendre les pouvoirs de ladite compagnie et pour autoriser l'établissement d'une ligne de télégraphe transatlantique par ladite compagnie*, S.C. 1857, c. 175, s. 3; *Acte pour pourvoir à l'amélioration et à l'agrandissement du havre de Montréal au creusement du fleuve Saint-Laurent entre lesdits endroits et pour d'autres fins*, S.C. 1852, c. 24, s. 35 and following; *Acte pour pourvoir à l'administration et à l'amélioration du havre de Montréal et au creusage du chenal pour les navires entre ce havre et le pont de Québec pour abroger l'acte maintenant en force pour lesdites fins*, S.C. 1855, c. 143, s. 30; *Acte pour autoriser l'établissement de compagnie à fonds social dans le Bas-Canada pour la construction des chemins macadamisés, ponts et autres travaux y mentionnés*, S.C. 1849, c. 56, s. 12 and following; *Acte pour incorporer la Compagnie du chemin à rails du aint-Laurent et du village d'Industrie et relatif à la Compagnie du chemin à lisses du Saint-Laurent et de l'Atlantique*, S.C. 1847-1848, c. 64 and 65; *Acte pour incorporer la Compagnie du chemin à rails de Montréal et de Lachine*, S.C. 1846, c. 82, s. 16; *Acte pour incorporer la Compagnie de chemin à rails de Montréal à Kingston*, S.C. 1846, c. 107; *Ordonnance pour établir et maintenir de meilleures voies de communication entre la cité de Montréal et Chambly*, S.C. 1840-1841, c. 16, s. 4; *Ordonnance pour pourvoir à la construction et l'établissement de salles d'audience et prisons dans certains districts judiciaires de cette province*, S.C. 1840-1841, c. 20, s. 5.

²³ *Acte pour incorporer la ville de Saint-Ours*, S.C. 1866, c. 60, s. 54; *Acte pour autoriser William John Bickell à construire un pont sur la rivière Saint-Charles*, S.C. 1866, c. 108, s. 2; *Actes pour incorporer le village de Berthier et l'ériger en ville*, S.C. 1865, h. 61, s. 53 and following; *Acte pour incorporer la ville de Lévis*, S.C. 1861, c. 70, s. 64.

²⁴ *Acte pour ériger le village de Beauharnois en ville*, S.C. 1863, c. 24, s. 53; *Acte pour incorporer la ville de Lévis*, S.C. 1861, c. 70, s. 64; *Acte pour faire de plus amples dispositions pour la ville de Trois-Rivières*, S.C. 1857, c. 129, s. 58 and 59; *Acte pour incorporer la Compagnie du chemin d'Iberville, Brome, Sheffield et Missisquoi*, S.C. 1857, c. 150, s. 23 and following; *Acte pour établir un marché public dans la cité de Montréal*, S.C. 1829, c. 39, s. 2; *Acte qui amende un acte passé dans la 36^e année du règne de Sa*

- ii) appointment of arbitrators (revision) to Circuit courts²⁷;
- iii) determination of award to *ad hoc* arbitrators²⁸, official arbitrators²⁹, municipal authorities³⁰;

préente Majesté intitulé «Acte pour faire réparer et changer les chemins et ponts dans cette province et pour d'autres fins», S.C. 1799, c. 5.

- 25 *Acte pour incorporer la ville d'Iberville, S.C. 1859, c. 64, s. 56 and 57; Acte pour faire de plus amples dispositions pour la ville de Trois-Rivières, S.C. 1857, c. 129, s. 58 and 59.*
- 26 *Acte pour amender les actes qui incorporent la Compagnie de télégraphe de Montréal et pour étendre les pouvoirs de ladite compagnie et pour autoriser l'établissement d'une ligne de télégraphe transatlantique par ladite compagnie, S.C. 1857, c. 175, s. 3; Acte pour incorporer la Compagnie du chemin à rails de Montréal et de Lachine, S.C. 1846, c. 82, s. 16; Ordonnance pour établir et maintenir de meilleures voies de communication entre la cité de Montréal et Chambly, S.C. 1849-1841, c. 16, s. 4; Ordonnance pour pourvoir à la construction et l'établissement de salles d'audience et prisons dans certains districts judiciaires de cette province, S.C. 1840-1841, c. 20, s. 5; Acte pour établir un marché public dans la cité de Montréal, S.C. 1829, c. 39, s. 2.*
- 27 *Acte pour refondre et régler les clauses relatives aux chemins de fer, S.C. 1851, s. 11 and following; Acte concernant les chemins de sources de pétrole, S.C. 1861, c. 88, s. 11; Acte pour faire de plus amples dispositions pour la ville de Trois-Rivières, S.C. 1857, c. 129, s. 58 and 59; Acte pour incorporer la Compagnie du chemin d'Iberville, Brome, Sheffield et Missisquoi, S.C. 1857, c. 150, s. 23 and following; Acte pour pourvoir à l'administration et à l'amélioration du havre de Montréal et au creusage du chenal pour les navires entre ce havre et le pont de Québec pour abroger l'acte maintenant en force pour lesdites fins, S.C. 1855, c. 143, s. 30.*
- 28 *Acte pour incorporer la ville de Saint-Ours, S.C. 1866, c. 60, s. 54; Acte pour autoriser William John Bickell à construire un pont sur la rivière Saint-Charles, S.C. 1866, c. 108, s. 2; Acte pour amender et refondre les dispositions contenues dans les actes et ordonnances concernant l'incorporation de la cité de Québec et l'aqueduc de ladite cité, S.C. 1865, c. 57, s. 35; Acte pour incorporer le village de Berthier et l'ériger en ville, S.C. 1865, c. 61, s. 53 and following; Acte pour amender les actes relatifs à la corporation de la cité de Montréal et pour d'autres fins, S.C. 1864, c. 60, s. 13 and following; Acte pour incorporer la ville de Joliette, S.C. 1863, c. 23, s. 57; Acte pour ériger le village de Beauharnois en ville, S.C. 1863, c. 24, s. 53; Acte pour amender les dispositions de l'acte d'incorporation de la cité de Saint-Hyacinthe, S.C. 1863, c. 22, s. 73(2); Acte pour amender de nouveau l'acte municipal refondu du Bas-Canada, S.C. 1862, c. 14, s. 1 and following; Acte pour incorporer la ville de Lévis, S.C. 1861, c. 70, s. 64; Acte pour refondre et régler les clauses relatives aux chemins de fer, S.C. 1851, s. 11 and following; Acte concernant les chemins de sources de pétrole, S.C. 1861, c. 88, s. 11; Acte concernant la Compagnie hydraulique de Montréal, S.C. 1861, c. 96, s. 21 and following; Acte concernant les compagnies de chemins, C.S.L.-C. 1861, c. 70, s. 20; Acte pour faire de plus amples dispositions pour la ville de Trois-Rivières, S.C. 1857, c. 129, s. 58 and 59; Acte pour incorporer la Compagnie du chemin d'Iberville, Brome, Sheffield et Missisquoi, S.C. 1857, c. 150, s. 23 and following; Acte pour pourvoir à l'administration et à l'amélioration du havre de Montréal et au creusage du chenal pour les navires entre ce havre et le pont de Québec pour abroger l'acte maintenant en force pour lesdites fins, S.C. 1855, c. 143, s. 30; Acte pour autoriser l'établissement de compagnie à fonds social dans le Bas-Canada pour la construction des chemins macadamisés, ponts et autres travaux y mentionnés, S.C. 1849, c. 56, s. 12 and following; Acte pour incorporer la Compagnie du chemin à rails de Montréal et de Lachine, S.C. 1846, c. 82, s. 16; Ordonnance pour établir et maintenir de meilleures voies de communication entre la cité de Montréal et Chambly, S.C. 1840-1841, c. 16, s. 4; Ordonnance pour pourvoir à la construction et l'établissement de salles d'audience et prisons dans certains districts judiciaires de cette province, S.C. 1840-1841, c. 20, s. 5; Ordonnance pour pourvoir à l'amélioration des chemins dans le voisinage de la cité de Montréal et y conduisant et pour établir un fonds pour cet objet, S.C. 1840, c. 31, s. 5; Acte pour établir un marché public dans la cité de Montréal, S.C. 1829, c. 39, s. 2.*
- 29 *Acte pour étendre et amender les actes concernant les travaux publics en ce qui se rattache aux travaux reliés à la défense de la Province, S.C. 1865, c. 7, s. 1.*
- 30 *Acte des municipalités et chemins, C.S.L.-C. 1861, c. 24, s. 46 and following.*

- iv) consignment of award to: Circuit courts³¹, municipal authorities³²; and
- v) taxation of costs to other courts³³, and official arbitrators³⁴.

However, three elements of the award process were exclusive to the Superior Court:

- i) exemplification,³⁵ which was reserved to the trial division of the Superior Court;
- ii) enforcement³⁶, which was also reserved to the trial division of the Superior Court; and
- iii) the hearing of appeals, which was reserved to its appeal division, the King's Bench.³⁷

46. If exemplification can be described as an administrative rather than judicial procedure that might not fall within the exercise of judicial power by the superior court, the power of enforcement and the appeal jurisdiction are clearly in the category of judicial powers which,

³¹ *Acte pour faire de plus amples dispositions pour la ville de Trois-Rivières*, S.C. 1857, c. 129, s. 58 and 59.

³² *Acte pour incorporer la ville de Joliette*, S.C. 1863, c. 23, s. 57; *Acte des municipalités et chemins*, C.S.L.-C. 1861, c. 24, s. 46 and following; *Acte pour incorporer la ville de Sorel*, S.C. 1860, c. 75, s. 56 and 57; *Acte pour incorporer le village de Terrebonne en ville*, S.C. 1860, c. 76, s. 56 and 57.

³³ *Acte pour incorporer la Compagnie du chemin d'Iberville, Brome, Sheffield et Missisquoi*, S.C. 1857, c. 150, s. 23 and following.

³⁴ *Acte pour amender le chapitre vingt-huit des statuts refondus du Canada intitulé «Acte concernant les travaux publics en ce qui a rapport aux pouvoirs des arbitres officiels»*, S.C. 1861, c. 4, s. 1 and following; *Acte pour amender les dispositions de l'acte d'incorporation de la cité de Saint-Hyacinthe*, S.C. 1863, c. 22, s. 73(2).

³⁵ *Acte pour amender et refondre les dispositions contenues dans les actes et ordonnances concernant l'incorporation de la cité de Québec et l'aqueduc de ladite cité*, S.C. 1865, c. 57, s. 35; *Acte pour amender les actes relatifs à la corporation de la cité de Montréal et pour d'autres fins*, S.C. 1864, c. 60, s. 13 and following.

³⁶ *Acte pour étendre et amender les actes concernant les travaux publics en ce qui se rattache aux travaux reliés à la défense de la Province*, S.C. 1865, c. 7, s. 1; *Acte pour refondre et régler les clauses relatives aux chemins de fer*, S.C. 1851, c. 51, s. 11 and following; *Acte concernant les chemins de sources de pétrole*, S.C. 1861, c. 88, s. 11; *Acte concernant la Compagnie hydraulique de Montréal*, S.C. 1861, c. 96, s. 21 and following; *Acte pour incorporer la ville de Sorel*, S.C. 1860, c. 75, s. 56 and 57; *Acte pour incorporer le village de Terrebonne en ville*, S.C. 1860, c. 76, s. 56 and 57; *Acte pour autoriser l'établissement de compagnies à fonds social dans le Bas-Canada pour la construction des chemins macadamisés, ponts et autres travaux y mentionnés*, S.C. 1849, c. 56, s. 12 and following.

³⁷ *Acte pour incorporer la Compagnie de chemin à rails de Montréal à Kingston*, S.C. 1846, c. 107.

having been exclusively delegated to the Superior Court before 1867, can be considered to belong to its core jurisdiction.

47. For Upper Canada, and again for reasons noted in paragraph 14, I have examined carefully all statutes enacted and ordinances issued between 1791 and 1867 (thus including the period from 1841 onwards, when it was part of the Province of Canada) conferring to the Superior Court or other judicial or quasi-judicial institutions, powers related to the appeal or enforcement of an award of compensation arising from an expropriation claim.
48. This investigation has shown that as early as 1794, two years after Upper Canada was distinguished from the former «Province of Québec», an *Act to establish a Superior Court of Civil and Criminal Jurisdiction and to regulate the Court of Appeal*³⁸ was enacted, which established the Court of King's Bench for the Province of Upper Canada, invested with all the powers of a superior court under the Laws of England. So from then on, that court had the power of judicial review and, furthermore, unless a statute explicitly excluded an appeal from an inferior court, the Court of King's/Queen's Bench heard appeals of decisions regarding takings of land authorized by law.
49. In fact, until 1831, very few statutes enacted in Upper Canada dealt with takings of lands, and most of those were either later repealed³⁹ or were of a transitory nature, because they concerned the construction of canals completed long before 1867⁴⁰. Only two consequently remain relevant to my purposes, one that expressly confirmed jurisdiction to the King's Bench Court⁴¹, and one which devolved disputes arising from land takings to an inferior court (Justices of the Peace), without excluding the appeal jurisdiction of the Court of King's Bench Appeal division⁴².

38 S.U.-C. 1794, c. 2.

39 *An Act to regulate the laying out, amending and keeping in repair, the Public Highways and Roads within this Province*, S.U.-C. 1793, c. 4.

40 *An Act to Incorporate certain persons therein mentioned under the style and title of "The Welland Canal Company"*, S.U.-C. 1824, c. 17; *An Act to repeal parts of and to explain and amend the several Acts of this Province relating to the Welland Canal Company*, S.U.-C. 1826, c. 19; *An Act to confer upon His Majesty certain powers and authorities, necessary to the making, maintaining, and using the Canal intended to be completed under His Majesty's direction, for connecting the waters of Lake Ontario with the River Ottawa, and for other purposes therein mentioned*, S.U.-C. 1827, c. 1.

41 *An Act to afford relief to those persons who may be entitled to claim Lands in this Province, as Heirs or Devisees of the Nominees of the Crown, in cases where no Patent hath issued for such Lands*, S.U.-C. 1805, c. 2.

42 *An Act to provide for the laying out, amending and keeping in repair the Public Highways and Roads in this Province, and to repeal the Laws now in force for that purpose*, S.U.-C. 1810, c. 1.

50. Between 1831 and 1841, most statutes dealing with land takings explicitly mentioned the appeal jurisdiction of the King's/Queen's Bench⁴³, in terms such as:

«*Provided always, that any award made under this Act shall be subject to be set aside on application to the Court of King's Bench in the same manner as in ordinary cases of submission by the parties [...]*»⁴⁴

Of the statutes of that period which did not contain such explicit reference to the powers of the Court of King's/Queen's Bench, most again had expired by 1867, at least regarding their

43 *An Act to Incorporate the Niagara Harbour and Dock Compagny*, S.C. 1831, c. 13, s. 3; *An Act to Incorporate a Joint Stock Company, to Improve the Navigation of the Grand River*, S.C. 1832, c. 13, s. 9; *An Act for incorporating a Joint Stock Company, under the style and title of the President, Directors and Company, of the Port Dover Harbour*, S.C. 1832, c. 14, s. 3; *An Act granting to His Majesty a sum of Money, to be raised by Debenture, for the Improvement of the Navigation of the River St. Lawrence*, S.C. 1833, c. 18, s. 22; *An Act to Incorporate a Joint Stock Company, for the construction of a Harbour at the mouth of the Twenty Mile Creek, on Lake Ontario*, S.C. 1833, c. 23, s. 3; *An Act to provide for the erection of a Bridge across the River Trent, and for other puposes therein mentioned*, S.C. 1833, c. 34, s. 22; *An Act to Incorporate certain persons under the style and title of the Cobourg Rail Road Company*, S.C. 1834, c. 28, s. 3; *An Act to Incorporate certain persons under the style and title of the London and Gore Rail Road Company*, S.C. 1834, c. 29, s. 3; *An Act to Incorporate certain persons under the style and title of the President, Directors and Company of the Port Hope and Rice Lake Canal Company*, S.C. 1834, c. 30, s. 8; *An Act to Incorporate a Joint Stock Company for the construction of a Harbour at the Mouth of Stoney Creek, on Lake Ontario*, S.C. 1835, c. 14, s. 3; *An Act to Incorporate certain persons therein mentioned under the style and title of the President, Directors and Company, of the Grimsby Breakwater, Pier and Harbour Company*, S.C. 1835, c. 16, s. 3; *An Act to Incorporate sundry persons under the Style and Title of the Hamilton and Port Dover Rail Road Company*, S.C. 1835, c. 17, s. 3; *An Act to Incorporate certain persons therein mentioned, under the Name and Style of the Erie and Ontario Rail Road Company*, S.C. 1835, c. 19, s. 3; *An Act to incorporate the City of Toronto and Lake Huron Rail Road Company*, S.C. 1836, c. 5, s. 3; *An Act to Incorporate certain persons therein mentioned under the name and style of the Niagara and Detroit Rivers Rail Road Company*, S.C. 1836, c. 6, s. 4; *An Act to Incorporate a Company to construct a Rail Road from Burlington Bay, to Lake Huron*, S.C. 1836, c. 7, s. 3; *An Act to Incorporate certain persons under the style and title of the Hamilton Water Works Company*, S.C. 1836, c. 11, s. 2; *An Act to improve the Navigation of the Inland Waters of the District of Newcastle*, S.C. 1836, c. 39, s. 9; *An Act to Incorporate certain persons under the style and title of the President, Directors and Company, for the Fort Erie Canal Company*, S.C. 1837, c. 46, s. 8; *An Act to Incorporate a Joint Stock Company, under the style and title of the President, Directors and Company, of the Grafton Harbour*, S.C. 1837, c. 47, s. 3; *An Act to Incorporate sundry Persons under the style and title of the President, Directors and Company, of the Colbourne Harbour*, S.C. 1837, c. 48, s. 3; *An Act to Incorporate sundry Persons under the style and title of the President, Directors and Company, of the Port Darlington Harbour*, S.C. 1837, c. 49, s. 3; *An Act to Incorporate sundry persons under the style and title of the Beverly Navigation Company*, S.C. 1837, c. 51, s. 8; *An Act to Incorporate certain persons, under the style and title of the Bond Head Harbour Company*, S.C. 1838, c. 31, s. 3; *An Act to Incorporate certain persons under the style and title of "The Windsor Road Company"*, S.C. 1838, c. 33, s. 3; *An Act to Incorporate certain persons under the style and title of "The President, Directors and Company, of the Bayfield Harbour"*, S.C. 1839, c. 39; s. 3; *An Act to Incorporate certain persons therein named, under the style and title of "The Sydenham Harbour Company"*, S.C. 1841, c. 56, s. 3; *An Act to Incorporate certain persons therein mentioned, for the purpose of making a Macadamized Road from Dundas Street to the River Humber, in the Township of York*, S.C. 1841, c. 60, s. 25; *An Act to establish a Company by the name of "The Sydenham Mountain Road Company"*, S.C. 1841, c. 80, s. 24.

44 *An Act to Incorporate the Niagara Harbour and Dock Company*, S.U.-C. 1831, c. 13.

expropriation provisions⁴⁵, and the only one that had not, contained an implicit reference to a period of limitation, at least implying the possibility of appeal to the Court of the King's/Queen's Bench.

51. After 1841, from the Union of Lower and Upper Canada to Confederation in 1867, whenever a statute conferred powers related to the arbitration of claims (nomination of Arbitrators with powers to determine awards), the arbitrators were not given the explicit powers of enforcing their decision and the possibility of final appeal was reserved to the Superior Court⁴⁶, always in the same terms of what became almost a standard clause:

«Provided always that it shall and may be lawful to and for the party or parties interested in the land mentioned in the said award, or their agent by counsel at any

⁴⁵ *An Act to afford further aid to the Welland Canal Company, and to repeal part of and amend the Laws now in force relating to the said Company*, S.U.-C. 1831, c. 18; *An Act to repeal part of and amend the Charter of the Niagara Canal Company*, S.U.-C. 1832, c. 12; *An Act to authorise the Niagara Canal Company to make a Canal navigable by Schooners to lead from the Welland Canal into the River Niagara*, S.U.-C. 1834, c. 22; *An Act to incorporate certain persons therein mentioned under the style and title of the Richmond Canal Company*, S.U.-C. 1834, c. 31; *An Act to authorize the construction of a Road from Hamilton, in the Gore District, to Port Dover in the London District*, S.U.-C. 1834, c. 34; *An Act to incorporate sundry persons under the style and title of the Gananoque and Wiltsie Navigation Company*, S.U.-C. 1836, c. 8; *An Act granting a Charter to an Incorporated Company, under the style and title of the President and Directors of the London and Devonport Rail Road and Harbour Company*, S.U.-C. 1837, c. 52; *An Act granting a sum of money to Improve a Harbour in the Township of Whitby, in the Home District*, S.U.-C. 1837, c. 71; *An Act to incorporate sundry persons under the style and title of the Grantham Navigation Company, and for other purposes therein mentioned*, S.U.-C. 1838, c. 29.

⁴⁶ *An Act to incorporate certain persons under the name of The Port Credit and Hurontario Plank Road Company*, S.C. 1847, c. 89; *An Act to incorporate certain persons as The Guelph and Arthur Road Company*, S.C. 1847, c. 91; *An Act to incorporate The Scarborough and Markham Plank Road Company*, S.C. 1847, c. 92; *An Act to incorporate The Cobourg and Grafton Road Company*, S.C. 1847, c. 93; *An Act to incorporate certain persons under the name of The Streetsville Plank Road Company*, S.C. 1847, c. 95; *An Act to incorporate The Cobourg and Port Hope Company*, S.C. 1847, c. 94; *An Act to incorporate certain persons as The Guelph and Dundas Road Company*, S.C. 1847, c. 88; *An Act to incorporate a Company to extend the Great Western Railroad from Hamilton to Toronto*, S.C. 1846, c. 110; *An Act to incorporate the Peterborough and Port Hope Railway Company*, S.C. 1846, c. 109; *An Act to incorporate the Wolfe Island, Kingston and Toronto Railroad Company*, S.C. 1846, c. 108; *An Act to incorporate certain persons as The Trafalgar, Esquesing and Erin Road Company*, S.C. 1846, c. 98; *An Act to transfer to Queen's College, at Kingston, certain estates, rights, and liabilities of the University at Kingston*, S.C. 1846, c. 89; *An Act to incorporate certain persons under the name of the Albion Road Company*, S.C. 1846, c. 88; *An Act to incorporate certain persons under the name of the Etobicoke and Mono Sixth Line Road Company*, S.C. 1846, c. 83; *An Act to revive and amend the Act of Upper Canada incorporating The Cobourg Rail Road Company, and for other purposes therein mentioned*, S.C. 1846, c. 80; *An Act to incorporate certain persons under the name and style of The President, Directors and Company of the Humber Harbour and Road*, S.C. 1845, c. 95; *An Act to incorporate certain persons as The Niagara and Ten Mile Creek Plank Road Company, for the purpose of constructing a Plank Road from a certain place in Niagara to the Ten Mile Creek in Grantham*, S.C. 1845, c. 88; *An Act to establish a Company by the name of "The Sydenham Mountain Road Company"*, S.C. 1841, c. 80; *An Act to incorporate certain persons therein mentioned, for the purpose of making a Macadamized Road from Dundas Street to the River Humber, in the Township of York*, S.C. 1841, c. 60; *An Act to incorporate certain persons therein named, under the style and title of "The Sydenham Harbour Company"*, S.C. 1841, c. 56.

time within the two terms aforesaid, after the same hath been made and the amount of the value awarded tendered, to move the said Court of Queen's Bench to set aside such award for corruption, or any other matter or thing for which awards are now subject to be impugned by law»

Even more explicitly, the *Municipal Institutions of Upper-Canada*⁴⁷ provides the devolution of expropriation powers to municipalities, according to a specific procedure, including:

«Every award made under this Act [...] shall be subject to the jurisdiction of any of the Superior Courts of Law or Equity, the Court shall consider not only the legality of the award but the merits as they appear from the proceedings so filed as aforesaid, and may call for additional evidence to be taken in any manner the Court direct, and may, either without taking such evidence or after taking such evidence, set aside the award, or remit the matters referred or any of them from time to time to the consideration and determination of the same arbitrators, or to any other person or persons whom the Court may appoint as prescribed in the "Common Law Procedure Act," and fix the time within which such further or new award shall be made, or the Court may itself increase or diminish the amount awarded or otherwise modify the award, as the justice of the case may seem to the Court to require."⁴⁸

52. Consequently, my research revealed that, as was the case in Lower Canada, these judicial powers were exclusively reserved to the Superior Court of Upper Canada.
53. For Nova Scotia, and again for reasons noted in paragraph 14, I have examined all statutes enacted and ordinances issued between 1758 and 1867 conferring to the Superior Court or other judicial or quasi-judicial institutions, powers related to the appeal or enforcement of an award of compensation arising from an expropriation claim.
54. Here again, my investigation has shown that well before Confederation, an Act *Of the Supreme Court and its officers*⁴⁹ was enacted, which provided that:

47 C.S.C. 1859, c. 54.

48 *Id.*, s. 358(14).

49 Quoted *supra*, fn. 16.

«The Supreme Court shall have within this province the same powers as are exercised by the courts of Queen's Bench, Common Pleas and Exchequer in England.»⁵⁰

So from then on, that court, like its counterparts in Lower and Upper Canada, had the power of judicial review and furthermore, unless a statute explicitly excluded an appeal from an inferior court, the Court of King's/Queen's Bench heard appeals of decisions regarding takings of land authorized by law.

55. Indeed, with one exception that provides for the General Sessions of the Peace to resolve disputes arising from takings in the context of building roads and bridges but without excluding an appeal to the King's Bench Court⁵¹, all statutes from that period relevant to takings of land in Nova Scotia referred explicitly to the jurisdiction of the Supreme Court of that province in such matters⁵².
56. Thus during that period in Nova Scotia, whenever a statute conferred powers related to the arbitration of claims (nomination of Arbitrators with powers to determine awards), the arbitrators were not given the explicit powers of enforcing their decision and the possibility of final appeal was reserved to the Superior Court⁵³, again always in terms that, although of

⁵⁰ *Id.*, s. 1

⁵¹ *An Act in amendment of the Act relating to Highways, Roads and Bridges*, S.N.S. 1834, c. 79.

⁵² *An Act for appointing Commissioners to determine upon a proper situation, in the town of Halifax, and to purchase Lots of Ground, if necessary, to erect a Public Building, for the accommodation of the General Assembly, Court of Chancery, Supreme Court, and Court of Admiralty, and Public Officers, and for procuring plans and estimates for a building hereafter to be erected for the residence of the Governor, Lieutenant-Governor, or Commander in Chief, for the time being*, S.N.S. 1797 c. 1; *An Act for the appointment of Commissioners of Sewers, prescribing their power and authority, and for repealing the Acts now in force relating to that Office*, S.N.S. 1823, c. 13; *An Act in addition to the Act, entitled, An Act to authorise the Incorporation of a Company, for making a Canal by the River and Lakes of the Shubenacadie*, S.N.S. 1827, c. 17; *An Act concerning the Common of Halifax*, S.N.S. 1829, c. 32; *An Act for increasing the Capital Stock of the Shubenacadie Canal Company, and the number of shares therein, for conferring further Powers on that Corporation, and for other purposes*, S.N.S. 1837 c. 66; *An Act to authorize the Incorporation of Company for making a Navigable Ship Canal across the Isthmus of Cumberland, in Nova Scotia*, S.N.S. 1838, c. 13.

⁵³ *An Act to incorporate the Dartmouth Water and Gas Company*; S.N.S. 1867, c. 55; *An Act to incorporate the Union Copper Mining Company*, S.N.S. 1867, c. 60; *An Act to incorporate the Halifax Railroad Company*, S.N.S. 1863, c. 83; *An Act to incorporate "The Cheticamp Copper Mining and Smelting Company"*, S.N.S. 1864, c. 41; *An Act to incorporate the International Coal and Railway Company*, S.N.S. 1864, c. 42; *An Act to incorporate the Broad Cove Mining Company*, S.N.S. 1864, c. 43; *An Act to incorporate the Central Mining Company*, S.N.S. 1865, c. 45; *An Act to incorporate the Caledonia Coal Mining Company*, S.N.S. 1865, c. 46; *An Act to incorporate Clyde Coal and Mining Company*, S.N.S. 1865, c. 48; *An Act to incorporate the Boston and Bridgeport Coal Mining Company*, S.N.S. 1864, c. 39;

course different from those of the aforementioned Upper Canada statutes, were similar from one statute to the other and also became almost a standard clause. These statutes invariably provide for the appointment of arbitrators who are empowered to determine an award but not explicitly to enforce it⁵⁴, and such award remains subject to a final appeal in the Superior Court. Moreover, in that Colony, judicial control of the expropriations was explicitly inbedded in the procedure prescribed for expropriations, which began with:

«a petition [...] to anyone of the juges of the supreme court [...] whereupon such judge [...], being satisfied that the lands are required and are not more extensive than be reasonably necessary, shall [...]»⁵⁵

57. Consequently, my research revealed that, as was the case in Lower and Upper Canada, these judicial powers were exclusively reserved to the Superior Court of Upper Canada.

Part III: The *ratione personarum* jurisdiction of the superior courts at the time of Confederation, more particularly regarding the rights of foreigners and foreign corporations

58. Around the time of Confederation, foreigners, both natural aliens and corporations, were allowed to and did engage in a variety of business activities in the four confederating provinces. The capacity of aliens to transact business arose by virtue of the regulatory

An Act to incorporate the Sea Coal Bay Mining Company, S.N.S. 1864, c. 40; *An Act to incorporate the Sydney and Louisburg Railway Company*, S.N.S. 1865, c. 50; *An Act to incorporate the Boston and Acadia Coal Mining Company*, S.N.S. 1865, c. 62; *An Act to incorporate the Cambridge Coal Mining Company*, S.N.S. 1865, c. 63; *An Act to incorporate the Acadia Coal Company*, S.N.S. 1865, c. 64; *An Act to incorporate the Cape Breton Coal Mining Company*, S.N.S. 1865, c. 71; *An Act to incorporate the Mabou Coal Mining Company*, S.N.S. 1865, c. 72; *An Act to incorporate the Boston Coal Mining Company*, S.N.S. 1865, c. 81; *An Act to incorporate the Richmond Coal Mining Company*, S.N.S. 1866, c. 80; *An Act to incorporate the St. Lawrence Coal Company*, S.N.S. 1866, c. 81; *An Act to incorporate the East River Coal Mining Company*, S.N.S. 1866, c. 82; *An Act to incorporate the Montreal and Pictou Coal Company*, S.N.S. 1866, c. 83; *An Act to incorporate the New York and Cape Breton Coal Company*, S.N.S. 1866, c. 84; *An Act to incorporate the Merrigomish Coal Mining Company*, S.N.S. 1866, c. 107; *An Act to incorporate the Collins Coal Company*, S.N.S. 1866, c. 85; *An Act to incorporate the Aconi Coal Company*, S.N.S. 1866, c. 108; *An Act to incorporate the Intercolonial Coal Mining Company*, S.N.S. 1866, c. 110; *An Act to incorporate the Mira Bay Coal Company*, S.N.S. 1866, c. 111; *An Act to incorporate the Washington Pier and Harbor Company*, S.N.S. 1866, c. 112; *An Act to incorporate the "St. Lawrence and Bay of Fundy" Canal Company*, S.N.S. 1867, c. 38; *An Act to incorporate the Pictou Mining Company*, S.N.S. 1867, c. 44.

54 In one case, this enforcement is even explicitly reserved for the Superior Court : *An Act to incorporate the Dartmouth Water and Gas Company*, S.C. 1867, c. 55, s. 13.

55 For an example of this standard clause, see: *An Act to incorporate «The Cheticamp Copper Mining and Smelting Company»*, S.C. 1867, c. 41, s. 9.

framework that was in force at that time. Not surprisingly, one of the essential prerequisites for transacting business in the mid-19th century was the legal capacity to deal in real property. Laws in at least three provinces expressly gave aliens this right.

59. In the province of Canada encompassing Lower and Upper Canada, the *Act respecting the Naturalization of Aliens*, introduced in 1849⁵⁶, provided that:

Every Alien shall have the same capacity to take, hold, possess, claim, recover, convey, devise, impart and transmit Real Estate in all parts of this Province, as natural-born or Naturalized Subjects of Her Majesty (s. 9).

This provision was further clarified by statute assented in 1865, whereby it was deemed to allow the aliens to transmit and take real property in the Province of Canada by descent⁵⁷.

60. Likewise in Nova Scotia, chap. 34 of the Revised Statutes of Nova Scotia *Of the Privileges and Naturalization of Aliens*⁵⁸ provided that “[a]liens may have, hold, convey and transmit real estate.” Inevitably, transaction of business by aliens and foreign corporations gave rise to all sorts of disputes which necessitated resort to the court system for their resolution. The laws of pre-Confederation provinces either expressly or implicitly conferred on foreign corporations the capacity to sue and to be sued in local courts. Thus in Lower Canada, under the *Act respecting the right of action by and against Foreign Executors, Administrators and Corporations* of 1858,

All Joint Stock or other companies or bodies politic and corporate, who have a legal capacity in the jurisdiction wherein they were respectively created and recognized, and all persons on whom by any properly constituted authority or law, (whether of the heretofore Province of Upper Canada, or of the Imperial Parliament of Great Britain and Ireland, or of the United States of America, or of any of them, or of any other foreign state, colony or dominion) the right or power of suing or being sued has been conferred, shall have the like capacity in Lower Canada, to bring and defend all actions, suits, plaints, bills and proceedings whatsoever, - and shall by and before all Courts, Judges and Judicial authorities whatever in Lower Canada, be held in law to be capable of suing and being sued, in the same name, manner and way as

⁵⁶ C.S.C. 1859, c. 8.

⁵⁷ *An Act to enable aliens to transmit and take real property in this Province by descent*, S.C. 1865, c. 16.

⁵⁸ R.S.N.S. 1864, c. 34, s.1.

they could or might respectively be within the jurisdiction wherein such . . . persons, bodies politic and corporate, Joint Stock Companies or Associations of persons were respectively created, erected or recognized. (Quebec: Law Printer to the Queen), 1861⁵⁹

61. Nova Scotia statutes did not single out foreign corporations but they were obviously covered by the general language of the relevant enactments. Thus, chapter 87 *Of General Provisions respecting Corporations* of the Revised Statutes of Nova Scotia, provided that “[a]ll corporations shall where no other provision is specially made, be capable in their corporate name to sue and be sued, to prosecute and defend actions.”⁶⁰
62. The policy rationale behind the conferral of extensive legal rights on aliens and foreign corporations, such as to deal in real property and sue and be sued in local courts, was well expressed shortly after Confederation when in 1874 the Dominion Parliament enacted an *Act to authorize corporations and institutions incorporated without the limits of Canada to lend and invest moneys therein*⁶¹. Such act was needed because the regulatory framework then in force did not envisage a procedure for granting licenses to lending institutions other than banks, incorporated outside the Dominion. For my purposes this Act is quite interesting because of the language of its preamble which in relevant parts highlighted the rationale for this statute:

it would greatly tend to assist the progress of public works and other improvements now going on within the Dominion of Canada, if facilities were offered to institutions and corporations incorporated without the Dominion of Canada for the purpose of lending moneys, to lend their money within the Dominion . . .

63. The thesis that the legal framework in force in the confederating provinces prior to Confederation made the domestic law applicable and the domestic courts available to foreign business actors is strongly supported by the decision of the Supreme Court of Canada in *Canadian Pacific Railway Company v. The Western Union Telegraph Company*⁶². That case arose out of a dispute involving an American telegraph company which had been carrying on business in New Brunswick and Nova Scotia “without let or hindrance” and

59 C.S.L.-C. 1858, c. 91.

60 R.S.N.S. 1864, c. 87.

61 S.C. 1874, c. 14, assented to 26th may, 1874.

62 (1889) 17 S.C.R. 151.

had been taxed by the provincial authorities for 20 years before 1869 when the cause of action arose. Writing for the court in that case, Ritchie, CJ stated that:

the comity of nations and the express legislation of New Brunswick recognizes the right of foreign corporations to carry on business and make contracts outside the country where incorporated, . . . not inconsistent with the local laws of the country in which the business is carried on . . .

64. From the survey above it is clear that the law of these three provinces around the time of Confederation granted to natural aliens and foreign corporations extensive rights for doing business in their territory and allowed them access to the domestic dispute resolution mechanisms and procedures.⁶³ Thus, the legal framework in force in the pre-Confederation provinces provided a mechanism for the resolution of disputes not only between aliens/foreign corporations and domestic private parties but also between aliens/foreign corporations and the Crown acting its governmental capacity (*juri imperii*). Such disputes were to be resolved in the superior courts.

65. I make this affidavit in support of an application and for no other or improper purpose.

AFFIRMED before me at the City of Montreal, in the Province of Quebec, this 12th day of May, 2003.

Pierre Tardif
A commissioner for taking affidavits, etc.
BAR OF QUEBEC : 177512-0

Andrée Lajoie
ANDRÉE LAJOIE

⁶³ See for example, Robertson's discussion of the question of whether aliens could avail themselves of remedies concerning the expropriation of property. His answer is unambiguously affirmative. He writes that A[t]here must, of course, be certain limitations in the right of an alien individual or corporation to adopt this procedure, due to the nature of the subject-matter... in connection with contracts made abroad and land situated abroad; but these limitations apply just as much to petitions of right lodged by British subjects. G. ROBERTSON, *op. cit.*, fn. 11.

THE COUNCIL OF CANADIANS et al

v. HER MAJESTY IN RIGHT OF CANADA, AS REPRESENTED
BY THE ATTORNEY GENERAL OF CANADA

Court file no. 01-CV-208141

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

AFFIDAVIT OF ANDRÉE LAJOIE

SACK GOLDBLATT MITCHELL
Barristers and Solicitors
20 Dundas Street West
Suite 1130
Toronto, Ontario
M5G 2G8

Steven Shrybman
LSUC No. 20774B
(416) 977-6070
(416) 591-7333 (Facsimile)

Solicitors for the Applicants