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The Potential Impact of a Quebec Superior Court Challenge on Access to Justice in Alberta

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Blog Post Commented On: "Clash of Courts", *Double Aspect* Blog by Leonid Sirota, 23 July 2017

In his brief post entitled "Clash of Courts: Senior Superior Court judges are suing Québec over its provincial court's jurisdiction; other provinces will be affected if they succeed," Leonid Sirota focused his readers' attention on a law suit brought by the Chief Justice, Senior Associate Chief Justice, and Associate Chief Justice of Quebec's Superior Court (on behalf of all of the judges of that court), against the provincial government, noting that it has received little attention outside of Quebec, and certainly much less than it should. The judges of Quebec's Superior Court are seeking a declaration that much of the jurisdiction of that province's small claims court, the Court of Quebec, is unconstitutional because it violates section 96 of the *Constitution Act, 1867* by granting the Court of Quebec exclusive jurisdiction to hear cases where the amount claimed is more than $10,000 and granting it powers of judicial review over provincial administrative tribunals. I agree that the case — a startling claim by a group of litigants that need to be taken seriously (even if their method for getting the issue before the courts, i.e., before themselves in the first instance, is unorthodox) — deserves to be noticed and that other provinces, including Alberta, will be affected if their claim is successful.

The Court of Quebec currently hears cases where the claims are for less than $85,000. The Superior Court judges' law suit argues that the small claims court cannot hear anything involving a claim of more than $10,000. The $10,000 figure is based on the argument that at the time of Confederation, section 96 courts could hear civil matters starting at $100, and that this figure adjusted for inflation is less than $10,000. Any ability of provincial courts to hear claims of over $10,000 would usurp the jurisdiction of section 96 courts. In other words, cases with claims between $10,000 and $85,000 have to be heard by the Superior Court because of the division of powers between the federal and provincial governments embodied in section 96 of the *Constitution Act, 1867*. That section looks deceptively simple:

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

The judges of the Superior Court of Quebec are appointed by the federal government (as are the judges of the superior courts in all provinces, including those of the Court of Queen's Bench of Alberta) while those of the Court of Quebec are appointed by the provincial government (as are the judges of the inferior or provincial courts in all provinces pursuant to section 92(14) of the *Constitution Act, 1867*, including the Provincial Court of Alberta – Civil (commonly known as

the small claims court)). For a brief explanation of the seemingly innocuous section 96, see "The Remarkable Evolution of Section 96 of the Constitution Act, 1867" by Paul Daly.

As Daly notes, section 96 is important doctrinally because it acts as a brake on provinces creating new decision-making bodies or conferring new powers on existing bodies. The law suit by the Quebec Superior Court judges appears to be an example of this. And Sirota's initial impression is that the Superior Court judges have a strong case.

The consequences of a win by the Quebec Superior Court would be troubling in Alberta and elsewhere. As Sirota notes in his post, the principles the judges of the Superior Court of Quebec are relying on apply across Canada. If the judges win, the jurisdiction of the small claims courts in Alberta, and elsewhere, would shrink. For example, the Alberta upper limit of $50,000 would have to be decreased.

And it is not just Alberta. British Columbia has just increased its upper limit to $35,000, as of June 1, 2017 (and diverted cases claiming less than $5,000 to their new online Civil Resolution Tribunal): see Important Changes to Small Claims Court. Ontario increased its small claims court upper limit from $10,000 to $25,000 in 2010, after Nova Scotia and the Yukon both increased their maximum to $25,000 in 2006.

When the upper limit on Alberta's small claims courts' jurisdiction was raised from $25,000 to $50,000 on August 1, 2014, the increase was promoted by the government of Alberta as an increase in access to justice. See the then Minister of Justice's press release, "Higher small claims court limit increases access to justice." Raising the monetary limit in the Provincial Court's civil division was seen as a way to "allow more people to competently represent themselves without the expense of a lawyer" (Jason Van Rassell, "Alberta may double limit to $50,000 for small claims court," *Calgary Herald*, 22 August, 2013).

A report of the union des consommateurs on "Consumers and Access to Justice: One-Stop Shopping for Consumers," June 2011, at 21-24, looked at small claims courts in Quebec and their linkages with access to justice:

> By lightening court procedures and formalities and thus reducing legal expenses and waiting times, small claims divisions aim to make legal proceedings more accessible to citizens who make more modest monetary claims.
>
> The characteristics obviously vary according to the jurisdictions, but generally, the various small claims court systems feature oral procedures, simplified rules of evidence, no obligation to be represented by a lawyer, and a certain geographic proximity.

As *La Presse* noted in "Les juges de la Cour supérieure lancent une poursuite", the judges of the Superior Court of Quebec launched their law suit to reduce the jurisdiction of the small claims court in the midst of a crisis in the justice system. Since Alberta increased its small claims court limits in 2013, concerns about access to justice and about self-represented litigants have only increased. See the Canadian Forum on Civil Justice and their Access to Justice Blog and Cost of Justice project, for example, as well as the work of the National Self-Represented Litigants Project (NSRLP).

This is definitely a case to keep an eye on. The judges are relying on a principle of law, a constitutional provision called one of the "principal pillars in the temple of justice" that legislatures may not undermine: *Toronto Corporation v York Corporation*, [1938] AC 415 at 426 (PC), per Lord Atkin (as cited by Daly). But their argument is aimed at reforms of the civil justice system intended by the provinces to increase access to justice.

Daly pointed out that the Supreme Court of Canada's decision in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 SCR 31, 2014 SCC 59 (CanLII), was "ample proof of the dramatic increase in the scope of s. 96 and its effect on the administration of justice in Canada." Perhaps the outcome of this law suit by Quebec's Superior Court judges will be just as dramatic, but in the nature of a tragedy for access to justice.

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