

The Court of Québec's jurisdiction over civil matters must be revised, says the SCC

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In a ruling dated [June 30, 2021](#), the Supreme Court of Canada confirmed that the exclusive jurisdiction of the Court of Québec to hear civil cases in which the value is less than \$85,000 oversteps the bounds of constitutionality. Writing for the majority, the Honorable Justices Côté and Martin held that article 35 of the Québec *Code of Civil Procedure* (CCP) creates a prohibited “shadow” court that impinges on the Québec Superior Court’s core jurisdiction.^[1] The appeals were accordingly dismissed. ^[2]

Context

In August 2017, the Québec Government availed itself of the referral process to seek the opinion of the Québec Court of Appeal on two specific questions.

The first question concerned the monetary jurisdiction of the Court of Québec in civil matters in which the value is less than \$85,000. The Court of Appeal concluded that the legislature may validly increase the amount of the Court of Québec’s exclusive monetary jurisdiction as long as the increased amount does not effectively alter the Superior Court’s inherent jurisdiction to hear “substantial claims”. The Court of Appeal went on to determine that a limit of less than \$85,000 was excessive and encroached on the protected sphere of the Superior Court. It concluded that the ceiling should be set between \$55,000 and \$70,000.

The second question concerned the constitutionality of applying the principle of judicial deference to appeals to the Court of Québec in the context of certain administrative decisions. The Court of Appeal held that the application of judicial deference to these appeals is compatible with section 96 of *The Constitution Act, 1867* (the Constitution), as the Superior Court nevertheless retains its superintending and reforming power over administrative decisions. However, this second question has become moot as a result of the decision in *Vavilov*^[3] and the coming into force of article 83.1 of the Québec *Courts of Justice Act*. Thus, the Supreme Court refrained from addressing it.

For additional information on the Québec Court of Appeal’s decision, please refer to our previous [Osler Update](#)

Reasons and conclusions of the Supreme Court of Canada

Two primary tests have arisen from the case law to assess whether a grant of jurisdiction is valid under section 96 of the Constitution. First, there is the historical test to determine whether the grant of jurisdiction affects a jurisdiction that has historically been exercised by the superior courts and cannot be granted to another court.^[4] Second, there is the core jurisdiction test, which aims to ensure that superior courts are not impaired in such a way that they are unable to play their role as the cornerstone of the Canadian unitary justice system and the primary guardians of the rule of law.^[5] Such an impairment would occur, for instance, if the essential powers and areas of jurisdiction of superior courts were transferred exclusively to another court.

The Historical Test

The historical test involves a three-step inquiry:

1. Does the transferred jurisdiction conform to a jurisdiction that was dominated by superior, district or county courts at the time of Confederation?
2. If so, was the jurisdiction in question exercised in the context of a judicial function?
3. If the first two questions are answered in the affirmative, is the jurisdiction either subsidiary or ancillary to an administrative function or necessarily incidental to the achievement of a broader policy goal of the legislature?

In the present case, the Court determined that article 35 of the CCP transfers to the Court of Québec jurisdiction over civil disputes concerning contractual and extracontractual matters. Turning to the first step of the inquiry, the Court found that, at the time of the Confederation, the inferior courts of three of the four founding provinces had sufficient practical involvement in matters relating to contractual and extracontractual matters. Thus, the jurisdiction transferred to the Court of Québec was not one which was dominated by superior, district or county courts at the time of Confederation. Since the answer to the first question is no, the inquiry stops there. The historical test does not lead to the conclusion that article 35 of the CCP is unconstitutional.

However, even if a grant of jurisdiction passes the historical test, it does not necessarily follow that it is constitutional. Notably, the historical test does not deal effectively with broad transfers of jurisdiction between levels of the judiciary, like the one at issue. Therefore, the impact on the core jurisdiction of superior courts must also be assessed.

The Core Jurisdiction Test

The Supreme Court proposes a multi-factored approach and outlines a non-exhaustive list of six factors which must be considered, in relation to one another, to decide whether the transfer of jurisdiction effected by article 35 of the CCP impermissibly infringes on the Superior Court's general private law jurisdiction:

1. The scope of the jurisdiction being granted;
2. Whether the grant is exclusive or concurrent;
3. The monetary limits to which it is subject;
4. Whether there are mechanisms for appealing decisions rendered in the exercise of the jurisdiction;

5. The impact on the caseload of the Superior Court of general jurisdiction; and
6. Whether there is an important societal objective.

While the Court of Appeal confined its analysis to the third factor, namely the monetary limit imposed by article 35 of the CCP, the Supreme Court warns against transforming the analysis into a purely mathematical operation. There is certainly value in the monetary factor, as it allows the analysis to be anchored in a quantitative range. However, the mere fact that a monetary limit exceeds historical ceilings — as is the case in the present situation — will not be, in and of itself, determinative of the issue of constitutionality. It represents but one of a number of factors which must be weighed in relation to one another, in order to properly assess whether and to what extent the role of the superior courts has been undermined in any given situation.

In the present case, the monetary ceiling of less than \$85,000 represents an increase of approximately 29% over the historical ceiling. The Supreme Court was of the opinion that such an increase is not manifestly disproportionate. However, surrounding factors, namely the broad scope of jurisdiction granted, the exclusive nature of transfer and the absence of an accessible appeal mechanism to the Superior Court, weighed heavily in favour of a finding that article 35 of the CCP is indeed incompatible with section 96 of the Constitution. As a result, the Court concluded that this article impermissibly invades the Superior Court's jurisdiction over private law matters.

The Consequences on proceedings before the Court of Québec

The Court's declaration that article 35 of the CCP is unconstitutional is suspended for a period of 12 months. In the interim, article 35 is considered as being valid. Therefore:

- An originating application filed in the Court of Québec before or during the suspension period can be pursued to the conclusion of the proceedings, even if the proceedings conclude after the suspension period has expired.
- *Res judicata* precludes the reopening of cases that were within the jurisdiction of the Court of Québec pursuant to article 35 of the CCP, and that have already been decided by that court.
- The *de facto* doctrine will also save rights, obligations and other effects which have arisen out of actions performed pursuant to article 35 of the CCP by courts, judges, persons exercising statutory powers, and public officials.

Comments

All in all, the Supreme Court and the Court of Appeal arrived at the same conclusion. Both courts concluded that article 35 of the CCP impinges on the Superior Court's core jurisdiction and is contrary to section 96 of the Constitution. However, they arrived at this conclusion by different reasoning.

The Court of Appeal looked first and foremost at the historical monetary jurisdiction of the Court of Québec and concluded that the province should limit this jurisdiction to civil cases in which the value is, at most, between \$55,000 and \$70,000. Following this reasoning, the province knew precisely how to ensure the constitutionality of article 35 of the CCP: it needed to lower the monetary limit so that it fell within the range set out by the Court of Appeal.

The Supreme Court, on the other hand, preferred a more nuanced reasoning involving a multi-factored analysis, with the monetary jurisdiction of the Court of Québec being only one

factor amongst others. Under this reasoning, the legislature has greater flexibility in redefining the jurisdiction of the Court of Québec, but this flexibility comes at the cost of uncertainty as to what the province must do to circumscribe the jurisdiction of the Court of Québec in a manner that will satisfy this multi-factored approach. The legislature may very well need the entire 12-month suspension period to carefully weigh its options in light of the Supreme Court's latest decision.

Notwithstanding the reasons, several will criticize the result, which may be seen as further undermining the access to justice at a time when this issue is seen as one of the most important challenges our judicial system has to address.

[1] Unless stated otherwise, all references to the Supreme Court or the Court means the majority decision.

[2] The Honorable Chief Justice Wagner and Justice Rowe dissented in part and Justice Abella dissented.

[3] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[4] The historical test was developed in *Re Residential Tenancies Act, 1979* [1981] 1 S.C.R. 714.

[5] The core jurisdiction test was developed in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725.