Québec’s New *Code of Civil Procedure* – Highlights and Preliminary Comments

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On February 20, 2014, the Québec National Assembly unanimously adopted *Bill 28* establishing the new *Code of Civil Procedure*, which will eventually replace the current Code. The Bill, introduced on April 30, 2013, is the result of extensive reform initiated almost 15 years ago by the Québec legislature. Scheduled to come into force in autumn 2015, the new Code will result in substantial changes that could have a major impact on Québec’s legal landscape.

The new Code aims to modernize and simplify the pre-trial process, trials and appeals. It emphasizes cost reduction, flexibility and proportionality. It is intended to encourage parties to collaborate in completing the court record, and provides for in-depth judicial supervision through case management. It also places a higher importance on alternative modes of dispute prevention and resolution, and encourages parties to consider such options before referring their disputes to the courts.

**Overview of the Upcoming Changes**

The most significant proposed changes include:

1. **Revised jurisdictional thresholds.** The jurisdiction of the Court of Québec, currently at $70,000, will be raised to $85,000 and will be adjusted periodically by effect of law (art. 35). The jurisdiction of the small claims division will be raised to $15,000 (art. 536).

2. **Recourse to private dispute prevention and resolution.** The parties will be obliged to “consider” recourse to private modes of dispute prevention and resolution (notably mediation, negotiation and arbitration) before referring disputes to the courts (art. 1). State and public bodies will also, if they consider it advisable, be able to avail themselves of private modes of dispute prevention and resolution prior to referring disputes to the courts (art. 75). It should be noted that the new Code refers only to the duty to “consider” such private modes, without requiring parties to utilize them.

3. **Codification of mediation and reform of arbitration rules.** The new Code codifies the rules applicable to mediation (art. 608 and following) and reforms the rules applicable to arbitration (art. 620 and following). It also provides specific measures for international arbitration (art. 649 and following).

4. **Pre-court protocol.** The new Code indicates that the parties may, even before a proceeding has been instituted, co-operate in the early stages of preparation by agreeing on a pre-court protocol (art. 2).

5. **Gathering and preservation of evidence before the institution of proceedings.** The new Code provides elaborate mechanisms for the gathering and collection of evidence even before judicial proceedings have begun (art. 253 and following).

6. **Obligation to preserve evidence.** The new Code imposes an obligation upon the parties to preserve relevant evidence (art. 20).

7. **Flexibility and proportionality.** The parties will have control over the conduct of their own case, but will be required to confine the case to “what is necessary to resolve the dispute” (art. 19). The importance of the principle of proportionality which governs current civil procedure, is further reiterated in the new Code (art. 18).
8. Obligation to co-operate and to communicate. The new Code imposes upon parties a positive obligation to “co-operate and, in particular, to keep one another informed at all times of the facts and particulars conducive to a fair debate [...] They must, among other things, at the time prescribed by [the new Code] or determined in the case protocol, inform one another of the facts on which their contentions are based and of the evidence they intend to produce” (art. 20).

9. Simplification of demands made in the course of the proceeding. Demands made to the court in the course of a proceeding can be filed in writing or presented orally during a hearing, if it concerns a case management measure and if the judge so requests or the judge and the parties so agree. Demands can also be recorded in a note, a letter or a notice (art. 101).

10. Case protocol. The current agreement between the parties as to the progress of the proceeding will become a more fully developed “case protocol”. Under the protocol, the parties must:

- Set out the agreements and the undertakings of the parties and the issues in dispute;
- Indicate what consideration was given to private modes of dispute prevention and resolution;
- Describe the steps to be taken to ensure the orderly progress of the proceeding and assess the time that completing these steps could require as well as foreseeable legal costs; and
- Set deadlines to be met within the strict time limit for trial readiness.

Moreover, the case protocol covers:

- Preliminary exceptions and safeguard measures;
- The advisability of holding a settlement conference;
- Pre-trial written or oral examinations, their necessity and, if any are to be conducted, their anticipated number and length;
- The advisability of seeking one or more expert opinions, their nature and, as the case may be, the reasons why the parties do not intend to jointly seek an expert opinion;
- The defence, whether it will be oral or written and, if written, the time limit for filing it;
- The procedure and time limit for pre-trial discovery and disclosure;
- Foreseeable incidental applications;
- The extension, if necessary, of the time limit for trial readiness; and
- The means of notification the parties intend to use.

However, if warranted by the complexity of the case or by special circumstances, the parties may agree on a complementary protocol for points that cannot be determined at the case protocol stage, or identify certain points on which they were unable to reach an agreement (art. 148). The protocol must be filed with the court office within 45 days following the service of summons (art. 149).

11. Retention of the time limit for trial readiness. The new Code maintains the six-month time limit to ready a case for trial (or one year in family matters), but the time limit will begin to run from the date on which the protocol is presumed to be accepted, from the case management conference following the filing of the protocol, or from the date on which the tribunal establishes such delay. The time limit may be extended by the court at the case management conference if warranted by the high level of complexity of the case or special circumstances. The parties may subsequently ask for an extension of the time limit if it can be shown that it was impossible, at the time of the conference, to properly assess the time necessary to ready the case for trial, or that unforeseeable circumstances have since occurred (art. 173).
12. Greater involvement of the courts in case management. Once the case protocol is filed, the parties may be convened to a case management conference. In the context of this conference, the court will be empowered to order the management measures it deems appropriate and, if it considers it useful, require undertakings from the parties as to the further conduct of the proceeding, or subject the proceeding to certain conditions (art. 154 and following).

The new Code grants courts very broad case management powers, including measures to simplify or expedite the proceeding and shorten the trial by ruling, assessing the scope of expert evidence, and determining conditions related to pre-trial examinations, notably their number and length when it appears necessary for them to exceed the time prescribed by the new Code (see below) (art. 159).

A decision or measure regarding case management made in the course of the proceeding will not be subject to appeal, unless it appears unreasonable in light of the guiding principles of procedure.

13. Financial sanctions where a protocol is not respected. The case protocol will be binding upon the parties under penalty, among other sanctions, of paying the legal costs incurred by any of the other parties or by third persons as a result of a failure to comply (legal costs are discussed below) (art. 150). The new Code further provides that a court will be empowered to punish significant compliance breaches in the conduct of the proceeding by ordering a party to pay another party an amount that it considers fair and reasonable to cover the professional fees of the other party’s lawyer incurred in relation to the breach (art. 342).

14. Complete reform of pre-trial examinations. The new Code abandons the distinction between examinations before and after defence, and makes reference to a “pre-trial examination”. The terms, as well as the number and length of the examinations will need to be specified in the case protocol (art. 221). These examinations will be subject to the following rules:

- **Transcripts under the control of the interrogating party.** While the draft bill introduced in 2011 provided that each party could file transcripts of the examination, the new Code, as adopted, reaffirms the current regime and provides that only the interrogating party may file all or excerpts of the transcripts of its examination. As is currently the case, another party may, however, ask the court to order the production of any other excerpt that cannot be dissociated from an excerpt that has already been produced (art. 227).

- **Objections taken under reserve.** Prior to an examination, the parties may submit anticipated objections in order to have them decided or to obtain directives. If an objection is raised during the examination, including objections based on relevance, the witness will nevertheless be bound to answer. A witness may, however, refrain from answering if the objection pertains to the fact that the person examined cannot be compelled, or relates to a fundamental right (for example, solicitor-client privilege) or to an issue raising a substantial and legitimate interest. Such objections must, however, be submitted to a judge within the next five days for a decision. All other objections are recorded for a decision by the court at trial (art. 228).

- **Limit of five hours per examination.** The duration of the examination will be limited to five hours. In family matters, or in cases where the value in dispute is less than $100,000, the duration will be limited to three hours. The parties may, in the course of the examination, agree to extend its length from five to seven hours or from three to four hours. Any other extension will require the authorization of the court (art. 229).

- **Written examinations.** A party will be able to conduct a written examination on the facts relevant to the dispute, and require the other party to answer within a specified time, which cannot be shorter than 15 days or longer than a month. Unlike an oral examination, a written examination may be filed in the court record by either of the parties (art. 223 and following).

15. Expert evidence reform. The new Code makes significant changes to the rules relating to expert evidence. These reforms focus on the number of experts, their role and their participation in the trial.

- **Mission of the expert.** The new Code codifies the well-established principle that the primary mission of the expert is to enlighten the court in its decision-making, rather than to represent one party or the other (art. 231).

- **Joint expertise.** The new Code aims to promote, as much as possible, recourse to a common expert shared by the parties (art. 148).
A single expert per area or matter. The parties will be unable to submit more than one expert opinion per area or matter unless authorized by the court (art. 232).

Disclosure of instructions. The parties must disclose to the court the instructions given to the expert (art. 232).

Meeting between experts. The new Code encourages and permits the court to order a meeting of experts to reconcile their opinions, identify points on which they differ, and prepare an additional report on those points (art. 240).

Examinations during the trial. The 2011 draft bill provided that a party would be unable to examine an expert it had appointed, unless so authorized by the court, and limited the right to cross-examination. However, while the new Code reiterates that the report of an expert stands in lieu of their testimony, it allows a party to examine an expert it has appointed to in order to clarify points covered in the expert report, or to obtain the expert’s opinion on new evidence. An examination for any other purpose requires the authorization of the court. A party with adverse interests may cross-examine the other party’s expert, given that the restrictions stipulated in the 2011 draft bill are not included in the adopted Bill (art. 294).

16. Testimony by written statement. The new Code provides that parties will be entitled to produce a written statement in lieu of oral evidence, when such testimony is intended to establish secondary facts of the dispute (art. 292). Any other party will be entitled to require that the witness be present at the evidence hearing, or to obtain authorization of the court to examine the witness outside the presence of the court. It should be noted, however, that the new Code does not specify whether the written statement must be produced under oath (art. 292). Currently, written declarations are only admissible in limited situations.

17. Partial exception to dismiss. The scope of the exception to dismiss will be enlarged, and the defendant will have the ability to seek the dismissal of only a part of the demand if it is unfounded in law, whether or not the facts alleged are true (art. 168, para. 2). Under the current Code, a defendant can have a claim dismissed only if it can establish that the entire action is unfounded in law.

18. Withdrawal or amendment of a pleading. The new Code provides that a party may, before the judgment, withdraw or amend a pleading without obtaining authorization of the court (art. 206).

19. Decision on a point of law. The new Code provides that, over the course of the action, the parties to a proceeding can jointly submit to the court a controversy between them on an issue of law relating to the dispute (art. 209). This represents an innovation from the current procedure to obtain a ruling on a question of law.

20. Power to sanction the improper use of procedure. The power to sanction the abuse or improper use of procedure is reiterated in article 51 and following of the new Code.

21. Use of technological means. The new Code provides that the use of appropriate technological means available to both the parties and the court should be encouraged (art. 26). It also provides, in certain circumstances, that conferences and examinations may be held by videoconference or other appropriate technological means (arts. 26, 279). The new Code further provides that the court office may, where technological capacity permits, receive documents saved on a technological medium (art. 99 para. 2 and art. 107 para. 4). Service (henceforth “notification”) via technological means will also be possible in certain circumstances (arts. 10, 133 and 134).

22. Contempt of court. The fine for contempt of court will be markedly increased from its current maximum of $5,000 in any case to $10,000 for an individual and $100,000 for a legal person, partnership or association. The court will also be empowered to impose compensatory community work on an individual or the officers of a legal person. As a last resort, the possibility to impose imprisonment for a period not exceeding one year will remain (art. 62).

23. In camera and confidentiality orders. The new Code codifies the court’s power to render in camera and confidentiality orders, notably when the “protection of substantial and legitimate interests requires that the hearing be held in camera, that access to a document or the disclosure or circulation of information or documents specified by the court be prohibited or restricted, or that the anonymity of the persons involved be protected” (art. 11 and following). Journalists will be admitted to in camera hearings, unless their presence would cause serious prejudice to a person (art. 13).
24. Costs reform. The Tariff of judicial fees of advocates will be repealed (art. 827), requiring each party to assume its own professional fees. However, the court is able to punish significant breaches in the conduct of the proceeding by ordering the payment of professional fees in certain cases (art. 342).

Unless the court decides otherwise, “Legal costs” (primarily court fees related to the filing of procedures, expert fees, as well as the remuneration of interpreters and stenographers) will be paid to the successful party, notably in cases of an abuse of procedure or undue delays by a party (arts. 340-341).

25. Appeals. The new Code also provides for the following changes relating to proceedings before the Court of Appeal:

- **Case management.** The new Code ratifies the pilot project put in place by the Court of Appeal and provides for the case management of appeals (art. 367 and following).

- **Joint statement of facts and issues.** The parties in appeal may, without being required to do so, file a joint statement of the facts and issues in dispute (art. 372).

- **Authority of a single judge of the Court of Appeal to issue safeguard orders.** The new Code fills a jurisdictional void by permitting a single judge of the Court of Appeal to issue a safeguard order (art. 379).

26. Execution of judgments. The new Code significantly reforms the approach taken with respect to the enforcement of judgments, and provides various measures to alleviate the economic burden imposed upon the debtor subject to enforcement measures (art. 656 and following).

27. Harmonization of judicial review. The new Code provides unified rules applicable to judicial review by the Superior Court (art. 529 and following).

Preliminary Comments

The new Code of Civil Procedure contains several interesting innovations that will surely be welcomed by the public, members of the bar and the judiciary.

The increase in the monetary thresholds of the jurisdiction of the Court of Québec (including that of the small claims division) will no doubt be welcomed, given that this measure directly addresses the congestion of the courts, while increasing access to justice.

The broadening of the scope of the exception to allow for the dismissal of only part of an action if it is unfounded in law (art. 163 para. 2), and the ability of the parties, over the course of an action, to jointly request that a court settle a dispute between them on an issue of law (art. 204) are excellent initiatives. However, we regret the refusal of the Québec legislature to include a summary judgment procedure in the new Code. Every province except Québec provides for some form of summary judgment procedure in their respective rules of civil procedure. These mechanisms allowing litigants to obtain judgments without holding full trials, are applied in strictly limited cases, where there is no genuine issue of material facts, and where it is appropriate to render judgment on a legal issue.

In addition, the postponement of the starting point for the calculation of the six months delay to complete and inscribe a case is a wise decision. Under the current Code of Civil Procedure, the parties have, in practice, only five months to complete and inscribe their case, which is impossible in most cases. In our view, the legislature could go further and provide a period of more than six months to complete the record, in addition to postponing the starting point of the delay. It is expected that frequent motions to extend the delay to inscribe will continue to occupy significant judicial resources under the new Code.

Another measure that will surely lead to debate is the obligation for a witness to respond immediately to questions during a pre-trial examination notwithstanding the formulation of an objection. According to the Supreme Court of Canada, there is “a principle that has a moderating effect on the evidentiary process and civil matters, including at the examination on discovery stage, namely relevance. This principle governs both the examination on discovery and thus disclosure of records”. As proposed, the new rule may undermine this moderating principle by requiring a party to answer questions despite a well-founded objection on the basis of lack of relevance. To
mitigate this risk of abuse, the legislature established, under the new Code, limits to the duration of the examination, and provided the opportunity for the parties to adjudicate in advance objections they may anticipate. In this regard, it is expected that the time limit provided by the legislature will be insufficient in many complex cases, and requests for authorization to allow longer examinations will be frequent. It will be interesting to see the extent to which the courts will grant such requests.

Finally, the repeal of the *Tariff of judicial fees of advocates* and therefore the regime for awarding costs seems to constitute a societal choice in that Québec has adopted a radically different approach to that chosen by most of its neighbours who impose significant costs on the losing party. It is uncertain whether this approach will truly promote access to justice, since this abrogation might encourage lawsuits that are either unfounded or with questionable merit. The legislature undoubtedly intended to mitigate this risk by allowing the dismissal, even partial, of unfounded actions before trial.

**Next Steps**

The provisions of the new *Code of Civil Procedure* are expected to come into force in autumn 2015.

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