ACCESS TO JUSTICE:
3 YEARS AFTER THE REFORM OF THE CODE OF CIVIL PROCEDURE

ADDRESS GIVEN BY
MR. JUSTICE FRANCOIS ROLLAND,
CHIEF JUSTICE OF THE SUPERIOR COURT OF QUEBEC

MAY 1ST, 2006

Thank you for your kind introduction.

To our conference co-chairs,

Distinguished guests,

And friends,

Thank you for your kind invitation to take part in this special conference.

Since I will be speaking in both Official Languages, I urge you to use the headsets.

A little over three years have now passed since the reforms to the *Code of Civil Procedure of Québec* came into effect. I have the pleasure of attending here today in order provide you with an update from the Superior Court of Quebec concerning the implementation of these reforms, particularly with respect to the application of the rule of proportionality.

The 2003 reforms are the result of a report issued by a committee whose members were appointed by the Minister of Justice in 1998. The report was tabled in July 2001 and was entitled: “Towards a new judicial culture”.

Some recommendations became law on January 1st, 2003. All these changes revolve around the following goals:

- To simplify proceedings;
- To reduce delays;
- To control costs.

I would like to remind you that this committee, composed of practicing lawyers, law professors, regulators and judges, started its work by consulting a vast number of practitioners in the legal profession.

As you already know, the purpose of reform is to develop a new judicial culture. One of the cornerstones of this judicial culture is, without a doubt, the rule or proportionality which the legislator codified in Sections 4.1 and 4.2 of the *Code of Civil Procedure*. These sections read as follows:

> "**4.1.** *Subject to the rules of procedure and the time limits prescribed by this Code, the parties to a proceeding have control of their case and must refrain from acting with the intent of causing prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith.*
>
> *The court sees to the orderly progress of the proceeding and intervenes to ensure proper management of the case.*
>
> **4.2.** *In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge*."

Thus, the parties and their legal counsel undertake to manage their case file (case management), while keeping the rule of proportionality in mind.

These sections impose serious undertakings, not only on the parties but also on the Courts. It is therefore time, three years after the date when the reforms took effect, to ask ourselves: have we achieved this result? Furthermore, the legislator asked that a review of the reforms be carried out after three years, and such a report has just been published.

According to a series of articles that appeared in the newspaper *La Presse* in January 2006, the reply seems to be clear and unfortunately rather sad: the reforms seem to be a failure as the public's perception is that the justice system is too slow and too expensive.

What is even sadder is that it indicates that for justiciable parties, the justice system is too slow because the judges are slow and the process is too expensive because lawyers' services cost too much.

Are judges slower today than 10 or 15 years ago? I don't think so. Before discussing in depth the rule of proportionality, allow me to provide you with a quick summary of the activities of the Superior Court which, in my opinion, indicates that this perception on the part of justiciables is perhaps not based on sound information.

In fact, as an example, the time devoted to the judges' deliberations is shorter than it was before. Furthermore, in the Montreal Bail Court, over 40 % of decisions are rendered from the bench, while in 1999, barely 25 % of decisions were.

Where commercial litigation is concerned, more than 60 % of decisions are rendered from the bench, while in family law, 35 % of decisions in 1999 were rendered from the bench compared to 48 % in 2005.

With respect to the cost of lawyers' services, it must be pointed out that this has always been expensive.

This does not mean that the judicial system as a whole has become speedier and more costly. On the contrary, there is still a serious problem with respect to access to justice.

So, why is the system so slow and so expensive? Well, it seems to me that some very interesting solutions have been offered within the framework of the reforms, but the new judicial culture is quite simply not yet part of lawyers' customs nor those of the judiciary. In his wisdom, the legislator provided for the simplification of procedures, cost controls and a reduction in delays. He also provided for the rule of proportionality, as well as alternative methods for dispute resolution. I would remind you that we

already set up fast-track procedures in 1997. This reform seemed to be very promising.

It seems obvious to me that if these measures were applied and entrenched in our mores, we would already be moving in the right direction to solve our most serious problems.

Although some progress has been achieved over the past 10 years, why is it that we have not found the solution that would enable middle-class citizens to come to court and have their dispute resolved with efficiency and diligence, without having to disburse unreasonable legal fees?

The findings are clear: the middle class has simply deserted the Common Law courtrooms. Most civil cases heard before the Superior Court in Montreal are filed by companies rather than individuals. This is with the exception of family matters, of course. At this rate, it looks as though, at least in the short term, a civil case between two individuals will become a rarity. The only exception to this rule is class action suits, but I will come back to those later on.

I would remind you that the Superior Court is the court of First Instance in Common Law and its judges preside over more than 42 judicial districts. Thus, we do not only find large cases being settled there. In fact, most of the files involve individuals and small claims. Regional districts do not all have cases such as those found in Montreal and Quebec City which involve large corporations.

At the rate at which things are advancing, regionally, the Superior Court is likely to become a Court in which only family matters will be handled. We must take action now. We must also avoid the setting up of a parallel justice system.

In Quebec, cases before the Superior Court dropped from 48,442 in 1990 to 21,157 in 2005. This represents a drop of 54 %. We should, of course, take into account the fact that the jurisdiction of the Court of Quebec went from $30,000 minimum claims to those $70,000 or more in 2003, and this has markedly reduced the number of files before the Superior Court. But this drop is still very significant.

With respect to family matters, the numbers show that the volume of cases has also decreased slightly since 1990, in spite of the growth in population. I would also remind you that in more than 40% of these cases, one or more parties represent themselves.

In addition, this dramatic reduction in the number of cases has not resulted in a reduction in the number of days spent testifying in court. To the contrary, there are much fewer cases but many more hours of testimony being heard.

So, in 1981, it took 35,000 hours of testimony to handle 51,985 case files. In 2005, it took more than 41,173 hours of testimony to handle 21,157 case files.

What is most disappointing in all of this is the fact that even if there are fewer justiciable cases being heard in court, the parties must wait even longer and spend more money before their case proceeds. As an example, in Montreal, most court time is spent on long case files or those that demand five days or more in court. Currently, a trial that is four days in length, however, is considered to be a short case file.

This is not necessarily explained by the legal questions being much more complex than they were ten years ago when I was called to the Superior Court. At that time, short trials lasted for two days and less and occupied almost ten judges every day of the week. Long case files of three days and more occupied between seven and eight judges every day of the week.

Ten years later, what we used to call short case files of two days and less occupy only four to five judges every five to six weeks. It is now the case files requiring more than three days that occupy almost 25 judges every day of the month. This is a huge difference!

Why do parties to a cause now request hearings of three days and more so frequently? I really do not have an answer to that. As an example, in civil practice, case files of three days in length have doubled since 2003.

However, the slow pace of the process does not rest exclusively on the shoulders of the parties. You hear and have often heard the comment

that because of the new procedures, one must hurry up and wait. Is this really the case?

It is true that the delays have become worse over the course of the last three years. But, I will now briefly explain one of the causes of these delays.

At the Superior Court, we are facing a bottleneck as the case files introduced prior to the reforms are still governed by the old provisions. When new files are added, which are ready to proceed much more quickly (due to the 180-day delay), this creates a surplus of files ready for a court hearing. There are therefore many more files than judges to hear them.

It is, however, to be expected that this backlog will be absorbed over time as old case files are dealt with.

Another important cause is that the number of judges has not significantly increased, even if the hours of testimony heard have increased drastically.

Let me give you another statistic which partly explains the delays. Indeed, every afternoon of the week, from Monday through Friday, in Montreal, three judges hear and decide objections made during discoveries. It is almost the equivalent of having two judges sitting full time on questions of relevance in relation to objections regarding discoveries which, for the most part, will never be filed into evidence.

Such hearings are expensive for the parties and significantly slow down the process by occupying judges, when they could be presiding over larger case files. What is the solution to this problem? Well, we could systematically refer such objections to the judge deciding on the merits of the case and the person being questioned could simply reply subject to the objection.

We could then set up a process whereby a case could be sent back to a judge only in cases of abuse, to avoid so-called “fishing expeditions”.

Such solutions would probably be much more in line with the rule of proportionality which examines all of the players in our justice system. It

could be done with the approval of the lawyers, which would be an ideal solution, or by way of legislation.

But what exactly is the famous rule of proportionality?

In the context which we are examining today, proportionality is defined as the necessity to establish a balance between arriving at a just and fair result and the costs and delays involved in reaching this same result.

Promoting access to justice is therefore a direct link with a system which allows a person to attain justice within time limits, and at a cost, that are proportional to the desired results.

The principle of proportionality demands that the parties and the court ensure that the chosen proceedings be proportionate to the nature and final result of the claim and the complexity of the claim. Based on this principle, a court may, for example, refuse to accept a written pleading, which a party would otherwise be permitted to use, because the stakes involved do not justify such a pleading. Proportionality may also be invoked in order to re-

establish balance and to avoid abuse when there is a wide discrepancy in resources between the parties, such as in the case of a justiciable who sues a multinational company, a government body, etc.

A judge may also restrict the number and cost of expert witnesses, or the duration of an examination and the number of examinations.

This is done by way of case management and could even be done in the absence of a request from the parties, if the agreement about the progress of the case shows that the means proposed are disproportionate to the relief sought.

The courts are also called upon to allot their resources efficiently in order to offer the best possible service in relation to the type of case files and the problems to be solved. The creation of special chambers, such as the Commercial Chambers, or more recently, class actions, are examples of the application of the principle of proportionality. We also think of settlement conferences in which we manage to settle litigation more quickly and at reduced cost in cases where the sums involved are very important.

The principle of proportionality is brought into play on several levels, both with respect to the administration of justice and court organization and, of course, the procedures and documents submitted by lawyers.

But why did the legislator add such a rule to our *Code of Civil Procedure*?

The principle of proportionality is anything but a new rule. We have simply reached a stage where it has become essential to apply it in every aspect of our judicial system.

Why is this? In order to allow a litigant to have access to the court system at a reasonable cost. After all, he is the one paying for that system.

As you know, many other jurisdictions dealing with the same problems of access to justice have reformed their system using the principle of proportionality.

The English experience, and more recently the Australian and New Zealand experiences, show that such reforms are efficient and offer

solutions in solving the problem of access to justice. Our legislation was inspired by these reforms. We will discuss the British Columbia experience later on.

As I have already mentioned, proportionality is far from being a new rule. We have simply reached a stage where it has become necessary to impose it on all aspects of our judicial system. Why? In order to allow the justiciable individual to have access to the courts at a reasonable cost. After all, it is the justiciable who pays for the system.

This is the result of "*Woolf's Reform"*, a reform of the rules of civil procedure adopted in 1999 which aims to apply the principle of proportionality to all stages of the judicial process.

A three-pronged system was set up to handle files in the fastest and most efficient manner based on the sum or stakes involved in the disputes. Greater flexibility was also provided in order to handle certain matters, taking into account their complexity and important social aspects.

British rules aim at creating a balance between the parties, their legal counsel and the courts by ensuring better proportionality between the nature of the case and the procedures followed. They mitigate the effects of the adversarial system by giving the courts the means by which to manage lawsuits, control expert evidence and supervise the evidence submitted. They make the parties and their legal counsel responsible for the way in which the lawsuit proceeds and place emphasis on amicable settlement methods for claims by including them in the procedural context.

These goals, you will agree, are quite similar to those supported by our “new judicial culture” and are all based on the principle of proportionality.

So, where are we in terms of the application of this principle since it was implemented in January 2003?

Some lawyers seem afraid that the rule of proportionality will complicate the procedures and increase costs, while engaging new discussions and means of challenging cases based on allegations of abuse

of procedure and bad faith, or that they will result in new claims for civil liability. Of course, this has not happened.

Furthermore, three years after the reforms, the courts have only made very shy attempts at interpreting Sections 4.1 et 4.2 of the *Code of Civil Procedure*.

With respect to examinations for discovery, for example, the Court has stated on several occasions that it will not allow them when the monetary stakes in a claim do not justify them. The Court refused to allow examinations for discovery in the case of a claimant who lives in Vancouver and the court judged that it was unreasonable to hold ten examinations on the file which concerned a dispute over the sum of $30,000.

The rule of Section 4.2 C.C.P. was also invoked in the case of an application to transfer a file to another district. The Superior Court recently decided that the rule of proportionality, although it can be considered when there is a question of changing districts pursuant to Section 75.0.1 C.C.P., does not constitute an attributive principle of jurisdiction, in spite of consent from the parties.

As for other applications of the rule of proportionality, the courts have up until now:

1. granted the communication of exhibits on compact disks where the production of exhibits represented over 10, 000 pages of documents;

2. stopped an examination for discovery after the defence was heard, because the requests for the communication of documents and the questions being asked were abusive and irrelevant;

3. rejected a request to substitute the petitioner in a class action, when he had already been examined at length about his affidavit;

4. rejected an application for an amendment to add a counterclaim, when a suit had already been filed in court and the respondent could not justify his delay in responding;

5. upheld an application to throw out a defence and counterclaim because the parties had been fighting for 33 years over the total capital amount of $5,000 and they were demanding a two-day long trial;

6. mitigated the costs related to an expert report which was considered to be useful, but nevertheless too expensive.

Those are the precedential developments of the past few years.

There are, however, many more examples of the application of proportionality, both with respect to judicial organization and in your day-to-day practice of law.

Settlement Conference

As you know, in 2001, the Superior Court of Québec implemented a settlement conference process. It has enacted rules of practice and we are very proud of our system.

The Court of Appeal was already conducting some settlement conferences and, seeing their success, we have also started to preside over such conferences. In 2003, the *Code of civil procedure* was modified to provide provisions with regard to settlement conferences presided over by judges. This system is fabulous and facilitates access to justice. It has received an overwhelming reception from both the parties and their attorneys.

However, in some ways, the Superior Court is now a victim of its own success.

In fact, the problem is that we cannot keep up with the demand.

Between 2001 and 2004, 1,295 settlement conferences were held throughout Québec. Last year, in the District of Montreal alone, we held close to 700 conferences. The delay to obtain a date was three weeks two years ago, and now it is seven months.

Five judges are allocated full-time to preside over these conferences, plus judges who accept on a volunteer basis to preside over conferences.

The success rate of these conferences is very impressive: 80% in civil matters and close to 70% in family matters.

Obviously, the parties and the attorneys are extremely satisfied with these conferences because they have access to judges on an informal basis to explain their case and to settle their dispute. Normally, this is done quickly in the process.

It would be great if these conferences were helping to settle cases that would not have been settled otherwise.

Is it the case?

Well, in 2001, out of 100 cases filed in the Superior Court of Québec, seven cases ended with a judgment after a trial. On December 31st, 2005, out of 100 cases introduced in the Superior Court, 7% will still end with a judgment after a trial.

So, in other words, we have the impression that we allocate resources to preside over settlement conferences to settle cases that would be settled

in any event for the most part. Obviously, we will save time if the conference is held early in the process.

The other problem with these conferences is that they are taking longer. Four years ago, we used to take half a day for a conference which was approximately 2 1/2 to 3 hours. Now, cases normally last two sessions or one day and it is not uncommon to see conferences that last two, even three days.

I do not know why, but it seems that not only trials are getting more complicated but also settlement conferences, and we should do everything to avoid spoiling that magnificent tool to facilitate access to justice.

What has become of the infamous 180-day time limit that has been the subject of so much criticism? Well, in my opinion, rather than actively challenging this time limit, particularly where we can see that it is respected in the great majority of cases, would it not be better to meet a judge at the start when the case is filed, if we estimate that it will require more than 180 days to sort it out, and to proceed by way of case management if you are unable to do so with your colleague?

Class actions

We are experiencing a phenomenal increase in the number of class actions in the province of Quebec.

In 1978, the provisions of the *Code of civil procedure* regarding class actions were enacted. Until the mid 1990s, we had a reasonable number of class actions.

Since then, the number of class actions has increased dramatically.

In 2004-2005, more than 60 class actions were authorized in Québec. Presently, we have over 242 class actions active in Quebec, including motions for authorizations or actual class actions.

In the Montreal division alone, there are 216 files. This is another area where the principle of proportionality should apply.

This is no doubt a wonderful tool for facilitating access to justice. Thus, you are probably all involved in some procedural reforms without really knowing it.

Furthermore, these class action suits must not be entered into for the sole purpose of permitting lawyers to make huge sums in legal fees. As with any other type of file, one must use one's discretion and act in the interests of the justiciable parties. Here too, the rule of proportionality should be applied.

Case management

Lawyers and judges still rarely use ordinary case management. On a good note, however, last year, judges of the Quebec division of the Superior Court attended a seminar on case management and judges of the Montreal division will attend a seminar next week on case management.

A special program on case management « 201 » will be offered to judges in November. We will discuss case management conferences. It is very promising. I have already offered the President of the Quebec Bar a

copy of our course material to enable the Québec Bar (Law Societies) to provide that training to their members.

We all know about special case management because of class actions and large specialized cases. But we are not familiar enough with ordinary case management. It should be part of our judicial culture.

Prudent management of a case can contribute effectively to reducing costs by ensuring proportionality in the procedural documents and the submission of evidence. The goal is really to avoid formal petitions and long and expensive sessions in Court.

The time has now come for lawyers to approach the bench by way of case management conferences rather than by traditional petitions served on the adverse party and submitted with a Notice of Presentation, etc. The time has also come for making more and more use of new technology; that is case management conferences via telephone or teleconferences, which make the most efficient use of professional services rendered to the justiciable parties.

Let us not forget that the Quebec legislator favoured a systematic approach to case management, but what we tend to forget, is that he has first of all given special weight to case management by the parties or their representatives. It is only in the circumstance of no agreement being reached by the parties that the judge should intervene.

Alternatively, the legislator has stated that the judge must intervene in cases of abuse, even in cases of disputes over compliance to undertakings between lawyers.

Case management easily fits within the boundaries of the evolution of the role of the judge. But the parties to a lawsuit and their legal counsel must do their part and fully explore all the possible methods of settlement that are available to them.

It is, in fact, more than just a duty imposed on the parties, it is an obligation. It is up to all legal counsel to keep a cool head when things heat up. They are the players who are the best equipped to assess their clients' situation in relation to the goals they hope to achieve, the strengths and

weaknesses of the case, their realistic chances of success and the means by which to reach it.

I will say it once again: this is an obligation.

And if we then accept the principle that the client consults his legal counsel in order to find a solution to his problem, a speedy solution and the least expensive way possible to arrive at that solution, it is then logical to think that the lawyer will present and show him the most appropriate steps to be taken to solve his problem. Any such solution must then be examined through case management and proportionality.

You, the lawyers, must keep this rule of proportionality in mind in all aspects of your practice. From the moment of your first meeting with opposing counsel, you owe it to yourself to plan and agree on how the case will proceed in a reasonable and proportional manner in relation to the type of dispute. All procedures that will follow, any objections that you might file, the expert reports that you will require - all of this must be mapped out while keeping proportionality in mind.

There should be no more recourse to standard time-frame forms, a time schedule ; what is needed is an agreement about how to proceed with a case in a well planned and thought out manner. Avoid useless expert reports, respect the dates agreed upon and ensure an efficient presence at all case management hearings. Plan for one expert witness. If you are in charge of a file, show up in person rather than delegating this to someone else in your office who is not familiar with the details of the case. This is very important. Get into the habit of presenting your petitions orally.

Now let's speak about oral defence.

Oral defence

Before 2003, the oral defence was very popular in many matters such as "hypothecary" claims, etc. The legislator thought that it was a great idea to increase the number of situations where an oral defence could be used.

Indeed, Article 175.2 of the *Code of Civil Procedure* addresses a vast number of situations where an oral defence is the rule. Unfortunately, there

has been a drastic reduction in the use of oral defence since the enactment of that provision.

We have noticed a reduction of 80% in oral defence since 2003 in the District of Montreal.

The consequences are dramatic. Instead of going to trial with a simple notice of presentation for cases of short duration, since there is a written defence, lawyers will instead proceed with a call of the roll and their cases will not be given a trial date for months, if not a year.

Something has to be done to induce lawyers to proceed by way of oral defence, this to facilitate access to justice, keeping in mind the rule of proportionality.

Furthermore, remember that while expert reports are often necessary in determining the rights and obligations of the parties, they are also very expensive. The cost associated with expert testimony and the inconvenience associated with it in terms of delays can prevent certain

justiciables from pursuing a lawsuit or filing a defence. Remember, you should consider the use of a sole expert witness.

The legislator has not yet intervened on this point. Be aware that other jurisdictions, such as England, have for a while now established a system which favours, or even imposes, single expert witnesses in many cases.

Selection of a sole expert witness is in fact encouraged and even imposed in less complicated and controversial matters. A similar rule has been adopted in British Columbia.

Some recommendations have been made to restrict the use of expert witnesses in Quebec. A multiparty committee was struck and a report should be presented to us during the course of the next few weeks to solve the difficult questions surrounding expert testimony.

This is another important initiative that will favour the application of the rule of proportionality.

Conclusion

These are the comments I wanted to make to you today, and I am happy that we were able to think about this as a group; to assess the reforms and find solutions which will allow for this new judicial culture to become part of standard legal practice. The judges on the bench are available to you and your comments are always welcome.

I would remind you that we set up a Commercial Chamber in Montreal three years ago and it is working very well. This is a model that could inspire us as it is the result of wonderful co-operation between the Bar and the Bench.

Isn't it better to work together, not just in commercial matters, but in all matters in order to favour access to justice?

Keep the rule of proportionality in mind while you practice, and remember that things are always better in moderation!

Thank you.