

## 2002 CIVIL PROCEDURE REFORM:

### Another milestone towards attaining the ideal of access to justice for all?<sup>1</sup>

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Access to justice is a persistent concern. It would be an understatement to say that delays and costs of court proceedings remain obstacles that still effectively impede access to justice. Despite decades of concerted efforts, the ideal of access to justice for all remains unachieved.<sup>2</sup>

Québec is not exempt from this concern. A survey conducted for a Montréal newspaper in December 2005 found that more than half of Québécois no longer trust the courts.<sup>3</sup> One-third of respondents, for the most part males and the highly educated, had had dealings with the courts. The finding speaks for itself: almost one in seven respondents said they preferred to waive their right to sue or to defend themselves, more than half the time because of the cost of trials. Others cite delays or bluntly state that they do not believe in the justice system.

Most surprising about the survey results is that they have remained stable over time.<sup>4</sup> On the heels of the coming into force of an important legislative reform of civil procedure

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<sup>1</sup> "...equal access to justice may be an unattainable ideal, but adequate access should be a social priority" : Deborah. L. Rhode, *Access to Justice* (Oxford University Press, 2004), p. 20.

<sup>2</sup> R. Macdonald, "Access to Justice in Canada Today: Scope, Scale, Ambitions", *Access to Justice for a New Century: The Way Forward*, J. Bass, W. A. Bozart and F.H. Zemans, eds. (The Law Society of Upper Canada), pp. 23-136; S. Normand, *De la difficulté de rendre une justice rapide et peu coûteuse : une perspective historique (1840-1965)*, [1999] 40 *Les Cahiers de droit* 13-31; and C. Brochu, *Y a pas de justice au Québec*, (Montréal: Les Éditions Les Intouchables, 2006), 89 pages.

<sup>3</sup> La Presse, Montréal, a series of articles published on January 5 to 9, 2006, under titles as varied as they are evocative of the issues raised: *Près de la moitié des québécois ne font pas confiance aux tribunaux* [Almost half of Québécois do not trust the courts]; *Quand une cause traîne, tu y penses tous les jours* [When your case drags on, you think about it every day]; *Des citoyens à bout* [Citizens fed up]; *Plus de 1 million en frais de procédures... avant même le procès* [More than one million in costs...before the trial has even taken place]; *Une millionnaire épuisée* [An exhausted millionaire]; *Le cri d'alarmes des juristes* [Lawyers sound warning]; *Sauvé par de bons samaritains* [Rescued by good samaritans]; *Les avocats sont-ils trop gourmands?* [Are lawyers too greedy?]; *Un juriste gratuit, ça existe* [There is such a thing as a free lawyer]; *Qui faire payer?* [Who should pay?]; *Refiler la facture des procès-fleuves aux entreprises* [Pass the cost of megatrials on to the business sector]; *Place à la conciliation* [Room for conciliation]; *Des procès plus courts?* [Shorter trials?]; *Les services juridiques gratuits... ou presque* [(Almost) free legal services]; *Une seule journée pour effacer 15 ans de litige* [Only one day to wipe out 15 years of litigation]; *Des maîtres économes* [Thrifty lawyers]; *Petit recours deviendra grand* [Small claim to grow]; *La justice par la télé* [Justice via TV].

<sup>4</sup> Québec: "The Right to Justice: findings, the future and avenues to follow", *News and Views on Civil Justice Reform*, Canadian Forum on Civil Justice, Spring 2006, No. 9, pp. 21-22.

on January 1, 2003, questions are being asked: Are we on the right track? Is the reform a further step towards improved access to justice?<sup>5</sup>

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A major reform of the *Code of Civil Procedure* was passed by the Québec National Assembly in 2002.<sup>6</sup> The ambitious objective of the reform was to establish a more rapid, more efficient and less costly civil justice that would improve access to justice and increase public confidence in the justice system. While recognizing the essential role of lawyers in the preparation and control over the presentation of their cases, the reform increased the court's power to intervene in the conduct of judicial matters and unambiguously affirmed the court's duty to attempt to conciliate the parties.<sup>7</sup>

The reform which came into force in 2003 brought a number of amendments to the 1965 *Code of Civil Procedure*.<sup>8</sup> Following are a few examples of the changes.

The procedure for instituting proceedings is a motion presented to the court not less than 30 days after the date of service.<sup>9</sup> At the commencement of proceedings, the parties must negotiate an agreement on the conduct of the proceeding, which sets out their arrangements and establishes a timetable within the 180-day mandatory time limit for entering the case for scheduling.<sup>10</sup> Examinations for discovery are restricted to claims of \$25,000 or more.<sup>11</sup> Preference is to be given by litigants and the court to oral defence in a wider range of matters.<sup>12</sup> The reform also brought the Court of Québec monetary jurisdiction threshold to \$70,000 and increased the monetary jurisdiction of the Small Claims Division from \$3,000 to \$7,000.<sup>13</sup>

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<sup>5</sup> Report of the working group on access to justice (Macdonald report), in preparation for the Québec Summit on Justice in 1992, recommended a number of "stepping stones" to greater access to justice: Ministère de la Justice, Québec, 1991.

<sup>6</sup> *An Act to reform the Code of Civil Procedure*, S.Q., 2002, c. 7, the legislative reform which was passed in 2002, and most of which came into force on January 1, 2003, followed the recommendations of the Civil Procedure Review Committee whose report was published in 2001 under the title *Une nouvelle culture judiciaire*, 294 pages, called the Ferland Report from the name of its chair, Denis Ferland of the law faculty of Université Laval in Québec City <http://www.justice.gouv.qc.ca/francais/publications/rapports/crpc-rap2.htm>.

<sup>7</sup> Art. 4.1, 4.2 and 4.3 C.C.P.; see D. Ferland and B. Emery, *Précis de procédure civile*, Vol. 1, 4th ed., 2003, EYB2003PPC3, and C. Belleau, *Les règles générales de la procédure civile québécoise et le déroulement de la demande en justice en première instance – Les principes d'interprétation, les concepts généraux et les règles fondamentales*, Collection de droit 2005-2006, École du Barreau du Québec, Vol. 2, 2005, EYB2005CDD, pp. 1-23.

<sup>8</sup> 1965 (1st Session) c. 80, came into force in 1966.

<sup>9</sup> Art. 110, 110.1 and 151.4 C.C.P.

<sup>10</sup> Art. 151.1 C.C.P.

<sup>11</sup> D. Béchar, *Chronique – Interdiction d'interroger en deçà du seuil de 25 000 \$ : où en sommes-nous avec l'article 396.1 C.p.c.?*; EYB2004REP260 and C. Gervais, *Commentaire sur la décision Importations Avaco ltée c. Lisi – L'interdiction d'interroger dans les dossiers de moins de 25 000 \$ : une règle étanche*; EYB2005REP379.

<sup>12</sup> Art. 175.2 C.C.P.; oral defence has become the rule in such claims as those relating to the sale price of delivered property or the price of a contract for services that have been provided.

<sup>13</sup> In force since June 8, 2002.

Under the principle that litigants are the masters of their own case, the parties must negotiate an agreement on the conduct of proceedings before the date of presentation of the action or application stated in the notice to the defendant.<sup>14</sup> The agreement must encompass or include preliminary exceptions, the procedure and time limit for disclosing exhibits, detailed affidavits, conditions for examinations for discovery before the filing of a defence, expert testimony, and the form of the defence (oral or written).<sup>15</sup> Some view the agreement as a "supervised judicial contract", or a contract under judicial control.<sup>16</sup>

A major feature of the reform is the imposition of a 180-day time limit for entering a case for scheduling. The plaintiff or applicant must have completed its record and produced all documents, reports, expert testimony and examinations that it intends to use at trial within the 180-day time limit. The defendant or respondent in turn has 30 days after the case has been entered for scheduling to complete its record and produce its documents. The time limit is mandatory and, in principle, may not be extended even with the parties' consent. The court has sole authority to extend the time limit, on application, if warranted by the complexity of the matter or special circumstances.<sup>17</sup>

Pre-trial conferences<sup>18</sup> already being part of the Code, the reform added provisions creating special case management conferences.<sup>19</sup> The Chief Judge or Chief Justice may order "special case management" for a case because of the nature or complexity of the issues or because an extension of the 180-day time limit has been granted.<sup>20</sup> The addition of article 4.1 to the Code confirms the court's authority to manage the orderly conduct of proceedings and intervene to ensure proper case management. Special case management "must not result in delaying rather than facilitating the progress of a case; preference must be given to informality in this area."<sup>21</sup>

Significantly, the reform was based on the principle of proportionality which requires all those involved (judges, lawyers, clerks) to ensure that proceedings "are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action

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<sup>14</sup> Art. 151.1 and 151.4 C.C.P.; the notice is usually 30 days.

<sup>15</sup> C. Belleau, *Le déroulement de la demande en première instance*, Collection de droit 2005-2006, École du Barreau du Québec, Vol. 2, 2005 : EYB2005CDD3.

<sup>16</sup> D. Ferland and B. Emery, *Précis de procédure civile, id.*, EYB2003PPC3, p. 6 of 36; see also: S. Guillemard, *La réforme du Code de procédure civile du Québec; quelques réflexions sur le contrat judiciaire*, [2004] 45 Les Cahiers de droit 133-155.

<sup>17</sup> Art. 110.1 and 274.3 C.C.P.

<sup>18</sup> Art. 279 C.C.P.: "After a case has been inscribed or scheduled for proof and hearing, the judge assigned to hear it, or any other judge designated by the chief justice, if he believes it useful or if he is so requested, invites the attorneys to discuss appropriate means to simplify the suit and to shorten the hearing, including the advisability of amendments to the pleadings, of defining the questions of law and fact really in controversy, of admitting some fact or document and of providing the list of authorities they intend to submit. During the conference, the parties must provide access to the original of the exhibits that they have communicated and that they intend to refer to at the hearing. ..."

<sup>19</sup> Art. 151.6 C.C.P.

<sup>20</sup> *Weinberg c. Cinar Corporation*, EYB2005-98133 (C.A.).

<sup>21</sup> C. Gervais, *Commentaire sur la décision Weinberg [...] – La gestion particulière de l'instance : le partage des tâches ...* »; EYB2006REP441.

or application and to the complexity of the dispute." According to some, this guiding principle of the reform implicitly includes the principle of economy, to some extent a "made-to-measure" or "à la carte" justice.<sup>22</sup> The principle of proportionality of means was presented as "an embodiment of the economy underlying the new Code seeking to facilitate access to justice" or "as a guide to interpret the rights...under the Code".<sup>23</sup> The principle does not, however, alter the mandatory provisions of the Code.<sup>24</sup>

Any examination of access to justice must necessarily include the small claims procedure under Book VIII of the *Code of Civil Procedure*.

The procedure for small claims was introduced into the Code in 1971,<sup>25</sup> less than a decade after the Code's last major reform. The Small Claims Division of the Provincial Court (now the Court of Québec), better known as "small claims court" took shape in 1972 with the coming into force of Book VIII. The 1971 law, whose title is quite explicit, *An Act to promote access to justice*, is based on the following principles:

- provide citizens with access to justice;
- remove excessive formalism from the justice system;
- make available a conciliatory procedure to help ensure social peace;
- safeguard the authority of the law;
- make justice available at low cost; and
- ensure speedy justice.<sup>26</sup>

Those principles were embodied in the legislation which, among other measures, provided for the definition of a small claim, the exclusion of legal persons, a simplified claim in the form of a motion, the provision of assistance by a clerk, low costs, the absence of lawyers and an altered role for the court.<sup>27</sup>

The small claims procedure has undergone numerous legislative and administrative changes in the thirty years since its inception. The most recent and wide-ranging is certainly the enactment of the ideas and recommendations of the Civil Procedure Review Committee contained in the Ferland Report. The reform provided an opportunity to completely redraft Book VIII of the Code, which deals with small claims recovery, and to introduce a number of procedural innovations, such as the defendant's right to make a counterclaim when contesting a claim. Legal representation remains unavailable unless authorized by the Chief Judge, an authorization that is rarely granted.<sup>28</sup>

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<sup>22</sup> D. Ferland and B. Ermery, *Précis de la procédure civile*, EYB2003PPC3, pp 7-8 of 36.

<sup>23</sup> G. Marcotte, *Commentaire sur la décision Citadelle [...] c. Montréal (Communauté urbaine) – La règle de la proportionnalité des moyens prend des proportions nouvelles* », EYB2005REP405.

<sup>24</sup> *Id.*, p. 2 of 4 and the case law referenced.

<sup>25</sup> *Act to promote access to justice*, S.Q., 1971, c. 86.

<sup>26</sup> Address of the Minister of Justice, Jérôme Choquette : *Débats de l'Assemblée nationale du Québec*, January 22, 1971, Vol. 11, t. 6, p. B-185.

<sup>27</sup> M. J. Longtin, *De certaines tendances de petites créances*, [1999] 40 Les Cahiers de droit 217-241, p. 220.

<sup>28</sup> Art. 959 C.C.P.; For a review of the case law, see: *Vermette c. Entreprises Polycept inc.*, SOQUIJ AZ-50355719; B.E. 2006BE-308 (C.Q.).

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It is now a little over three years since implementation of the reform and time for an assessment, although interim.

Is the 2002 civil procedure reform the way to improved access to justice? Or at the least, a few steps on the way?

Section 180 of the *Act to reform the Code of Civil Procedure*<sup>29</sup> requires the Minister of Justice to carry out an assessment of the implementation of the reform. The assessment report is required to be presented to the Government on or before April 1, 2006, and then tabled in the National Assembly. The report must then be examined by a committee of the National Assembly in the year after the tabling of the report. The assessment must include an evaluation of the implementation of the 180-day mandatory time limit and the new rules relating to oral defences.<sup>30</sup>

Even without discussing the findings of the assessment report prepared after consultations with the judiciary and the Québec Bar, among others, some problems became evident in the first years of implementation.

The 180-day mandatory time limit became the object of much criticism. It is the most severely criticized aspect of the reform, especially by lawyers and the Québec Bar. In a letter to the Minister of Justice in February 2002, the head of the Québec Bar complained about the shortness of the time within which a case must be entered for scheduling, particularly when considering that litigants must then wait for up to more than one year before being heard.<sup>31</sup> The head of the Québec Bar argues that the time limit imposes additional costs on litigants and puts extra pressure on lawyers.<sup>32</sup>

The Associate Chief Justice of the Superior Court considers the 2005 reform to be only half-successful. According to the Associate Chief Justice, case management hearings, one of the cornerstones of the reform, which promised to reduce hearing delays and limit the complexity and cost of trials, are underused.<sup>33</sup>

Others consider that while some of the new provisions of the *Code of Civil Procedure* improve the functioning of the justice system, they provide improved access only for a minority. The poor and the middle class are "left out in the cold"<sup>34</sup> They write:

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<sup>29</sup> See footnote 3.

<sup>30</sup> The report has not yet been tabled. It must be tabled before the end of April 2006.

<sup>31</sup> *Délai de rigueur de 180 jours et Réforme du Code de procédure civile*, letter dated February 3, 2006, <http://www.barreau.qc.ca/quoideneuf>.

<sup>32</sup> L. Baribeau, *On manque de temps!*, <http://www.barreau.qc.ca/journal/vol37/no14/temps/html>

<sup>33</sup> L. Baribeau, *La réforme de la procédure civile n'est qu'un demi-succès*: <http://www.barreau.qc.ca/journal/vol37/no14/temps/html>

<sup>34</sup> Julius H. Grey, Geneviève Coutlee and Marie-Ève Sylvestre, "Access to Justice and the New Code of Civil Procedure, *Revue juridique Thémis* 38 (2004), pp. 711-758.

We suggest that strict and complex procedures favour the powerful and the wealthy and lessen accessibility for the average individual.

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The imposition of strict delays will surely increase the cost of malpractice insurance, the incidence of accidental results unconnected with the merits, and the advantage of those who can pay more expensive, less overwhelmed attorneys.

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It is true..."justice delayed is justice denied." However, undue haste and pressure can have an equally nefarious effect in making it difficult for the less fortunate litigant to raise the funds and find and finance the experts for his case.<sup>35</sup>

Which goes to show that the colourful adage describing the non-formalist approach underlying article 2 of the Code<sup>36</sup> remains relevant: procedure must be the servant, not the master, of justice,<sup>37</sup> and remain faithful to the law.<sup>38</sup>

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<sup>35</sup> *Id.*, p. 729.

<sup>36</sup> Article 2 reads: " The rules of procedure in this Code are intended to render effective the substantive law and to ensure that it is carried out; and failing a provision to the contrary, failure to observe the rules which are not of public order can only affect a proceeding if the defect has not been remedied when it was possible to do so. The provisions of this Code must be interpreted the one by the other, and, so far as possible, in such a way as to facilitate rather than to delay or to end prematurely the normal advancement of cases."

<sup>37</sup> *Hamel c. Brunelle*, [1977] 1 R.C.S. 147, 156.

<sup>38</sup> *Norbert c. Lavoie*, [1990] R.J.Q. 55, Baudouin, J; see F. Charrette, *Du formalisme procédural : une critique de l'article 2 du Code de procédure civile*, [1994] 39 Mc Gill L.J. 263.