INTRODUCTION

This preliminary report has been prepared by the working group on "Civil Justice" for the Quebec Branch of the Canadian Bar Association; a list of its members is attached as Annex "A". The group was formed at the beginning of December 1995 and its report was scheduled to be completed by January 3, 1996.

This report offers a summary of the problematic and context of civil justice in Quebec.

In March 1995, the Canadian Bar Association formed a Task Force on systems of civil justice. Its mandate has been to examine the state of systems serving Canada overall, and to set out strategies for modernising those systems in order that they be better adapted to the actual and potential needs of the Canadian people. The Task Force decided to prioritise the following sectors:

- court management and organisation;
- the litigation process;
- use of alternative dispute resolution processes;
- integration of technology in the civil justice system;
- access to civil justice and enhanced public confidence in the system; and
- legal practice and the role of the bar in civil justice reform.

THE MANDATE OF THE WORKING GROUP

In each province and territory, a working group was created in order "to provide local input to the Task Force in order to ensure that the report and recommendations reflect jurisdictional differences and is truly national in scope." Working groups will:

(a) "collect and provide information on the civil justice system in its jurisdiction;

(b) liaise with local civil justice reform initiatives;

(c) advise the Task Force on existing problems in the civil justice system;

(d) identify priorities for reform;

(e) participate in the national conference sponsored by the Task Force;

(f) review consultation document prepared by the Task Force; and

(g) advise the Task Force on the viability of proposed recommendations for reform and implementation strategies."

CONTEXT

a) Constitutional Context:

The Canadian Constitution sets forth the principle of rule of law.

Furthermore, the Canadian Constitution establishes that the provinces have exclusive jurisdiction in civil matters and in the administration of justice (s. 92 (13) and (14), Constitution Act, 1867).

b) The Context of Quebec:

Quebec is the only province in Canada with a system of civil law rather than common law.

The National Assembly of Quebec has completely reformed its civil law by adopting a new Civil Code (1991 S.Q. c. 64) which begins with the following provision:

> "The Civil Code of Quebec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.
>
> The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the jus commune, expressly or by implication. In these matters, the Code is the foundation of all laws, although other laws may complement the Code or make exceptions to it."

The new Civil Code came into force on January 1, 1994.

Although this reform did modify the Code of Civil Procedure (R.S.Q. c. C-25) to ensure concordance, it did not introduce changes which would adapt the Code of Procedure to the modern context. Both the Bar and the Ministry of Justice share a growing preoccupation to reform this Code.

It is worth mentioning that for several years now, the Quebec Government has intensified its reflection upon civil justice, having mandated a task force, under the direction of Professor Roderick Macdonald of McGill University, to make recommendations on access to Justice. This report was presented in June 1991 and is titled: "**L'accessibilité à la Justice. Jalons pour une plus grande accessibilité.**" (Access to Justice. Steps Towards Greater Accessibility).

Furthermore, the Ministry of Justice organised a "Sommet de la Justice" (Justice Summit) in February 1992, which resulted in a document titled "**Les Actes du Sommet de la Justice, La Justice: une responsabilité à partager**" (The Justice Summit Acts, Justice: A Shared Responsibility), dated January 1993. This text was preceded by a statement of overall problems: "**Le cahier des états de la situation**" (Notes on the

State of the Situation), in October 1991. The Summit did not limit itself to civil law, but rather covered law as a whole.

Another particularity of the Quebec context is the existence of two professional corporations within the legal profession: the Quebec Bar and the Chamber of Notaries. The primary vocation of notaries is to draft documents and search title to immoveables, but they also have a role to play in resolving conflict through extra-judicial and non-contentious recourses. The Quebec Bar is comprised of lawyers practising in Quebec.

We have assumed that the administrative justice system is not within the ambit of a civil justice study. However, we note that the Quebec approach to administrative law is based on common law rather than civil.

We also note that civil juries do not exist in Quebec.

c) Social Context:

Quebec has evolved towards a system rooted in human rights, drawn from two fundamental texts: the Canadian Charter of Rights and the Quebec Charter of Human Rights and Freedoms (R.S.Q. c. C-12). This orientation has led to higher requirements from individuals regarding respect of their rights, an increase in the number of cases and a greater degree of case complexity.

Individuals with shared interests have formed pressure groups to advocate their viewpoints either through the media or through collective legal recourses.

The media has acquired more influence, as much by raising questions over the legal system as by transmitting legal information. All constituents of society must publicly account for their management, and the judicial system is no exception.

Throughout the years, immigration has fostered social and cultural diversity, with repercussions on the courts. A bicultural judiciary (French-English) has required practitioners to be familiar with both languages, and given parties the right to demand translations of judgments into their own language even though they have always had

the right to be heard in their own language.

d) The International Context:

Quebec is faced with the same fundamental questions regarding civil justice as the entire industrialised world. These questions center on access to justice and the reduction of costs and delays.

Thus, government is seeking to balance budgets and reduce expenses. Henceforth, any solution arrived at in relation to civil justice cannot increase expenses either for the Ministry of Justice or for parties not including other adjustments that can be made.

> p. 5 The expenditure of the Ministry of Justice were $ 326 million in 1986-1987. Credits granted for the fiscal year 1991-1992 included expenditure which were calculated at around $ 459.8 million, an increase of 41% in five years. During the same period, total government expenditure increased 36%.
>
> p. 6 The Ministry of Justice expenditure did not cover sums spent on police and correctional services. If we add Public Security expenditure ($ 820.4 million) to that of the Ministry of Justice, the sum is $1.28 billion for the year 1991-1992, which is 3.3% of Quebec government expenditure, 0.8% of gross internal production and a per capita expenditure of $187. These figures must nevertheless be reduced to exclude certain expenses, such as those spence on civil protection and protection against fire ($12.7 million in 1989-1990).
>
> Les cahiers des états de la situation, Les aspects économiques de la justice pour le citoyen, Sommet de la Justice, October 1991.

The internationalization of economics and of the circulation of goods and services has brought with it a diversification of disputes and a greater complexity to litigating as much at the level of law as fact.

COURT MANAGEMENT AND ORGANIZATION

a) Jurisdiction:

There are two important legislative sources to the organization of Quebec's courts: the Code of Civil Procedure (R.S.Q. c. C-25) and the Judicial Tribunal Act (R.S.Q. c. T-16). Articles 22 to 54 of the Code of Civil Procedure lay out court jurisdiction (the Court of Appeal, the Superior Court, the Court of Quebec and the municipal courts), as well as jurisdiction of judges and clerks, and the powers of the courts and judges.

We refer you to Annex "B" for more information on the division of powers between the various courts of Quebec.

The Judicial Tribunal Act is more detailed in its treatment of the jurisdiction of tribunals and public officers, adding certain aspects regarding criminal jurisdiction, and several technical considerations such as the division of Quebec's territories into juridical districts etc.

b) The Process of Unification

In 1988, similar to the example of other provinces (see Court Reform in Canada, the Canadian Bar Association, August 1991), Quebec unified certain courts that were previously distinct, such as the Youth Court and the Expropriation Court, which have become the Youth Division and the Expropriation Division of the Court of Quebec.

Bill No. 130, tabled in December 1995 at the National Assembly, regroups the following courts under one future "Administrative Court of Quebec": the Social Affairs Commission, the Board of Appeals in Matters of Employment Injury, the Quebec Real Estate Assessment Office, the Office of Public Hearings on the Environment (unofficial translation of names).

Should there be a unification of both courts of first instance, the Court of Quebec and the Superior Court, in order to decompartmentalize civil, criminal and administrative jurisdictions, enabling the same court to cover all aspects of the same situation, as in matrimonial law? Would it lead to significant savings in human and material resources, as well as greater access for parties? Nevertheless, it should be remembered that article 96 of the Constitution 1982 reserves the right to nominate

Superior Court judges to the federal government.

THE LITIGATION PROCESS

The process of litigation is governed by the Code of Civil Procedure and rules of practice adopted by the various courts. The whole forms a complex body of rules difficult for the uninitiated to access, and for which growing legal costs are attached to each step taken. Many practitioners believe that it is now opportune to undertake a complete reform of the Code of Civil Procedure in order to simplify and adapt it to the reality of year 2000.

Measures already taken by the Superior Court have led to a reduction in waiting periods for case hearing from 90 months in 1985, to 4 months for a hearing of one day, 8 months for a hearing of 2 days, and 14 months for those requiring 3 days or more. These delays are calculated from the time that Practice Rule Number 15 is filed (the Rule requires a declaration from the lawyers that the case is ready to proceed, that all evidence has been produced, and setting out time required for the case hearing). The amount of time taken by a judge to deliberate must not exceed 6 months, or the judge will be subject to a warning by the court clerk. The medias, which has access to this information, has published a list of late judges every year. As of the end of 1995, no judge has been found late.

The Quebec Court of Appeal has called attention to delays in case hearings, and the new Chief Justice has decided that all efforts must be made to reduce such delays. He has ensured that new practice rules oblige lawyers to produce their factums within shorter delays, failing which they may forfeit their right to appeal (fast track).

An increasingly significant number of clients and lawyers would like proceedings prior to Rule 15 to be controlled by judges, who would fix shorter delays for each step of the litigation process (case management).

Following the Annual Meeting of the Canadian Bar Association in May 1995, a decision was taken to collaborate with the magistrature in order to explore the

possibility of implementing a case management pilot project within the Superior Court. At a meeting between the President of this committee and judges of the Superior Court on the topic of the Superior Court, a decision was taken to wait for the results of a study currently commissioned by the Quebec Bar and the Montreal Bar on the causes underlying the average delay of 17 months between the writ of summons (which commences action) and Rule 15.

It is clear that certain cases would be better resolved outside of the courtroom, and that there are processes which should be adopted to better define the points of law and fact dividing parties, thereby eliminating frivolous and unfounded claims.

THE USE OF ALTERNATIVE DISPUTE RESOLUTION PROCESSES

For the last 20 years, alternative dispute resolution processes have been discussed in Quebec. However, their use has been slight in spite of the opening of centres such as the National and International Commercial Arbitration Center of Quebec (CACNIQ). Legislation and regulations provide for these processes mainly in three sectors of activity: labour relations, agricultural products marketing and professional corporations.

Nevertheless, there have been some important commercial and legal developments towards their use.

There are three levels where alternative dispute resolution could intervene:

a) at the level of prevention, i.e. before the conflict has arisen. This could be accomplished by including specific contract clauses. Notaries and lawyers could play a large role at this stage; education for practitioners should therefore be intensified. Nevertheless, it is clear that as long as large-scale public and private institutions do not follow suit, diffusion will remain slow; by large scale institutions we mean: banks, insurance companies, various levels of government, etc. Banks have adopted mediation

procedures concerning possible disputes with their clients in regards to credit demands or renewal, and some insurance companies have agreed to submit professional liability disputes to mediation and arbitration, and grant lower premiums to professionals who thereby consent. When will government change its regulations in order to introduce alternative dispute resolution processes into its contracts? When will other levels of government follow suit?

b) at the curative stage, but before initiation of legal proceedings: a conflict has arisen, the parties are searching for a solution and have not yet decided to go to court. This is a good opportunity to attempt mediation or conciliation. There are still too few practitioners using these mechanisms and few clients familiar enough with these options to ask for them. When will systematic education be undertaken at all levels of education, beginning with primary, to turn the tide towards solutions based on the principled negotiation of disputes?

c) after the writ of summons; not only is there still time to incorporate alternative dispute resolution processes, but certain provinces and states have established that once the writ has been issued, parties cannot continue proceedings without producing a certificate for the court record stating that they have spent a certain number of hours (about two) in the presence of a mediator. This requirement is all the more welcome since one of the main criticisms of the magistrature is that lawyers fail to communicate before appearing in court. Should the Code of Civil Procedure be modified accordingly?

It is understood that even though alternative dispute resolution has a great deal of merit, it is not a panacea. There should be no extra costs created for the parties; and there will always be a certain number of cases for which the subject matter is not suitable for alternative dispute resolution, such as certains problems arising out of constitutional law, administrative law or general politics. However, viewpoints do

evolve, at least for some types of disputes, such as in administrative law where administrative tribunals have set up mechanisms for conciliation (i.e. consumer protection, access to information, personal injury at work etc.)

Drawing upon two experiences with mediation at the Small Claims Division of the Court of Quebec, one involving Ministry of Justice bureaucrats and the other accredited notaries and lawyers, it appears that the first was more successful partly because it took place at the Courthouse, a symbol which continues to have great importance in Quebec. Officially, the experiment was ended due to budgetary problems. Should the Courthouse become a centre for dispute settlement?

It would be difficult to talk about alternative dispute resolution without discussing the Pilot Project currently underway in the Superior Court, District of Montreal. The project involves cases for which a lengthy hearing (more than 3 days) is anticipated in the Rule 15. A judge invites the parties, through their lawyers, to meet with him or her at an information session on mediation, following which the parties are put in touch with an accredited mediator, who will attempt to reconcile the parties. The rate of affirmative responses to the judge's invitation to attend an information session is currently between 20% and 30%. Since the project is just beginning, it is still too early to determine the success rate of the mediations themselves.

Educational work must be done at all levels of society to develop dispute prevention. This work begins by introducing young people in schools to ways of peacefully resolving conflicts. As for the legal education of adults, there could be instructional material appropriate to specific domains such as: consumer law, family law, labour law, landlord-tenant relations, business law. Legal information could also be adapted to the needs of particular clients: senior citizens, cultural communities, the handicapped. Citizens should be made aware of how disputes can prevented, through efforts such as a recent publicity campaign carried out by the Quebec Bar.

THE INTEGRATION OF TECHNOLOGY INTO THE CIVIL JUSTICE SYSTEM

Quebec has made important progress in this field. For example, all proceedings are reported on computer, and the title registration bureau has computerized registration of titles. The public has access to this database. Nevertheless, implementation of cadastral computerized services has not been completed and will take several more years.

Another positive development has been computer services for the new Civil Code of Quebec and its corresponding jurisprudence along with a periodic update offered at a relatively affordable price. However, practitioners are demanding that all laws and regulations be "on-line" along with corresponding jurisprudence.

The future is clearly moving towards greater use of computers, and the expansion of Internet paves the way to direct exchanges between practitioners and parties; the latter showing a growing tendency to handle their own legal proceedings. Lengthy proofs could be filed on CD-ROM and use multi-media techniques. Should all judgments be available on Internet? Could law faculty libraries make the entire contents of their collection available on Internet?

In the United States, the creation of a "Cybernotary" is being seriously considered in order to ensure the security of computerized transactions.

ACCESS TO CIVIL JUSTICE AND REGAINING PUBLIC CONFIDENCE IN THE SYSTEM

The Charter of Human Rights and Freedoms (R.S.Q. c. C-12) constitutes, along with the Civil Code of Quebec, one of the cornerstones of Quebec law. Article 23 reads as following: "Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him". This article is at the basis of access to justice.

As mentioned above, the Quebec Government is greatly concerned with access to justice and in 1991, published the results of a study carried out under the

direction of Professor Roderick Macdonald titled, "**Jalons pour une plus grande accessibilité à la justice**".

The conclusion of this report is made up of 131 recommendations which touch on various aspects of access to justice.

For several years, economic growth has slowed in many regions of the world, including Canada and Quebec. One result of this slower growth is that access to justice, principally because of costs and delays, it is only open to the "rich" and the "poor" classes (thanks to legal aid and other assistance programs) whereas it is increasingly closed to the "middle" class unless its members take on the burden of debt. Nevertheless, this latter group represents the majority of workers who support the costs of the legal system through their taxes. Therein lies a paradox difficult to ignore.

Is it not worth reconsidering the strict division between criminal and civil law? In the case McClish (1982 A.C. 473 at 481), the Quebec Court of Appeal found that the Commission of Safety and Security in the Workplace (now the CSST), upon exercising its right to subrogate, was capable of making proof upon evidence of a prosecution in a court of criminal jurisdiction. How can the continuity of decisions made in different jurisdictions but regarding the same situation be fostered (i.e. divorce, domestic violence, youth protection, criminal prosecution for incest)? Would the creation of a family court be an appropriate solution, under reserve of certain constitutional aspects?

It is clear that confidence grows when the public is better informed of its rights and possible recourses in the context of financial ability, and has a better understanding of the institutions and roles of implicated parties.

LEGAL PRACTICE AND THE ROLE OF THE BAR IN THE REFORM OF CIVIL JUSTICE

We are witnessing substantial growth in the number of members to the professional legal corporations; the Quebec Bar and the Chamber of Notaries. Demand for legal services has not grown proportionally, resulting in more offer than demand.

The number of lawyers in Quebec had been stable at less than 2,000 from 1867 to around 1960, between 2,000 and 4,000 from 1960 to 1973, and since 1973 the number has grown steadily to around 16,000 lawyers in 1994.

Measures must be taken in order to prevent the surplus of offer from having repercussions on the quality of services offered, in view of the economic imperative to maintain an office that is competitive.

This rapid growth necessitates regulations promoting continuing education. The Quebec Bar has adopted such regulations but the Office of Professionals has not yet advanced them.

Furthermore, the system of financing universities should be revised so that funding does not increase the number of legal professionals regardless of demand for services, solely with the aim of permitting universities to finance other activities.

CONCLUSION

Should the Canadian Bar Association intervene so that government will facilitate access to the legal system, as much by offering training in prevention at all levels of education, as by simplifying and shaping legal proceedings so that they will be less costly, faster, but adapted to the degree of complexity of different files?

Should there be a concerted effort by all practitioners to develop a management system for Justice that respects the independence of the judiciary but is also capable of reducing administrative costs, using technology to allow universal access to legal information? Is information not the cornerstone of the rule of law?