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Standards for the New Millennium – Meeting Public Expectations

An Assessment of the 2002 Civil Procedure Reform in Québec
Marie José Longtin
Associate Director General of Legislative Affairs
Ministère de la Justice du Québec

The challenge for any civil procedure reform

The greatest challenge in reforming civil procedure in order to improve access to justice is finding the right balance between time, cost and the quality of justice.

Interestingly, if this challenge is put into historical perspective, today's difficulties seem less daunting. In 1539, King Francis I proclaimed the *Ordonnance de Villers-Cotterets* to "*pourvoir au bien de notre justice, abréviation des procès, et soulagement de nos sujets*" or, in other words, improve the justice system, shorten trials, and ease the burden on the King's subjects. Louis XIV followed with the *Ordonnance civile de 1667*, which was to a certain extent our first code of civil procedure. The ordinance declared that the reform was based on the report of "persons of great experience" and that it had become necessary because existing rules had been neglected or changed by time and the "malice" of litigants. The ordinance also stated that matters needed to be processed with greater speed, simplicity and security and that this would be done by eliminating a number of time limits and useless proceedings and by establishing standardized rules. Those considerations were not alien to the revisers of the 1866 and 1897 codes of civil procedure or to the lawmakers embarking upon the 1945 reform who, on announcing the exercise, wrote in the preamble to the *Act to Improve the Code of Civil Procedure* (9 Geo. VI, chapter 69), that a general reform of the Code would be conducted because it was essential that "courts of justice should be made easily accessible"; and for that purpose it was necessary to "render procedure less costly, simpler, more expeditious and better adapted to present needs." The report accompanying the 1965 draft code also stated that the drafters intended that the code would "offer to litigants the means of resolving their disputes efficiently and rapidly" and "ensure a frank discussion of the issues in dispute, without the danger of being taken by surprise by one's adversary"; they also wanted the code to avoid formalism that would "jeopardize the very rights which procedure is designed to safeguard" and "avoid leaving the administration of justice to the whim of pleaders or to the arbitrary ruling of the judge."

Access to justice appears to have become a permanent challenge, but the will to act to respond to the challenge has also remained constant. Not long after the coming into force of the new Civil Code on January 1, 1994, a resolve to rethink the 1965 Code of Civil Procedure became apparent.

Civil procedure reform

The numerous procedural innovations that have been integrated into the Code over the years seem to have been deposited like layers of sediment, making civil procedure more complex and defeating the ultimate goal of simplifying it. In 1998, the Minister of Justice established a committee to review the Code with a mandate to propose new procedure to make civil justice speedier, more efficient, less adversarial, and less expensive in time, energy and cost for both litigants and the justice system itself. The *Comité de révision de la procédure civile* was made up of representatives from the judiciary, the Barreau, universities, and the Ministère de la Justice. During its work, the committee sought the views of many legal practitioners in different areas of practice and held a number of consultations. The committee submitted its report to the Minister in June 2001. Only a few months later, the Minister introduced part of the reform. He brought changes to adversarial procedure in first instance proceedings by shortening the time limits within which a case must be ready for scheduling with the introduction of a peremptory time limit of 180 days from the date of service of the motion, reinforcing litigant accountability and increasing the role of judges in case management, and he set out the new principles that would govern civil procedure. The Minister also completely revised small claims procedure. The legislation was passed on June 6, 2002 and came into force on January 1, 2003.

Basic principles of the 2002 legislation

Under former civil procedure, it was accepted that matters brought before the courts were primarily the responsibility of the parties' attorneys and that the court's role was essentially limited to deciding issues. That view of the justice system eclipsed the government's role as organizer and provider of this public service and the judiciary's role in the management and orderly conduct of cases. While acknowledging the essential role of lawyers in the preparation and control over the presentation of cases, the reform has increased judges' involvement in the conduct of cases and underscored the importance of their conciliatory role. To encourage early court intervention, the reform introduced rules on agreements between parties on the conduct of a case, and on early hearing dates if there is no agreement or if the parties are ready to proceed with an oral contestation. The reform imposed a peremptory 180-day time limit for case readiness and set out measures to encourage settlement conferencing and individual case management in certain cases. The reform also simplified the commencement of

proceedings by reducing the former three modes of commencing proceedings to a single motion.

The cornerstone of the reform was the principle of proportionality which requires judges, lawyers and clerks to consider that proceedings, and since then, by interpretation, the presentation of evidence, must be cost and time effective in relation to the nature and purpose of the action or application and the complexity of the issues.

Legislative requirement for an assessment

The 2002 legislation includes the requirement for an assessment of the effects of the reform three years after its coming into force. The provision required the Minister to report to the Government by April 1, 2006 on the implementation of certain components of the reform, including the 180-day peremptory time limit for case readiness, oral defences and the other major changes to the Code of Civil Procedure. The report was then to be tabled in the National Assembly within the following 15 days. Because of the Easter holiday, that deadline was extended and the report was tabled on April 25. The National Assembly Committee on Institutions will now examine the report and hold public consultations.

The assessment process

As a first step, the Minister of Justice, the chief justices and the Barreau du Québec established in February 2002 a committee to identify indicators that would provide an effective assessment of the new rules three years after their implementation. The committee was tasked with identifying the relevant statistics to be compiled and submitted its report to the Minister in June 2004. It soon became evident, however, that the management information systems in place were inadequate for the large number of recommended indicators.

As a consequence, a departmental committee was set up to establish the verifiable indicators to be used and the mechanisms for gathering the statistics, as well as prepare the report required by the legislation. The Institut de la statistique du Québec was then called upon to gather the data. The statistics were compiled during the summer of 2005 through direct access to 2,440 files in 14 selected courthouses and then transfer of the relevant data to an electronic questionnaire.

Since the new provisions had been in force only since January 1, 2003 (June 17, 2004 in the case of amendments to the rule on the case readiness time limit), there was a risk that the statistics that had been gathered would not be an adequate measure of problems encountered in implementing the reform. To

offset the lack of statistics, in the fall of 2005 the departmental committee sought the views of groups that make up the legal community.

Because of their dissimilar functions, perspectives and particular experience, the effects of a reform may impact differently on the judiciary, the legal profession and court clerks, and the effects vary according to jurisdiction or judicial district, or according to whether their functions are exercised in Montréal, Québec City or in a smaller community. Accordingly, separate consultations were held with groups of representatives from the Superior Court, the Court of Québec, the Barreau du Québec and with a group of court clerks. The departmental committee also met with members of the Court of Appeal and with representatives of Government litigators. Representatives from the different groups were again consulted in February 2006 on the preliminary draft of the report to ensure the report faithfully represented the discussions and their positions.

The assessment, then, was based on statistical analysis, on case law interpretation and on the observations and comments of the groups consulted. That process, however, was somewhat limited in that it could not measure the consequences of the reform for the public; measuring the public's experience would have required a different method of analysis.

Assessment report under the Act to reform the Code of Civil Procedure (2002, c. 7)

The assessment report tabled by the Minister examines a number of issues:

- Maintaining the 180-day peremptory time limit for case readiness;
- The implementation of case management mechanisms introduced or generated by the reform, including the parties' agreement on a case management timetable;
- Examinations for discovery and expert evidence as frequent impediments to the progress of a proceeding;
- Encouraging oral contestation;
- Amicable settlement conferences at trial and in the appeal;
- Appeal procedure;
- Other procedural reforms including the principle of proportionality, the use of new technologies, small claims and class actions.

The report sets out recommendations on all these issues on which public consultations will be held by a committee of the National Assembly.

Various recommendations

The 180-day time limit for case readiness

Without going into the report's recommendations in detail, it should be mentioned that the report considers that to ensure a proper balance between the litigants' right to control the presentation of their case, the court's obligation to ensure the orderly conduct of proceedings and compliance with the proportionality rule, it is necessary to maintain the requirement that a case be ready for scheduling and entry on the roll for proof and hearing within 180 days in all civil matters.

Compliance with that deadline is admittedly confining and the requirement to appear in court for any extension of the deadline gives rise to costs. But the report found that providing for a longer time limit would weaken the court's role and make the principle of proportionality, which seeks to limit the costs of proceedings, seem like an illusive goal.

But the rule must be relaxed somewhat. By making better use of information technologies, applications for extension could be made by telephone conferencing or by letter, thus providing savings for clients, the judiciary, lawyers and clerks. The rule could further be eased by excluding from the calculation of the time limit the periods of decreased judicial activity from July 15 to August 15 and December 15 to January 1.

Currently, the only penalty for failure to have the case entered for proof and hearing within the 180-day time limit, or within the time limit granted by the court, is an irrefutable presumption of discontinuance by the applicant. The courts are reluctant to apply the presumption since it entails a loss of rights for the parties. One solution may lie in providing courts with alternate measures. The court could order the parties to appear and explain their failure to comply with the time limit, instruct them on case readiness within a new deadline, or order that the case be deemed entered on the roll for hearing on the matter as filed.

Agreement on the conduct and management of a case

One of the major changes imposed by the 2002 reform was the introduction of the agreement on the conduct of cases by which the parties decide themselves on the conduct and timetable of their case. That type of agreement already existed informally but since the reform it has become a keystone of civil procedure. While many find the agreement useful and seek to make it thorough

and tailor it to their case, others refer to it in the manner of the past procedure and enter more or less realistic pleadings and time limits. The report does not question the need to preserve the agreement but argues the necessity of improved training for lawyers on the use of the agreement and of providing additional instructions as to its content, in particular the length, number, subject, cost and general conditions of examinations for discovery and expert evidence.

The court should, in principal, exercise oversight over the agreement, but that would be extremely impracticable. Given the high percentage of cases that are heard by default, or settled or abandoned before case readiness or trial, such monitoring would be a poor use of time and resources. More promising in the medium term would be to establish a pilot project of random monitoring of agreements by judges or by clerks. Random spot-checking would alert judges to incomplete agreements or more complex cases and a judge could intervene at that time. Such a monitoring process would no doubt contribute to better case management.

Nor does the report question the court's inherent power to manage cases. Gone are the days when a judge's role was limited to hearing and deciding. Although adjudication remains at the heart of the judicial function, judges are now expected to be more actively involved in the conduct of matters. Their authority to impose measures to simplify or accelerate proceedings, shorten hearings, narrow the issues, encourage conciliation or invite parties to settlement conferences has been formally established.

Pre-trial examinations and expert testimony

Examinations for discovery and expert evidence are considered essential in the preparation of evidence. But they also cause procedural delay and are costly in terms of time, energy and money. Examinations for discovery have become too numerous and too lengthy. Judges are not always available to quickly hear and rule on the many objections raised during examinations. And is it really necessary to spend so much legal time deciding issues that will likely not be part of the evidence to be weighed at trial? Would it not be better to reserve the objections raised during examinations for discovery (except for objections based on privilege or relating to fundamental rights) and have them decided during trial testimony by the judge who will be hearing the case on the merits? A tripartite judiciary-justice-bar committee is currently examining the question of expert testimony and will shortly submit a report aimed at improving the situation by reducing the number of experts and appointing, with the consent of the parties, a single neutral and impartial expert at the service of the court.

Oral contestation

The report observed that almost all proceedings are now contested in writing, whereas one of the three procedures originally used to commence proceedings,

the motion introductory of suit, more often than not was contested orally. The unified procedure brought about by the reform has seen an opposite move to written contestation, but written procedure can slow down the justice system and cause litigants to experience delays in even relatively simple proceedings.

As a consequence, the report emphasizes that efforts should be made to alter that trend and encourage and steer litigants towards oral proceedings, using measures in areas such as the drawing up of court rolls and case prioritization, and by restructuring court fees and tightening the criteria for filing written pleadings. To satisfy the litigants' and litigators' need for security, the report proposes that the grounds for an oral contestation be entered in the minutes of the hearing and that a summary of the arguments be filed in the court record.

Other findings of the assessment

The report observes a high rate of satisfaction among participants in settlement conferences. Managing settlement conferences in less populated areas has proved more problematic however; judges are often in the area for only a short time and have full schedules. The problem is not insurmountable but it is an administrative one.

The new civil procedure appears to be well adapted to appeal matters, with the exception of a few needed adjustments. The only criticism that can be made is that matters are dealt with quickly, which is an inconvenience to those who value slowness.

The report noted that the principle of proportionality, central to interpreting the rules of procedure, should not only apply to pleadings but also to methods of presenting evidence as well as guide case management and management of the judicial process.

Before concluding, a few words should be said about class actions. Before the reform, the class action authorization process was slow and beset with obstacles owing to numerous examinations and extensive exchanges of documents. Since the removal of those obstacles, obtaining an authorization to institute a class action has become simple, too simple for some in view of the substantial increase in the number of authorization motions. The challenge lies in tightening the procedure at the authorization stage while avoiding regenerating the former procedural burden.

Another finding of the report worth mentioning is the importance of continuing to encourage the various stakeholders in the justice system to use the technology at their disposal and making them aware of the advantages of the technology. The law has generally entrenched the juridical value of electronic documents if their integrity is assured. On-line civil court offices in all judicial districts and an electronically managed justice system and court records are medium-term

possibilities. An almost paperless court office? Why not? And why should the creation and management of court rolls and court records continue to be governed by nineteenth century rules?

Conclusion

A series of articles on access to justice published in the *La Presse* newspaper last January concluded that it had become important to implement the 2002 reform and prevent a return to the past.

That is also in essence the conclusion that can be drawn from the assessment. While there is room for fine-tuning the new civil procedure, as the report recommends and as the public consultations to be held by the Committee on Institutions will surely confirm, it would not be appropriate to ignore its basic principles and rules. For legal practitioners and litigants who know them and use them properly, the rules provide justice that is quicker and potentially less expensive.

It must be remembered that it takes time for new legislation to take hold, and three years is a short time. To illustrate, this summary will end on another historical note. The Code of Civil Procedure that was enacted in 1965 brought about a great cultural change when compared with its predecessor, the 1897 Code, in which "form prevailed over substance." The principle underlying the 1965 Code stated quite the opposite: "rules of procedure are intended to render effective the substantive law" and must not, unless warranted for public policy reasons, result in the loss of rights. It was necessary to wait 12 years and several Supreme Court judgments before that cultural change became a reality. Even though changes appear to be assimilated much more rapidly today, the cultural change targeted by the reform cannot be instantaneous and, to quote another adage, we must "leave time to time".