THE RELATIONS BETWEEN PARTIES, JUDGES AND LAWYERS IN THE QUEBEC CIVIL PROCEDURE

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SUMMARY: I. *Evolution of Quebec Procedure to an Adversarial Model*. II. *The 2003 Quebec Reforms.*

Quebec civil procedure has its historical roots in the investigative procedure installed in New France from the early 17th century. There were no avocats during the French regime, the French Crown preferring litigation in the colony to take place under exclusively judicial control. Parties could thus formulate the nature of their complaint (the "dispositive" principle) but measures of instruction were decided upon and carried out by the judiciary. The only relations which existed were therefore those between judge and party. Judges acted according to the ethical standards of the judiciary, but it was also the case that they enjoyed no civil immunity since they were subjet to the "prise-à-partie" of French law. Litigants thus possessed a recourse for improper handling of their case, though it is difficult to know whether the remedy was ever effectively exercised. The French investigative style of procedure was not to survive, however, the change to English sovereignty in 1759.

I. EVOLUTION OF QUEBEC PROCEDURE TO AN ADVERSARIAL MODEL

Under the English regime, initial judicial appointments to the Quebec Bench were made from the English Bench and Bar, such that these judicial officers had no familiarity with the prevailing form of investigative procedure. An informal Bar also began to develop, which received official recognition in the early 19th century. Thus elements of adversarial procedure, and an increased role for counsel, began to develop from the early years of the English regime. An attempt to introduce the common law system of

writs was however unsuccessful, as incompatible with the substantive civil law which had been guaranteed by the Quebec Act of 1774. Nevertheless, the system of civil procedure continued to evolve towards a common law, adversarial model through the 19th century. Thus the main form of judicial instruction, the enquête, began to fall into disuse as counsel were permitted to interrogate witnesses under some form of judicial supervision. This occurred apparently in a large hall, with several interrogations occurring at any given time, in a number of separate cases, while a judge was available at the front of the hall to resolves any disputes which occurred in the course of the interrogations. The results of these interrogations were part of the file and treated as evidence. The notion of a common law trial was therefore still not present, though there was a form of privatization of the enquete.

In the first Quebec Code of Civil Procedure in 1866 the enquete became optional and could be replaced by a U.S. style of discovery (interrogation by lawyers now being converted to this objective) followed by a common law style of trial. In the 1897 Code of Civil Procedure (C.C.P.) the enquête disappeared entirely, such that Quebec procedure could now be seen as having evolved completely towards a North American model of adversarial procedure. The process took approximately a century and a half. The civil jury had been created in the 18th century but had not been entirely successful given the difficulties with the notion of a trial. It was eventually abolished entirely in the 1970s.

With the move to English-style procedure, the relations between the parties changed significantly. Judges held themselves to be civilly immune, relying on received English public law. Their role in the administration of cases had changed, however, since much of the task of investigation had now devolved to the members of the Bar. Unlike the English Bar, however, members of the Quebec Bar never saw themselves awarded professional immunity, such that negligence in prosecution or defense of a case could result in the individual liability of the advocate. As well, Quebec law follows the general rule that costs are in the cause, i.e, payable by the losing party, and it was implicit in this costs rule under the English model that counsel could also be held personally liable for wasted costs. By the late 20th century, awards of costs against counsel had become a recognized instrument of judicial supervision of litigation practices. It was used, however, only in the most obvious instances of professional negligence.

Parties may have recourse to the disciplinary agency (the syndic) of the Quebec Bar, however, if they have complaints about the manner in which

their advocate has dealt with their case. The office of the syndic is fully funded by the Bar to undertake investigation of complaints. Conduct of Quebec advocates is governed by a provincial Code of Ethics, enacted as a Regulation under the Bar Act. It is relatively detailed and occupies what may be seen as a middle position between codes of ethics which are very brief and codes of ethics drafted as codes of law. After investigation a complaint may be referred to a disciplinary committee of the Bar, which may impose sanctions ranging from a reprimand to disbarment. Appeal is possible to the Tribunal des Professions, a distinct court staffed by provincial court judges and responsible for all appeals from the disciplinary agencies of some 35 Quebec professions.

The procedural model which had thus developed was one in which there was no judicial administration of individual cases. Preliminary motions or exceptions were dealt with by whatever judge was sitting in chambers or in the Practice Court and these judges were seised only with particular questions and had no responsibility for the overall progression of the case. Nor did the Quebec judge play any significant role in assisting parties to come to a settlement. Law firm structures may have contributed to delays and costs, since Quebec law firms have followed the North American model and there are many junior counsel deployed in large cases who must meet in-house billing requirements. The Code of Civil Procedure contained a complex system of delays meant to expedite progression of the case, but the delays were regularly subverted on grounds of professional courtesy, as counsel were reluctant to move to strike particular acts of procedure on grounds of delay for fear of seeing such tactics deployed against themselves. By the 1970s major delays were being experienced at all levels of Quebec courts. By the 1990s major declines in litigation rates were occurring (as in other countries), a result of substantive law reform (*e. g.*, elimination of automobile accident litigation, simplification of divorce proceedings), the rise of alternate dispute resolution, and party disenchantment with the expense and delay of court proceedings. These declines in the rate of litigation occurred even though there was a significant rise in the number of cases where parties represented themselves. In some measure, this represented a return to the pre-1759 situation, though judges accustomed to the adversarial form of proceedings saw great difficulties in presiding over proceedings in the absence of counsel. For all of these reasons, in the late 1990s major reform efforts were undertaken and a first series of measures have now been enacted which will lead to the promul-

gation of an entirely new Code of Civil Procedure in 2003 or 2004. The reforms already enacted, which came into force on January 1, 2003, represent a major change in the nature of civil procedure and in Quebec and have radically changed the relations between judges, lawyers and parties.

II. The 2003 Quebec Reforms

The major effect of the 2003 reforms is to engage the judge much more actively in the administration of cases and in efforts to effect a settlement between the parties. The measures have been partially inspired by case management models of procedure adopted in the U.S. and the U.K. (and in partial form in Canadian common law provinces) and partially also by the French notion of the "juge de la mise en état". There are major theoretical and practical questions, however, as to the overall effect of the reforms and their relation to the substantive civil law of Quebec. The Commission charged with preparing the reforms described them as meant to Aensure a better balance between the parties and the court.@[1] The reform simplifies prior methods of initiating judicial proceedings by providing for a single new procedure (though there are some minor exceptions), the motion to institute proceedings (articles 110, 111, C.C.P.). Use of the procedure of a motion (unlike the prior procedures of a writ and declaration or statement of claim) is significant because it automatically implies appearance before a judge. The motion to institute proceedings must state the facts on which the action or application is based and the conclusion sought. No affidavit, however, is required (article 111, C.C.P.). The motion sets a date for its presentation which must be at least 30 days from service (setting a later date will reduce the time available prior to setting down for trial) (article 151.4, C.C.P.). The defendant has 10 days to appear and the remaining time until the date of presentation of the motion is intended to be used by the parties in negotiating a timetable for the conduct of the proceedings. This timetable must respect an overall delay of 180 days for setting down of the case for trial (article 274.3, C.C.P.) and it binds the parties. If such an agreement has been reached, the motion need not be presented and the procedures will normally follow the timetable which has been fixed. If an

[1] Russell, A., A Revising Civil Procedure in Quebec: A Necessary Process@ (2002), Canadian Forum on Civil Justice, p. 11.

agreement has not been reached, or if the defence may only be an oral one (article 175.2 provides an extensive list of proceedings for which only an oral defence is permitted) or if there are preliminary objections, the motion must be presented to the court on the day fixed. Here the occasion for case management arises and it is automatic, unless displaced by party agreement. This appears to follow the French model of the conference before the President of the Tribunal and not the procedure of at least some common law jurisdictions, which may require further proceedings for institution of a case management judge or case management proceedings.

On presentation of the motion, the presiding judge has extensive powers and may either hear the case immediately or fix a date for such a hearing (where the defence is only oral); hear and decide the preliminary objections; determine the number and conditions of examinations for discovery; fix a timetable for the progress of the proceeding, in the absence of an agreement of the parties (again respecting in principle the overall delay of 180 days); or generally decide on how the conduct of the proceedings may be simplified or accelerated (article 151.6, C.C.P.). The parties may apply for an extension of the 180 days time limit if warranted by the complexity of the matter or special circumstances but this request may be made no earlier than 30 days before the expiry of the 180 day time limit, such that there are obvious dangers if the request is refused (article 110.1, par. 2).

While Quebec has used the technique of discovery for approximately a century and a half it will henceforth be prohibited in causes involving less than $25,000 and may otherwise by limited or made conditional by the presiding judge (article 151.6, C.C.P.).

These reforms represent greater involvement of the judge in the administration of cases and some have seen in them a return by Quebec towards its original tradition of investigative procedure. Case management generally may be seen in this way. Yet it is still the case that the investigative function remains largely in the hands of lawyers, both in the process of discovery and in the trial itself. There is no judicial enquête. So it is still possible to situate these reforms, and those of other case managment jurisdictions, within a distinctively common law tradition of what Professor Jolowicz has called “procedural justice”. Such a tradition of procedural justice would be one in which the primary objective is that of dispute resolution. It would be contrasted with a tradition of “substantive justice”, usually associated with civil law jurisdictions, which concerns itself actively

with the ascertainment of truth such that appropriate rules of pre-established law may be effectively applied. To the extent that Quebec and other case management jurisdictions leave the investigative function to lawyers, and now even limit the time and means available to them, there would be ongoing adherence to underlying common law attitudes.

This ambiguity about the underlying nature and effect of the reforms is reinforced by further measures involving the role of the judge in settlement proceedings. Previously, the Quebec judge played little or no role in settlement proceedings, though the Code of Civil Procedure did provide for a pretrial conference designed to simplify the proceedings (article 279, C.C.P.). Some have seen in this non-involvement in settlement proceedings a necessary consequence of substantive civil law, which would reserve the function of the judge to application of rules of law to situations objectively established through judicial enquiry. The reform, however, engages the Quebec judiciary in active measures of settlement negotiation. Articles 151.14 and following of the Code of Civil Procedure now establish a new procedure of a Settlement Conference@, presided by a judge enjoying judicial immunity in these functions (article 151.14 explicitly so provides). Such a conference may be called at the request of the parties or at the initiative of the Chief Justice, though consent of the parties is required in the latter case. A settlement conference is held in the presence of the parties and, if the parties so wish, in the presence of their attorneys. The presiding judge may meet with the parties separately, if the parties consent (article 151.17, C.C.P.). The parties must ensure that the persons who have authority to conclude an agreement are present at the settlement conference, or that they may be reached at all times to give their consent (article 151.20, C.C.P.). The judge who presides over such a conference may not preside any subsequent hearing relating to the dispute (article 151.23, C.C.P.).

The new provisions relating to the settlement conference place new emphasis on the process of dispute resolution, and are thus consistent with an underlying procedural philosophy of "procedural justice". They are similar to measures adopted in common law jurisdictions, notably in the U.S.A. and U.K. but which appear to be less present in civil law countries. The result may be a form of procedure poised somewhere between traditional concepts of adversarial or investigative procedure, and which may be of long duration.

In terms of the relations between judges, lawyers and parties, the authority of the judge in the administration of justice has been increased sub-

stantially. The role of lawyers has been considerably reduced. They have lost much of their strategic control over the progress of a lawsuit, though retaining their tactical means of investigation and interrogation (though in potentially limited form). Lawyer liability remains as it was before, though there may now be fewer occasions for professional negligence. Party control over the disposition of the case may have increased, notably through party presence at settlement negotiations before a judge. The traditional power of the advocate to bind the client to a settlement still exists (subject to disavowal proceedings) but may now be exercised less frequently if the majority of settlements are reached in a settlement conference in the presence of the client. While the judge remains civilly immune even in the exercise of the new settlement powers, parties may have recourse to both Quebec and federal Judicial Councils if they wish to complain about the conduct of their judge. These Councils now hear approximately one hundred such complaints per year, the majority of which are dismissed as disguised efforts to appeal. If a complaint is found to be justified, however, the Council's may undertake appropriate disciplinary action. Sanctions include reprimand or a recommendation that complex procedures for dismissal be undertaken. There is no range of intermediate sanctions, however, these being seen as incompatible with the independence of the judiciary.