Access to Justice and the New *Code of Civil Procedure*

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Abstract

This article studies the recent reform of the Code of Civil Procedure *in Quebec. It aims at exploring the impact of reducing delays and increasing procedural formalism for the poor and the middle-classes for whom judicial costs and technical requirements are already an important obstacle to the exercise of their rights and freedoms. It asks again and from a different perspective which rules facilitate and which impede access to justice? Who benefits from formalism and strict observance of mechanical rules? Which periods of history tend to adopt formal rules, and why? And how could justice be best served by the rules of procedure? The authors conclude that, though representing some palpable improvements, the new* Code

Résumé

Cet article traite de la récente réforme du Code de procédure civile *du Québec. En particulier, il étudie l'impact de la réduction des délais et de l'augmentation du formalisme procédural pour les personnes pauvres et celles de la classe moyenne pour qui les coûts judiciaires et les exigences techniques de la procédure constituent déjà un obstacle important dans l'exercice de leurs droits et libertés. Adoptant une perspective différente, les auteurs soulèvent une fois de plus les questions suivantes: quelles règles facilitent ou nuisent à l'accès à la justice? Qui bénéficie du formalisme procédural et de l'application stricte et mécanique des règles de procédure? À quels moments de notre histoire avons-nous eu tendance à adopter*

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of Civil Procedure *is likely to have negative consequences and assist in the creating of an improved system of justice that is accessible only to a minority. The authors make suggestions for a more accessible system of civil justice in Quebec.*

des règles plus formelles et pourquoi? Comment la justice serait-elle mieux servie par les règles de procédure? Tout en soulignant que le nouveau Code de procédure civile *apportera un certain nombre d'améliorations, les auteurs sont d'avis qu'il aura probablement des conséquences néfastes et contribuera à la création d'un système de justice amélioré, mais accessible seulement pour une minorité. Les auteurs suggèrent des mesures visant à rendre le système québécois de justice civile plus accessible.*

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In principle, there is general agreement on the need for a system of justice accessible to all citizens. In Quebec, access to justice has even acquired the status of a quasi-constitutional right under section 23 of the Quebec *Charter of Human Rights and Freedoms*[1]. In practice, what is required from society to fulfill such a promise is, however, more controversial.

Nonetheless, there is general agreement too it seems, that a greater understanding and simplification of the rules of procedure are important components of accessibility. The recent reform of civil procedure in Quebec which took effect on January 1, 2003, was largely inspired by this desire to make justice more accessible[2]. The report of the Comité de révision de la procédure civile tabled in July 2001[3] is replete with references to accessibility[4]. This report and the subsequent reform of procedure followed a long period of dissatisfaction with the level of accessibility[5].

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1 *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. s. 23 reads as follows: "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". The *Canadian Bill of Rights*, S.C. 1960, c. 44, uses very similar language in section 2(e) but it only applies to federal matters.

2 The Canadian Bar Association has made accessibility central to its proposal for reform. It is also a recurrent theme discussed at CBA annual meetings. See resolutions from 2002, 2003 and 2004 annual meetings at [http://www.cba.org/CBA/annualmeeting/Main/].

3 COMITÉ DE RÉVISION DE LA PROCÉDURE CIVILE, *Une nouvelle culture judiciaire : rapport*, Québec, Ministère de la Justice, 2001.

4 *Id.*, for example at 11: "Le coût de la justice : un frein à l'accessibilité". See also at 32. The entire report is permeated by these reasons. At 3, we read: "*Le mandat du Comité consiste à réviser la procédure civile. Il ne s'étend pas à une réforme de la justice civile dans sa globalité. Il doit cependant avoir, comme cela lui fut demandé par le Ministre, le souci de placer le citoyen au coeur de la révision*".

5 See: Jean-Guy BELLEY, "Une Justice de la seconde modernité", (2001) 46 *McGill L.J.* 317; Roderick A. MACDONALD, "Accessibilité pour qui? Selon quelles conceptions de la justice?", (1992) 33 *C. de D.* 457; GROUPE DE TRAVAIL SUR L'ACCESSIBILITÉ À LA JUSTICE, *Jalons pour une plus grande accessibilité à la justice*, Québec, Ministère de la Justice, 1991 [hereinafter "MacDonald Report"]; Pierre-Claude LAFOND, *L'exemple québécois de la Cour des petites créances*, (1996) 37 *C. de D.* 63; CANADIAN BAR ASSOCIATION, *Executive Summary: Systems of Civil Justice Report*, January 1997; Jacques FRÉMONT, "L'accès à la justice à l'aube du XXI^{e} siècle au Québec : Commentaires sur le Rapport du Groupe de travail sur l'accessibilité à la justice (Rapport MacDonald)", (1991) 11 *Windsor Yearbook of Access to Justice* 143.

However, in spite of efforts to simplify procedures and initiatives by judges and court personnel to demystify the rules for the litigants, the assistance of a lawyer is for many citizens the only way to obtain a real access to justice. In *Fortin* v. *Chrétien*, Mr. Justice Gonthier, writing for a unanimous Court, emphasized that allowing individuals to represent themselves pursuant to article 61 of the *Code of Civil Procedure* (C.C.P.)[6] was a necessary, but clearly not a sufficient measure to ensure access to justice:

> *In concluding, I would like to add a few words regarding access to justice … There is no doubt that what art. 61 C.C.P. does, inter alia, is to recognize the situation of certain litigants who are too well off to qualify for public legal assistance but not well enough off to pay for the services of an advocate. Often, the option of consulting an advocate is not available to them. Article 61 enables them to represent themselves and to present the proceedings that are needed in order for them to be able to exercise their rights and remedies. Recognition of that reality must not, however, be confused with access to justice.*[7]

Mr. Justice Gonthier recognized both the crucial role of the lawyer to resolve disputes and promote the full exercise of rights, and the importance of being represented by a lawyer regardless of one's financial situation:

> *Every day, the courts across Canada contribute to some degree to enhancing access to justice. For example, they ensure that constitutional guarantees, including the right to the assistance of an interpreter and the right to use the official language of one's choice in proceedings before them, are enforced. The registrars of those courts also provide litigants with invaluable technical assistance, and judges provide persons who are not represented by advocates with direction and guidance in exercising their rights. In no respect, however, can they replace an advocate. As an officer of the court, the advocate plays an essential role in our justice system, in representing the rights of litigants before the courts, but also at the preceding stage of settling disputes. It would therefore be desirable for all litigants to be able to retain the services of an advocate, irrespective of their financial situation.*[8]

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6 R.S.Q., c. C-25.

7 *Fortin* v. *Chrétien*, [2001] 2 S.C.R. 500, at para. 48. Underlining ours.

8 *Id.*, at para. 54. Underlining ours.

Section 34 of the Quebec *Charter of Human Rights and Freedoms* and Section 10(b) of the *Canadian Charter of Rights and Freedoms*[9] also protect the right to be assisted by counsel in various contexts.

Making the system more accessible will therefore also involve finding ways to make legal services more affordable. When it comes to procedure, this will mean attempting to reduce the number of hours that lawyers need to spend dealing with procedural matters and waiting at the courthouses for motions to be heard.

However, the precise nature of the link between procedure, accessibility in general, and access to legal services in particular, has not been fully explored. In fact, the recent report of the Comité de révision de la procédure civile has not considered this issue[10]. The present article proposes to do precisely this. It aims at exploring the impact of reducing delays and increasing procedural formalism for the poor and the middle-classes for whom judicial costs and technical requirements are already an important obstacle to the exercise of their rights and freedoms. It asks again and from a different perspective which rules facilitate and which impede access? Who benefits from formalism and strict observance of mechanical rules? Which periods of history tend to adopt formal rules, and why? And how would justice be best served by the rules of procedure? We believe that these questions are fundamental in evaluating last year's reform.

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9 *Charter of Human Rights and Freedoms*, *supra* note 1; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

10 COMITÉ DE RÉVISION DE LA PROCÉDURE CIVILE, *op. cit.*, note 3, at 3, we read:

> *Le mandat du Comité consiste à réviser la procédure civile. Il ne s'étend pas à une réforme de la justice civile dans sa globalité. Ainsi, le Comité ne procède pas à une révision de l'aide juridique, de la tarification des droits de greffe, des frais et honoraires judiciaires, des honoraires extrajudiciaires des avocats ou des frais d'experts. Le Comité ne se prononce pas non plus sur les règles déontologiques applicables aux différents intervenants judiciaires ni sur l'organisation et la gestion des greffes des tribunaux.*

I. Types of Rules of Procedure

The line between form and substance is often blurred.

Some rules contained in the *Quebec Civil Code* and in other legislation directly address substantive rights. They shape and inform freedoms and obligations for the different classes of citizens in society, and thus affect access to justice, both on a procedural and substantive level. For instance, Civil Code rules establishing priorities in guarantees in the event of a bankruptcy have long to say about employee-employer hierarchies in our society[11]. These rules are as crucial to access to justice as are the more formal and procedural ones.

Secondly, the rules that appear at first glance to be procedural in nature and which tell us how, when and before which forum to pursue our legal remedies are not all of the same type and may have substantive consequences. Some of these rules are more or less substantive in nature. For instance, prescription is a substantive right once acquired, even though it is usually pleaded as a procedural exception[12]. Similarly, a right of appeal, once it is granted, is a substantive right[13]. Moreover, the issues behind certain procedural questions raise substantive considerations. In deciding whether or not one should be strict with regard to the revocation of judgments one has to decide how important is the substantive notion of the finality of judgments[14]. One can state too that the supervisory role of the Superior Court over all subordinate bodies, while included in the *Code of Civil Procedure*[15], is in essence a substantive and indeed a fundamental issue[16]. The more directly substantive rules and the procedural rules which are substantive in nature will not be the object of our study here, but shall be kept in mind in any discussion about accessibility.

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11 R.A. MacDONALD, *loc. cit.*, note 5, 480.

12 See: Pierre-André CÔTÉ, *Interprétation des lois*, 2nd ed., Cowansville, Éditions Yvon Blais, 1990, p. 181.

13 *Construction Gilles Paquette Ltée* v. *Entreprises Végo Ltée*, [1997] 2 S.C.R. 299 at para. 18.

14 But even here a difference exists between purely procedural rules about presenting motions in revocation of judgment and the more substantive question of when to grant them on the merits.

15 Art. 33, 453, 750ff. and 834ff.

16 *Crevier* v. *A.G. Quebec*, [1981] 2 S.C.R. 220.

Other rules of procedure, while not substantive in nature, can have a serious direct or indirect impact on substantive rights and therefore on access to justice. In a recent case, *Somers* v. *Fournier*, the Ontario Court of Appeal shows how the procedural rules respecting costs have an impact on substantive justice in sanctioning abuses of process by litigants and promoting efficient administration of justice. Cronk J.A. writes:

> *Thus, costs are both a discretionary indemnification device and a mechanism by which abuses of the court's processes may be deterred and penalized. Solicitor and client costs, or costs on a substantial indemnity basis, may be awarded to penalize and deter reprehensible, scandalous or outrageous conduct, or conduct deserving of sanction. Costs awarded against solicitors personally, because of their conduct in a proceeding, have both punitive and compensatory aspects (see rule 57.01). In addition, by rule 49.10, costs can be utilized to promote settlement and to encourage efficient and timely dispute resolution.*
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> *Viewed from a multi-purpose perspective, therefore, costs are "a means by which the ends of justice are attained" (*Sutt *v.* Sutt, *at p. 175 O.R. per Schroeder J.A.). They are an essential tool designed, in the words of La Forest J. in* Tolofson, *"to make the machinery of the forum court run smoothly" and to aid Ontario courts in "administering their machinery as distinguished from their product" (at pp. 1067-68 and pp. 1071-72 S.C.R. pp. 318 and 321 D.L.R.).*[17]

Most rules of civil procedure are practical in nature and tell us how to present legal arguments without an immediate apparent effect on substantive justice. These rules are meant to make the proceedings as simple and as clear as possible, to improve the quality of justice by making sure that court files contain all necessary information and they also seek to make proceedings more rapid or efficient. The new *Code of Civil Procedure* has brought in several improvements with respect to simplicity and efficiency, such as the single system of introducing proceedings by motion and the presentation of all preliminary matters at the same time[18]. Among the most interesting changes are those which reduce the complexity of cases of relatively small value, notably by eliminating discoveries[19]. These are virtually all laudable modifications and they, in effect,

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17 *Somers* v. *Fournier*, [2002] 60 O.R. 3d 225, 233 and 234 (C.A.).

18 Arts. 110-119 and 151.5 C.C.P.

19 Art. 396.1 C.C.P. However, other beneficial changes in such cases would include the elimination of oral hearings of experts and the admission of some hearsay.

diminish the number of procedural issues that will arise pending the outcome of a case.

It is the rules which seek to improve the quality and reduce the overall duration of the proceedings that are open to discussion. These include the rules of total disclosure of documents and experts. Most striking are the rules requiring celerity, notably the obligatory inscription within 180 days and the establishing of fairly strict delays from the outset, either by agreement of the parties or through a Court order[20]. In the last ten years, similar rules have already been instituted for appeals[21] and for the "*procédure allégée*"[22] which was meant to deal with less complex cases or ones with less at stake.

Do these rules which impose strict discipline on attorneys and parties advance the cause of justice? The notion that reducing delays within the court system makes justice more accessible is generally accepted and certainly justified in many cases. However, a closer look at the whole situation is necessary in order to find out who is favoured by a faster court system and whether speed always means justice.

II. The Recent History of Procedure

Before the 1970s, Canadian law, and Quebec law in particular, were quite formalistic and technical; an error in the conclusions of a proceeding or in the description of a party or a failure to act within the delays could prove fatal. This was so even after the entry into force of the 1965 *Code of Civil Procedure* which stipulated in Article 2:

> *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*

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20 See: arts. 110.1, 151.1-151.3, 151.6-151.7 and 274.3 C.C.P.

21 Arts. 494, 495.2, 503.1, 505 and 507.2 of the 1965 *Code of Civil Procedure.*

22 See: arts. 481.1-481.17 of the 1965 *Code of Civil Procedure.*

facilitate rather than to delay or to end prematurely the normal advancement of cases.[23]

A number of cases can be cited to show the formalism which, although abating since the 19th century, was nevertheless still quite present in the 1970s. The Court of Appeal decisions in *Duquet* v. *Town of Sainte-Agathe-des-Monts*[24] and *Vachon* v. *Attorney General of Quebec*[25] are excellent examples.

In a series of striking decisions, the Supreme Court reversed the trend and reduced procedure to a technique which could almost never determine the result.

In *Duquet* v. *Town of Sainte-Agathe-des-Monts*[26], Pigeon J. said:

These observations show that the Court of Appeal went against the intention of the Code of Civil Procedure *in refusing to consider as a measure of "preventive justice" a motion made to provide against an express threat from the other party. In saying this, I am in no way suggesting that the Commissioners' observations on the distinction between preventive and curative justice should be considered as part of the wording of the Code. On the contrary, it appears obvious to me that their purpose in omitting it from the draft, which they proposed and the legislature later enacted, was precisely that they did not wish the courts to be embarrassed by it. In fact, the governing intention behind the whole new Code was the desire to bury the old adage that "form takes precedence over substance". This intention is stated expressly in art. 2 ...*

In *Hamel* v. *Brunelle*, Pigeon J. said:

In my opinion, it is important to intervene to ensure compliance with the intention of the Quebec legislator to repeal the old maxim that "form takes precedence over substance". To cite only recent decisions, the rejection of unjust formalism was the reason for this Court's intervention on questions of procedure in: Frank *v.* Alpert, Basarsky *v.* Quinlan, Ladouceur *v.* Howarth, Witco Chemical Co. *v.* Oakville. *When a decision on a question of form results in a litigant losing his rights, it ceases to be a question of form and becomes a question of law. It is a question of form only as long as a remedy is possible, not when a right is lost. For this*

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23 See also: art. 20 and art. 9 of the 1965 *Code of Civil Procedure*.

24 [1975] C.A. 764.

25 Not reported; quoted in *Vachon* v. *Attorney General of Quebec*, [1979] 1 R.C.S. 554, 557 and 558.

26 [1977] 2 S.C.R. 1132, 1140. This decision refers to earlier procedural judgments.

reason, in the case at bar, the point cannot be treated as a mere question of procedure.

... The principle governing amendments in this Court, which the authors of the new Quebec Code of Civil Procedure *took as their guide, is that it is immaterial that the necessity for the amendment was "occasioned by the defect, error, act, default, or neglect of the party applying to amend": the Court may nevertheless allow it in order to "determine the real question" between the parties.*[27]

In *Vachon* v. *Attorney General for Quebec*, Pigeon J. added:

In my view, the theory of nullity for some formal defects, elaborated in the cases on which the decisions in question are based, is contrary to the principles of the present Code of Civil Procedure*. It is quite true that art. 834 prohibits evocation and certain other remedies without prior authorization, but nowhere does the Code prohibit a declaratory action or a motion for a declaratory judgment in respect of claims that may be urged by an extraordinary remedy contemplated in this article.*[28]

While the Court of Appeal was initially reluctant to embrace this trend, it followed suit in *Munger* v. *Falardeau*[29].

On the issue of counsel errors, the Supreme Court said further that litigants' rights should be safeguarded and protected despite the error made by counsel when it would be required by the "ends of justice". In *St. Hilaire* v. *Bégin*, Lamer J., as he then was, explained:

In exercising its discretion, it must in general, as art. 523 provides, seek "to safeguard the rights of the parties". As we have a system in which the parties are adversaries, and their respective rights are more often than not in conflict with each other, it goes without saying that the Court will have to give priority to the rights of some as against, and often to the detriment of, the rights of others. In this regard, the Court must base itself on the initial wording of art. 523 and, when it has a choice, choose the means of safeguarding the rights of the parties which are required by "the ends of justice". I am also of the opinion that, in a case where the rights of the parties must be protected following an error by counsel for one of them, and where this error will necessarily have detrimental consequences for one or other of the parties depending on the Court's decision, "the ends of justice" require that the detrimental consequences of this error be borne by the party represented by the counsel in question

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27 *Hamel* v. *Brunelle*, [1977] 1 S.C.R. 147, 153 and 154.

28 *Supra* note 25, 561.

29 [1981] C.A. 308, aff'd [1983] 1 S.C.R. 243.

and not by his opponent; any other result would be singular, to say the least.[30]

Although some cases continued to favour form over substance[31], the breadth and the zeal of the cases decreased markedly[32]. The waning of formalism in the 1970s and 1980s should not be exaggerated. There always were cases in which procedure did tip the balance, sometimes because of a conservative judge, sometimes because of a particular rule which was legislated in a peremptory manner and sometimes because the conduct of lawyers or parties was simply too egregious to be forgiven or caused irremediable prejudice which was always a ground for refusing relief[33]. This meant that, even in the most liberal of times only a foolish lawyer would have simply disregarded the rules of procedure and assumed that he would be granted relief, no matter what.

However, the change in atmosphere since the 1990s goes far beyond the sporadic severity of courts before this. In part because of the long delays which had often marred the Quebec system of justice, a new strictness set in and it became far less clear than before that technical errors would be corrected[34].

For instance, *Laval* v. *Berkovits*[35] made a distinction between an attorney's error which can be corrected and negligence which could not be. This distinction was later applied in simplified procedure cases[36].

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30 *St. Hilaire* v. *Bégin*, [1981] 2 S.C.R. 79, 87 and 88.

31 See for instance: *Services de santé du Québec* v. *Communauté urbaine de Québec*, [1992] 1 S.C.R. 426.

32 See: *Watier* v. *Watier*, [1990] R.D.J. 369 (C.A.); *Laval* v. *Berkovits*, [1989] R.D.J. 592 (C.A.); *Nobert* v. *Lavoie*, [1990] R.J.Q. 55 (C.A.).

33 See: *Charpentier* v. *Municipalité de Rock Forest*, [1980] C.S. 387; *Allard* v. *Dorion*, [1980] C.S. 752; *Les Prévoyants du Canada* v. *Marcotte*, [1986] R.D.J. 137 (C.A.); *Migneault* v. *Huot*, [1985] R.D.J. 559 (C.A.).

34 Although they often were. See: *Caron* v. *Lessard*, J.E. 2002-1839 (C.A.). See also: *Verrault* v. *Tribunal des Professions*, [1992] R.J.Q. 1284 (C.A.).

35 *Supra* note 32.

36 See: *Yuen* v. *Kabbaj*, REJB 99-10339 (Sup. Ct.); *Guignard* v. *Assurance-vie Desjardins Laurentienne inc.*, REJB 99-11271 (Qc Ct.); *Morasse* v. *A.P.C.H.Q.*, J.E. 98-1031 (Qc Ct.); *Bilbul* v. *Thériault*, J.E. 98-874 (Qc Ct.); *Duguet* v. *Tessier*, J.E. 98-643 (Qc Ct.); *Huot* v. *Industries Pard inc.*, REJB 98-10401 (Qc Ct.).

Another example of the new tendency can be found in *Riverin* v. *Blais*[37], where LeBel J.A. (as he then was) refused to allow further extension to the plaintiff who was not represented by counsel to produce her brief before the Court of Appeal, arguing that rules of procedure should apply to all litigants alike and that the efficient administration of justice and the rights of the defendant justified the refusal. This case shows the formalism of the new philosophy evident, too, in *Construction Gilles Paquette* v. *Les Entreprises Végo*[38], where the appellant lost its right of appeal because its counsel failed to produce his brief within the stipulated time.

In *Construction Gilles Paquette*, counsel for the appellant wrote to counsel for the respondent in order to advise that his brief would not be received on time and to suggest a motion for an extension of time. The letter remained unanswered and, under the then new article 503.1 of the 1965 *Code of Civil Procedure*, the appeal was administratively declared deserted. The Court of Appeal found that since there was no more appeal in existence, a motion for an extension of time could never be presented after the time limit was past and that in any event the presumption of desertion could not be rebutted. The Court also refused to grant a special permission to appeal, finding that counsel ignorance of the new article 503.1 was not sufficient grounds to grant such a permission.

Further, new rules were constantly elaborated by the legislator for complete disclosure[39], filing of detailed property forms in family law, written arguments and special accelerated proceedings. Some, such as the simplified procedure, clearly imposed rules where default was difficult to remedy[40]. Others merely added to the difficulty, complexity and cost of the proceedings.

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37 [1990] R.D.J. 455 (C.A.).

38 [1995] R.J.Q. 2853 (C.A.), rev'd [1997] 2 S.C.R. 299; see also: *La Garantie Compagnie d'Assurance* v. *Inter-Cité Construction*, [1996] R.D.J. 58 (C.A.).

39 This process started in the 1980s with rules of court.

40 Article 481.11 of the 1965 *Code of Civil Procedure* imposed a strict delay of 180 days to inscribe a case, which has now been extended to all procedures under the new Code. Many cases were dismissed because that time period had ellapsed, regardless of the merits of the cases; see for example: *Réal Boisvert Transport inc.* v. *Ménard*, REJB 97-04930 (Sup. Ct.); *Pouliot* v. *Vachon*, J.E. 98-283 (Sup. Ct.); *Paysagiste Blave Ltée* v. *Les Investissements de la rue Avoca inc.*, J.E. 97-2102 (Qc Ct.); *Franceschini* v. *Ialenti*, REJB 2000-17761 (Qc Ct.); *Arsenault* v. *Unique compagnie d'assurances générales*, REJB 98-05938 (Qc Ct.); *Gauthier*

The new trend, chipping away at *Duquet*[41], *Hamel*[42], *Vachon*[43] and *St-Hilaire*[44] can be seen in two recent judgments of the Court of Appeal. In *CUM* v. *Crédit commercial de France*, Fish J.A. says, unfortunately in dissent:

> *Nearly 50 years ago, when matters of this sort were dealt with more strictly, a five-member panel of the Court held, unanimously, that counsel's failure to file a defence to an action was "sufficient cause to support an opposition to judgment."*
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> *...*
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> *A quarter century later, in Cité de Pont Viau v. Gauthier Mfg. Ltd., the Supreme Court of Canada, again unanimously, cited that judgment of our Court with approval.*
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> *In an unbroken line of cases, all of them similar in principle, the Supreme Court has since then reached the same result, restoring a right to be heard after it had been extinguished, through the error or negligence of counsel, by expiry of peremptory delays.*[45]

The majority's views reflect the more strict approach to procedure which was unfashionable and sporadically used since the 1970s, but which now seems to be in favour again. Rochon J. explained that there was a clear distinction between the concepts of "*impossibilité relative*" and that of "*force majeure*", and he showed his approval for the latter more restrictive version which ensured more stability and certainty in proceedings, even to the detriment of justice:

> *Le législateur exprime sa volonté et son choix en assujettissant la mesure remédiatrice à une condition d'ouverture plus ou moins stricte. Lorsqu'il*

Décor inc. v. *Les Gestions Lédes inc.*, J.E. 98-2108 (Qc Ct.); *Commission des normes du travail* v. *Jean-Marc Trudel inc.*, J.E. 98-408 (Qc Ct.); *Les carrières St-Eustache Ltée* v. *La compagnie d'assurances Jevco*, J.E. 2000-1941 (Sup. Ct.); *2847-8428 Québec inc.* v. *Bélanger*, REJB 99-14783 (Sup. Ct.); *Yuen* v. *Kabbaj*, *supra* note 36; *Guignard* v. *Assurance-vie Desjardins Laurentienne inc.*, *supra* note 36; *Morasse* v. *A.P.C.H.Q.*, *supra* note 36; *Bilbul* v. *Thériault*, *supra* note 36; *Duguet* v. *Tessier*, *supra* note 36; *Huot* v. *Industries Pard inc.*, *supra* note 36.

41 *Supra* note 26.

42 *Supra* note 27.

43 *Supra* note 25.

44 *Supra* note 30.

45 *CUM* v. *Crédit commercial de France*, [2001] R.J.Q. 1187, 1194 (C.A.), leave to appeal denied: [2001] C.S.C.R. 429.

> *conditionne la mesure à l'existence d'une situation de force majeure, il marque l'importance d'assurer une plus grande stabilité aux rapports juridiques visés. À l'opposé, il retiendra le concept de «l'impossibilité relative» pour donner préséance à des considérations d'équité qu'il estime supérieures aux droits protégés par le seul écoulement du temps.*[46]

This clearly opens the door to a stricter reading of some of the new rules of procedure where the intention may well be to make the application of the stipulated time periods relatively severe.

In *Éclipse Bescom Ltd.* v. *Soudures d'Auteuil Inc.*, Brossard J.A. describes in considerable detail and with approval, the new trends in civil procedure. He notes that the possibility for the litigants to control their procedures is one that definitely belongs to the past. He writes:

> *D'entrée de jeu, je soulignerais qu'il me paraît un peu théorique, en 2001, d'opiner qu'il serait contraire aux droits du demandeur de lui imposer un codéfendeur additionnel. Les choses ont beaucoup évolué depuis l'époque où un demandeur pouvait prétendre être maître de sa procédure. Non seulement n'est-il plus aujourd'hui le maître de ses délais procéduraux (v.g. délais de rigueur et de déchéance en matière de voie allégée), mais la politique de gestion des dossiers qui s'implante de plus en plus en première instance lui impose, comme au défendeur, des échéanciers sur lesquels il garde très peu de contrôle. Les règles 15 et 17 des Règles de pratique de la Cour supérieure du Québec en matière civile lui imposent, d'une part, le dévoilement complet de sa preuve, l'obligeant à cristalliser, souvent longtemps avant la date d'audition, le contenu de la preuve qu'il pourra présenter au procès, et l'empêchent, d'autre part, sous réserve de la discrétion du juge, de présenter à ce procès une preuve qu'il aurait omis de mentionner dans sa déclaration selon la règle 15 parce qu'il ne croyait pas, à cette époque, que cette preuve pourrait lui être nécessaire. L'évolution est telle, dans ce domaine, que l'on a des motifs raisonnables de croire qu'on lui imposera bientôt une médiation obligatoire avant qu'il puisse faire avancer son dossier. Enfin, il est clair que toute l'évolution récente du Code de procédure civile vise à imposer aux parties la plus grande transparence qui soit et à mettre devant le tribunal, dans le cadre d'un même dossier, tous les éléments pertinents au litige dont, me semble-t-il, la présence d'une partie qui en aurait été omise.*[47]

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46 *Id.*, 1192.

47 *Éclipse Bescome Ltd.* v. *Soudures d'Auteuil Inc.*, [2002] R.J.Q. 855, 863 (C.A.). Underlining ours.

He concludes, referring to the adage "procedure is a servant of the law, not its master": "*À mon avis, ces vices procéduraux ne sont pas susceptibles de remède en l'espèce. Il y a en effet une limite à la maxime*"[48].

It is true that virtually no one has expressly repudiated the doctrine that form should give way to substance. The sole exception is the essay by Frédérick Charette, *Du formalisme procédural: une critique de l'article 2 du Code de procédure civile*. He summarizes his three conclusions as follows:

> *Résumons ici les conclusions auxquelles nous sommes parvenu:*
>
> *1. Les règles de procédure existent dans un lien nécessaire avec les règles de fond et priment ces dernières;*
>
> *2. L'abandon du formalisme est un moyen inefficace de traiter les lenteurs et les rigueurs de la justice;*
>
> 3. *La tentative de construire législativement un ordre juridique idéal est une utopie périlleuse qui crée des problèmes insolubles là où il n'y avait que des difficultés praticables.*[49]

The fundamentally conservative ideology of his position comes out more clearly in other passages. Although recognizing that there are real difficulties deriving from procedural formalism in the administration of justice, the author comes to the startling conclusion that they should rather be resolved by limiting judicial discretion, reducing state intervention, enhancing individual liberty and promoting competition:

> *La solution qu'apporte l'article 2 est d'abandonner le formalisme, cependant qu'il aurait fallu d'abord s'interroger sur le rôle de l'étatisation, de l'inflation législative et des chartes dans l'emballement du système judiciaire. Si elle ne veut pas être la cause du mal qu'elle entend soigner, toute réforme « doit se limiter à soulager la souffrance; elle ne peut prendre pour objet la quête du bonheur ».*
>
> *La justice impartiale fait partie des règles du jeu et c'est une condition nécessaire de la vie d'une société libre et démocratique. On peut penser que cette règle tende à dénaturer la vie communautaire et qu'on doive la changer. Mais, comme le souligne Oakeshott, il n'existe aucune considé-*

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48 *Id.*, 870.

49 Frédérick CHARETTE, "Du formalisme procédural : une critique de l'article 2 du Code de Procédure Civile", (1994) 39 *McGill L.J.* 263, 301.

> *ration interne à l'ordre juridique en vertu de laquelle on pourrait dire que la justice impartiale est « inéquitable ». On doit jouer le jeu du droit d'une manière consciencieuse, en respectant ses règles authentiques.*
>
> […]
>
> *Or, si nous réitérons sans cesse le même discours sur les rigidités et la solennité du processus judiciaire, c'est que nous refusons d'admettre l'incapacité de l'État de régler tous nos problèmes. Chaque difficulté sociale est traitée par une intervention législative, cependant que le temps et la liberté laissée aux individus règleraient bien des choses.*
>
> […]
>
> *Cette interprétation de l'article 2 comme principe régulateur et source d'innovation de la procédure nous entraîne toutefois sur des chemins obscurs. Car nous connaissons un moyen d'innover et de régulariser encore bien plus puissant que l'article 2 : la concurrence.*[50]

These propositions ignore the fact that since the first critiques of John Stuart Mill, it has been convincingly established that *laissez-faire* ideology could not fulfill its promise of liberty and equality for all without major concerns for redistributive and substantive justice, and that the apparently invisible non-intervention of the state was precisely intervention in favor of a privileged minority.

That being said, Charette's essay has the merit of posing the questions very clearly for our more immediate purposes. The other authorities, less categoric, had created a procedural limbo in which it was still possible to be relieved of the consequences of an error, but this was never certain, and in which the procedural requirements for the obtention of a trial date had been made far more onerous just as the time given to fulfill them had contracted. Under the new Code, there is still some degree of uncertainty on whether relief from errors will be available in individual cases. Unfortunately, however, an intent to deny such relief in most cases has been made clear, supposedly in the name of increasing access to justice, with the result that there is now a much greater danger of cases being decided on purely procedural grounds, like many were in the "simplified procedure" regime[51].

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50 *Id.*, 300 and 301.

51 See *supra* note 40.

III. Who Gains from Strict or Complex Procedure

We suggest that strict and complex procedures favour the powerful and the wealthy and lessen accessibility for the average individual. This is amply clear in Frédérick Charette's article[52] where he wants to reduce the role of both the legislative process (*i.e.* regulation) and the role of the Charter while enforcing mechanical rules of procedure in the name of fairness[53]. However, the discriminatory effect of strict procedural rules is a general one even without the radical propositions of Me. Charette.

In the first place, it stands to reason that when one imposes complex rules, creates obligations to file difficult and detailed forms and compresses the amount of time available, one limits the number of cases a lawyer can accept while increasing the cost of each case and thus favours those with greater means and manpower[54]. What will be created is a new Cadillac of litigation – a perfectly desirable result from the point of view of major litigants. However, the individual who may have benefitted from a more modest but more affordable system will be left out in the cold.

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.

It is true, as the old saying states that, in some cases, "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[55]. The new rules in the Court of Appeal have already put the weaker appellants in the invidious position of having to order

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52 F. CHARETTE, *loc. cit.*, note 49.

53 This is redolent of John Rawls' distinction between "fairness" and "justice" in J. RAWLS, *A Theory of Justice*, Cambridge, Mass., Belknap Press of Harvard University Press (1971).

54 This will also favour those with access to better technical equipment which is not, in our times, an insignificant consideration.

55 In medical malpractice law, plaintiffs have a notoriously hard time in finding experts and the new pressure will surely dissuade many from suing.

transcripts and pay for factums virtually immediately[56], which many will simply be unable to afford.

There are other less evident unjust effects of the strict application of rules. As noted earlier, fairness as opposed to justice often means the application of strict rules. Procedural rules are, by their nature, technical and lend themselves to technical and mechanical applications. Thus, discretion is reduced and those who obtain earlier and more complete legal advice are given a serious edge. Technically predictable results give an edge to those who have had the benefit of counsel and who are trying to uphold established precedent. In many cases, a court who wishes to ensure that justice prevails over form does so by attenuating the effect of established precedent or by finding an innovative solution which could not easily be foreseen. Stability and predictability are not always in the interest of justice or of society as a whole.

The idea that strict procedure leads to more justice is not a new one. In 18th-Century England, the reformers' intent was to abolish judicial discretion because it was understood to lead to uncertainty and corruption. They suggested introducing stricter procedural rules to ensure that everyone would be equal before the law. However, as Kiralfy explains in *Potter's Historical Introduction to English Law*, this new formalism in fact gave way to conservatism and further rigidity:

> *The second difficulty was the necessity for reducing every stage of the proceedings to a definite form, avoiding all discretion upon the part of the court. Discretion would not only lead to uncertainty, but it would also open the door to corruption. Judges, who are laymen, must rely on formality, or justice will not be according to law. But early men destruct all novelty and desire ritual to support their conservative and superstitious temper.*
>
> *This conservative formalism marked every step in the procedure, and formalism led to rigidity. Early law was nearly static, except in times of conquest, until the King became strong and the judges became lawyers. From this unpromising beginning the history of procedure developed steadily in the direction of flexibility. Today, both in directions relating to*

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56 It is to be noted that all of these procedural requirements were vividly described in *Eclipse Bescom Ltd.*, *supra*, note 46.

> *pleading and in the course of the action, much is left to the discretion of "the court or a judge".*[57]

The association between formalism and conservatism was also examined by Professor Lawrence Friedman in the American context in *A History of American Law*[58]. He explains that judges were mostly from white Protestant and Presbyterian backgrounds, raised in an essentially traditional context, and surrounded by a working environment which favoured the values of American industrialism for whom formalism represented a protection and a justification for maintaining their power and legitimacy. Professor Friedman writes:

> *Who were these judges? On the whole, they were fairly conservative men, educated in traditional ways, and they lived out their careers in a general environment that exalted the values of American business (though not necessarily big business). They tended to be jealous of their judicial and economic prerogatives. High-court judges were no cross section of the country. They represented old America. The bench was lily-white and mostly Protestant; there was a tendency toward dynasties – the Tuckers in Virginia, for example. In New Jersey, every chief justice from 1776 to 1891, with only one exception, was Presbyterian. Most associate justices had also been Presbyterians, many of them elders in their churches. Nearly all of the judges with a college education were products of Princeton. As of 1893, of forty-eight judges elected to Virginia's highest court, only three had been "born outside of the ... limits of Virginia". From 1860 to 1900, virtually every Vermont judge was a native; only occasionally did a son of Connecticut or New Hampshire creep in. The fifteen supreme court judges of Minnesota between 1858 and 1890 were all Protestants, and primarily from good, solid middle-class backgrounds.*

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57 A.K.R. KIRALFY, *Potter's Historical Introduction to English Law*, 4th ed., London, Sweet & Maxwell, 1958, at 314 and 315. See however: Douglas HAY, "Property, Authority and the Criminal Law", in Douglas HAY and others, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, London, Allen Lane, 1975, who warns us of the legitimation effect of judges' use of discretion. In this brilliant essay, Hay discusses the necessary and complicated relationship between formalism, judicial discretion and power and explains how the criminal justice system in the eighteenth century system maintained its authority by walking a thin line between terror and mercy: it impressed and protected the ruling class by its majesty, formalism, and apparent justice for all, but yet it needed to operate with considerable use of discretion, patronage and paternalism towards the poor to ensure its legitimacy and power.

58 L.M. FRIEDMAN, *A History of American Law*, 2nd ed., New York, Simon & Schuster (1985).

> *For judges of this stamp, formalism was a protective device. They were middle-of-the-road conservatives, holding off the vulgar rich on the one hand, the revolutionary masses on the other. The legal tradition represented balance, sound values, a commitment to orderly process. The judges, by habit and training, preferred to work within the comfortable confines of legal tradition; there were, of course, still great opinions (great in the sense of consequential); but, in a generation of bulging law libraries, creativity no longer required the style of the judges of the "golden age", who invented whole areas of law in a few majestic brushstrokes. "Formalism", thus, was less a habit of mind than a habit of style, less a way of thinking than a way of disguising thought.*[59]

Professor Friedman continues and explains how formalism served the interests of the time:

> [The judges] *relied less on long oral arguments than on written briefs. They spent their lives looking at formal records, and may have come to believe in them too much. Again, the profession took itself (as always) very seriously. A judge may consider very significant an error which an outsider would find trivial at best. Stylistically, this was a period of conceptualism, of dry legal logic. The bench, as we have suggested, was peopled with lesser men; rules were their one excuse for power. Some procedural excess may have stemmed from a good idea gone bad: a fumbling attempt to govern, standardize, and rationalize trials, appeals and written arguments.*[60]

It would seem that historically, periods of conservatism and obedience to rules coincide with judicial and legal formalism. What does this say for our times? It is quite unfortunate that in our current society which purports to be open and inclusive, strict procedure is once again favoured and is being presented as a means of increasing access to justice for all.

Years in which formalism was rejected, that is the 1970s and the 1980s, were years of progress towards a more inclusive society. They were years of democratization, economic equalization and the growth of human rights laws as demonstrated by the Charter and provincial legislation[61]. It is fair to assume that the removal of technical and formalistic barriers to judicial relief was in harmony with the prevailing trends.

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59 *Id.*, at 383 and 384. Underlining ours.

60 *Id.*, at 400.

61 It is fair to say that in these years the concern with social justice evident since World War II, reached its highest point.

Since the 1980s and in spite of a prevailing public discourse to the contrary effect, equality has declined as an ideal both economically and politically. There has been an increasing disparity of income and a loss of patience with Charter rights and with the notion of judicial discretion[62].

Despite the populist language used by some of the advocates of strict procedure who have presented the hardening of rules in the garb of consumer rights, it is difficult to see the trend as separate from social tendency in other fields. A belief in the literal application of rules, in law and order, in efficiency rather than equity is simply being expressed in the judicial sphere.

In an article in the *New York Times*, Paul Krugman, a noted economist, studied the general trend towards the growth of inequality in recent times and its effect on public policy. He demonstrated the real possibility for the emergence of a vicious circle in which income disparities create public support for measures creating even wider disparities:

> *Much more than economists and free-market advocates like to imagine, wages – particularly at the top – are determined by social norms. What happened during the 1930s and 1940s was that new norms of equality were established, largely through the political process. What happened in the 1980s and 1990s was that those norms unravelled, replaced by an ethos of "anything goes". And a result was an explosion of income at the top of the scale.*
>
> *Not to put too fine a point on it; as the rich get richer, they can buy a lot of things besides goods and services. Money buys political influence; used cleverly, it also buys intellectual influence. A result is that growing income disparities in the United States, far from leading to demands to soak the rich, have been accompanied by a growing movement to let them keep more of their earnings and to pass their wealth on to their children.*
>
> *This obviously raises the possibility of a self-reinforcing process. As the gap between the rich and the rest of the population grows, economic policy increasingly caters to the interests of the elite, while public services for the population at large – above all, public education – are starved of resources. As policy increasingly favours the interests of the rich and*

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62 For example, the *National Post* has led a crusade against perceived legislation by judges.

neglects the interests of the general population, income disparities grow even wider[63].

What is intriguing about Krugman's paper, from our perspective, is not the economics, but the vision of the post-war period as a brief egalitarian period followed by a return to a new "gilded age".

If this type of analysis is justified, the return to formalism in procedure reflects the values of a society which no longer prizes equality of result as highly as it once did. When equality was the goal, procedure waned. When equality lost its sheen, procedure returned.

It must be said, too, that, in recent years, the gap between the practice of law in large commercial firms and in other environments continued to grow, both in remuneration and in prestige. The new proceduralism caters to the more luxurious ways of practising law and therefore favours the few litigants who can afford this luxury, in fact making justice less accessible for all others.

This is, of course, not the entire story. There clearly were genuine and justified concerns about delays and about ineffective preparation of many cases. No doubt there was a sincere desire to increase access to justice which motivated the reform of civil procedure, although the choice of means was questionable, especially in light of the Quebec Bar's prior warning[64].

In its brief, the Quebec Bar warned about the potential unfairness and impracticability of the 180 days mandatory time period for inscription, which was originally intended to stand unless there was an absolute impossibility to act. The Bar criticizes the need to wait until 30 days before the end of the period to ask for an extension, explaining that the potential for a party to lose its rights in case of a refusal only becomes greater and should that happen, "*on reviendrait 40 ans en arrière en ramenant à l'avant-scène le principe selon lequel la forme l'emporte sur le fond*"[65].

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63 P. KRUGMAN, "The End of Middle-Class America", *New York Times*, Oct. 20, 2002, 62, 66 and 141.

64 BARREAU DU QUÉBEC, *Mémoire du Barreau du Québec, Projet de Loi 54: Loi portant réforme du Code de procédure civile*, mai 2002.

65 *Id.* at 8.

The legislator heeded this and subsequent warnings from the Bar by amending the new Code in order to allow requests for extensions at any time before the end of the 180 days period and in order to extend the 180 days period to one year in family matters[66]. While these recent amendments are welcome, they do not remedy the problems caused by short mandatory time limits, especially with respect to increased legal costs, and they do not fully address the Bar's concerns about the 180 days period. In a letter addressed to the Minister of Justice in November 2003, the then bâtonnier Pierre Gagnon noted:

> *Dans les autres matières civiles, les avocats et avocates doivent d'avantage négocier des échéanciers et gérer des agendas que conseiller leurs clients et faire du droit. Puisque de nombreux dossiers ne peuvent vraisemblablement pas être inscrits pour enquête et audition dans les six mois et ce pour différentes raisons, les avocats sont actuellement forcés de déposer des échéanciers bidons et d'attendre au 151e jour pour présenter une demande de prolongation. Cette pratique choque l'éthique des avocats, s'avère néfaste pour les clients (pour qui les services professionnels, à cause de cette très courte échéance, sont souvent devenus trop coûteux) et est contraire à l'intérêt de la justice. On revient malheureusement à l'époque d'avant la codification de 1966 alors que la forme l'emportait sur le fond.*[67]

Hence, as observed by the Quebec Bar following the coming into force of the new Code, not only the initial need to wait until 30 days before the end of the period to ask for an extension, but also the very short "*de rigueur*" time period itself have caused an increase in legal costs, which is certainly not conducive to greater accessibility. In light of this fact, it is not surprising that the Bar was also asking, in its letter, for the 180 days time period to be less strict in all cases[68].

There exist attorneys' errors which can never be rectified[69]. However, it would be foolhardy to examine these issues without

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66 *An Act to amend the Code of Civil Procedure with respect to the time limit for inscription*, S.Q. 2004, c. 14.

67 Letter to the Honorable Marc Bellemare, Minister of Justice, signed by the bâtonnier Pierre Gagnon on November 4, 2003. Underlining ours.

68 *Id.*

69 *St. Hilaire* v. *Bégin*, *supra* note 30, clearly did not extend to errors where there is irreversible prejudice to the other side.

considering the social and political context and without asking oneself who the real winners and losers will be.

IV. The Example of the Federal Court

A useful comparison showing how formalism often operates to the detriment of justice can be made with the Federal Court which has a complex and formalistic set of procedural rules and forms. These apply as much to the court's ordinary procedures as to applications for judicial review. Even if, in theory, the rule that substance prevails over form applies to federal matters, one realizes at once that the requirements of form at the Federal Court go much further than before Quebec courts, with results that are sometimes highly questionable in terms of justice and equity.

In *Novotny* v. *Minister of Citizenship and Immigration*, the Prothonotary notes, with respect to time extensions, that the test is very strict and requires clear proof of a justification throughout the whole period of the delay *and* an arguable case:

> *While the elements required by Grewal in seeking an extension of time are, as I say, well known, and indeed Grewal is referred to in the Respondent's material, too often counsel do not take seriously the necessity for clearly establishing, in their material in support of the motion for a time extension, that there is an arguable case.*[70]

It must be understood that the time periods to be extended are in themselves extremely short. For example, in *Novotny*, the Respondent had 30 days after receiving the applicant's record to serve and file a memorandum of argument. In that case, the extension was refused, even if the delay was minimal and was simply the result of a misreading of the calendar by counsel, because the motion for extension itself did not contain *material* demonstrating that there was an arguable case, aside from an assertion to that effect. Other examples of the short time periods prescribed by the *Federal Court Rules*, 1998[71], are the 30 days time periods to file affidavits and other supporting documents for applications and the

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70 *Novotny* v. *Minister of Citizenship and Immigration*, Imm-4701-99, 1 and 2; see also: *Mapei Inc.* v. *Flextile Ltd.*, (1995) 59 C.P.R. (3d) 211.

71 SOR/98-106.

20 days time periods to cross-examine on affidavits and to serve and file the applicant's record and then the respondent's record[72].

According to the jurisprudence, the factors to consider in an application for an extension are, to a great degree, open-ended[73]. There are three factors which come into play, in addition to the justification for the delay and the presence of an arguable case. First, there is the underlying consideration of doing justice between the parties[74]. Second, a compelling explanation for delay may result in a time extension where the arguable case is weak, and *vice versa*[75]. Third, there must be material before the Court upon which the Court can be satisfied both as to an explanation for the delay and that the case is an arguable one[76]. Because of this factor, cases can be dismissed on the doubly procedural ground that (1) there was a delay, no matter how short and justified; and (2) there is no material, *in the motion for an extension*, showing that the case is arguable. This principle introduces a requirement to present long and complex motions for extensions where the substance of the case is explained and argued. Such procedures will obviously be time consuming and costly in themselves.

Also, the fact that the strength of the case, which is often a subjective assessment, is an important issue immediately creates an uncertainty. In any event, a strong case will not suffice where there is no reason deemed acceptable for justifying a delay. In *Chin* v. *Canada*, Reid J. set out his approach to motions for extensions of time and explained how he made such decisions regardless of the workload of counsel:

> *... I do not grant requests for extensions of time merely because it is the first time that counsel has asked or because the workload which counsel has assumed is too great. I think such decisions are unfair to those coun-*

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72 See: Rules 306, 307, 308, 309 and 310.

73 See for example: *Noel & Lewis Holdings Ltd. and Warky* v. *Canada*, (1986) 5 F.T.R. 166, 168 and 169; *Karon Resources Inc.* v. *Minister of National Revenue*, (1994) 71 F.T.R. 232, 235 and 236.

74 *Novotny* v. *Minister of Citizenship and Immigration, supra* note 70, 4, referring to *Grewal* v. *Minister of Employment and Immigration*, [1985] 2 F.C. 263, 63 N.R. 106, 110 (F.C.A.).

75 *Id.*, referring to *Grewal*, *supra* note 74, 116.

76 *Novotny* v. *Minister of Citizenship and Immigration*, *supra* note 70, referring to *Consumers Association of Canada* v. *Ontario Hydro (No. 2)*, [1974] F.C. 460, 463 (C.A.).

sel who refuse clients because their work-load is too heavy to allow them to meet required deadlines or who "pull out all the stops" to meet the deadlines, at great inconvenience to themselves. As I have indicated I take the view that the time limits set out in the rules are meant to be complied with and they are meant to apply to everyone equally. If an automatic extension was meant to be available merely because counsel seeks one, then the rules should provide for such an automatic extension, for everyone, when such is sought.

On what grounds then do I grant an extension of time. I have already indicated that, in general, I am not receptive to requests which are solely based on the workload counsel has undertaken. When an application for an extension of time comes before me, I look for some reason for the delay which is beyond the control of counsel or the applicant, for example, illness or some other unexpected or unanticipated event.

...

I know the courts are often reluctant to disadvantage individuals because their counsel miss deadlines. At the same time, in matters of this nature, counsel is acting in the shoes of her client. Counsel and client for such purposes are one. It is too easy a justification for non-compliance with the rules for counsel to say the delay was not in any way caused by my client and if an extension is not granted my client will be prejudiced. I come back again to the question of fairness. It is unfair for some counsel to be proceeding on the basis that barring unforeseen events the time limits must be met and for others to be assuming that all they need do is plead overwork, or some other controllable event, and they will be granted at least one extension of time. In the absence of an explicit rule providing for the latter, I proceed on the basis that the former is what is required.[77]

Courts sometimes forget that control over workload is often a luxury only a larger law firm can afford. What is even more disturbing is that delay in obtaining legal aid or other funds is not generally a good enough reason for extending a delay. In *Woo* v. *National Parole Board*, we read:

Counsel for Mr. Woo submits there has been prejudice because Mr. Woo has not yet been able to secure funding, from a third party, to cover his expenses and for that reason sought an adjournment of the present motion. Yet waiting for funding, in the context of legal aid, and the situ-

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77 *Chin* v. *Canada*, [1993] 22 Imm. L.R. 136, 138 and 139. The same conclusions can be drawn from *Bellefeuille* v. *Canadian Human Rights Commission*, [1994] 66 F.T.R. 1 (F.C.A.).

> *ation is no different here, is certainly not an excuse for allowing a time limit to pass.*[78]

The proceduralism and the complexity of the rules is also apparent in *Legault* v. *Attorney General of Canada* where Gilles A.S.P. explains the negative impact of adopting a courteous conduct towards the other party. In this decision, we read:

> *Under the previous Rule 402 gentle-person conduct of the type outlined by counsel was possible, and perhaps encouraged by concepts of legal etiquette.*
>
> *Rule 204, save for the restricted possibility outlined in Rule 7, puts an end to such practices. It may be that considerate counsel should jog an opponent falling afoul of the Rules before it is too late, but counsel who allows an opponent to delay extensively runs the risk after 6 months of having his own action dismissed under Rule 382 at a status review.*
>
> *A further difficulty arises from the provision of Rule 298 that, with some exceptions, a motion in a simplified action may only be brought at a pre-trial conference.*[79]

It follows that it is even unsafe for attorneys to exempt each other from the strict application of these rules. Further, under Rule 7, an extension by consent "shall not exceed one half of the period sought to be extended", which will often mean no more than 10 or 15 days, given the short time periods provided for in the Rules.

Clearly these procedural requirements affect all sides. However, given the federal Crown's technical means and its familiarity with the Court before whom it appears constantly, the occasional and weaker litigants are evidently the ones more affected. It is not surprising that so many of those cases are in the field of immigration law.

Immigration law practice also provides a perfect illustration of the effect of procedure on accessibility. In the 1970s, a judicial review of a deportation order under section 28 of the *Federal Court*

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78 *Woo* v. *National Parole Board*, (1998) 153 F.T.R. 147. The case cites much authority to the same effect. See also: *Morales* v. *Canada*, (1995) 91 F.T.R. 294; *Espinoza* v. *M.E.I.*, (1992) 142 N.R. 158.

79 *Legault* v. *Attorney General of Canada*, T-698-99, 2; for an example of complex procedure, see also: *Regional Municipality of Hamilton-Wentworth* v. *Minister of Environment*, T-1400-99 (Dansen J.).

Act[80] was obtained by the service of a one-paragraph notice. Several months later, the Court allotted a short period of time for oral argument which normally was preceded by an informal written statement of fact and law. The Court itself prepared the record. It was possible to obtain review with an appreciable chance of success and charge very little. Indeed, the Quebec legal aid tariff was quite sufficient to cover the cost of an application.

After the imposition of the leave requirement[81] and the formation of the new rules for judicial review, the one-paragraph application was replaced by:

a) a notice of application including rudimentary grounds for judicial review;
b) a perfection of the application with (computers) affidavits and argument;
c) a reply by the Respondent in similar forms;
d) final answer;
e) if leave is granted, another set of rather similar procedures.

It is useful to quote textually the judgment *Ministre de la Citoyenneté et de l'Immigration* v. *Gurghian* granting leave to the Crown:

> 1. *L'autorisation soit accordée et que la demande de contrôle judiciaire soit réputée avoir été introduite;*
> 2. *L'audition de la demande de contrôle judiciaire soit fixée au mercredi, le 18 février 2003, à 9H30 de l'avant-midi, au 30, rue McGill, dans la ville de Montréal, province de Québec;*
> 3. *L'audition soit tenue en français;*
> 4. *Le tribunal administratif fasse parvenir à chacune des parties et au greffe des copies certifiées de son dossier le ou avant le 13 décembre 2002;*
> 5. *La partie demanderesse signifie et dépose d'autres affidavits, le cas échéant, le ou avant le 23 décembre 2002;*
> 6. *La partie défenderesse signifie et dépose d'autres affidavits, le cas échéant, le ou avant le 3 janvier 2003;*

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80 R.S.C. 1985, c. F-7.

81 See: *Immigration Act*, R.S.C. 1985, c. I-2, s. 82.1(1), as amended by S.C. 1990, c. 8, s. 53.

7. *Les contre-interrogatoires sur les affidavits, le cas échéant, soient terminés le ou avant le 13 janvier 2003;*
8. *La partie demanderesse signifie et dépose son mémoire, le cas échéant, le ou avant le 23 janvier 2003;*
9. *La partie défenderesse signifie et dépose son mémoire, le cas échéant, le ou avant le 3 février 2003;*
10. *Les transcriptions des contre-interrogatoires sur les affidavits, le cas échéant, soient déposées le ou avant le 13 février 2003.*[82]

This is *after* an equally strict set of delays for obtaining leave. The complexity of the procedure cannot be put in doubt. The delays for all of the elaborate proceedings and filings are strict and any motion for relief must be justified under the usual requirements set out by Federal Court jurisprudence[83]. It goes without saying that lawyers must limit the number of cases they take in order not to be caught in a negligence suit and that the cost cannot be the same as for the earlier, informal procedure. When one factors in the very large chance of failing to obtain leave, it becomes obvious that only immigration clients who are economically comfortable or who are totally desperate can obtain access to the Court.

The changes in the practice before the Federal Court were explained both by the need to avoid abuse of proceedings and by the desire to be scrupulously fair and to create the best possible file for the judge who must decide. The presumably unintended effect was to increase the cost and thus diminish accessibility to justice. In the end, many cases have been decided on purely procedural and formalistic grounds, with the individuals who are economically weakest losing their rights through no fault of their own. Under those circumstances, one would certainly be justified in questioning the fairness, or at least the justice and equity, of strict procedure and in seeking to make our rules of civil procedure more flexible, rather than more strict.

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82 *Ministre de la Citoyenneté et de l'Immigration* v. *Gurghian*, Imm. 526-02, Nov. 22, 2002:

83 See *supra*, p. 736-740.

V. Everyday Work Under the New Code

It is now possible to foresee the type of work climate which will be created by the new Code[84]. It is one thing to create a logically coherent scheme which appears to provide for both fairness and celerity. It is another to apply it in practice.

The new Code will force lawyers to work under a series of strict and short delays. These delays will be different for every case and will be fixed for each case individually at the beginning, when or before the lawyers first present themselves before a judge.

This situation already exists for cases started by motion, notably in matters of judicial review. However, the delays in such cases are not strict and therefore it is common not to observe them when new circumstances arise. While the delays under the new Code will not be as rigid as those of the Federal Court, the presence of the final deadline of 180 days will make it necessary for them to be observed with considerable diligence. Lawyers' calendars will become jigsaw puzzles with a very serious possibility of missed delays and malpractice suits. Already, in November 2003, the Quebec Bar indicated that "*les avocats et avocates doivent davantage négocier des échéanciers et gérer des agendas que conseillers leurs clients et faire du droit*"[85].

While the 180 days can now be extended without an *a priori* limit, unlike in earlier drafts of the Code, it is clear that such extensions will not be automatic. They will depend on the attitudes of different judges, some of whom will undoubtedly be as demanding as the Federal Court and some will grant most extensions, at least for a certain period[86]. The jurisprudence under the simplified procedure will be of help in predicting this result and in demonstrating

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84 As indicated by the bâtonnier Pierre Gagnon in his letter of November 2003, *supra* note 67:

> *Actuellement, les demandes de prolongation du délai d'inscription de 180 jours sont pour la plupart accordées selon ce que le juge en chef adjoint de la Cour supérieure nous a affirmé mais on doit admettre que nous sommes présentement dans une période de transition et que la clémence des tribunaux ne sera sans doute pas toujours aussi constante*. Underlining ours.

85 *Id.*

86 This was the trend as of November 2003, but most likely this will not last. *See supra* note 84.

that no clear rule can be formulated. This jurisprudence has generally been relatively strict and extensions were not easily granted[87].

One can immediately see the danger of receiving a mandate just before the expiry of prescription. If an unprepared motion is issued, it will be difficult to apply for time in order to prepare it or to finance it adequately. Thus, lawyers will be taking a risk. If lawyers are forced to refuse, rights will be lost for all intents and purposes *before* they are actually prescribed since they will be unenforceable.

Further, the preparation of cases will now have to be done largely *before* the issuance of the motion, thus increasing costs and making it more difficult for the indigent party to get to the stage where a settlement might become possible, which usually does not arise until the proceedings are filed.

The entire operation will be one dependent on good technology, the availability of junior lawyers, articled clerks, para-legals and secretaries, and above all, the availability of considerable financial resources from the start. Needless to say, this system will increase the gap between legal services for different classes in society and decrease the quality and indeed the availability of justice for those without means.

In recent years there has been an increase in the phenomenon of unrepresented parties appearing before the Courts. One might deplore this in many cases where such proceedings disrupt and delay the conduct of the Court, but the right to proceed without a lawyer is surely quite fundamental[88]. However, it is difficult to imagine an unrepresented party following the new Code without risking utter disaster[89]. In fact, the new Code makes it much more difficult to proceed successfully without a lawyer, while making the cost of litigation with a lawyer significantly higher and still risky in terms of the possibility to lose rights for purely procedural reasons.

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87 See *supra*, note 40.

88 It is not infrequent for such parties to acquit themselves honourably before the Court. See, generally: The Honourable Mr. Justice Allan HILTON, *An Approach to the Management of Pro-Se Litigants*, address to the Lord Reading Society, September 12, 2002.

89 This once again brings us back to early and very conservative times of the common law where strict procedure, the use of Latin and Norman French were used as ways of maintaining the monopoly and the mystery of the lawyer.

• The Summoning of Witnesses – An Example

One example of the new philosophy is found in the changes which concern the summoning of witnesses, that is, in article 280 and following of the new Code[90].

The changing of the time-limit from five to ten days is part of the trend towards requiring almost complete readiness a considerable time before the hearing. Last minute preparation and brain-storming are not encouraged. The prior preparation will, in many cases, improve the quality of the trial when it occurs. It may, in some cases lead to an earlier settlement. It is also clearly more convenient for the witnesses to receive advanced notice of the time when their presence will be required[91]. However, it will make it more difficult for lawyers to carry on a volume practice with consequent last-minute preparation. That is the type of practice which is often the only one accessible for clients with limited means. For instance, such a client may not be able to spend money on preparation unless it is absolutely clear there will be no settlement. Also, a volume practice is often the only way to make legal services relatively affordable and to enable lawyers to accept legal aid cases, in spite of the notable insufficiency of legal aid tarifs.

The new requirement of advancing one day's compensation to witnesses with the *subpoena*[92] also adds to the problems of parties with tight budgets. No one can approve of the fact that, in many cases, witnesses are not paid their due. The new Code will have the fortunate effect of remedying this. However, the advance of one day's compensation to a considerable number of witnesses ten days before the trial, when it is still difficult to know which witnesses will really be essential, may well put an unbearable strain on some litigants. If forced to choose between fairness to witnesses and equality before the law, it is far from clear that we should choose the first option. After all, everyone may need access to our justice system at

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90 This is similar to Rule 15 of the *Rules of Practice of the Superior Court of Québec in Civil Matters*, R.R.Q., 1981, c. C-25, r. 8, and other rules concerning disclosure.

91 Although in actual fact, the change will be minimal, since in any event a *subpoena* is always issued for the full duration of the trial, with witnesses later agreeing with lawyers, when the case is sufficiently ready for the order of the witnesses to be decided, about the precise date and time of their testimony.

92 See: art. 281.1 C.C.P.

one point and society as a whole undoubtedly benefits from it, while few people are witnesses more than a few times in their lives.

Moreover, the money advanced may prove difficult or impossible to recover if a case is settled or postponed. Forcing the investment to be made earlier will once again put pressure on the weaker party in any settlement negotiations[93].

As in so many areas, the new Code prefers a luxury vehicle for the few, to a more affordable system for everyone.

VI. What Is to Be Done?

The problems which led to a hardening of procedural and technical rules were real. There was a palpable degree of dissatisfaction both with the delays and with the costs of litigation. This was evident both among those who did not have the means, who manifested an increasing alienation from the system of justice, and those who did and who relied instead on systems of commercial arbitration and mediation. Pierre Noreau explains this phenomenon:

> *Un rapide coup d'oeil sur le rapport annuel produit par la Direction générale des services judiciaires (ancienne Direction générale des greffes) du ministère de la Justice suffit à s'en convaincre. En effet, contrairement aux problèmes soulevés par plusieurs observateurs lors du Sommet de la justice ou au cours de la même période, le problème de l'engorgement des tribunaux et des délais a paradoxalement fait place actuellement à un autre problème: la désertion graduelle de l'institution judiciaire.*[94]

If the return to a severe observance of technical rules is not the answer, several other possibilities remain which could make it easier for the average citizen to use the system of justice.

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93 It is true that the Court will retain discretion to authorize summoning witnesses later. However, no lawyer mindful of his civil liability will delay serving subpoenas in the hope of obtaining discretionary relief.

94 Pierre NOREAU, "La justice est-elle soluble dans la procédure? Repères sociologiques pour une réforme de la justice civile", (1999) 40 *C. de D.* 33, 42.

A. Legal Aid

Undoubtedly, legal aid, a subsidy from the State to the users of the system, remains the most important tool to promote access to justice. Given the difficulties recently encountered by the medicare system and the controversy which surrounds it despite its incontrovertible merits, it is unlikely that a complete system of legal coverage by the State is anything other than a visionary dream. Nevertheless, a significant improvement of the legal aid system can certainly be contemplated and easily implemented.

The current situation is unacceptable on many levels. In criminal law, the inherent injustice of condemning a person because he or she was unable to obtain the assistance of counsel has been recognized. In *Procureur général du Canada* v. *Chouinard*, Provost J. held that it was central to the accused's right to a fair trial:

> *Au Québec, l'arrêt de principe est celui de la Cour d'appel dans l'affaire* Sechon *c.* R.
>
> *Au nom d'une cour unanime, l'honorable juge Rothman, après avoir référé aux arrêts* R. *c.* Rowbotham, *précité,* R. *c.* McGibbon, R. *c.* Turlon, R. *c.* Taubler *et* R. *c.* Hiller, *écrivait ceci:*
>
> > *I am therefore satisfied that, although the right to counsel is not constitutionally guaranteed in express terms under the Charter, where the length or complexity of the proceedings or the circumstances of the accused are such that the accused would not obtain a fair trial without the assistance of counsel, counsel must be provided for him if he does not himself have the means to retain counsel. And where an accused, for whatever reason, is not represented by counsel at his trial, it is clear, as well, that the trial judge has a duty to provide reasonable assistance to the accused in the presentation of evidence and in putting his defences before the court.*[95]

As Provost J. went on to explain, the Supreme Court of Canada also acknowledged the importance of assistance by counsel in the case *Minister of Health of New Brunswick* v. *J.G.*[96]. It is to be noted that this was not a criminal case and thus the principles developed in criminal law can be applied at least in certain types of civil cases.

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95 *Procureur général du Canada* v. *Chouinard*, [2002] R.J.Q. 553 (C.S.). See also: *Côté* v. *Québec*, [2001] R.J.Q. 2294, rev'd *Procureur général du Québec* v. *R.C.*, [2003] R.J.Q. 2027 (C.A.).

96 [1994] 3 S.C.R. 41. See also: *Winters* v. *Legal Services Society*, [1999] 3 S.C.R. 160.

Some criminal courts have also ordered legal aid to pay more than the tariff in deserving cases[97].

These developments, largely but not entirely in the criminal field, bring out the inadequacy of the present legal aid system, both in terms of how much it pays and whom and what it covers[98]. Not only does the legal aid system have extremely low eligibility thresholds (*i.e.* only extremely impoverished individuals qualify for aid), but it is also very limited in terms of the legal services it can offer, both in criminal and civil law fields.

In criminal and penal matters, legal aid is guaranteed when a financially eligible individual faces prosecution for an indictable offense. By contrast, an individual who faces prosecution for an offense punishable by summary conviction is only guaranteed legal aid when, upon conviction, there is a *likelihood*, and not merely a possibility, that he or she will be imprisoned, committed to custody, or will lose his or her means of earning a livelihood[99]. This distinction is significant, as the Crown prosecutes an overwhelming majority of offenses by means of summary conviction, and is arguably in violation of basic administrative law rules as well as the Canadian Charter of Rights and Freedoms, particularly section 7. In any event, the mere *possibility* of imprisonment upon conviction should guarantee the right to legal representation[100].

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97 *Beauchamp* v. *Procureur général du Québec*, [2002] R.J.Q. 375 (C.S.); *Brisebois* v. *Procureur général du Québec*, [2002] R.J.Q. 779 (C.S.). Both decisions were reversed by the Court of Appeal in *Procureur général du Québec* v. *R.C.*, *supra* note 95, but the Attorney General agreed to continue payment under the first court order until the end of the proceedings (see para. 6 of the Court of Appeal decision).

98 See generally the *Legal Aid Act*, R.S.Q., c. A-14 and the corresponding regulations, in particular, the *Regulation Respecting Legal Aid*, c. A-14, r. 0.2. The problems and the limitations of the Quebec legal aid system was the object of a discussion among many actors working in the Quebec judicial system, including McGill University Professor Roderick MacDonald and one of the authors of this article, Marie-Ève Sylvestre, at a Conference sponsored by the Fondation Robert-Sauvé in October 2002. See the paper presented by Marie-Ève SYLVESTRE, "Améliorer l'accès à la justice et promouvoir une vocation sociale pour l'avocat", October 2002 (on file with the authors).

99 *Legal Aid Act*, *supra* note 98, s. 4.5 (1) and (3).

100 See: M.-È. SYLVESTRE, *loc. cit.*, note 98.

In civil law matters, legal aid is guaranteed only in a limited number of circumstances. Generally speaking, family law matters and cases involving the enjoyment and exercise of personality rights and of some rights related to the capacity of the person are covered, but eligible persons are rarely able to bring claims as plaintiffs, and they cannot consult with a lawyer on a preventive basis, *i.e.* before litigation has begun[101].

Legal advice outside the context of litigation is not incompatible with legal aid. In England, for instance, eligible people (that is, half the population[102]) have access to a free two-hour consultation with an attorney independently of any representation before courts. The complete exclusion in the Quebec legal aid system of preventive legal services, and especially of consultations, has important detrimental effects as it discriminates among litigants along class lines. Poor and middle-class individuals are prevented from consulting with a lawyer to learn about their rights, to obtain legal advice on which measures they could take to avoid an imminent suit, and to protect themselves more generally. This is a significant limitation in light of the fact that most of the work of corporate lawyers and of other legal counsel working for the powerful and the wealthy consists of giving administrative, financial and preventive advice to their clients. The most privileged citizens of our society are well aware that we can and should rely on lawyers to administer and secure property, to make it productive, or to prevent conflicts and protect general interests. This is not an option available to poor and middle-class individuals of our society[103].

The importance of non litigious, non judicial aspects of the practice of law is confirmed by the studies presented to the Quebec Bar in 1998 and 1999, indicating which fields of endeavor are growing and which are in decline[104]. The Supreme Court of Canada

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101 *Legal Aid Act*, *supra* note 98, s. 4.7

102 Nearly 65% of the population is covered in the Netherlands.

103 See: M.-È. SYLVESTRE, *loc. cit.*, note 98.

104 MARCON ÉCONOMIE, *Rapport: Enquête économique auprès des cabinets d'avocats du Québec, présenté au Barreau du Québec*, 1999 and 1998; according to those studies, it is the non litigious, non judicial aspects of the practice of law that have grown the most in the past ten years and that are seen as the fields that will grow the most in the future. On the other hand, representation before the Courts seems to be in decline.

also reaffirmed this essential but often forgotten role of the lawyer. In *Fortin v. Chrétien*, Justice Gonthier wrote:

> *In the collective imagination, the advocate therefore embodies, first and foremost, the trial lawyer who defends his client's rights. He embodies the defence of liberty and is the custodian of the secrets of the law and procedure that enable him to win his cases. This function, which is referred to as judicial, does indeed represent part of the work of certain advocates, but it is by no means the only or the most important work they do. In fact, the judicial function is in a way merely* [TRANSLATION] *"incidental to the legal function". This aspect of the advocate's function, which is public and more flamboyant, has simply overshadowed his primary legal function: J.-C. Woog,* Pratique professionnelle de l'avocat *(3rd ed. 1993), at p. 8.*
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> *In a book that presents various points of view regarding the professional ethics of the legal profession, some authors suggest a fuller moral conception of the "responsible lawyer". This approach suggests that apart from the adversarial role that may have been assigned to the advocate, he is a person who performs various counselling functions in the best interests of his client, his profession and the administration of justice in general: D. E. Buckingham, J. E. Bickenbach, R. Bronaugh and the Honourable Bertha Wilson,* Legal Ethics in Canada – Theory and Practice *(1996), foreword by the Honourable Mr. Justice Frank Iacobucci. (original citation omitted)*
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> *...*
>
> *Thus, contrary to popular belief, not only will a good advocate not foment dissension and promote disputes between parties, he will seek to reconcile opposing interests in order to avoid the ultimate confrontation of a trial. He will be called on to play the role of moderator, negotiator and conciliator.*[105]

The legal aid system with its present rules of eligibility does not protect the middle classes but only the very most indigent. Yet the middle class also finds justice inaccessible.

It is true that for selected issues, notably discrimination cases, class actions and so on, there exist special funds[106]. One can also sometimes find support in lobbies or the private sector. However, it is impossible to envision a great improvement without an increase

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105 *Fortin* v. *Chrétien*, *supra* note 7, para. 51-53.

106 MARCON ÉCONOMIE, *op. cit.*, note 104, at 6.

in the funding available for legal aid. The figures given by Statistics Canada[107] illustrate how much remains to be done.

Since public funds are, in our times, the subject of very savage competition between different social interests, it is important to look for novel ways of financing the expanding legal aid system. A direct tax on legal services rendered outside the legal aid system might be one way of equalizing litigants' chances without straining the public purse beyond what can realistically be achieved.

A similar redistribution effect could result from the imposition of a duty on all lawyers to accept a certain number of mandates on legal aid or for free. Associations between non-profit organizations, for example working in consumers rights protection, community centers supporting victims and authors of domestic violence, support groups for immigrants, and law firms could be the start of serious and rewarding partnerships. Articling students could be graciously lent for an extended period by major law firms to legal aid centers to work on specific projects or to provide general assistance. Current initiatives should be acknowledged and new ones should be pushed forward. Tax exemptions, direct participation in the administration of the legal aid system, and the possibility of broadening their network of possible clients could be an interesting way for firms to benefit directly from their involvement in the system. Participation in the community, fulfilling experiences, and embodiment of what it really means to be a public servant and a lawyer in a society which aims at granting freedom and equality for all its members would also constitute benefits for all involved in such initiatives.

Curiously enough, the system of imposing a duty to accept *pro bono* mandates was the one in force in Quebec before the creation of modern legal aid in the 1970s. While undoubtedly, large numbers of clients who would have been on their own received legal assistance under this system, it proved unsatisfactory in many ways. It completely violated freedom of choice both of clients and of lawyers. It produced considerable uncertainty and forced many lawyers to provide services for areas of law they did not know. The result was great disparity in the quality of services dispensed. Under that

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107 STATISTIQUES CANADA, *L'aide juridique au Canada : tableaux de données sur les ressources et le nombre de cas*, 2000-2001.

regime, an individual without sufficient financial means was also completely at the mercy of the lawyers consulted who were free to choose which *pro bono* cases to accept, as they should be. Therefore, without a State obligation to provide some form of legal aid, some individuals could fall through the cracks of the system and simply never obtain the help they needed.

While no effort should be spared in persuading lawyers to give a portion of their time to servicing the indigent[108], in part, to make them all aware of the realities of working for the less fortunate, redistribution through taxation is probably a more effective tool. In any event, it is not possible to imagine that the system of justice can be made more accessible merely through changing procedure and forums. A major element of fiscal redistribution is essential.

B. Reducing the Cost of Litigation

It has been noted above that, in some respects, cases valued at less than $25,000 are treated differently under the new Code, for instance with respect to discoveries.

The clearest and best-known example of this type of special treatment is Small Claims Court. This Court exists since 1971 and is now an established and generally accepted part of our system of justice. Professor Lafond analyses this Court in considerable detail in a recent article. He defines the Court as a path towards further accessibility, limiting judicial costs and lawyers' fees:

> *Le deuxième objectif de la Cour est d'offrir une justice à un coût abordable pour les justiciables. Par la création de ce nouveau forum judiciaire, le législateur s'attaque aux deux principaux obstacles économiques à une justice accessible, soit les dépens et les honoraires professionnels. D'une part, les frais judiciaires sont ramenés à leur plus simple expression. Les frais d'introduction et de contestation d'une action sont relativement minimes et la condamnation de la partie qui succombe aux dépens ne peut excéder ces frais, en sus des frais des témoins. Les frais d'exécution du jugement sont à la charge du débiteur et des barèmes sont établis par règlement.*[109]

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[108] For instance, those who donate their time should be given the same recognition as those who work on Bar committees.

[109] P.-C. LAFOND, *loc. cit.*, note 5, 69 and 70; however, the Court has not fulfilled all of the hopes it raised: Louise ROZON, "L'accès à la justice et la réforme de la Cour des petites créances", (1999) 40 *C. de D.* 243.

The small claims court model of doing justice before the courts, less formal when less is at stake, can be applied to certain claims which are not adjudicated before the Small Claims Court. It is possible to reduce the costs of presenting a case even when the total elimination of lawyers and the complete informality of small claims courts is not desirable. Professor Roderick A. Macdonald, president of the Groupe de travail sur l'accessibilité à la justice in the beginning of the 1990s, makes this point and argues in favour of the expansion of this model[110]:

> *Le Groupe de travail est également conscient que si le non-formalisme de la Cour des petites créances rend ses procédures à la fois plus expéditives, moins coûteuses et moins complexes, il y a lieu d'établir des institutions semblables pour d'autres espèces de litiges. Suivant le modèle adopté par plusieurs États américains, on suggère dans le rapport la mise sur pied d'un programme optionnel d'économie des frais relatifs aux litiges civils ou commerciaux dont le montant n'excède pas 15 000 dollars, que ce soit des litiges impliquant des individus ou des corporations.*

The elimination of expert evidence[111], the admission of one-time hearsay[112], the dispensation from burdensome disclosure procedures and perhaps the imposition of relatively flexible time-limits in Court would certainly reduce the costs of pursuing relatively small claims and would help prevent the economically stronger party from making such claims virtually unenforceable.

Also, in every case, the reduction of the time that lawyers are forced to spend attending at court, often waiting in the hallway, should be a primary goal in order to reduce the cost of litigation. For example, lawyers currently have to be physically present in court for a number of matters which could easily be disposed of by telephone or fax[113]. In criminal law, the situation is even more problematic, since every step requires the presence of the lawyer, from appearing in the file to postponing a date, thus making a defense difficult to afford. Also, it is not unusual for lawyers to spend hours, even a complete day, waiting in the corridor at the courthouse for

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110 R.A. MACDONALD, *loc. cit.*, note 5, 467 and 468.

111 Except with authorization for special reasons.

112 Similar to the dispositions of the *English Evidence Act*, 1938 (U.K.), 1 & 2 Geo. 6, c. 28.

113 For example, continuing cases to another date, fixing trial dates, interim orders by consent.

their case to be heard[114]. While it is important that judges not be kept waiting for lawyers, it must be understood that the present organization of the court system is expensive for litigants and is contributing to making justice less accessible.

C. The Creation of Non-judicial Forums

One of the most frequently repeated suggestions in recent years has been the removal of cases from legal forums to more flexible ones. For instance, the Executive Summary of the Canadian Bar Association *Systems of Civil Justice Report*[115] makes the following suggestion:

> *Integration into the court system of various dispute resolution techniques with a focus on early settlement;*
>
> *Increased flexibility and proportionality in procedures through the creation of multiple tracks for dispute resolution.*

Professor J.G. Belley describes the terms "the new modernity" in the following principles:

> *Principe 3*
>
> *À l'exception des tribunaux qui sont tenus d'adjuger les litiges conformément au droit, les procédés de règlement des différends peuvent se référer à des normes et critères autres que ceux du droit, sous réserve de respecter les droits et libertés de la personne.*
>
> [...] *En droit procédural, les procédés d'amiable composition, d'arbitrage, de conciliation et de médiation sont autant de procédés où le droit substantif cède la place, au moins implicitement, au «non-droit» ou aux autres normativités sociales.*
>
> [...]
>
> *Principe 4*
>
> *Les procédés généraux de la justice civile sont :*
>
> *a) la négociation entre les premiers intéressés;*
> *b) la médiation privée ou publique;*
> *c) l'adjudication arbitrale ou judiciaire;*

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114 This is the case for almost every motion presented while a case is pending and it is also the procedure at the Court of Appeal.

115 CANADIAN BAR ASSOCIATION, *Executive Summary Systems of Civil Justice Report*, 1997, at 6.

> *L'encadrement juridique de la justice civile ne doit pas se limiter à la seule organisation de la procédure judiciaire.* [...]
>
> *Principe 5*
>
> *Tout citoyen engagé dans un différend est tenu de participer de bonne foi à sa discussion et à son règlement par la négociation, la médiation ou l'adjudication.* [...]
>
> *Principe 6*
>
> *Toute personne morale est tenue de mettre à la disposition de ses clients ou usagers, employés ou membres, contribuables ou cotisants, un ou des procédés adéquats de règlement des différends.*
>
> *La qualité procédurale de ces procédés est soumise au pouvoir de surveillance et de contrôle de la Cour supérieure.*[116]

Professor Rozon also believes that the development of alternative dispute resolution mechanisms is relevant to access to justice issues:

> *Nous estimons ainsi que la notion d'accès à la justice se réfère autant à des mécanismes officieux de règlement des litiges (règlement à l'amiable sans l'intervention d'un tiers) qu'à des mécanismes plus officiels (tribunaux, mécanismes de recharge, arbitrage contractuel, ombudsman, etc.). La notion d'accès à la justice fait également référence à des caractéristiques liées aux personnes (bonne connaissance des lois et recours, qualités personnelles pour régler et prévenir des conflits, etc.) ainsi qu'à des caractéristiques rattachées aux systèmes (coût abordable, simplicité de la procédure et des règles, souplesse et rapidité dans le traitement, heures d'ouverture appropriées des tribunaux, proximité des lieux, participation du citoyen à l'élaboration des mécanismes de règlement des litiges, etc.).*[117]

There is much to be said in favour of negotiation and mediation of disputes. There are also areas of law and life, such as family law, where it has encouraged greater harmony and was beneficial to more vulnerable parties, such as children. But there are many false compromises and questionable agreements which have proved to run against the interests of weaker parties. The idea that a less for-

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116 Jean-Guy BELLEY, "Une justice de la seconde modernité: proposition de principes généraux pour le prochain *Code de procédure civile*", (2001) 46 *McGill L.J.* 317, 363 and 364.

117 L. ROZON, *loc. cit.*, note 109, 246.

mal system is necessarily more accessible or more even-handed is, at best, naive[118].

The advantage of courts is their independence and impartiality[119]. It has now been decided by the Supreme Court[120], perhaps not definitively for Quebec[121], that administrative tribunals are not held to those lofty standards. Would it not stand to reason that, in a society of increasing disparity of means and influences, such tribunals would be less likely in the long run to present an even playing field?

In the same way, resort to non-judicial tribunals is not usually initiated by the weaker litigants. Privative clauses are drafted by government and arbitration clauses are often inserted into insurance and other contracts drafted by companies, presumably to protect themselves. Non-judicial forums are often quite expensive to set up and to use, and they do not eliminate the need to obtain legal advice and, in many cases, legal representation. This will be especially true when, as is often the case, the other party has full access to a broad range of legal services, often through in-house counsel as with government and large corporations. Therefore, much of the cost of justice, which clearly comes from professional fees, remains unchanged with non-judicial forums.

Further, the main advantage these forums offer appears to be, once again, speedy resolution. While it must be recognized that alternative dispute resolution forums will often allow for the saving of the costs associated with many unnecessary court appearances, it must also be pointed out again that greater speed does not always mean greater access to justice and sometimes means just the opposite, because a time period is required in order to raise sufficient funds to present a case. In fact, it seems to be the more fortunate, for whom "time is money", who will benefit the most from the speedy resolution offered by alternative dispute resolution mechanisms.

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118 Norbert ROULAND, *Aux confins du droit : anthropologie juridique de la modernité*, Paris, Odile Jacob, 1991.

119 *Mackin* v. *N.B.*, [2002] 1 S.C.R. 405; *R.* v. *Valente*, [1985] 2 S.C.R. 673; *Reference re Remuneration of Judges*, [1993] 3 S.C.R. 3.

120 *Ocean Port Hotel* v. *British Columbia*, [2001] S.C.R. 52.

121 Because of the presence of section 23 of the *Quebec Charter of Human Rights and Freedoms*.

Moreover, although mediation and negotiation can lead to definitive settlement, arbitration necessarily leaves open the possibility of judicial review[122] and therefore even more potential cost for the indigent.

Finally, access to the courts of the land is not only a matter of settling practical problems; it is a fundamental constitutional right[123]. Only the courts with their almost total independence and impartiality can ultimately strike down laws and issue universally binding orders and effectively change the legal regime in any area of endeavour. Arbitration and informal procedures presuppose accepting existing rules at least until the stage of judicial review. Moreover, in the long run, where there is absence of total independence and immunity, the stronger parties are in a better position to apply pressure than the weaker ones.

In many cases, mediation and negotiation are highly desirable. Lawyers are often right when they say that the worst settlement is better than the best of trials. Nevertheless, the creation of these new channels should not become an alternative or an obstacle to making the courts accessible to all. If it does, those deprived of access to courts will be subject to a less comprehensive, less effective and less trustworthy system of justice[124].

D. Insurance

Insurance for legal services has been suggested as the way to resolve the problems. If we mean by this a universal and comprehensive coverage, like Medicare, it would clearly be desirable, at least in some areas of law[125]. However, such an idea is totally impractical in today's political climate and would, in the best of times, require considerable refinement.

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122 *Crevier* v. *Attorney General of Quebec*, *supra* note 16.

123 *Id.*

124 It would also mean that the courts of justice which are the custodians of fundamental rights would be restricted, most of the time, to major commercial disputes.

125 Clearly not in corporate or commercial law. However, such a development would be beneficial in criminal or family law.

Insurance as a voluntary scheme paid for by payment of premiums[126] has more chance of success.

The difficulty is the great variation in the type and cost of legal services. There would undoubtedly exist a deductible amount as well as limits on what would be provided. Even more significant is the concentration of work that would occur in the hands of lawyers connected to insurance firms. It is now well-established that insurers can assign lawyers to their clients except where the contract of insurance preserves the client's freedom of choice[127]. This would have a negative effect on the independence of the legal profession, on the freedom of the clients and on the ability of small firms to form or to survive.

It must also be kept in mind that insurance companies can and do have contentious issues with their clients respecting the nature and extent of the coverage and the conditions surrounding the conclusion of the insurance contract. In a case where an individual is denied coverage, the issues of lack of access to justice that this type of insurance is meant to remedy would remain unsolved, and possibly would be made even more difficult for the individual who would then be facing the prospect of litigation with an insurance company, without access to the funds that were previously used to cover the insurance premiums.

Despite these queries, it is not possible to write off insurance as an instrument of increasing access to justice. However, it is clearly not the complete answer nor an easy one. Indeed, it should not be contemplated without some legislation to ensure freedom of choice of attorney and strict regulation of policy content.

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There are many ways to combat the inaccessibility of justice. Most of them require funds and all of them require a judicial culture of courage in the face of those who are in authority and those who are economically or socially privileged. It must be accepted that the festering sense of alienation from justice reflects a new reality of

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126 With perhaps some subsidizing of the premiums.

127 See: *Zurich du Canada, Compagnie d'indemnité* v. *Renaud & Jacob*, [1996] R.J.Q. 2126 (C.A.); *Ville de Fermont* v. *Pelletier*, [1998] R.J.Q. 736 (C.A.).

disparity in all of society and not just a feature of our system of justice.

It follows that one cannot entirely remedy the lack of accessibility with procedural modifications. While some of the provisions of the new *Code of Civil Procedure* do represent palpable improvements, many are likely to have a negative effect and assist in the creating of an improved system of justice that is accessible only to a minority. The Code is, of course, not the only relevant factor, but it is a function of society and its values and it must be viewed as an important reflection of our legal philosophy.

Procedural distinctions and formalism have generally been a feature of conservative, rule-bound, deferential societies. We should take another look at the reasons which brought about the drafting of the new Code instead of taking for granted its declared purpose of streamlining and facilitating litigation. We should also understand that often, grave consequences can result from even the best intended actions, where not enough consideration is given to the proper ways to achieve our ideals. When it comes to procedure, one should be careful before assuming that increased celerity through stricter delays actually increases access to justice. In fact, history has shown, and experience continues to show, that quite often the opposite is true.

We should also draw conclusions of a more practical nature about the application and interpretation of the new Code. Whenever doubt arises, it would be desirable to interpret the Code flexibly and never to allow procedural errors to determine the outcome of the case. Missed deadlines should be remedied by extending the time periods and failure to disclose or produce a document should be sanctioned by appropriate awards of costs, not by the exclusion of evidence. This was generally so under the previous code but will be even more important now. In those areas where the Code may appear to be dangerous at first sight, jurisprudence should strive to palliate the danger.