Problems Surrounding The Coming Into Force of The New Code of Civil Procedure

Hon. George S. Challies *

The coming into force of a comprehensive new statute such as a Code of Civil Procedure is always attended with transitional problems and this is particularly true when the code that is replaced has been in force for almost one hundred years. It is not surprising therefore that a number of problems have followed the introduction of the Quebec Code of Civil Procedure [1] on September 1st, 1966.

The first problem that was met was that of the jurisdiction of the Magistrate's Court, now called Provincial Court. It should be explained that the codifiers of the new Code of Procedure in their report recommended by a majority that the jurisdiction of the then Magistrate's Court be extended to $500.00, although Commissioner Leblanc, in a dissenting opinion, suggested that this figure be increased to $1,000.00.[2]

A statute of 1963 [3] increased the jurisdiction of the Magistrate's Court from $200 to $499.99. Provision was made in Section 3 of this statute for the transfer of pending cases by consent of the parties from the Superior Court to the Magistrate's Court — i.e. cases instituted before the Superior Court prior to the increase in its jurisdiction. This section reads as follows:

> 3. With the consent of the parties, any case which was instituted in the Superior Court before the coming into force of this act and which, under section 1, is now within the competence of the Magistrate's Court, shall be referred to that court to be heard and decided, as if the case had been instituted and all interlocutory judgments had been rendered therein.

There are almost 2,000 cases that have been transferred to the Provincial Court in Montreal.[4] In the other districts in the appeal district of Montreal very few cases have been transferred.

The constitutionality of this increase in jurisdiction was referred to the Courts by Order-in-Council on the 22nd January, 1964. As is

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* Associate Chief Justice, Superior Court (Quebec).

1 (1965) 13-14 Eliz. II, c. 80.

2 (1964) Bill 20, p. 6a.

3 (1963) 11-12 Eliz. II, c. 62.

4 Up to 31 December, 1966, 1836 cases had been transferred in the district of Montreal. Thanks to the co-operation of the Provincial Court these cases have been heard promptly.

well known, the Supreme Court of Canada [5] held the statute to be constitutional, reversing the decision of the Court of Appeal.[6]

When the new Code of Procedure was actually enacted as a statute, the legislature of the Province of Quebec made a number of changes without consulting the Commissioners, and among them was a change increasing the jurisdiction of the Provincial Court to $999.99. As this had not been recommended in the codifiers' report the matter of the jurisdiction over pending cases involving $500.00 to $999.99 was not dealt with. As so often happens, two views immediately developed as to whether or not the pending cases had all been transferred to the Provincial Court. Chief Justice Dorion, in a judgment rendered on 18th October, 1966 [7] decided this matter in the affirmative. The appeal from this judgment, by special arrangement with the Court of Appeal, was given a preferred hearing on 1st November, 1966 and on 31st December, 1966 the Court maintained the appeal[8] with the result that these pending cases remain under the exclusive jurisdiction of the Superior Court.

In the meantime it has been necessary to suspend the hearing of all cases between $500 and $999.99, of which there are approximately 2,000 in the district of Montreal alone. These cases will start appearing on the rolls from March 1st, 1967.

The coming into force of the new Code made it necessary to prepare and enact new Rules of Practice because the former rules no longer were applicable, the more so because many of the former rules had been put into the Code as Articles.[9]

This necessitated first the preparation by committees of Judges of the Superior Court of drafts of both the General Rules of Practice and the Rules of Practice for the Montreal District, the circulation of the drafts to all the Judges, and then, as provided in Articles 47 and 48, the convoking of meetings of the Judges of the Superior Court to enact these rules. Such meetings were held in Quebec City on March 4th and 5th, 1966 for the General Rules of Practice, and in Montreal on May 16, 1966 for the Rules of Practice of Montreal, and both sets of rules were published in the Quebec Official Gazette on the 30th July, 1966. At the same time the Provincial Court adopted

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[5] [1965] S.C.R. 772.

[6] *Re Constitutionalité de la Cour de Magistrat* [1965] Q.B. 1

[7] *Goodyear Employees Union Ltd.* v. *J. Louis Keable and Barreau de la Province de Québec* — S.C.Q. 144,227, so far unreported.

[8] C.Q.B. No. 6999 as yet unreported.

[9] For example former R.P. 45 became Art. 253, Article 562 incorporates R.P. 62 and Article 875 covers R.P. 64.

new rules of practice which were published in the Quebec Official Gazette of the 22nd October, 1966.

One of the new institutions introduced in the Code was the declaratory judgment (see Articles 55 and 453). In order to simplify the procedure it was provided that the declaratory judgment would be sought by motion which normally would involve the matter coming up for decision in Practice Court and accordingly no provision was made for inscribing such proceedings as in contested cases. While it is an advantage that such matters can be decided quickly, one may wonder whether the Practice Court is the appropriate place for the decision of such matters. This whole question is now under active consideration and no definite decision has yet been taken.

The new Code has made it necessary to have a considerable reorganization of Practice Court. Article 404 requires that in actions in separation from bed and board, to annul a marriage or on motions to rectify registers of civil status, the evidence of plaintiff must be given before the Court. Accordingly it is no longer possible to refer these matters to the greffe for proof and they are heard in open Court, which has added considerably to the length of time spent in hearing witnesses. For this reason a sixth Judge now sits in Practice Court, spending half the month in third division hearing separation cases and half the month in Chambers to do all the Chambers work, and the other third division Judge does likewise but in reverse.

As Article 12 amended the former Article 15 with the result that delays to plead run during the Christmas and long vacations and that all matters of procedure can be heard at any time during those periods, the Practice Court will be much busier during the holidays and it will be necessary to have more Judges sitting, particularly during the long vacation.

The summary cases have been done away with and Articles 1150 to 1162 have not been reproduced. The Code provides in a few articles that certain proceedings will be heard and decided by preference (Articles 576, 646, 659, 740, 827, 835 and 861). Article 275 stipulates that the prothonotary shall keep a general roll and also a special roll for matters which are to be heard and decided by preference by reason of the provision of law (such as the articles already mentioned) or of a decision of the Chief Justice or a Judge designated by him for such purpose. Chief Justice Dorion and I issued instructions to all prothonotaries under date 29th June, 1966 listing as matters which must be heard and decided by preference those already referred to and ten other categories of cases.

Article 279 provides for pre-trial either by the Judge assigned to hear a case or by any other Judge designated by the Chief Justice

either *proprio motu* or at the request of the attorneys. No general system of pre-trial has yet been set up in Montreal for a number of reasons. It is obvious that if Judges are pre-trying cases they cannot be hearing cases on the merits and one has to determine what is the best employment that can be made of their time. The smaller automobile and bodily injury cases do not, in my opinion, need to be pre-tried because the great majority of attorneys now make admissions before the trial which greatly shorten the enquête. We are experimenting in Montreal with a system whereby all cases of one day or over will be pre-tried by the Judge who will hear them. In addition any case is pre-tried if one of the attorneys so requests. I am informed that many cases are now being pre-tried both in Quebec City and in the rural districts in the appellate district of Quebec.

Article 1 provides that the Code will govern all matters commenced after its date. It will also apply to pending matters "Saving that they will not have the effect of shortening a delay which has started to run or of affecting things which have already been validly done". It is expected that this Article will give rise to a number of problems and indeed the question of jurisdiction over cases pending between $500 and $999.99 is but one example. One place where it might have been expected to arise was where a mixed jury had been ordered at the request of a company and where the other parties might have argued that the right to a mixed jury had been lost because Article 339 provides that the composition of a jury is determined without consideration of parties which are not physical persons. However, during the month of November a number of jury trials was held and this matter was not raised.

Coercive imprisonment was done away with in the new Code by Article 1 except in cases of contempt of Court. There are throughout the Code provisions providing that disobedience of orders of the Court, (notably by witnesses who fail to attend in answer to a subpoena) is a contempt of Court, and indeed Article 284 provides that the person duly summoned and who has had his travelling expenses advanced may be arrested on warrant if the Judge is of opinion that his evidence may be useful. This Article is completed by Article 50 stating that anyone is guilty of contempt of Court who disobeys any process or order of the Court and by Article 53 providing that no one may be condemned for contempt of Court committed out of the presence of the Judge unless he has been served personally with a special rule. Articles 50 and 53 and Article 284 are contradictory and to resolve the contradiction we have in the Superior Court in Montreal adopted the view that while Article 284 provides for the possible arrest of a defaulting witness the Judge is not obliged to go

this far and in fact a rule or ordinance is served upon the defaulting witness ordering him to appear and try to justify his default. This ordinance reads approximately as follows:

> Seeing the motion and affidavit in support, the Court orders... to appear before the Court on the ..... day of .... 196 , at .. .. of the forenoon in Room 31 of the Superior Court at the Old Court House, Montreal, to justify his default.
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> Justice of the Superior Court.
>
> Montreal, ...

If the witness appears and gives some valid excuse he is not imprisoned. If he then fails to appear the Judge may and probably will order his immediate arrest.

Article 827, in order to simplify proceedings in alimentary suits, permits all such suits between consorts, relatives or in-laws, to be brought by motion and to be heard and decided by preference. No provision unfortunately was made for the custody of children, although such cases are equally urgent and moreover custody must often be determined before the amount of an alimentary pension may be decided. It is hoped that an amendment to the Code will be passed dealing with this matter.

Finally there is the problem of the Court holidays. Article 7 of the previous Code of Procedure and sub-paragraph 14 of Article 17 of the Civil Code both listed as Court holidays, in addition to Good Friday and Easter Monday, the following: Epiphany, Ash Wednesday, Ascension Day, All Saints Day and Conception Day. These additional holidays were excluded from Article 6 of the new Code and the codifiers' report provides that "there have been removed from the list of non-juridical days religious feasts on which Roman Catholics are now allowed to work". Unfortunately the Civil Code was not amended, with the result that there is a basic disagreement between the two Codes. Moreover, the Collective Agreement with the Court House employees and other employees of the Ministry of Justice makes all these feast days holidays. It is necessary to correct this matter, how it is corrected being the problem of the administration.

The foregoing are some of the problems that have been met with in the first few months of the life of the new Code. There will no doubt be numerous others.