THE NEW QUEBEC CODE OF CIVIL PROCEDURE: SOME COMMENTS AND SUGGESTIONS

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On Tuesday, July 14, 1964, the Quebec Legislative Assembly gave first reading to Bill 20, a massive new code of civil procedure. The three commissioners charged with the preparation of the Code [1] had been appointed on March 30, 1960. They held hearings, received submissions, and studied the procedural laws in force in other jurisdictions. While still involved in the preparation of a new draft Code, they came to the conclusion that certain measures should be adopted immediately, and these were embodied in a preliminary report; many of these suggestions were adopted by the legislature without delay. Thus the increase in the jurisdiction of the Magistrate's Court from $200 to $500 together with an appeal from its judgments in cases involving $200 or more, on questions of law only, was enacted but not promulgated, pending the outcome of a reference to the courts on the constitutionality of the increase; the Quebec Court of Appeal heard the case some months ago, but has not yet rendered its judgment. Similarly, in accordance with the Commissioners' recommendation, the period for peremption was reduced from two years to one, with a preliminary notice of 30 days being required before presentation of the motion, and plaintiff may now cover his default at any time before judgment thereon.[2] Again, the rules dealing with amendments were revised at the same time, so that now only amendments introducing an entirely new claim, having no connection with the original demand, are prohibited.

In February, 1964, the Quebec government received the first part of the Commissioners' final report, and it is this first part which has been reproduced as Bill 20. The rest of the Commissioners' Report has been fyled in Quebec, but at the time of writing, legislation covering the remaining areas of the new Code has not yet been introduced. Consequently, Bill 20 does not represent the entire Code proposed by the Commissioners, but only a significant portion of it — Books One to Four out of a total of six. It is considered likely that Books 5 and

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[1] The Hon. Mr. Justice Garon Pratte of the Quebec Court of Appeal; The Hon. George S. Challies, Associate Chief Justice of the Quebec Superior Court; and Me Albert Leblanc, former Dean of the Faculty of Law at the University of Sherbrooke, and a former Bâtonnier of the Province.

[2] This was adopted in 1963 by 12 Eliz. II, c. 63.

6 will be incorporated in Bill 20 at the next session of the Legislature.

The first thing that comes to mind in connection with Bill 20 is that the Commissioners deserve the warm thanks and congratulations of the community as a whole, particularly of the Bar and the Bench. If adopted, the new Code, while not making a clean sweep, will go a long way towards streamlining our system of justice and bringing it into line with the most modern and advanced procedural systems in existence today. It is to be hoped that the proposed innovations will not meet with obstruction on the basis of tradition, conservatism and habit, but will be considered objectively and scientifically. On this basis, there should be a large measure of acceptance and agreement possible, and the new Code could be enacted at the earliest available opportunity.

A comparison of the present Code, enacted in 1897, and the new Code shows that while the present Code is divided into 74 chapters grouped in eleven parts, the proposed Code is shorter, and is composed of six Books, substantially following the order of the present Code. The spirit of the new Code is not in any way alien to our established system of procedure; on the contrary, the Commissioners have taken care to make their innovations within the framework of traditional institutions, for which they deserve our appreciation.

No doubt there will be many comments and representations made, in public and in private, before the new Code is considered in detail by the Legislature. I do not propose in this short comment to deal with the Code in its entirety, or to anticipate the discussion which will take place. My only purpose is to mention one or two specific points, and to make a few tentative suggestions, based on my experience as a practitioner and a teacher. Perhaps at a later stage I may have additional remarks to make as well.

I would like to make the preliminary point that, insofar as these observations are intended as a criticism of the Code, this is only in the sense that in some ways the innovations *do not go far enough.* There is no doubt that we would be far better off with the new Code than our present one, and it would be a catastrophe if the draft were emasculated or found its way into the dust-bin, as so often happens with reports by Commissioners. The new Code is an important step in the right direction; but inasmuch as procedural reforms are now being considered, it seems to me this is the logical time to propose other, more radical changes; an equally propitious moment for doing so may not arise again for many years.

My first observations concern examination on discovery. To begin with, let us look at the new, proposed Article 404, whose first paragraph reads as follows: (Italics mine)

> "404. At any stage of the case, the parties may agree, *or the court, if it sees fit to do so,* may permit that a witness be heard out of court before a person authorized to administer the oath, provided that all the parties are present or duly summoned."

The second paragraph of the article is not relevant for the purpose of this discussion.

If we examine this article carefully, and compare it with its predecessor, we find a marvelously useful device is here introduced, perhaps unwithingly, by the Commissioners. The present equivalent of the proposed Article 404 is Article 355, which only permits such out-of-court examinations *by consent of the parties.* But the new article would, in effect, introduce examination on discovery of *any witness,* with the permission of the court, granted on motion.

Modern, wide discovery provisions are the keystone of a truly efficient, advanced procedural system. Without wide discovery rules, a lawyer may be extremely reluctant to disclose pertinent information during settlement negotiations — all the cards are not laid on the table, due to an apparent conflict in the lawyer's duty to his client, should the negotiations fail. But with liberal discovery provisions lawyers tend to open their fyles, no conflict of duty exists, and settlements are encouraged.

Under the U.S. federal rules of procedure, discovery provisions similar to the proposed Article 404 exist [3], except that *no motion is required* — just a notice to the opposing attorney and a subpoena to the witness (no subpoena is required if the witness is the opposite party). However, the opposite party may move to quash the notice on the ground of abuse or frivolity; for example, if a dozen witnesses living far away are summoned, all of whom would testify on the same point, in an obvious attempt to run up costs or wear out one's opponent. But the burden of proof is on the opposite party to show that the procedure is being abused, not on the person summoning the witness.

It seems to me that it would be preferable to proceed in the same way in our new Code. However, the difference would not be too significant, *provided lawyers take advantage of the new provisions,* and use this magnificient discovery tool whenever it is indicated, and *provided the judges encourage its use by a liberal and wide use of their discretion* under Art. 404. Thus, if the Article is maintained in its present form, our judges should not require cause to be shown for the examination, nor should they deny the motion on the ground that the

[3] Rule 26.

examination will constitute a so-called "fishing expedition". The fundamental principle should be full disclosure of all relevant facts and elimination of surprise.

In a sense, the wide discovery rules are similar to the mixed enquête system we had in Quebec prior to 1897, but put to much better and more efficient use. Thus, in an automobile accident case, the defendant's attorney would automatically examine the driver of the other vehicle, the owner, the victim, eyewitnesses, etc. In other cases, the experts would be examined on discovery. At this point I can hear the objection being raised that the trial will be cut and dried, and all the proof will be more or less known in advance, eliminating surprise and other weapons from the lawyer's bag of tricks. This is only partially true, just as in the case of a preliminary inquiry in a criminal proceeding. Moreover, there is no doubt that the ends of justice are best served when surprise and confusion are eliminated on both sides; it is the side which has right on its side that should succeed, not the party with the shrewdest, most skillful advocate. In any event, it is always true that the shrewd, experienced attorney will have an immense advantage over his opponent, even in terms of marshalling and synthesizing the mutually available evidence; but much of the chanciness in the contest will disappear with prior examination on discovery of all the key, material witnesses.

The new discovery provisions can be especially useful if used *before the pre-trial hearing*, the latter being another of the Commissioners' innovations. In fact, many U.S. federal judges insist that all the depositions on discovery be taken before the pre-trial hearing, and that the lawyers be perfectly familiar with the evidence as well. This then has the effect of enabling the issues to be radically narrowed for the trial, even if no settlement results.

Another significant advantage of liberal discovery rules is that detailed pleadings become unnecessary. However, the reform of the rules of written pleading is conditional upon the liberal use of discovery, without which it makes no sense. Moreover, in Quebec we have a very peculiar problem, unknown to the common law, in our exclusionary rules regarding verbal proof and our insistence on writings in many cases [4]. While there is some analogy between our rules and the common law Statute of Frauds which also excludes writings in certain instances, the two are not strictly comparable. Under the Statute of Frauds, the absence of a writing makes the contract *unenforceable*,[5] and consequently, even the admission that a verbal contract

[4] Art. 1233 C.C.

[5] *Cf.* the position in Quebec, where the only problem is whether verbal proof is admissible under our law of evidence; any contract is normally enforceable, provided it can be *proved*.

exists is of no avail. But under Quebec law, a deposition, on discovery or otherwise, may serve as a commencement of proof in writing against the witness; and conversely, a lawyer may open the door to verbal proof against his own client by asking questions in the wrong area, thus tacitly waiving his right to object later on. The existence of this problem does mitigate, to some extent, against a very wide use of discovery in actions where a writing is *de rigueur*. The obvious solution to this would be, of course, to abolish the distinction between writings and testimony, and to leave the presence or absence of written proof as a matter to be appreciated by the judge in weighing the evidence. We must also bear in mind that depositions on discovery in most common law jurisdictions do not automatically become part of the record, unless the party sees fit to use them, very much like depositions on discovery taken in Quebec in Bankruptcy Court. If depositions on discovery did not automatically form part of the record in Quebec, then a liberal use of discovery would be possible in contract cases, notwithstanding the Civil Code provisions excluding testimony and the dangers resulting therefrom. I would, therefore, strongly recommend the adoption of this principle in lieu of proposed Article 396, which provides that depositions on discovery always form part of the record; without this change, the usefulness of discovery is greatly reduced, and this would be true even in a common law jurisdiction, although it is much truer in Quebec.

In sum, the proposed Art. 404 is to be applauded — it is a most useful change, and I am merely asking for more of the same. It is instructive to examine the extensive literature praising the U.S. discovery provisions. These are extremely popular, and have been embraced by many states which have been most unwilling to adopt other procedural reforms. There was some initial reluctance in conservative United States legal circles when the reforms were first adopted, but this soon disappeared, and the experience with the reforms has been a very happy one.

To cite one significant example, I had a lengthy discussion on the subject with an Alabama lawyer who had been extensively involved in litigation in the state courts. Alabama maintains the rigid common law rules of pleading, which are even more formalistic than our present rules. But because of liberal discovery provisions adopted by the State, notice pleading [6] has been introduced *de facto* in the Alabama state courts, and although lawyers may have the right to complain that pleadings are irregular or insufficiently detailed, they do not do so in practice. This has resulted indirectly from the progressive, federal

[6] *i.e.*, short informal complaints without any lengthy, formal statement of claim alleging *all* facts; similarly for answers, etc.

rules, with which these same lawyers are familiar from their experience in the federal courts.

Liberal discovery rules can thus minimize technicalities, eliminate the need for detailed fact or issue pleading, and result in parties not taking advantage of formal defects. More important still, they facilitate settlements, eliminate surprise at trial, and help to define and limit the issues, particularly in conjunction with the pre-trial conference.

The second comment I wish to make concerns what may be called *summary judgment.* In this connection, the following proposed articles are extremely useful and significant:

> "93. When a party has filed an affidavit required by any provision of this Code or of the rules of practice, any other party may summon the deponent to be examined before the judge or the prothonotary upon the truth of the facts sworn to in the affidavit.
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> "Failure to submit to such examination entails the dismissal of the affidavit and of the proceeding which it supported.
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> "176. The defence must be supported by an affidavit, failing which it is considered null, in an action:
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> a. on an account for services rendered or goods sold and delivered;
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> b. upon a bill of exchange, cheque, promissory note or acknowledgment of debt;
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> c. for salary or rent or for money lent;
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> d. to recover taxes, rates and assessments imposed by any law of this province or in virtue of any of its provisions.
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> "The affidavit must attest that there is a serious defence, and if the defence is based upon the failure to present regularly for payment a bill of exchange, cheque or promissory note, it must also attest that at maturity provision had been made for payment at the appointed place.
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> "177. In the cases provided in article 176, the court may order the defense struck from the record if an examination under article 93 shows it to be frivolous."

In effect, these provisions enable a contested case to be converted into a default case, where the defence is clearly frivolous, usually after examination of defendant on the truth of his affidavit. This makes summary judgment possible in many cases, without having to make a special request to the Chief Justice for a quick hearing.

I should like to suggest a *reciprocal* provision, so that plaintiff could be forced to fyle an affidavit or have his suit dismissed. In the U.S. federal rules, there is a procedure open to either party called the *motion for summary judgment.*[7] This motion is supported by affidavits, and often by depositions on discovery (here again, liberal discovery rules are needed), answers to interrogatories, and answers to

[7] Rule 56.

requests for admissions.[8] The court is thus enabled, not only to render a summary judgment in favour of plaintiff where the defence is frivolous and dilatory, but also to dismiss summarily frivolous and vexatory proceedings. This is indeed a most useful power.

The reader will have seen by now that I greatly admire the work of the Commissioners, but that in a few isolated instances, a little more radical surgery might benefit the patient even more. It would be superfluous in this article to attempt to deal with the Commissioners' other suggested changes, but perhaps some examples should be given. The elimination of the *fiat*, which should have occurred years ago, is finally accomplished by the proposed Code. The pre-trial conference is introduced. Cross-demands may be incorporated in the defence; incidental demands may be made by amendment of the declaration; superfluous pleadings are eliminated; security need no longer be given by a defendant-appellant; petition of right is eliminated; and many other reforms are proposed which have the effect of eliminating formalism and making procedure the handmaiden, not the mistress, of substantive justice. Of course, many questions remain, some of which may be answered by the as yet unpublished balance of the report covering Books Five and Six; some require answers from the provincial and federal governments. The proposed Code abolishes petition of right; what legislation will the government now pass to enable the Crown to be sued? So far, Bill 66 has been passed by the Legislative Assembly permitting Hydro-Quebec to be sued in the usual way; further legislation is required immediately. What about relieving the load on the Superior Court by a further increase in the Magistrate's (soon to be District Judges) Court, say to $1000, if this is constitutional; if it is not constitutional, why not create a County Court, as in the other provinces ?[9] What about the qualifications for judicial

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[8] This is another excellent reform we should consider: it is a method of forcing the opposite party to admit a fact. If he refuses to do so, he must pay the costs of proving that fact. This procedure in the U.S. federal rules also has the effect of substantially narrowing the issues. It would flow naturally as a corollary to proposed Article 85 of the new Code. See U.S. Rule 36.

[9] Of course, the problem is that the judges of a County Court must be appointed federally under s. 96 of the British North America Act. Perhaps the solution is a constitutional amendment to allow the provinces to make these appointments. It has been suggested that some of the civil jurisdiction (not necessarily monetary) now possessed by District Judges is that of a County Court, in 1867 terms, and that hence these judges either do not have the required jurisdiction to hear such matters, or their appointments are illegal. The same may also be true of Judges of the Sessions of the Peace, notwithstanding s. 466(a)(ii) of the Criminal Code, for Parliament could not lawfully grant to a provincially appointed judge the powers of a County or District Court within the meaning s. 96 of the British North America Act, 1867.

office and the methods of appointing judges? What about considering the revision of our rules of evidence in order to make the civil trial less of a contest and more of a scientific fact-finding expedition? What about genuine legal aid for indigent parties? The new Code does contain a section misleadingly entitled "Public Legal Aid". However this is just the old *in forma pauperis* procedure; it exempts an indigent litigant *who has an attorney* from paying certain costs; it does *not* provide any method of providing the free services of a competent attorney for an indigent who has been sued or wishes to take proceedings. There is no doubt that the present system, in spite of the valiant efforts of the Bar, is completely inadequate.

Many of these problems will have some time to resolve. It is, however, respectfully suggested that the first step should be to accept the Commissioners' Report and enact the new, progressive Code now in process of consideration, preferably with the few modifications suggested here.

No doubt other suggestions will be made, and in the course of the discussion valuable ideas may come to light. But the important thing is to keep the goal in mind: the better, more efficient administration of justice, in the interests of the litigants and the public; and this is a goal which the new Code goes a long way towards achieving.