LAPOINTE ROSENSTEIN MARCHAND MELANÇON
L.L.P. Attorneys

INSURANCE LAW NEWSLETTER

Volume 4, Number 2 December 2014

Editor's Note

We are very pleased to provide you with the 9th edition of our insurance law bulletin.

In this issue, Honourable Justice Gilles Hébert discusses the new Code of Civil Procedure which is scheduled to enter into force in the autumn of 2015.

Justice Hébert discusses both the reflections which led to the reform, as well as its principal impacts.

No doubt that this subject and these current events will be discussed by a great many authors.

In closing, we would also take this opportunity to offer our very best wishes for the holiday season and the New Year.

Mtre Paul A. Melançon

The new *Code of Civil Procedure*: evolution or revolution?

Honourable Gilles Hébert, Q.C.
Counsel

Introduction

After four (4) years of debate in the National Assembly, the new *Code of Civil Procedure* was adopted in 2014 and will likely be in force by the fall of 2015.[1]

The last major reform dated back to 1965, when the procedural rules were completely modified by the legislature within the general framework of the principle according to which substantive law should take precedence over form, and that protecting the rights of citizens was more important than the choice of procedural vehicle.

In 2002, a partial revision modernized procedure in order to simplify it, but this revision was extremely limited.

The issue and the goals pursued

The issue is well known: procedures are too long, too costly and too complicated, to the extent that the judicial system has become inaccessible to numerous people.

The increase in delays and costs deprives citizens of their access to court, and those who risk going through with their claims risk facing a system so complex that the process of getting a hearing often feels like navigating a labyrinth.

Furthermore, more and more people are self-represented, without legal advice or representation, and the legal system has been slow in adapting to this new reality which is not only local, but universal.

Proportionality

The proportionality rule, introduced in 2002, should be fairly obvious to all: proceedings and the means used for them should be limited to those necessary for the dispute to be heard by a court, and prevent one party from being crushed by the other with endless and useless procedures which have little to do with the rights they are supposed to defend.

The goal is therefore to establish a fair balance between the end goal of a complaint, the importance of the dispute and the means used in relation to same. Stonewalling no longer has its place in a court of law.

The new Code, which takes the proportionality rule much further, extends it to the means of proof which the parties plan on using, such as pre-trial discovery, legal experts, and superabundant documentation. The goal is to find a balance between the size of the problem and the size of the toolbox used to solve it.

Furthermore, in order to ensure that this rule is respected, the court can intervene at the beginning of proceedings rather than at the end.

The court's mission

With all this in mind, the judge is no longer a simple decision-maker; he or she also acts as manager and guardian of the parties' rights while handling a dispute.

With respect to alternative dispute resolution modes, such as mediation or arbitration, the judge is no longer a simple observer, but rather an actor who ensures that parties will consider alternative avenues to solve their dispute. The judge must also ensure that the schedule established between the parties is respected in order to avoid procedural inflation and the multiplication of various procedures or requests.

In order to accelerate and to simplify the court's activities, the judge has been given a wide discretion in the management of disputes and may use any new technology at his disposal in order to spare costly trips and useless paperwork.

However, in order to implement this, it would be necessary for the authorities to provide the courts and citizens with modern, accessible and efficient technology, which would allow Quebec's judicial system to finally join the 21st century. In this respect, we should look to the American courts, which are far ahead of us.

The impacts for insurance providers

The new Code certainly will impact lawyers' work and practices, but what will be the effect on insurance companies?

Yes, the new Code will impact insurance carriers, and here are a few examples of how:

I. The small claims division

As of January 1, 2015, the competence of the small claims division of the Court of Quebec will go from $7,000 to $15,000[2]. This means that the number of claims handled by this division will most likely double. Insurers should review their workforce responsible for handling disputes in the small claims division.

II. Mediation and arbitration

The new Code's philosophy is quite different from that of the current Code.

Article 1 of the current Code reads: *"Notwithstanding any contrary provision of any general law or special Act, imprisonment in civil matters is abolished, except in cases of contempt of court."*

The new Code's Article 1 is radically different and sends a strong message that its philosophy has changed. It reads: *"To prevent a potential dispute or resolve an existing one, the parties concerned, by mutual agreement, may opt for a private dispute prevention and resolution process.*

The main private dispute prevention and resolution processes are negotiation between the parties, and mediation and arbitration, in which the parties call on a third person to assist them."

The legislature's message is clear: the parties must prioritize mediation and arbitration before they consider a trial.

It is the judicial system's new philosophy and insurers should take it into account quickly.

While the Canadian Inter-Company Arbitration Agreement applies to the situations set out therein, the new Code adds a universal obligation to consider a private methods of dispute resolution. Therefore, insurance carriers should compile a list of mediators and arbitrators after consulting with their current legal advisors.

III. Experts

In the recent years, the use of legal experts has been the object of abuse, and many have sought a fundamental reform of the relevant provisions of the *Code of Civil Procedure*; however the new Code is a rather timid attempt at reform.

Nevertheless, it will now be necessarily to summarily convince the judge at the outset of the proceedings, that is, when the schedule is established, that an expertise is necessary, especially if each party wishes to retain its own contradicting expert.

Resort to a common expert is highly prioritized.

Moreover, the legislator emphasizes, in the very text of the Code that the precise role of an expert is to assist the court, not to defend the position of the party who hired him.

Insurance carriers would be wise to prepare a list of experts that are not clearly "identified" as defending insurers' interests; objectivity is clearly preferable to devotion or loyalty.

This does not mean that an insurer should blindly accept an expert suggested by the opposing party without verification and without being able to make its own suggestions.

IV. The relationship between insurance providers and attorneys

The new provisions of the *Code of Civil Procedure* will cause insurers and attorneys to develop a more immediate relationship, as several decisions will have to be made jointly, much earlier and much more often. For example, several questions will have to be answered from the outset of a file:

- Should we go to mediation or arbitration? In front of whom? Under what conditions?
- Are we able, as soon as the timetable is established, to summarily inform the judge of the probable duration of our hearing, of our list of witnesses, and of our position concerning experts?
- What admissions can be made from the outset in order to focus on the key issues?
- Are we in a position to make offers as soon as the judicial process has been started?
- What are the factual elements of investigation that we are missing to enable us to answer all of the above questions?

From now on, things will not only happen on the eve of the trial, but at the outset of the proceedings and the parties, whether they are insurance companies or not, will need to work closely with their legal advisers to allow the courts to fulfill their mission.

Insurers will still appreciate that the time spent on their file is the most efficient possible and the courts will equally benefit from an efficient use of their time; otherwise the nightmare of delays and costs will continue indefinitely.

We are no longer at the dawn of the 21st century; we are already almost 15 years into it.

1. Press release issued by the Minister of Justice on February 20, 2014 (http://www.fil-information.gouv.qc.ca/Pages/Article.aspx?aiguillage=ajd&type=1&idMenuItem=1&idArticle=2202206004). However, see footnote 2 concerning the date at which the increase in the jurisdiction of the Small Claims Court takes effect.
2. Chapter 10 of the laws of 2014, voted on October 23 and sanctioned on October 29, last, increases the jurisdiction of the Small Claims Court from $7,000 to $15,000 (article 536 of the new Code also dealt with this). Article 15 of this Act enacts that it will come into force on January 1, 2015.

For more information, contact one of the team members:

Louis P. Brien
514 925-6348
louis.brien@lrmm.com

Julia De Rose
514 925-6408
julia.derose@lrmm.com

François Haché
514 925-6327
francois.hache@lrmm.com

Selena Lu
514 925-6420
selena.lu@lrmm.com

Francis C. Meagher
514 925-6320
francis.meagher@lrmm.com

Antoine Melançon
514 925-6381
antoine.melancon@lrmm.com

Paul A. Melançon
514 925-6308
paul.melancon@lrmm.com

Peter Moraitis
514 925-6312
peter.moraitis@lrmm.com

Meïssa Ngarane
514 925-6321
meissa.ngarane@lrmm.com

Bertrand Paiement
514 925-6309
bertrand.paiement@lrmm.com

Daniel Radulescu
514 925-6403
daniel.radulescu@lrmm.com

Hélène B. Tessier
514 925-6359
helene.tessier@lrmm.com

Ruth Veilleux
514 925-6329
ruth.veilleux@lrmm.com