LAPOINTE ROSENSTEIN MARCHAND MELANÇON
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Newsletter

Civil and Commercial Litigation

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The new Code of civil procedure – movement towards mandatory negotiations

The new provisions of the Code of civil procedure set forth in Bill-28 will bring profound changes to Quebec's legal system. It is not merely a question of new terminology, but rather a change in philosophy, admittedly aiming to achieve a more expeditious, less expensive and accessible civil justice system.

To accomplish this goal, the legislator has taken drastic measures.

Since 2003, Quebec litigants have had the possibility of participating in voluntary dispute settlement programs, namely settlement conferences. This "free" service offered by the Courts allows the parties and their respective counsel to request that a judge preside over negotiations for the purpose of concluding an out-of-court settlement. This method of conflict resolution has proven quite effective. According to information compiled by the Superior Court of Quebec, District of Montreal, nearly 80% of the cases handled during such settlement conferences have been settled out of court.

Aside from being an effective means of alleviating the charge upon our overburdened justice system, it appears that parties who have used this service have been very satisfied overall. According to a study conducted by Professor Jean-François Roberge from the University of Sherbrooke[1], out of 740 participants, including both litigants and lawyers, an overall satisfaction rate of 83% was recorded in relation to their participation in settlement conferences.

Although this program was fairly unknown at its outset, it has become somewhat of a victim of its own success. In May 2005, the Superior Court of Quebec issued instructions to the members of the Montreal Bar Association that settlement conference requests would have to be received by the Associate Chief Justice at least 30 days before the trial date.

Since December 2011, it has been necessary for such requests to be addressed before the case is scheduled for proof and hearing, with the intention of using the resources related to holding settlement conferences earlier on in the course of the proceedings.

The Minister of Justice, Stéphanie Vallée, announced at the 2014 Annual Bar Convention that the changes made to the Code of civil procedure will have a fundamental impact. She stated:

"*We have an obligation to move from a culture of conflict to a culture of settlement. It is a new direction in which lawyers will play a decisive role by making it their duty to explain to their clients the limits of a court-rendered decision and the benefits of settlement. The new Code of civil procedure will give us the opportunity to restore a human dimension to our justice system.*"[2] (Our translation).

This unequivocal intention to promote the prevention and the resolution of disputes is stated in the very first article of the new Code of civil procedure, which is expected to enter into force in January 2016.

Parties involved in litigation will have the obligation to consider private dispute prevention and resolution processes, even before going to court. The parties shall, in addition, indicate in the pre-court protocol (currently known as the "timetable") the consideration they have given to trying to settle the dispute out of court.

The new Code, however, does not provide any specific penalty for a party who has not made efforts to settle the

dispute. This said, it is fairly probable that the members of the magistrature will evaluate and apply necessary penalties, whether it be, for example, ordering payment of legal fees which will not be limited to traditional court costs and disbursements awarded under the current regulations. Indeed, the Courts will have broad discretion when awarding legal fees and will consider whether a party participated in a dispute resolution process. A party reproached of unjustifiably failing to consider out-of-court settlement could certainly be penalized through ordering payment of various costs.

The new Code provides a non-exhaustive list of private dispute prevention and resolution processes, including negotiation, mediation and arbitration. The traditional settlement conference presided by a judge will be retained, but the emphasis seems to be made on private methods of dispute settlement in order to limit the involvement of judges.

When these new provisions come into force, litigants will have to rethink how to manage their legal disputes. As for businesses involved in litigation, because of the nature of their activities, now is an ideal time to consider implementing internal mediation programs and designating professionals to act as private mediators, such programs benefiting parties prior to the institution of proceedings.

Implementing such mediation programs will not only have the effect, for the target business, of fulfilling its obligations to consider settlement under the new Code of civil procedure, it will also have the benefit of settling potential litigation files without incurring the significant costs of instituting legal proceedings.

In anticipation of the new Code of civil procedure coming into force, our colleague M[tre] Antonietta Melchiorre will be giving a conference in the month of September on the benefits of private mediation as well as the integration of internal corporation mediation programs.

All those who are interested in attending should contact Ms. Claudine Bordenave by email at claudine.bordenave@lrmm.com to reserve for this conference.

M[tre] Melchiorre is an accredited mediator by the Quebec Bar Association and the *Institut de médiation et d'arbitrage du Québec* in civil, commercial and labour matters.

1. Jean-François ROBERGE, « Le sentiment d'accès à la justice et la conférence de règlement à l'amiable », rapport de recherche sur l'expérience des justiciables et avocats à la Cour supérieure du Québec et à la Cour du Québec (2014)
2. M[tre] Stéphanie VALLÉE, « Congrès annuel 2014 : La ministre de la Justice donne le coup d'envoi! », (2014) 46-7, *J. du Bar*. P. 10

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