

# What Does Justice Mean?

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I would like to thank the Canadian Institute for the Administration of Justice and in particular, The Honourable Madam Justice Anne-Marie Trahan for this invitation to speak about a most important subject : the administration of justice in commercial disputes.

During the preparation of this speech, Madam Justice Trahan asked me to play devil's advocate and offer my thoughts as a consumer of judicial services. What do consumers usually do? They criticize, express their dissatisfaction and, contrary to our profession, base their opinions on facts and emotions and not on legal theories. So with your indulgence, I will play the role of consumer as best I can.

As you may have already guessed, I will (very humbly, indeed) submit to you some thoughts which I have gathered during my professional career. I will also share with you a recent personal experience which gave me a new perspective on the administration of justice.

Before relating some specific examples of my professional and my personal experience as such, I should say that I do understand how difficult it would be to create or develop a perfect judicial system. I had a professor at McGill who once said that the Canadian, or for that matter European or North American system of justice, is really "the best of the worst." As we struggle to improve our system, we should always keep this in mind.

Life teaches us lessons, one of which is that there are always two sides to a story : it is extremely rare that facts are ever black or white. Most often, each party sincerely believes in his or her own version of events and the truth usually lies somewhere in the middle.

In a democratic country like Canada, we seek due process; that is, the opportunity for parties to be heard fairly, and present testimony from witnesses, and independent experts. Although the process and the rules of evidence are designed to accomplish this goal, "creative" litigants and their lawyers can use this same process and the rules of evidence to delay, or to even subvert the truth.

We often criticize the judicial system, however, I submit that the litigants are often to blame. It should not be overly surprising to this audience that there are companies which decide as a matter of corporate policy, to dispute or instigate claims even though they are themselves at fault. It has been my goal as in-house counsel to develop policies for resolving disputes in the most effective manner possible. My intention is not to settle all files at any cost but to analyze the facts in light of the law and arrive at a reasonable settlement that is the most cost-effective result for the corporation. Please note that this "settlement approach" is not

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applied in all cases. For example, I am intransigent on ill-founded claims, fraudulent cases or where the opposing party is trying to use blackmail.

This approach has given quick proof of its worth. It precludes late settlements or judgments accompanied by years of interest and fees not to mention the savings of lost dollars in employee productivity in processing useless cases. Meritorious or more simple files are settled quickly and efficiently.

There are, of course, the extreme and complicated cases where it might be advisable to protract litigation. For example, should we use delay tactics to allow our client to get its financial picture in order or to accumulate reserves and so that a more effective settlement might be reached down the road. These situations, I submit, are few and far between.

The focus of my comments today, however, is on the lawyers, judges, and the rules with which they play their roles. I will start by relating a personal story about my involvement in the judicial system. Like any good personal, legal experience, it woke me up and heightened my awareness to an otherwise routine legal problem.

In 1990, I bought an apartment building for investment purposes. The seller provided the usual warranties and representations. I hired a building inspection/assessment firm that confirmed, in writing, that the building was in "A-1 condition." The report ended with the following conclusion : "In our opinion, this is an excellent investment."

Less than six weeks after taking possession, I realized that the plumbing system in the building was in complete disrepair. I had the pleasure of meeting with the City Inspector who set out an extensive list of repairs that had to be completed. In his enthusiasm, he also discovered electrical problems. Costs mounted as the list grew longer and longer. I later found out from one of the tenants that there had been a flood in the basement three months prior to the closing date. In short, it was a disaster.

In my mind, this was such a clear case of liability that I was certain it would be settled in no time. But NO! The former owner vigorously denied responsibility and even more aggressively, so did the insurance company representing the assessment firm. I retained the services of a good law firm and sued the former owner and the assessment firm.

To begin, I paid that law firm \$3,000.00 to confuse me by asking me to choose between two types of recourse (deceit and misrepresentation or hidden defect) about which I cared nothing because as a frustrated consumer, I just wanted my costs covered, costs which continued to escalate.

I found myself calling the law firm and saying things like "I am a poor citizen who needs to recover damages from a former owner who is a liar and a thief and from an assessor who is completely incompetent. That's all I want."

The gist of the story is that the lawsuit was settled after many travails, six years later. In addition to repair costs, I had spent more than \$15,000.00 in fees. Many of my witnesses had vanished — after all, who wants to be a witness in court anyway? In the meantime, I had also evicted my main witness since my other tenants were threatening to leave if she had stayed.

During those six years, I fought against an insurance company, a thief, an incompetent and even worse — a large firm in Montreal that represented the insurer. I later found out that the law firm was responsible for recommending that its client not settle my claim which exponentially increased the number of procedures and length of the action.

In addition, a friend had told me that the judge assigned to my case was, in French, "soupe au lait" or in English, "temperamental", leaving us not knowing what to expect.

I settled out-of-court and barely recuperated my costs. At that time, I had recently changed jobs and could not afford the luxury of taking a week to ten days for the trial (with no pay by the way). As the imminent trial approached, an offer was made and I found myself settling the morning of the trial. Did I mention that I lost money?

As a lawyer, I understand civil procedure. I even understand the rationale for the rules of procedure and evidence. But now, I also understand the frustration of ordinary individuals or companies with the administration of justice, with the inordinate delays and processes and, finally, with the abuse inflicted by self-interested parties for whom justice is a secondary issue.

The main problem with lawyers, as I see it, is delay. Delay, as a general rule, is usually accepted, with good exercise or apparent good excuse, in both Ontario and Quebec. Lawyers should be compelled to review the facts, assess the law, complete discoveries within a reasonable period of time and resolve matters as quickly as possible. Although Ontario and Quebec<sup>1</sup> have Case Management and ADR initiatives which should help this problem, most lawyers will wait until a few days before trial to properly assess the case in order to be in a position to discuss it intelligently with opposing counsel.

I also wonder if many of these delays result from lawyers having an overly heavy caseload. I could give you dozens of examples of lawyers who accept files and do not have time to attend to them. My goal as in-house counsel has been to create a system whereby lawyers are required to give a preliminary assessment within 60 days of receiving files and to provide a well reasoned opinion within six months after that. Thereafter, periodic reports must show progress within the court system. I also find that delay occurs when files are transferred numerous times throughout a firm : this also increases costs to the client.

This also constitutes a serious nuisance to the corporations which have to record contingencies in their books, report these cases to their audit committees, and make public disclosure, in certain cases.

Finally, there is an attitude among certain law firms, companies and lawyers who believe that by being aggressive, they are achieving a better result for their client. But are

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1. For Ontario, see e.g. Ontario, Ministry of the Attorney General News Release, "Attorney General Announces Improvements to Ontario Courts" (27 Jan. 1996); Ontario, Ministry of the Attorney General, "*Supplemental and Final Report : Civil Justice Review*" (Toronto : Queen's Printer, 1996); Ontario, Ministry of the Attorney General, News Release, "Improving Access to our Courts : Mandatory Mediation to Save Ontarians Court Costs and Speed Justice" (31 Jan. 1997). For Quebec, see e.g. *Règlement sur la médiation familiale*, R.R.Q. 1981, c. C-25, r. 2.1.

they? I have often seen, during my career, practices which border on abuse, rudeness and harassment.

During my employment as counsel for a former employer, we defended a number of lawsuits claiming hundred of millions of dollars. Despite experts' reports which concluded that there were no links between the amounts claimed and the issues in the case, and despite a first judgment which confirmed for a large part that we could continue our business, the case was aggressively pushed ahead by the plaintiff's counsel. The lawyer continued to bring unnecessary motions and various other procedures to stall, and ultimately increase, the litigation costs for all involved. Coincidentally, negotiations were on-going between the business people which resulted in the purchase of the plaintiff corporation. Having access to the plaintiff corporation's books, we discovered that this lawyer had negotiated a contingency arrangement with the company that he would recover 35% of the damage award, some one hundred million dollars. We then understood the highly aggressive and emotional attitude of this lawyer.

In addition to the litigants and lawyers, judges are also responsible for many of the image problems plaguing the judicial system today. I know that there are many judges in the room and it is with the greatest respect that I am going to make the following comments : first, I will tell you right away that I am not a litigator and therefore, you will not be seeing me in court. I am an administrator. I supervise legal services, I review whole systems or procedures, I attempt to implement sound policies, I make recommendations to senior management, I coordinate work with external counsel, I negotiate fees with law firms, I ensure that their management of our files is appropriate. I attend pre-trials or trials on rare occasions and only when large interests are at stake for my employer. These cases are rare indeed. In short, I have had little acquaintance with judges but, during all these years, how often have I heard comments from litigators : "Oh, no! not this judge. She tends to side with the small guy."; or "He hates insurance companies.", or "Not this judge, he has bad disposition." or "He/she doesn't understand commercial matters." — and so on. I have also heard comments such as "Oh that judge puts us to work. He or she keeps asking for details and reports."

Is it always necessary? Each time additional details are requested, then additional costs are involved for all the parties and for the system itself. Of course, I take what I hear with a grain of salt but sometimes, voices about reputations are unanimous and it is worrying to hear negative comments in the vein that I have just mentioned. On the other hand, it is always a pleasure to hear that a judge is recognized for his/her intelligence, patience, capacity to listen, ability to show respect for all parties involved and most importantly, for the skill to render thoughtful, reasoned judgments.

How do we insure that justice is administered efficiently? How do we alter negative perception of our judicial system by litigants and the consuming public? We all recognize that the judiciary system is under constant evolution and that many initiatives continue to improve the efficiency of our tribunals :

- Rule 15 in Quebec<sup>2</sup>
- preparatory sessions

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2. *Rules of Practice of the Superior Court of Quebec in Civil Matters*, R.R.Q. 1981, c. C-25, r.8.

— commercial division of certain jurisdictions, etc.

But are these measures sufficient? Shouldn't we work at the root of the problem :

P Taking into account the variety of cases and the numerous levels of complexity, I do not think that one four-tiered level judicial system will answer everyone's needs. Thought should be given to increased specialization in the court initiatives in certain jurisdictions.

P Thought should be given to increased specialization of the lawyers themselves.

P For simple cases based on facts, like my own personal experience, why not an expedient justice in the Solomon style?

P Other measures such as Case Management and ADR, although relatively new, will undoubtedly contribute to the improvement.

P Efforts should also be undertaken to do the following :

- shorten limitation periods;
- enforce the time limits in the *Rules of Civil Procedure*;<sup>3</sup>
- implement rules which require lawyers to process cases within a reasonable time period;
- vigorously enforce *ethics rules* requiring lawyers to respect their fellow colleagues, their clients and the Court;<sup>4</sup>
- implement ADR as a mandatory course at university level and during bar admission;
- provide for continuing legal education requirements for the profession.

In other words, everyone should work toward a more efficient system of justice. Lawyers and judges are entrusted with ensuring that the Canadian judicial system is providing the "consumer" or litigants efficient mechanisms for resolving disputes. We should work on restructuring the system itself. We should have expertise in the courts, where both complex and simple cases can be processed rapidly and effectively. We should train our lawyers to make them more efficient and cultivate a settlement approach from the start. We should

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3. For Ontario, see *Rules of Civil Procedure*, R.R.O. 1990, Reg. 104, as amended to O. Reg. 333/96. For Quebec, see *Code of Civil Procedure*, R.S.Q. c. C-25.

4. For Ontario, see Law Society of Upper Canada, *Rules of Professional Conduct : Professional Conduct Handbook, as amended to June 26, 1998* (Toronto : Law Society of Upper Canada, 1996). For Quebec, see *Code de déontologie des avocats*, R.R.Q. 1981, c. B-1, r.1.

monitor the performance of lawyers and judges. And finally, we should remember that we all have a responsibility and a role to play in the improvement of our collective image.