



**The Honourable Guy Gagnon
Chief Judge
Court of Québec**

**The "Pre-Action Protocol",
Is It Part of the Solution?**

Reflection on civil procedure

March 2009

The "Pre-Action Protocol", Is It Part of the Solution?

In October 1997, the Lord Chancellor's Department in England announced its decision to implement certain recommendations made by the Right Honourable Lord Woolf,* who at the time was given the responsibility of studying various ways and means of promoting greater accessibility to the English judicial system, by improving the efficiency of the system, from the point of view of its promptness and its equitableness as well as by reducing costs.

The Woolf Report, named after its author, deals with a number of facets of civil procedure and suggests a cultural – and indeed an ethical – approach that is different from the one known to date both in England and in Canada. In fact, Lord Woolf's proposal is simply based on harmonious, constructive relations between lawyers, free from the emotionalism aroused by disputes, in order to encourage seeking solutions to litigation rather than developing a strategy focusing on confrontation.

Among the many topics addressed, Lord Woolf devotes one chapter in his report to "Pre-Action Protocol".

What does "Pre-Action Protocol" consist of?

In fact, it involves a statement of rules that are to be enforced prior to referring the dispute to the courts. The protocol is an amalgamation of formalities to be followed as well as recommendations submitted to the parties and to their lawyers. To some extent, these recommendations constitute a code of good conduct to put into practice before the case is officially contested before the courts.

The framework imposed by the protocol strives to facilitate an exchange of information, and expeditiously at that. The main aim of such a protocol is to encourage a quick settlement, whether at a step prior to court action or as soon as the case is, in fact, referred to the Court. It also makes it possible to more efficiently manage follow-up proceedings in the courts.

There are four main objectives of the protocol proposed by Lord Woolf:

1. To draw the parties' attention to the advantages of resolving a dispute before resorting to the courts;
2. To encourage communication of all relevant information, both by the claimant and by the alleged obligator;
3. To create favourable conditions, prior to referring a matter to the courts, so that suitable offers of settlement are made and so that the parties are prepared to consider them honestly, thereby fostering a fair and satisfactory settlement of the dispute as promptly as possible, before court intervention;

* Harry Kenneth Woolf, Baron Woolf. Lawyer, Master of the Rolls (1996-2000) and Lord Chief Justice of England and Wales (2000-2005)

4. To promote the implementation of a conciliation process and, failing that, an efficient caseload management process, if it becomes inevitable to refer the dispute to the courts

In short, "Pre-Action Protocol" forces the parties to follow a structured approach in good faith. It establishes a procedure whose initial step is similar to a formal notice, or rather, to a detailed written notice whose minimum contents are governed by rules laid down in the protocol. And all of this must be given to the alleged obligator. The claimant must also make sure that he efficiently conveys all relevant information to the obligator. In fact, the notice is much more than a mere formal notice, as it also and, above all, consists of the beginnings of a discussion that is meant to be constructive and potentially able to eventually lead to a settlement of the dispute. This approach must make it possible for the Defendant to be sufficiently informed in order to be in a position to take a knowledgeable stand with regard to the looming litigation.

As for the Defendant, who is also governed by the protocol, he must provide a written answer, giving his reasons, so as to clearly make the claimant understand his position, within the time limit. He agrees to cooperate by providing all the information he has in his possession with regard to the dispute and to submit the documents required by the protocol. Moreover, he must contemplate all situations allowing for the implementation of an arrangement in order to resolve the dispute efficiently and at the least possible cost.

It should be noted that the "Pre-Action Protocol", as developed in England, isn't intended for all fields of law. And so that's how Lord Woolf identified nine types of disputes to which a binding protocol could apply:¹

1. Construction and engineering;
2. Defamation;
3. Personal injury following an accident (Personal injury claims);
4. Medical liability (Clinical disputes);
5. Personal damage arising from illness or following a physical or psychological condition (Disease and illness claims);
6. Professional negligence;
7. Judicial review;
8. The owner's responsibility in case of disrepair of a building;
9. Rent arrears and repossession of social housing;

Lord Woolf proposes various examples of claim letters, whose contents – marked with the politeness usually found in correspondence between English lawyers – vary depending on the specific nature of the type of dispute.

¹ A pre-action protocol of a general nature, i.e., addressing all types of remedies, is also conceivable.

And so for a claim resulting from alleged liability, the advance notice should moreover:

1. Inform the recipient that the notice comes within the process inherent in the "Pre-Action Protocol";
2. Describe, with sufficient particulars, the facts behind the claim, the reasons justifying the liability invoked and the details of the claim;
3. Be accompanied by all documents inherent in the claim (supporting documents);
4. Demand that within a time limit already specified in the protocol, the recipient provide all documents in his possession that are related to the dispute;
5. Ask the recipient to send this notice to his insurers (if applicable);
6. Mention that the insurers have a 3-month time limit to gather their evidence;²
7. Immediately offer the possibility of appointing a single joint expert;
8. Offer the possibility, in case of disagreement on a given point, of submitting it to a conciliation procedure;
9. Inform the recipient that he must respond within 21 days of that notice.³

The alleged obligator should therefore respond within the time limit. This reply should normally indicate acceptance or total or partial refusal of the claim, and:

1. Explain, with sufficient particulars, the reasons underlying this position, with regard to the liability and to the quantum of the claim.
2. Arrange, with the other party (in this case, with the other lawyer) a meeting date and place to discuss how this case may be settled.⁴
3. Provide all dispute-related information in his possession and immediately demand that the other party provide additional information deemed necessary in order to fully grasp the matter at hand.
4. Respond to the conciliation offer as well as to the offer to hire a single joint expert, by saying that he is willing to discuss the implementation of these proposals.⁵

Some people will say that in actual fact, we are already following a similar procedure in Quebec.

In my opinion, I'm not so sure of that. We mustn't confuse obligations imposed on the parties pursuant to the *Code of Civil Procedure* – which are mainly applicable from the time when the case is referred to the Court – with the objectives of the "Pre-Action Protocol", which are supposed to prevail prior to all court proceedings.

² Depending on what time limits the protocol might stipulate

³ See note 2.

⁴ Since the Woolf Report dates back to 1996, its author had probably underestimated, at the time, the efficiency of electronic means of communication, and consequently suggested a meeting between lawyers. Nevertheless, face-to-face discussions usually do give rise to the best results.

⁵ Full details of the "Pre-Action Protocol" may be found on the following website:
http://www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm

In fact, the "Pre-Action Protocol" would equip the lawyers with new tools, making it possible for them to become very influential in resolving the dispute, by getting actively involved, in good faith, in bringing about a settlement before the matter is referred to the courts. This new tool would moreover allow the parties to obtain almost all information on the dispute prior to the filing of an originating motion in this regard; consequently, parties and lawyers, by having full relevant information on hand, would be in a position to better evaluate their respective positions, thereby fostering more knowledgeable management of their case. All this information is obtained without any order from the courts nor any court action nor any attendance at Court. All in all, this process gives precedence to seeking equitable solutions rather than to relations based on adversity.

The lawyers, at this point in time in the process, therefore totally control their case and have everything in their hands, so to speak, in order to resolve the dispute between their respective clients. The ultimate objective at this stage of the case – and this aspect must be emphasized – is not so much to evaluate all available defence and all possible strategies within the outlook of a long, complex and costly trial, but rather to constructively consider parts of the solution and, if they fail to reach a settlement, then to ensure that the scope of the legal debate will be in keeping – in both time and cost – with the actual value of the dispute.

Nevertheless, if it is impossible to find a consensual solution to the dispute, a conciliation procedure, prior to court action, may be contemplated within the "Pre-Action Protocol". It should be noted that for the parties who so desire, an out-of-court conciliation procedure would not subsequently hinder a judicial conciliation procedure held before a judge, if the dispute were later to be referred to the courts.

If the case can't be settled with conciliation, the lawyers' structured initiatives all throughout the "Pre-Action Protocol" will have nevertheless made it possible to pave the way for very stringent case management of the upcoming lawsuit, as the information inherent in the case will have been conveyed before the official start of the court proceedings; consequently, the legal debate should logically be shorter, better focused and more rational.

In our own law, we already have procedures that are in some ways similar to the "Pre-Action Protocol", without being as elaborate, however. I am referring here to the notices and formal notices provided for in various articles of the *Civil Code of Québec*, such as:

1. 1866 C.C.Q. (notice of a defect with regard to a leased property)
2. 1739 C.C.Q. (notice prior to remedy for a hidden defect)
3. 978 C.C.Q. (formal notice prior to having property boundaries determined)
4. 1368 C.C.Q. (the administrator of another person's property)
5. 1546 C.C.Q. (alternative obligation)

In conclusion, it seems to me that the development of a "Pre-Action Protocol" that could govern formal notices, or – if we prefer – prior notices sent to the opposing party, would have a positive impact on shortening the time involved in the legal proceedings, and this should make it possible to reduce costs, both for parties as well as for the judicial system, as such.

Obviously, this would imply that the lawmaker would have to specify and oversee the obligations that should govern the parties in the pre-court phase of the dispute, that the lawmaker provide for the terms and conditions of the advance notices and in the case of failing to comply, that the lawmaker also set forth the legal consequences to which the parties would be subject under such circumstances.⁶ Of course, the prescriptive rules should be adapted as well as certain rules stipulated in the *Code of Civil Procedure*.⁷

In the case where court procedures become inevitable, fulfilling the requirements of the protocol would give the parties the benefit of a case that is ready for court, rather than one that would be gradually completed as the procedural requirements inherent in referring the dispute to the court would come to the fore.

And so there is no need for a lengthy discussion in order to foresee the great advantages of a case that would be practically complete as soon as the action is brought before the Court.

Within the scope of the current reflection on civil procedure, shouldn't "Pre-Action Protocol" be considered to be an interesting, appropriate measure in order to improve the public's accessibility to justice?

Guy Gagnon
Chief Judge
Court of Québec

⁶ For example, upon deciding on court costs, the Court could consider, within a judgement on the merits, the attitude of a party that hadn't complied with the provisions of the "Pre-Action Protocol".

⁷ ...as some obligations imposed on the parties under the C.P.C. would have already been fulfilled within the scope of implementing the "Pre-Action Protocol".