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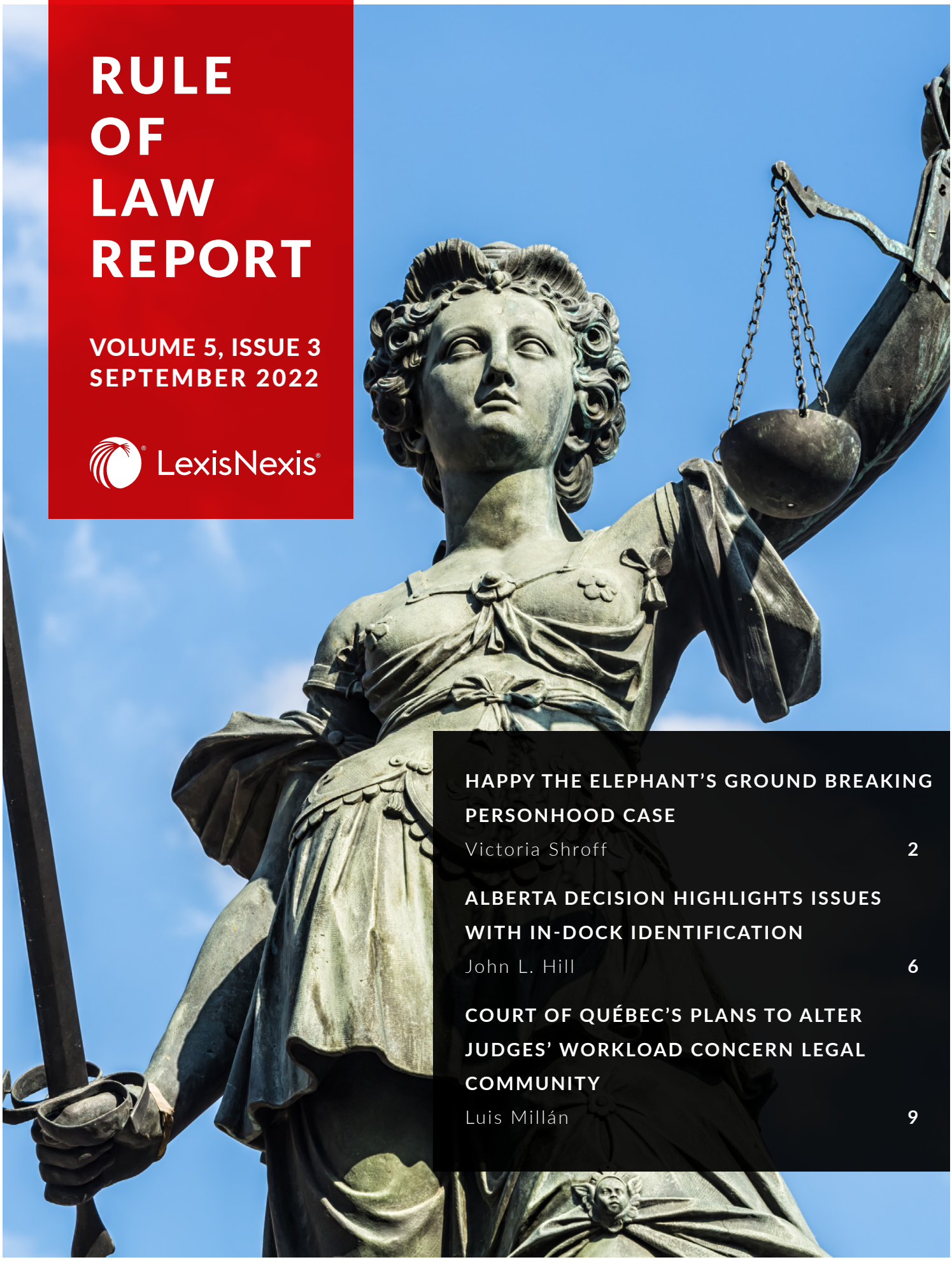

HAPPY THE ELEPHANT'S GROUND BREAKING PERSONHOOD CASE

By Victoria Shroff, (Originally published in *The Lawyer's Daily*, © LexisNexis Canada Inc.)

On June 14, the New York Court of Appeals released its 5-2 **decision** in the landmark animal law case concerning Happy, the 51-year-old elephant confined in the Bronx Zoo. The case centred on whether the legal principle of *habeas corpus*, a legal vehicle used to protect against indefinite imprisonment, would be extended to an autonomous, cognitively complex being like Happy, but the majority ruled that Happy is not a legal person.

The lawyers for Happy were not arguing that she was a human being, but she could be a legal person. The appeals court decision means that Happy was denied personhood and will not be released from the zoo to a sanctuary.

Chief Judge Janet DiFore, writing for the majority, stated that *habeas corpus* is intended for human beings and does not apply to animals. The majority decision ruled that: "While no one disputes the impressive capabilities of elephants, we reject petitioner's arguments that it is entitled to seek the remedy of *habeas corpus* on Happy's behalf ...." The majority, however, did concede that "... no one

disputes that elephants are intelligent beings deserving of proper care and compassion."

ANIMAL RIGHTS, ANIMAL PERSONHOOD RELATIVELY NEW CONCEPTS UNDER LAW

It's important to bear in mind that the notion of animals as rights holders is still in its infancy, and part of a global effort that is slowly unfolding in how animals are treated as more than mere property under the law. (Please see: **Animals may not be human but they can be persons of interest in U.S.**) Happy's lawyers, the influential American-based Nonhuman Rights Project (NhRP), put forth vigorous innovatory arguments that an autonomous, cognitively complex elephant should not be illegally detained in a zoo. They had a groundswell of support in their position, including scholars and scientists.

POWERFUL DISSENTS IN HAPPY'S CASE

While Happy did not succeed in being accorded personhood, the case was taken very seriously by a top court and was still a victory for animal law globally. The decision contains two very powerful dissents on the rights and plight of animals.

NhRP, in an e-mail to me on June 16, provided a quote from Steve Wise, president of the NhRP: "Happy lost this time. But the two powerful dissents will, one day, become the majority." We have seen evidence of this in cases where dissents may look untenable initially, and then years later are quoted with approval by the majority. (In Canada, a salient example comes from the watershed dissent of Chief Justice Catherine Fraser of Alberta in the Lucy the elephant case, *Reece v. Edmonton* 2011 ABCA 238. Approximately 10 years after her powerful dissent, the words of the chief justice were quoted with approval by the majority of the Court of Appeal of Alberta in another animal law case, *R v. Chen* 2021 ABCA 382 at paragraph 21: "a civilized society should show reasonable regard for vulnerable animals.")

It is truly unfortunate that a wild animal like Happy lost her bid for freedom, but we should be buoyed by the insightful, clear and empathic dissents from the New York Appeals Court Justices Rowan Wilson and Jenny Rivera in Happy's case. The dissents seized on the concept of how society treats or mistreats animals as an important reflection for how we are doing as a society.

In her strongly worded dissent, Judge Rivera decried that a wild animal living in captivity is both unjust and inhumane, stating: "Captivity is anathema to Happy because of her cognitive abilities and behavioral modalities — because she is an autonomous being. Confinement at the Zoo is harmful, not because it violates any particular regulation or statute relating to the care of elephants, but because an autonomous creature such as Happy suffers harm by the mere fact that her bodily liberty has been severely — and unjustifiably — curtailed." Happy's "... captivity is inherently unjust and inhumane. It is an affront to a civilized society, and every day she remains a captive — a spectacle for humans — we, too, are diminished ...."

> "[. . .] the rights we confer on others define who we are as a society."

Judge Wilson argued in his robust dissent that the court had a duty "to recognize Happy's right to petition for her liberty not just because she is a wild animal who is not meant to be caged and displayed, but because the rights we confer on others define who we are as a society." Justice Wilson quoted Jeremy Bentham's famous moral rallying cry about animals from the 1700s: "... [T]he question is not, Can they reason? nor, Can they talk? but Can they suffer?" (Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 311 n1 (Oxford, Clarendon Press, 1781)).

Justice Wilson answered Bentham's call: "They can and do, and that day is upon us."

Far from giving up their well-orchestrated fight, the NhRP look forward to continuing to press for rights of cognitively complex animals. In fact, they already have another elephant case in California in the works and intend to file more cases in the U.S.A. and overseas. As those of us working in animal law appreciate, just having Happy's case heard in an upper court was a victory in itself. It was also apparently the first time a court in an English-speaking jurisdiction heard an animal law personhood case.

There is much to unpack from this decision and much to celebrate with these robust dissents. Happy's case and its ramifications for the animal law field will echo for years to come and will be closely studied in my and many others' animal law classrooms. We will also be discussing Happy's case in the Canadian Animal Law Study Group and undoubtedly at upcoming law conferences.

INTRINSIC WORTH OF ANIMALS

Happy's case resonates with what I wrote in *Canadian Animal Law* about animal law court cases: "The voices decrying the notion that animal matters are a waste of court resources may gradually be fading into the background as courts hesitantly, nervously approach the idea of animal rights. I believe we will likely be seeing more cases like Happy's where the court has to grapple with law, ethics, science and policy to try to account for the intrinsic worth of non-human animals." (For more background on Happy's case, personhood, please see chapters 1 and 12 of *Canadian Animal Law* (LexisNexis, 2021)).

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ALBERTA DECISION HIGHLIGHTS ISSUES WITH IN-DOCK IDENTIFICATION

By John L. Hill,
(Originally published in *The Lawyer's Daily*,

It has been said that the danger of what is commonly referred to as "in-dock identification" is "that honest but mistaken witnesses make convincing witnesses" (*R. v. Hanemaayer*, [2008] O.J. No. 3087, 2008 ONCA 580 at para. 21). It is not uncommon for a Crown witness to point confidently to an accused, identifying that person as the perpetrator. This is referred to as an "in-dock identification". When there is a transference of that confidence to a judge, it sets up the danger of a wrongful conviction or an interesting appeal.

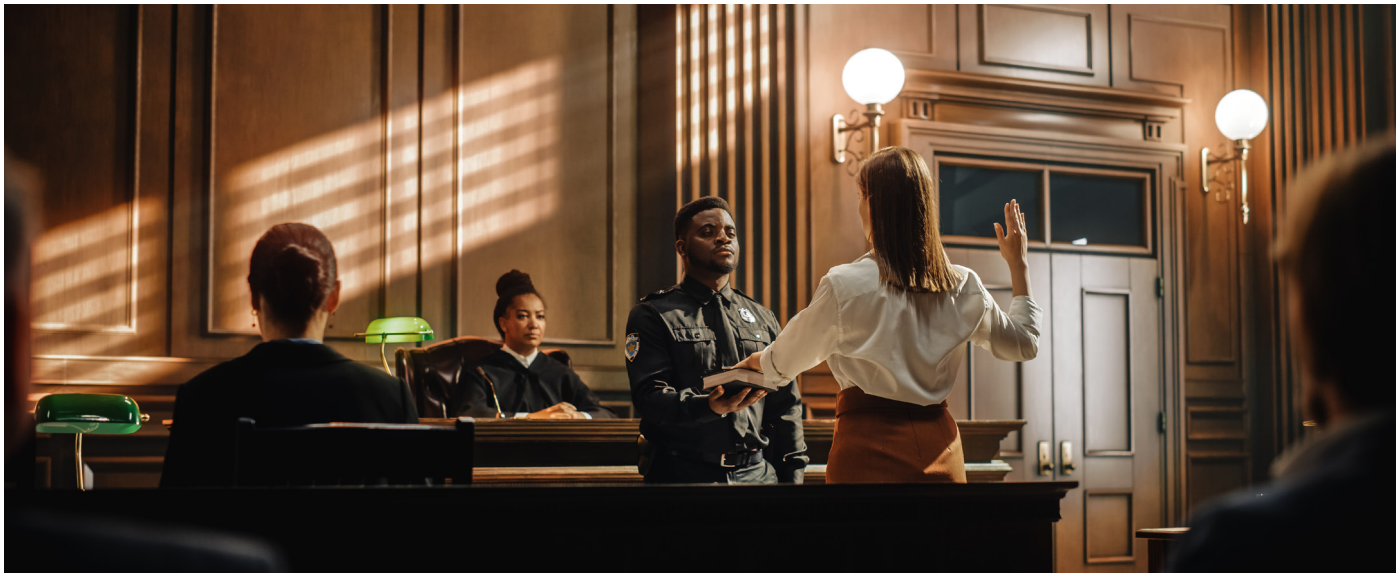
A decision on acceptance of a judge's reliance on identification evidence was the key issue in a recent Alberta Court of Appeal decision (*R. v. A.K.B.*, [2022] A.J. No. 611, 2022 ABCA 170). The facts can be summarized as follows:

Two robberies occurred on Aug. 29, 2019, involving five masked adolescents, one early in the day and another robbery somewhat later. A.K.B. was found not guilty after trial of the later incident because he could not be identified. The trial on the earlier robbery was held later. The main Crown witnesses in that trial included two of the individuals convicted in the earlier trial where A.K.B. was acquitted, as well as the complainant in the robbery.

In this subsequent trial, A.K.B. was convicted. The two who had been found guilty in the previous trial identified A.K.B. as their accomplice. The complainant made an in-dock identification. Although the complainant claimed he was able to see through the mask, his reliance was placed on the black eyes and dark complexion of A.K.B.

Since the two so-called cohorts of A.K.B. were willing to name him as participating in the robbery, their evidence had to be subject to a *Vetrovec* warning requiring

special consideration when considering the reliability of evidence from disreputable or unsavoury witnesses (*R. v. Vetrovec*, [1982] 1 S.C.R. 811, [1982] S.C.J. No. 40). The trial judge noted that the complainant was highly confident in making his courtroom identification of A.K.B. and this confidence was transferred in allowing the trial judge to feel highly confident that A.K.B. was guilty beyond a reasonable doubt.



A three-judge panel of the Alberta Court of Appeal split on the question of whether that confidence was proper. The majority found that the judge properly assessed the complainant's evidence in light of the known dangers of in-dock identification. Further, the evidence was corroborated by the two accomplices. The Appeal Court majority noted the two witnesses had already been convicted and there was "no obvious motivation to shift blame to others." The evidence was very compelling and deference should be given to the trial judge. Therefore, the appeal should be dismissed.

The motivation to blame others may not be obvious to judges, but it would be to prisoners. No prisoner, whether a juvenile offender or a penitentiary inmate, wants to be known as a "rat." Serious and even lethal consequences could ensue if it could be made known that an offender gave evidence implicating another in crime. Yet to the group of five involved in this robbery, implicating another not associated with their group would make the two who gave evidence heroes in the eyes of the fifth person who got away.

The complainant identified the only black man in the courtroom. He may have done so confidently and believing that he was telling the truth, but many wrongful convictions have been based on such well-meaning testimony.

> “The dissent writes: “As there is a real chance that the appellant was mistakenly identified by [the complainant] merely for ‘looking black’, appellate intervention is warranted.”

The dissenting opinion in this case offers a much more persuasive analysis. Not so much weight should be placed on the weight the trial judge gave to the in-dock identification of evidence, the dissent concludes, but rather the trial judge failed to properly assess the reliability of the complainant’s evidence. The dissent writes: “As there is a real chance that the appellant was mistakenly identified by [the complainant] merely for ‘looking black’, appellate intervention is warranted.

The majority of the Alberta Court of Appeal may be right that the confidence shown by the trial judge in convicting the accused was well-placed. Justice may well have been served. However, the well-reasoned dissent gives us good reason to reflect.

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COURT OF QUÉBEC'S PLANS TO ALTER JUDGES' WORKLOAD CONCERN LEGAL COMMUNITY

By Luis Millán, (Originally published in *The Lawyer's Daily*, © LexisNexis Canada Inc.)

The Quebec justice system, **in crisis following an acute shortage of court personnel and strained labour relations that has led to walkouts and strikes**, may face even more serious judicial delays if the Court of Québec follows through with plans to have judges of the Criminal Division sit every second day as of this fall.

Court of Quebec Chief Justice Lucie Rondeau informed Quebec Justice Minister Simon Jolin-Barrette earlier this year that 160 provincial court judges who preside over criminal proceedings will curb the amount of days they sit, from two days out of three to one day out of two so that they can spend more time writing judgments and managing cases. The chief justice is calling for the appointment of 41 provincial court judges to attenuate judicial delays once the new work scheme is implemented.

"It is important to stress that the current work organization of judges in criminal matters, which has been in place for 40 years, is a major concern that has been the subject of reflection and discussion within our institution for some time now," said Chief Justice Rondeau in an e-mail to *The Lawyer's Daily*. "The judges of the Criminal and Penal Division are currently the only ones to have only half a day of work under advisement for each day they sit." The restructuring will put these judges on par with judges from the Court of Québec's Civil and Youth Division, as well as Québec Superior Court justices.

At least 50,000 criminal cases annually could exceed the 18-month time limit set by *R. v. Jordan* ([2016] 1 S.C.R. 631, [2016] S.C.J. No. 27), according to a report prepared by the Quebec Ministry of Justice obtained by the French-language newspaper *Le Devoir*. Chief Justice Rondeau said the court is holding ongoing discussions with the Ministry, and it is assessing the impact of the reorganization

on judicial timeframes, which varies from region to region. "The Court of Québec is aware of this impact and is participating in this work in a spirit of cooperation aimed at gradually deploying additional resources so that, in accordance with the public's expectations, it can provide quality services within a reasonable timeframe," said Chief Justice Rondeau, adding that she is waiting to meet with Jolin-Barrette.

The secretary of the Commission des services juridiques (CSJ), the provincial agency that oversees the legal aid system, is concerned, particularly since approximately 75 percent of cases heard by the Criminal and Penal Division of the Court of Québec are covered by legal aid. "This orientation does indeed raise certain questions and concerns within the commission," said Richard La Charité. "We are certainly concerned about the impact that this measure will have on the increase in judicial delays in general." He added that the CSJ has expressed their qualms to the chief justice and are hoping to "exchange and collaborate" with her court.

The head of the Association of Defense Counsel of Québec is also concerned about the announced change, asserting that it will lead to "serious problems."

"If provincial court judges end up sitting every other day, new judicial appointments will have to be made," said Marie-Pier Boulet, a Montreal criminal lawyer with BMD Avocats. "If they don't go hand-in-hand, I'm telling you it's going to explode in terms of delays."

Catherine Claveau, the head of the Québc bar, declined to comment on the move by the Court of Québec but noted that Chief Justice Rondeau is one of several legal actors seeking to improve legal services. "All stakeholders in the justice system will get together to try to solve the problems that affect them," said Claveau. "We offer our co-operation both to the Ministry of Justice and to all the other stakeholders to try to find other options that could help prevent justice from running into a wall."

Université de Montréal law professor Martine Valois understands the shift that Chief Justice Rondeau is instigating. The role and responsibilities of judges have evolved over the past few decades, particularly since the adoption of the *Charter*, noted Valois, author of the book *Judicial Independence: Keeping Law*

at a Distance from Politics. Nor does Valois believe that the new policy is a way for the chief justice to apply pressure on the Québec government to appoint more provincial court judges.

"The government wants us to believe that it's a pressure tactic, but it's not," said Valois. "By law, the management of the court and the assignment of cases is the responsibility of the chief justice. She can see if cases are delayed because the judges don't have time to write their judgments. This was something we saw perhaps less often before — we had more judgments given on the bench. But now judges have to manage proceedings and write judgments, and it has become much more complex since the adoption of the *Charter*."

Those observations also form the thrust of a report written by Court of Québec Deputy Judge Maurice Galarneau, issued this past February. Titled **"Evolution of the function of judge at the Criminal and Penal Division of the Court of Quebec,"** the 42-page report laid the foundation for Chief Justice Rondeau's new course of action. The report, written after consulting with 15 Court of Québec judges, notes that judges are now expected to demonstrate efficient management qualities, particularly since the landmark Jordan ruling. "The time spent by the judge in getting the parties and their lawyers to narrow the debate,

> “In this context of pressure on the judicial system, the government has a role to play in ensuring that the criminal justice system is adequately resourced, particularly in order to support initiatives aimed at reducing delays.”

simplify the procedure, shorten the hearing, try to find a partial or final solution to the case, etc., is important and must be recognized in the calculation of the additional resources that the Court of Québec expresses the need for,” said Judge Galarneau in his report. “In this context of pressure on the judicial system, the government has a role to play in ensuring that the criminal justice system is adequately resourced, particularly in order to support initiatives aimed at reducing delays.”

The report also points out that the growing phenomena of self-represented litigants has substantially lengthened procedures as has the *Charter*. The development of new methods of police investigation and evidence derived from new technology has also had an impact on the work of the judge in chambers, said the report, pointing out that quite often judges have to spend hours listening to wiretaps stemming from organized crime investigations. Moreover, the Québec Court of Appeal in a number of recent decisions has made it plain that it favours written reasons, or at the very least oral reasons prepared as carefully as if they were given in writing, noted the report. “Although the form of the judgment is always a matter for the judge’s discretion, writing reduces the risk of unfortunate and inappropriate expressions,” added the report.

While the report asserts that the Court of Québec does not seek “perfect symmetry” between the resources allocated over the years to the Director of Criminal and Penal Prosecutions (DCPP) and those dedicated to its own Criminal and Penal Division, it does highlight that when the DCPP was

created in 2007, it employed 478 prosecutors and the Court of Québec had 270 judges. According to the latest figures, the DCPP now has 772 prosecutors, while the Court of Québec has 308 judges. “It does not take long to convince anyone that these prosecutorial reinforcements have led to increased judicial activity at the court,” said the report.

Quebec Superior Court Chief Justice Jacques Fournier also believes it is time for more resources to be allotted to the courts. “Unfortunately, over time, we have been a little bit neglected,” he said. “Judicial resources have not kept up with the evolution of society.”

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