

Rules Sub-Committee Meeting
May 11, 2012 2p.m.-4p.m.

Justice Stratas

Justice Stratas made opening comments, and invited those present to use the simultaneous translation services available for the meeting and also invited participants to use the official language of their choice.

Secondly, Justice Stratas suggested that methodology that might be followed for the discussions this afternoon would be to allow for unconstrained discussions at this stage of the deliberations and to build on each others' comments. Chantelle Bowers will be providing detailed minutes based on the recorded discussions. This will provide information on consensus on certain points that may be reflected by the discussions as this process proceeds and that would ultimately lead to a final report. Discussions may be very broad.

Since the discussions may demonstrate a need for more information or more research on some topics, we are going to keep a list of to do's and assign responsibilities for further follow-up and study. It should be remembered as we discuss these issues that while our own personal views are important, and given that some of the members present represent constituencies, it is also important as this process proceeds that you feel free to consult with your constituencies because it is your role to represent the views of your constituency and to remember the formal submissions that we have received. It is assumed that everyone has already read the formal submissions received but if needed a hard copy is available and there is also a computer with access to the submissions on line. The summaries of the submissions are also in your rules binder, and also in this binder are the actual submissions that were received from the parties.

Peter Hutchins:

I have reviewed the submissions and noted that submissions from the Aboriginal Bar are absent and I am here to provide views that may not have been provided.

Justice Stratas:

The Rules committee will continue to accept submissions and therefore anyone is welcome to consult their association or a bar and provide additional comments as soon as possible.

Justice Gauthier:

Justice Gauthier asked if the intent of Mr. Hutchins's comment was to ask whether the comments that he may offer today could be accepted as submissions on behalf of the Aboriginal Bar absent any written submissions provided.

Peter Hutchins:

That is not exactly the case. Despite a 40 years experience of practice in the area it would be preferable to rely on the views that may be expressed by the Canadian Bar Association national section of aboriginal law that has a federal court liaison committee and that meets three times a year. Admittedly there have been very little discussions on these topics so far.

There is a full day meeting on June 13 with the Aboriginal Bar, and the opportunity will be taken to bring the subject forward and provide any feedback to Justice Stratus and this committee.

However there is a potential problem given that Justice Mondamen chairs this federal court liaison committee and Mr. Hutchins happens to have a case before Justice Mondamen and this is why Mr. Hutchins did not go to that last meeting of the committee. Since it would make sense for members of the bar to participate in those meetings to offer their views and experience, Mr. Hutchins will enquire with Justice Mondamen as to possible objections.

Justice Gauthier:

Justice Gauthier noted that the colleague and opponent in the trial referred to could also be consulted as to possible objections.

Peter Hutchins:

Mr. Hutchins will explore that avenue for the next meeting.

Justice Stratas:

Justice Stratas indicated that it should be remembered that the discussions are about policy review rather than drafting rules and that the objective is to gather the views of all to the table.

Today's discussions are about the issues in the first bucket list as identified at the last meeting that are: issues of proportionalities; abuse of process; the involvement of courts in proceedings; judicial determination vs. settlement and the issue of case management; and one size fits all vs. specialized procedures.

The second bucket involves broader issues on architecture; the relationship between rules and practice directions and so on.

Professor Walker:

Starting with the proportionality issue would make sense given that, as indicated by Justice Gauthier, this issue has been discussed in many fora and many courts and many

issues are encompassed under the heading of proportionality so maybe that would be a good starting point. It is suggested that it probably would be good to identify, make a brief description, and provide a brief explanation of the general understanding of what constitute proportionality. It is unlikely that people would be against the principle given all that has been heard.

Justice Gauthier:

The proportionality is described in article 18 of the *Draft Bill to enact the new Code of Civil Procedure* in Quebec that was circulated to you. There is value to this document “overriding objective” to provide the proceeding the appropriate share of court resources while taking into account the need to allot resources to other cases.¹ The message should be clear that proportionality is not simply a question of money and that even though parties have the money to spend years on a case it does not mean that there will be no cutting down on the time that the Court would spend on a particular case. Proportionality may require the Court to look at its available resource in order to determine the amount of time that may be warranted on a particular case. This is a crucial point.

Taking into account materials available, there would be a favourable inclination to put this principle in the Rules somewhere, maybe under rule 3 so as to put it up front and as a key interpretive element or principle that applies to all the rules and everything that is done by the court. It should be decided whether something more would be required in the rules. For instance, taking example from the UK rule on discovery it may be appropriate to consider if some definition is needed around how much time you can get from the court in terms of procedures regarding discovery because it seems to call for the proportionality principle to apply. Also, considering a comment received regarding proportionality and cost of litigation, it may be considered whether it is possible or advisable to apply the principle of proportionality. The example provided was that if you decide to raise 15 issues and because of that you get 10 more days of trial then you won’t get the cost. This seems to fit within the proportionality principle. There was maybe a court of appeal of Ontario decision on the subject that may be worth considering where the argument of proportionality regarding costs may have been made.

Protonotary Tabib:

Proportionality I think already exists in our rules and in our case law, the word is not used in our rules but the concept about proportionality is already encompassed in rule 3. “The just most expeditious least expensive determination” speaks to proportionality. However, it could be worthwhile like Justice Gauthier has expressed to define it further in terms of court resources because in the big IP Pharmaceutical cases where billions are at stakes,

¹ Art. 18 Parties must adhere to the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of cost and the time involved, to the nature and complexity of the matter and the purpose of the demand. Judges, in managing the proceedings they are assigned, must likewise ensure that the measures or acts they order or authorize, whether at the case management, trial or execution stage, are so proportionate, while bearing in mind the efficient processing of the court's caseload and the general interest of justice.

nobody has a resource problem. The only resources problem that exists is the courts time. Case management is the key here because proportionality is something that bites only on actions, it does not appear to matters in applications, it's more of an issue on actions and most if not all actions are case managed. The only cases that aren't case managed are the ones that actions actually apply for a trial date within 180 days and there is no need to intervene.

Justice Stratas:

It would be interesting in knowing, because you are in the trenches as a prothonotary dealing with how people are using the rules, It would be interesting to hear how you perceive to be the disproportionate conduct. What is it specifically that we need to address.

Prothonotary Tabib:

The problem we are having I think with actions and what is the biggest lack of proportionality are discoveries. There have been discussions at IP Town Hall meetings on how IP users go about limiting discoveries to a limit number of days and what we are hearing there is this push back and to me this is the key place where we can put some specifics, where we can explore what needs to be done. The first idea is always limit the number of days of discovery and then you have the bar saying yeah but that mean that the other side is going to be obstructive, they are not going to answer questions and they are not going to give into it which to me is a false problem because on the other hand everything is case managed. The case manager will know, there will be another opportunity to ask because the other side was obstructive, so I've always thought that limiting the number of days that you can spend discovering the other side is a very good idea. I personally don't think that going the English way and saying there's no discovery unless authorized is going to be palatable to our bar. Discovery rules are known provincial rules. I think in many places they have a right to depose a number of witnesses which we don't have so we have an inherent limit that our bar is happy to live with when you have one representative. Now one of the problems is when you have multiple parties in an IP litigation you get 2 defendants, you get 2 people, you get 2 inventors, and it blows up from there. But, there is an inherent limit to having 2 representatives of that party. We could limit it further by saying there are so many days of discovery that you can have after that you need to seek leave or you need to have a discovery plan. Perhaps that's where the discovery plan should be going. We don't want to impose discovery plans because it's a lot of work to come up with one in every single case, but if you are looking for more than one day of discovery you should be joining a discovery plan with it so that everybody will know what you will be addressing and it's thought out and it's not automatic, you have to justify it. A lot of discovery is futile and doesn't need to be futile because people aren't using the rules. Our rules provide that if any party refuses to answer a proper question on discovery the information may not be used at trial without leave of the court. A lot of discovery questions are being asked either on a fishing expedition or to avoid being surprised at trial such as: "I am going to ask this question because if I don't ask it they will surprise me with it at the trial". And yet, they move on

those refusals. A party moves on a refusal that is irrelevant to try to have the answer. This is somewhat useless and that is because people don't remember the rules.

Justice Gauthier:

They refuse to answer so you can't accept any evidence

Prothonotary Tabib:

Yes when the court has upheld the refusal. But when a party moves for a ruling so that they can use the ruling of the court to prevent the answer, they don't realize that they don't need a ruling of the court. This brings me to something that I have been trying to do and implement in case management that is to provide for a deadline after which a party can produce documents and answer discovery questions without leave of the court or the consent of the other party. There is resistance and push back so I try as case manager to focus the parties on rules 232 and 248 and get them to use them properly. At the moment, the rules say that a document that has not been discovered on discovery and an affidavit of document cannot be used at trial without leave of the court. The rules say that an answer not given on discovery cannot be used without leave of the court but it doesn't say at what point it is closing, so theoretically you can disclose all that stuff a week before trial and you have people moving for undertakings because an undertaking hasn't been answered and the party answers that it will follow and that it will be provided when they know. Therefore, as case manager, I can try to get the party to answer as to when it is going to be ready to answer. But when do you close that door? And once you have closed that door I may force the parties to be more ready to have their theory of the case and to know what they are going to need which narrows the issues for speedy trial.

Justice Gauthier:

The rules provide that undertakings and everything has to be completed before the pre trial conference. What has become slack is that we are not enforcing the rules. That's very different from saying we don't have a rule. We have a rule we are just not strongly enforcing it.

Prothonotary Tabib:

The trial judges in many instances are not enforcing it.

Justice Gauthier:

That's an education story not a no rule story

Prothonotary Tabib:

There is also the question of affidavits of documents and what it means. Maybe there is a need for a change in the rules to clarify that when we say discoveries are to be completed

we mean that you've done your final affidavit of documents and have answered all the undertakings

The rules already provide for what is needed maybe it would be sufficient to tighten them up a little bit and be more specific. There has been a lot of push back about putting a date and one of the problems with the pre trial conference is that with the court's initiative to allow parties to request trial dates early on in the case, the pre trial conference is no longer the time to set the trial date. The pre trial conference has gotten far less relevant.

Justice Gauthier:

The rules are made so that the judges always have discretion to go outside of rule 232 that says unless you've put it into your affidavits of document you cannot use it at trial unless you have leave. That has been there forever. So maybe the issue is to educate and maybe this can be put in a report.

Justice Stratas:

You have identified the discovery stage of proceedings as an instance of proportionality. Are there other areas in your experience outside of discovery or is the real problem only with discovery? Because that will affect possibly the tools in which we might look to manage the problem.

Prothonotary Tabib:

Amendments is another instance, but we are getting to grips with that. There is a series of court decisions that is getting amendments to be pleading. Last minute amendments. That's really where the abuse comes from, especially with experts. Experts are now limited to 5 per side and for the large cases 5 is more than enough. For the smaller cases, parties are limiting themselves because they are expensive, so the lack of proportionality is more with the big cases where they can afford it. I don't see a need in practice but I don't know if the bar perhaps has a better idea on that.

John Morrissey:

I have 2 comments. What is interesting is that we see proportionality moulding into the whole topic of court help proceedings so that's a step ahead. I like what Prothonotary Tabib has had to say and I agree with her quite frankly. My problem with proportionality is that I don't really know what it means and we may need a ton of case law to get it better defined. But what I think Prothonotary Tabib may have put her finger on, is maybe that for proportionality we need a general guide or rule but with good case management in effect you have good proportionality. I did a case a few years ago the cheque processing case that Justice Hughes might remember which settled but Prothonotary Alto on the first set of discovery more or less let us have at it and had probably a week of discoveries but then he intervened and put in a heavy hand and said look you guys you've had 5 days each of 8 parties now for the first draw of discoveries, second round you got 2

and a half days and he just cut us down and that let us as parties, as lawyers to probe and find out where the issues were and try to extract the evidence, but he prohibited us from going through all those futile lines where we turn over every rock and look underneath it. So right now the subject of what I am hearing on the table is that proportionality is vague but maybe the way to implement it is via case management.

Justice Gauthier:

It's not so vague it's defined in two rules, it's defined in the English rule and it's defined in the Quebec rule.

Professor Walker:

Perhaps a way of clarification or to help the conversation move along it could be said that proportionality is an all encompassing term but the way it's come up in recent years is the way things were generally un-proportional and were managed that way in our system through cost because our main concern was an imbalance between parties that would affect procedural justice. In this case that was handled between cost and cost shifting so that you could balance it out. What we are finding more recently in what is especially true in the federal court in these mega cases is that it is not self limiting, both sides have huge resources and they would go on forever. So what we end up with is a problem that is not proportional in a way that it hurts the general public because it unduly irrigates to one case disproportionate resources that should be more equitably distributed. So what might not be as clear in the rules is a matter of the dual administrative of Justice regardless of the resources available to the party, that need to be allocated appropriately. It may be helpful to develop a report that identifies specific examples. It would also be very helpful to identify alternate solutions. One of them is to go with the English rule of discovery, even if we don't adopt the solution simply to identify them. Two other ways of addressing these is one that is used in British Columbia and was discussed with Justice Rennie, where they have a situation where the matter is adjudicated by the person who case manages. That tends to create an internal limit because the parties simply don't want to annoy the person case managing the case. That is not necessarily appropriate for this court especially where we have all of the wonderful resources of the Prothonotaries who will not necessarily adjudicate the case.

Justice Stratas:

Rules that allow case manager to adjudicate: is that in their rules?

Professor Walker:

Yes that is the presumption

Justice Stratas:

Could you forward that and I will post it.

Professor Walker:

Yes because that's a presumption and they regard that as an important natural feature.

Justice Gauthier:

We have the exact opposite rule that the case manager, unless the party consent, cannot hear the trial.

Professor Walker:

And that is the rule here in Ontario. Another option that is very interesting and is used in Australia, is that they charge the parties for hearing time, cost recovery for hearing dates or either services of the court and they regard that as appropriate raining on the parties appetite

Prothonotary Tabib:

We already have that they pay for the stenography and translation.

Justice Gauthier:

Cost is not necessarily an obstacle to those who have the financial resource. They would accept to pay then thousand dollars a day to have their court time.

Professor Walker:

Maybe this is another indication that is why there is value in having this as a specific rule in identifying and linking this to judicial resources and the courts resources.

Justice Stratas:

Just for illustration purposes can you find the Australian rules if they are at the State level and I will post them just so people can see that as a tool

Peter Hutchins:

Proportionality is a unique factor with regards to aboriginal law litigation because it is virtually always against the crown, one or the other, usually both, and that raises all the issues of proportionality, resources and so on. Another issue is the perception that sometimes the aboriginal seem to be carried away. But one of the reasons is that our understanding of the supreme court is that if you don't have a proper record you are in trouble and proper record in these types of proceedings where you are covering history from 3-5 hundred years ago means that you have to have expert documents. Therefore it's difficult to know how to address this issue of proportionality. Maybe there should be

a meeting with the supreme court Justices but that's a problem for us. While Prothonotary Tabib mentioned that the issue of proportionality is really an issue for actions, it is not the case in area of aboriginal litigation. It is present just as much for applications and we do a lot of them and we try actively not to take actions if we can and try to deal with things through judicial review.

Justice Stratas:

Where in application for judicial review does things bog down or become disproportionate...where does the process bog?

Peter Hutchins:

There is the issue of affidavits, examination on affidavits and once again and obviously you take a judicial review first of all, you don't want to be in a 10 year trial. Typically you want to get an answer as quickly as possible, and we find sometimes that is difficult in terms of just getting the other side to collaborate. There are delays and judicial reviews are suddenly becoming less useful as a tool. The other thing about judicial reviews is that we need ...and the big issue on proportionality is that we need case management and intervention by the court. First of all we always ask for case management in judicial reviews because it's very useful and we often try to move it into dispute resolution mediated by the court. I have had 3 cases in the last year which were going on for 18 months and which were settled through judicial mediation. Very often the problem first of all is with judicial crown that won't agree with case management. It is extremely rare that the crown will agree with dispute resolution. While the court may order judicial review, my experience is that very few judges or prothonotaries will order dispute resolution without consent on both sides despite the fact that it is a perfect way of saving court resources and our clients' resources and the crown's resources. A solution in our area would be to try to avoid actions if at all possible and it might be possible with a little more cooperation from the other side; and to try and have the court immediately involved automatically without consent or application. Case management for applications but even for dispute resolutions which is not substituting for adjudication.

Justice Stratas:

Do you have a direct response?

Justice Gauthier:

In the first bucket we have something called one size fits all versus procedure specific. Would you agree that what you are saying that there should be automatic case management and dispute resolution? If you've read the submissions, most people in other fields are against that.

Peter Hutchins:

That would be specific to Aboriginals for reasons I have specified earlier. I have read the submissions and actually agree with certain DOJ's submissions. I didn't agree with all but I have to speak with the specificity of our area and it's David and Goliath and it's how to get confidence in the court among Aboriginal people and court. Do they have confidence in the court and its process when you see a case going on and on and sometimes after 5 years people wonder when they are actually going to get to speak to the judge. I'm speaking in terms of the image of the court.

Justice Stratas:

Do we have something directly responsive to what Peter just said?

Other person:

I would have to ask you to at least consider a solution that's been adopted in the US for complex litigation where both parties are well funded. IP is a good example of that. That is that the court appoints and the parties pay for a neutral experienced practitioner who in effect does much of the case management and disposition of discovery and other issues subject to the monitoring of the court by order if needed. The advantage of that is that the parties are able to afford it and it means that court's resources aren't tied up over these long tedious issues. In Canada we have all kinds of people offering themselves as mediators and arbitrators that could mediate the discoveries questions and carry on to case management. So I just leave with you the thought that in certain cases, parties themselves, through court appointed person, could proceed on that basis.

Justice Stratas:

Do you have any resource like an article or written documentation that might shed light on how that process works that we could look at?

Other person:

I will try and find one I'll see if I can find something

Justice Stratas:

John can you look and see if you could find some material that could illustrate the practice?

Justice Gauthier:

The US is a very big place, Canada is much smaller with lots of conflicts. If it was so easy people wouldn't come to court and would just go to the arbitrator.

Justice Rennie:

The central issue remains to decide whether proportionality needs to be prescriptive and intergraded structurally into the rules. If it needs to be prescriptive we need to reverse 40 years of thinking based on Peruvian Guano. Secondly and that's engraved in every judicial mind and in every adversary litigation counsel's approach, so we have to say that's not good law anymore and if that's our view we need to say that because if we are reversing Peruvian Guano that's a fundamental change that needs to be expressed. In the case of a section 7 infringement there is a fusion with Stinchcombe disclosure type principles because there is a Charter interest that is raised. Therefore the document discussion doesn't go to the discretionary but to the obligatory. If that right is to be limited, then the basis has to be expressed. The third point I would make is that for proportionality to work, you have to answer what it is proportional to. Therefore you have to come into the hearing with a theory of the case. To have the theory of the case you have to know what the cause of action is and the elements of the cause of action and how certain types of documents will prove or disprove those elements. To take Peter's example, in Aboriginal case you need the record. There's a big distinction between I need a record and let me go rummage around and find it. In my experience, counsel don't like to think or express the theory of the case. They might not even have one let alone trying to explain it to the prothonotary and show how certain types of documents relate to the theory of the case. Therefore, the proportionality discussion should take place at the case management stage. If it has to be mandatory, you do it there.

Other person:

In response, the answer is I need this and then the prothonotary or whoever is case managing asks why...and that invokes discussion of I need this because my theory with the case requires such and such. I think that's where it comes in and it's the empowerment of a descriptive rule that have empower the case manager to sit and say I am entitled to ask why because of the rule 300 of whatever because proportionality applies that is what I think is needed here.

Justice Gauthier:

I think the Australian rule is different than the UK. The judge who manages the case would say that the party has to come before him and say why they are entitled to a discovery on such and such issue. So I don't know if their rule is different.

Justice Stratas:

Maybe if you could, and Professor Ferland as well, look up those rules and see if, based on the discussions today, you know of tools or approaches that certain jurisdictions have and maybe write a short note perhaps with some links and we can hoist them for people to look at and consider.

Rob MacKinnon:

It seems that it is agreed that the rules as they are can be used as they are but that a rule amendment that would substantiate the rules would have its place. Taking example with the Ontario rules where they have the same rule about an expeditious process but where they felt there was a need to specifically define this principle because counsel and the courts felt a little constrained too because they didn't have a prescriptive rule to rely on when cutting off the number of experts and discovery. That way, counsel would know when they are discussing, and hopefully before any case conference, that the rule can be applied. Incorporating a more general rule with specific considerations would be useful for not only the courts case management but also for counsel because then they can discuss with other counsel and agree on a reasonable discovery that would save time and money rather than having to be ordered to explain how this relate to the ultimate issue. So I agree with the prescriptive rule, Justice Gauthier mentioned court resources, I think that's a good consideration also following what Justice Rennie said and just looking on how is phrased the Ontario rule where the time has to be proportionate to what is at stake and the complexity of the issue and the amounts involved. It has some use in it and it goes to Prothonotary Tabib's issues to allow the judge or master to say I am not ruling on these because this is not proportionate to the issues at stake. This would also follow Chief Justice Crampton's comment earlier about harmonizing. If we can to some extent harmonize with what other courts are doing so that litigants who go before both courts don't feel alien when they come in to the federal court especially on area of jurisdiction.

Justice Stratas:

Would it be helpful for us to look at emergent case in Ontario on proportionality? I could get my law clerk to do it or Professor Walker could you do that or someone else? I am just asking do you think it would be useful to see how they have been doing it?

Professor Walker:

I think it would be useful to have them identify the areas that have been affected by proportionality and how that has happened.

Justice Stratas:

Do you want to write a short note on that?

Justice Gauthier:

What about the situation in Quebec?

Professeur Ferland:

Il y en a beaucoup. Comme vous avez remarqué il y a déjà une distinction entre 4.2 et l'article 18 par exemple. Le fait fais de tenir compte des ressources de la cour, le contrôle

des moyens de preuves en font parti. Alors il y a eu des modifications qui ont été apportées compte tenu de l'expérience québécoise pendant 9 ans et plusieurs remèdes nouveaux sont apportés, par exemple le contrôle des interrogatoires préalables qui étaient prévus. Tous les interrogatoires prévus étaient pour se dérouler avec des conditions fixées par les parties ou par la cour et les interrogatoires étaient interdits jusqu'à 25 milles dollars alors qu'en Ontario c'était déjà interdit. Essentiellement le concept de proportionnalité est un guide d'interprétation et d'application des dispositions du Code. Le principe de proportionnalité, pas les règles, permet d'adapter selon la nature, la finalité de chaque cause selon les enjeux. L'approche proposée est plus globale on a pas à examiner par exemple une demande d'amendement uniquement selon le type de demande d'amendement. Il faut regarder quel est l'enjeu global. Par exemple une cause en matière familiale pour laquelle les avocats des deux parties ont déjà dépensé plus de 100 milles dollars alors que l'enjeu était de 36 milles dollars. Au fond c'est un remède qui est apporté au système traditionnelle contradictoire donc on veut essentiellement contrôler les abus par un transfert de responsabilité. La proportionnalité s'impose aux parties mais c'est aussi le devoir du tribunal de s'assurer du respect de ce principe si le plan de match, n'est pas adapté à la complexité plus ou moins grande et la nature de chaque procédure.

Le principe de conciliation fait référence à une intervention par un médiateur. Le juge est bien placé souvent en voyant l'évolution du litige pour inviter les parties, on le fait au Québec à l'occasion d'une conférence de gestion, le juge peut inviter les parties à aller à une Conférence de règlement amiable. Ou bien d'aller vers la médiation privée ou d'autres modes de facilitation. En vertu du principe de proportionnalité beaucoup d'amendements sont refusés lorsqu'ils sont tardifs, comme à la veille du procès parce qu'ils modifient le débat loyal et l'équilibre entre les parties. Le contrat judiciaire au Québec, c'est une expression qui est utilisée pour parler du « litigation plan », soit une entente sur le déroulement de l'instance, donc ça modifie considérablement l'approche. Par exemple, le principe de proportionnalité guide aussi chaque juge de la cour d'appel qui est saisie d'une demande d'appel qui en tient compte si les coûts du débat d'appel sont un enjeu de 5 milles dollars ou 10 milles dollars. Ça se prête moins pour la compétence de la cour fédérale mais ça justifie qu'on accorde la permission d'appeler même si en principe il y a une belle question théorique à débattre. Il y a une utilisation des ressources judiciaires qui peut être considérable et qui n'est peut être pas justifiée par l'enjeu. Peut être que la même belle théorique pourrait être soulevée dans un autre litige ou les enjeux se prêtent mieux à la discussion de cette question. Alors chez nous le principe de proportionnalité a touché le choix de la défense orale ou écrite. On donne priorité sur les rôles des tribunaux lorsque les parties acceptent de plaider oralement sans qu'il y ait défense écrite, dans 90 jours ou dans 120 jours. On a encadré l'interrogatoire préalable en limitant les expertises et en favorisant l'expertise unique chaque fois que c'est possible.

Ce que l'on a remarqué au Québec c'est que le nombre diminue mais le temps d'audience se prolonge. Donc il y a un principe général qui est dénoncé mais ça n'écarte pas les règles particulières qui sont des règles que j'appelle moi des règles de proportionnalités et on a repris sur l'article 151 (1) du Code de procédure civile toute l'énumération de pouvoirs en gestion d'instance qui ont été retenus en droit anglais. C'est inspiré beaucoup

du rapport Wolf qui donne le pouvoir au juge de décider des moyens propres à simplifier, accélérer la procédure et aussi à presser l'audition.

Dans le texte que j'ai fait parvenir, on s'est inspiré d'une cause au Québec en 1992 qui indique que le juge n'est pas l'otage, le juge a une responsabilité publique qui dépasse les intérêts privés des parties. En appel d'une décision d'un juge de limiter le débat, la cour n'interviendra pas à moins qu'il n'y ait un déni de justice naturelle.

Il m'apparaît essentiel d'intégrer en début des règles ce que j'appelle un guide d'interprétation et d'application, ce qui n'écarter pas la nécessité de trouver des règles plus précises dans certains domaines et ce qui n'écarter pas la possibilité aussi d'avoir un corpus de règles particulières pour certains domaines, recours collectif, autochtone, peut-être propriété intellectuelle, peut être droit maritime, ce n'est pas à écarter. Je veux préciser que je ne propose pas le modèle québécois comme le modèle parfait et absolu. Je pense qu'il faut vraiment répondre aux besoins de la compétence de chaque cour, matière visée par la cour fédérale et la cour d'appelle fédérale.

Justice Stratas :

I would be interested in the rulings in the Quebec case you are referring to.

Professeur Ferland:

Oui, je pourrais vous transmettre le jugement de la cour d'appel.

Justice Gauthier :

To the two professors, if there are any judgment of a court of appeal or a court reviewing a decision on effort of proportionality and a breach of natural justice, because that is my main concern, if you do have a case law on that I think it would benefit the committee

Prothonotary Tabib:

We have already simplified action rules that apply mandatory leave to actions. These rules can also apply to the consent of the parties. One of the things that are preventing a lot of the parties from revealing themselves voluntarily is that discoveries are limited to written examination and a lot of parties have told me that it's more costly to come up with 50 questions in writing and answering them in writing than to have a half day of discovery. The suggestion I would make is to see if we can tweak that so that people who really want to go fast can go fast without case management.

Amend rule 345, the rules that provide for case manager, once we can have proportionality built into rule 3. But perhaps rule 385 can specify the power of case management judge to include proportionality, and that would include managing court resources having regard to the resources of the parties and specific things like the ability to limit the rights of discoveries, to limit the right to interlocutory motions, to limit trial

time, to limit the parties to a single joint expert, etc... Give examples of what case management judges can do because case management is key. That would help the parties understand that they can expect that certain rights can be limited.

Prothonotary Tabib:

I have one last point, and building on the idea of reviewing Peruvian Guano that remains manageable under the rules. There is a gradation of means we can do to achieve under Peruvian Guano and the scope of discovery. We can limit the number of days of discovery as a mid point with leave to add some more or we can keep as we are and rely on a more muscular definition of the case management judges' powers to limit discoveries and so on.

Justice Gauthier:

Just about this thing about leave. I don't think we should even think of reopening the Federal Courts Act but I think it might be wise if we do want to issue the delay in the expense of a 2 tier appeal is to say that case managers should consider when it is clear that it's an issue.

Prothonotary Tabib:

Or modify rule 50 or modify rule 51 saying rules from prothonotaries that there has to be a manifest error of facts, an error of law or an exercise of discretion. The novo is misunderstood.

Justice Stratas:

Now just a point of order, I was thinking we go to 3h30 is that acceptable?
During the break I spoke with Professor Ferland and you are going to help us a little bit providing us with a little more information about the valuable Quebec experience on proportionality and judicial decisions and article that have been written and so on.