

Notes of meeting of the sub-committee on global review

Friday, July 20th, 2012, 10h00 – 11h30

Present

J. Stratas (call in)
J. Gauthier (call in)
J. Hughes (call in)
Prothonotary Tabib
Andrew Baumberg
John Morissey (call in)
Peter Hutchins
Janet Walker (call in)
Denis Ferland (call in)
Robert MacKinnon
Lucille Collard

Regrets

J. Rennie
Cecily Strickland
Chantelle Bowers

J. Stratas, presiding

The website for the sub-committee has new material that has been posted for the members to access and review.

Professor Walker has started on a draft report addressing bucket one issues.

The subcommittee has made good progress and it appears that the work is on schedule.

There should be another call in August following which a draft report would be available for members, and that will be helpful to focus on debating points for future meetings.

It is highly likely that the sub-committee will be able to meet with the Rules Committee, November 9 with a report.

It is noted that the target date for the completion of the report has to take into consideration the time required for translation.

Translation bureau will be given advance notice in order to ensure that available resources are available, likely at the end of September, early October (Lucille Collard and Chantelle Bowers to coordinate).

The draft report should be widely distributed for comments as various legal groups, such as IP will likely welcome an opportunity to provide input.

Comments should be welcomed even as the report is being drafted.

Peter Hutchins has two documents that are distributed at the meeting to the members. One is a preliminary note on proportionality in aboriginal litigation, the second is a report titled « Renouncing the old rules of the game: crown conduct within the context of litigation involving aboriginal peoples, dated September 1994. These will be posted on the website as well.

The awaited submission of the CBA aboriginal group has been received and has been posted on the website as well.

Addressing the main bucket one issue: **Proportionality**

It is agreed that the implementation of the concept of proportionality should be built into the Rules. Options:

- 1) A general statement of the principle in rule 3;
- 2) A general power added to the rules;
- 3) A specific reform of specific sections of the rules (for example in discovery).

Discussion on **interpretative power vs. additional power**

See: *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65. (SCC interpreting 4.2 of the Quebec Civil Code of Procedure). Excerpts from the judgment below:

For the majority (5):

I. *Principle of Proportionality*

[42] Even though there is no need to invoke the principle of proportionality to justify the dismissal of the motions to authorize the class actions in issue here, I think it would be helpful to add a few comments about this principle, as I would not wish to limit it to a principle of interpretation that confers no real power on the courts in respect of the conduct of civil proceedings in Quebec.

For the minority (4):

The application of art. 4.2 C.C.P. to the conditions for authorizing a class action does not support the conclusion that a class action would in this case be inconsistent with the principle of proportionality. Since the proposed actions meet all the conditions set out in the *Code of Civil Procedure*, they should have been authorized. [130]

Article 4.2 C.C.P. on the principle of proportionality does not supplement the criteria for authorizing a class action set out in art. 1003 C.C.P. and therefore does not confer on the court a discretion separate from the one flowing from the latter provision. Proportionality is a guiding principle of civil procedure that cannot be applied independently. The purpose of art. 4.2 C.C.P. is

to reinforce the authority of the judge as case manager. The effect of the principle of proportionality on art. 1003 C.C.P. is to give concrete expression to and to reinforce the discretion judges are already recognized as having when reviewing each of the four conditions for authorizing a class action. The enactment of art. 4.2 C.C.P. did not have the effect of requiring applicants for authorization to show that the class action would be the preferable procedure for resolving common issues. The effect of requiring applicants to prove this would be to limit access to the class action.

If it is believed that proportionality is particularly helpful in certain areas then it should be put in specific rules in addition to having the general power.

Proportionality should be a factor for interpretation but also it should give the power to limit or expand the rules and also for the trial judge to control evidence, and the assignment of hearing days.

The British model uses a terminology that speaks to proportionality in terms of giving effect to the "overriding objective" as oppose to a "power" (ref.: A paper prepared for civil procedure reform by Craig P. Dennis, entitled ["Proportionality: A More Effective Tool"](#))

In [Apotex Inc. v. Merck & Co.](#) 2003 FCA 438 Date: November 20, 2003 :

Excerpt:

I do not understand Rule 385 to authorize a case management judge or prothonotary, in giving directions that are necessary for the "just, most expeditious and least expensive determination of the proceeding on its merits" to enable them to deny a party the legal right to have questions answered on examination for discovery which are relevant to the issues in the pleadings. That right is not merely "theoretical" (as the prothonotary put it) but is clearly spelled out in Rule 240 and I do not take the general words of Rule 385(1)(a) or of Rule 3 to be sufficient to override that specific right.

Consensus:

- a) Using proportionality only for an interpretative purpose is not sufficient;
 - b) The statement of a general principle in rule 3 is not sufficient.
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Case management is a key area where proportionality needs to guide the process, particularly in aboriginal litigation matters to address the systemic problem of the Crown always leading the process to the detriment of the aboriginal litigants. This leads on to the issue of court-led procedure vs. party-led procedure.

The actual proposed case management guidelines for aboriginal litigations give a veto to the parties because the recommendation is for issues to be put to parties for resolution. The guidelines have been worked on by a liaison committee composed of members from the CBA, the IBA and the Department of Justice. Compromises were

made to accommodate the various positions. DOJ tends to favour not handing anything over to the judge whenever possible.

In Quebec the proportionality is implemented through the obligation by the parties to enter into judicial contract that is subject to the supervision of the judge.

Let's not rush to a court-led process on the basis of the position of Justice, simply in order to circumvent it.

Au Québec, les parties sont en effet requises de s'entendre sur un contrat judiciaire basé sur le principe de proportionnalité. Le Code de procédure civile à l'article 151.6, paragraphe 5 établit que la cour peut décider des moyens, et limiter les délais.¹ Cette approche a été confirmée par la cour d'appel en autant que le droit d'être entendu n'est pas brimé. La règle de proportionnalité ne peut pas être utilisée si elle a pour effet de nier un droit de justice naturelle mais elle peut en guider son application.

Est-ce que le principe directeur de proportionnalité peut seulement permettre d'interpréter des dispositions existantes ou permet-il de modifier les règles? Jusqu'à présent les cours s'en servent à cette fin avec l'approbation des instances d'appel.

It is better to provide the tools to the Court to intervene and to let the parties persuade the judge to the contrary if necessary.

Proportionality as a tool to interpret the powers vs. a power to go beyond.

¹ **151.6.** Au moment de la présentation de la demande le tribunal peut, après examen des questions de fait ou de droit en litige:

1° procéder, lorsque la défense est orale et que les parties sont prêtes, à l'audition sur le fond, sinon fixer la date d'audition ou ordonner que la cause soit mise au rôle;

2° procéder à l'audition des moyens préliminaires contestés ou en reporter l'audition à la date qu'il fixe;

3° déterminer les conditions, notamment le nombre et la durée, des interrogatoires préalables avant production de la défense;

4° établir, à défaut d'une entente entre les parties déposée au greffe, le calendrier des échéances à respecter pour assurer le bon déroulement de l'instance;

5° décider des moyens propres à simplifier ou accélérer la procédure et à abrégier l'audition, notamment se prononcer sur l'opportunité de scinder l'instance, de préciser les questions en litige, d'amender les actes de procédure, d'admettre quelque fait ou document, ou encore inviter les parties à une conférence de règlement à l'amiable ou à recourir à la médiation;

6° autoriser ou ordonner, dans les cas où elle n'est pas permise de plein droit, la défense orale ou écrite aux conditions qu'il détermine;

7° décider des demandes particulières faites par les parties;

8° ordonner la signification de la requête introductive à toute personne qu'il désigne et dont les droits peuvent être touchés par le jugement;

9° autoriser ou ordonner des mesures provisionnelles.

Rule 55 is an example of a power that could be interpreted using proportionality. (varying rule and dispensing with compliance).

Can the proportionality principle be used to vary a rule where mandatory language, such as “shall” is used (?).

Consensus:

The implementation of the proportionality principle should go further than just being an interpretative tool.

General consent that there are specific areas where specific reference to the applicability of the principle of proportionality should be made:

- Discovery
 - Trial management
 - Case management
-

Rule 3 should be refurbished to expand on the meaning of the implementation of the principle of proportionality in addition to provide that the parties must apply proportionality, if not the court can intervene.

r.55 contains what is necessary to vary the rule already

r.3 – the principle is largely known but is rarely applied

It would be useful to identify a laundry list of rules that need to be looked at for all the areas where we want to reference that the proportionality principle applies.

Consensus that the overarching principle of proportionality should apply to all aspects of discovery.

Proportionality is not the cure for everything. It may not work for the managing the judges' time.

There should be a balance between effective use of court and natural justice, each case being unique, with the principle and the power available to make just decisions.

Court resources should be part of the proportionality consideration.

Case management

Should court plan more active role in selecting which case should be case managed and according to what criteria.

The system seems to work the way it is. There is no example to report to show that case management needs to be improved.

The general rule is that case management is applied when:

- Parties agree;
- If one party asks for it and the judge agrees;
- When it is a NOC;
- When there has been no activity for a year.

Should this be broadened to include certain other types of proceedings?

Class proceedings is already identified to be specially managed (r. 384.1)

R. 385 provides that a case can continue as case management if required.

Currently a judge can propose the case management and still impose it if parties don't agree.

What about self represented litigants?

The Chief Justice does that behind the scene and judges can decide on it depending on the circumstances and personality of the self represented litigant. Should not be automatically case managed.

However, the rule for case management should be moved in the infrastructure to a more forefront position.

For consideration: the requirement that a motion record be filed by a party that files a motion to request that the case be managed may be a deterrent to initiate the motion as it may constitutes a burden for the requestor.

Next meeting

It is suggested that the next meeting deal with bucket 2 issues with the access to justice as the overarching issue, by everyone, by self represented litigants.

August 10th and 24th are selected for two one hour meetings, allowing the most participation by the members by giving the option to participate in one or in two sessions, depending on availability. Notes of the meetings to be circulated promptly.