Proportionality and Other Guiding Principles of Procedure

David Grossman

Avoiding Injustice

- Traditionally, courts have focused on justice versus injustice
- Substantive and procedural rules are developed to ensure that justice is done

Avoiding Injustice

- Core concepts that ensure injustice is avoided
  - *Audi alteram partem*
  - Adversarial principle
  - Fact-finding as the search for truth
- Some common rules that enhance the search for truth
  - Pre-trial discovery
  - Hearsay
  - Limits to judicial notice

Avoiding Injustice

- But the search for truth is not the only goal of the legal process
  - Finality (*res judicata*)
  - Confidentiality of legal communications (privilege)
- The search for truth has always been balanced with other goals

Avoiding Injustice

- Principal goal:

  A fair process that results in a just adjudication of disputes

  Hryniak v. Mauldin, 2014 SCC 7

- Result is not the only thing that matters
  - Fair process as intrinsic (opposed to instrumental) good
  - Expecting a “just adjudication” versus the “correct result”

An Expanded Idea of Injustice

- Injustice is not just refusing a party the right to be heard, or reaching the wrong result at trial

- Allowing parties to access the just system of adjudication needs to be part of our legal culture

> *The trial process denies ordinary people the opportunity to have adjudication*

Hryniak v. Mauldin, 2014 SCC 7

An Expanded Idea of Injustice

- Legislated access to justice
  - Administrative tribunals
  - Small claims court

- Proportionality as a cornerstone of access to justice

> *A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.*
>
> *Hryniak v. Mauldin*, 2014 SCC 7

An Expanded Idea of Injustice

- This did not start with *Hryniak*
  - Art. 4.2 Code of Civil Procedure (2003)

  In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.

- Proportionality as the *équilibre entre l'atteinte d'un résultat juste et bon et les coûts et délais engendrés pour atteindre ce même résultat* (*A v. B.*, 2006 QCCS 2850)

Proportionality as Compromise

There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

Hryniak v. Mauldin, 2014 SCC 7

Proportionality as Compromise

- *L’accès à la justice n’équivaut pas à un droit illimité de déposer des procédures ou de soulever une multitude de questions (Beaudet v. Procureur générale du Québec, 2019 QCCA 1034)*

- *L'argument du droit à une défense pleine et entière, interprété comme signifiant le droit à l'enquête royale ou à l'excursion de pêche, doit être écarté du revers de la main. La simple lecture des articles 6 et 7 du Code civil du Québec et des articles 4.1 à 4.3 du Code de procédure civile suffit pour s'en convaincre. Certes, les parties sont maîtres de leur dossier, mais cette maîtrise loge à l'enseigne de la bonne foi, de l'absence d'abus et d'intention de nuire, et d'un usage raisonné et raisonnable des ressources judiciaires permettant un accès à la justice dans le respect de la règle de la proportionnalité (Eurobloq Inc. v. Matériaux de construction Oldcastle Canada inc, 2013 QCCA 509)*

- *En ce qui concerne l’objectif de recherche de la vérité, il convient de rappeler qu’il s’agit d’un principe cardinal de la conduite de l’instance civile « [s]ous réserve du respect des objectifs parallèles de proportionnalité et d’efficacité, dont l’importance croît dans le cadre de la procédure civile ». L’adoption du nouveau Code de procédure civile, qui a consacré ces derniers principes afin de favoriser l’accessibilité à la justice, a ainsi écorné « la marge de manœuvre des parties dans la présentation des preuves, voire dans la recherche de la vérité » (Lagacé v. Gestion Michel Lagacé inc., 2021 QCCA 576)*

The Power of Proportionality

Charland v. Lessard, 2015 QCCA 14

- Courts do not merely regard proportionality as an interpretive tool or a gentle prod to guide litigants
  - *Le principe de proportionnalité constitue une source du pouvoir d'intervention des tribunaux dans la gestion des procès*
- However, this power to intervene is not unlimited
  - *Le principe directeur de la proportionnalité se heurte parfois à un autre principe directeur de la procédure, celui qui reconnaît aux parties « la maîtrise de leur dossier, dans le respect de l'obligation de bonne foi ». D'un point de vue pratique, ce dernier principe limite le pouvoir d'intervention des tribunaux pendant le déroulement de l'instance ou du procès.*

The Power of Proportionality

Charland (con'd)

- In order to respect both principles, courts may allow parties to conduct their case how they see fit, and then impose sanctions thereafter
  - *À mon avis, la partie qui ne respecte pas le principe de proportionnalité et qui, de ce fait, compromet la justice et l'équité, s'aventure en chemin périlleux. Lorsque ce non-respect échappe au pouvoir de surveillance et d'encadrement du tribunal et qu'il se perpétue au cours de l'instance, un juge pourrait certes conclure, a posteriori, au caractère déraisonnable de la procédure et sanctionner l'abus qui en résulte.*

How to Resolve Conflicts with Proportionality

- There is no absolute rule on how to balance the guiding principles of procedure
  - Courts may intervene to simplify proceedings and deny excessive procedure
  - There can be no compromise on the process of fair and just adjudication
- Proportionality as a zone of intersection between access to justice and procedural fairness

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Proportionality in Family Law


This is the way –
New Legislative
Framework

Code of Civil Procedure (Principles)

18. The parties to a proceeding must observe 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 the cost and time involved, to the nature and complexity of the matter and the purpose of the application.

Judges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice.

19. Subject to the duty of the courts to ensure proper case management and the orderly conduct of proceedings, the parties control the course of their case insofar as th ney comply with the principles, objectives and rules of procedure and the prescribed time limits.

They **must be careful to confine** the case **to what is necessary to resolve the dispute**, and **must refrain from acting with the intent to cause prejudice to another person or behaving in an excessive or unreasonable manne**r, contrary to the requirements of good faith.

They may, at any stage of the proceeding, without necessarily stopping its progress, agree to settle their dispute through a private dispute prevention and resolution process or judicial conciliation; they may also otherwise terminate the proceeding at any time.

Code of Civil Procedure (Principles)

- Article 18 of the *Code of Civil Procedure* now extends the scope of the prior law to add that the principle of proportionality now applies to both the actions of the parties and their means of proof

- This enlargement in scope seeks to make justice more accessible and to ensure a greater equity between litigants

Code of Civil Procedure (Power of the Court)

49. The courts and judges, both in first instance and in appeal, have all the powers necessary to exercise their jurisdiction.

They may, at any time and in all matters, even on their own initiative, grant injunctions or issue protection orders or **orders to safeguard the parties' rights for the period** and subject to the conditions they determine. As well, they may make such orders as are appropriate to deal with situations for which no solution is provided by law.

Code of Civil Procedure (Sanctions)

342. The court, after hearing the parties, may punish substantial breaches noted in the conduct of the proceeding by ordering a party to pay to another party, as legal costs, an amount that it considers fair and reasonable to cover the professional fees of the other party's lawyer or, if the other party is not represented by a lawyer, to compensate the other party for the time spent on the case and the work involved.

Challenges Inherent to Family Law

1. Family matters account for a large proportion of active matters before the Superior Court, and consume a sizeable amount of scarce judicial resources

2. Conflicts over parenting time/custody and parenting decisions *may* require urgent adjudication and frequent court appearances

3. Not all perceived urgencies are real *Urgencies*

4. Litigants are frequently self-represented, and are unfamiliar with their procedural obligations

5. The high costs associated with litigation are born by individual litigants

6. Faced with these challenges, family litigators often unintentionally become embroiled in the emotional tumult of their clients and take actions that contravene their obligation to always remain proportional

How to overcome these challenges while remaining proportional?

1. Be cognizant that the Court's time is precious, and that there are many litigants that require its services
2. Before you litigate, collaborate. If possible, prioritize reaching an amicable settlement, even it is a partial settlement, prior to scheduled court hearings
3. When proceeding before the court for interim adjudication, properly assess whether the issues for which you are seeking adjudication are truly urgent in nature
4. Be as collaborative as possible with self-represented litigants
5. Limit the scope of your proceedings to that which is necessary to attain the desired end
6. Avoid being a vector for your client's emotions and becoming emotionally hijacked by their plight
7. Refrain from instituting a plethora of unnecessary proceedings

When passionate advocacy goes too far

(*Droit de la famille – 151877,* 2015 QCCS 3546)

Droit de la famille – 151877, 2015 QCCS 3546

The Facts

- The parties were engaged in divorce proceedings and proceeded to the trial on the merits.
- Both parties engaged in vicious and relentless litigation throughout the instance, with each party spending over $700,000 in legal fees.
- Madame, through her attorney, was requesting a provision for costs of $310,000 to cover her attorney's legal fees.

Justice Pierre C. Gagnon's Comments

[310] Les torts sont partagés, mais [l'avocate de madame] s'est particulièrement démarquée par:

- Son mépris du contrat judiciaire, en particulier quant au temps alloué pour l'audition de chaque témoin;
- Son défi au tribunal de mettre à execution certaines sanctions annoncées pour non-respect du contrat judiciaire;
- Ses interminables *filibuster* dès qu'il fallait plaider la moindre objection, alors qu'elle se considérait tenue et autorisée à plaider de fois en fois l'ensemble de sa théorie de la cause, sans toujours faire le lien avec l'élément de prevue soulevant l'objection;
- Son insolence face aux decisions du Tribunal quand ells ne lui étaient pas favourables.

Droit de la famille – 151877, 2015 QCCS 3546

What tools are at the Court's disposal to sanction a party or their counsel's conduct?

[304] Madame réclame une dernière provision pour frais de quelques 310 000 $.

[305] Normalement, pour les motifs énoncés depuis le début du présent volet, le Tribunal serait porté à accorder une provision pour frais de 200 000 $.

[306] Cependant, pour les motifs énoncés ci-après, le Tribunal réduit la provision pour frais à 100 000 $

[307] Durant son témoignage, Madame a affirmé qu'au début des procédures, elle avait choisi une première avocate pour ses habiletés à travailler en mode collaboratif.

[308] Mais, considérant cette première avocate manquait de combativité, Madame a décidé le 23 novembre 2010 de provoquer une substitution de procureurs en faveur [d'un autre cabinet]. Madame a voulu que sa nouvelle avocate puisse tenir tête à Monsieur et à ses avocats.

Droit de la famille – 151877, 2015 QCCS 3546

[312] Par contre, le juge qui préside un procès doit veiller à la sérénité des débats et préserver son autorité et son impartialité quand une avocate se comporte comme si les règles de preuve, de procédure et de bienséance n'existaient que pour les autres et que le mépris de la partie adverse pouvait s'exprimer ouvertement.

[313] Durant le procès, [l'avocate de madame] aura confondu combativité et hostilité. Pourtant, le Code de déontologie des avocats, oblige l'avocat à agir en toutes circonstances avec dignité, respect, modération et courtoisie. L'avocat doit également soutenir l'autorité des tribunaux.

[314] Les tribunaux doivent sanctionner les avocats qui transgressent ces règles élémentaires dans le cadre d'une affaire judiciaire et d'un procès.

[315] [L'avocate de madame] avait une cause juste à faire valoir pour Madame mais la fin ne justifie pas les moyens.

[316] Le Tribunal ignore si, de la sorte, [l'avocate de madame] a débordé le mandat et les instructions de Madame. Le Tribunal ne peut s'ingérer dans le secret de la relation avocat-client.

[317] Le Tribunal laisse donc Madame et [l'avocate de madame] régler entre elles les répercussions de la présente réduction de la provision pour frais, en faisant appel au besoin aux mécanismes de conciliation et d'arbitrage du Barreau.

Droit de la famille – 152870, 2015 QCCA 1883

- Madame's attorney *personally* sought leave to appeal from Justice Pierre C. Gagnon's judgment
- The Court found that madame's attorney did not have the requisite interest to request leave to appeal, as she was not a party to the instance
- The request for leave to appeal was dismissed

When should a judge sanction a lawyer personally?

(*Droit de la famille – 212335,* 2021 QCCS 5112)

C.B v CH. D. 2021 QCCS 5112 (Droit de la famille – 212335)

Considerations

When must a judge sanction a lawyer personally for procedural abuse?

The Code of Civil Procedure speaks of judicial applications or pleadings that are "clearly unfounded, frivolous or intended to delay", as well as "substantial breaches noted in the conduct of the proceeding" as reasons for, inter alia, condemning a party to pay damages to the other, including professional fees and disbursements.

That is clear, but this appears to be limited to a party.

C.B v C.H. D. 2021 QCCS 5112 (Droit de la famille – 212335)

Considerations

Are there circumstances that require that the faulty party's lawyer should pay all or part of those damages?

Where it is probable that the abuse is attributable to a significant degree to the lawyer, shouldn't he or she bear part of the financial responsibility for the damages awarded?

If so, should such a sharing only be ordered where the client requests it and shows that the lawyer's advice led to the abuse?

C.B v C.H. D. 2021 QCCS 5112 (Droit de la famille – 212335)

The Proceedings

- **June 17, 2021:** Mother filed an application to vary corollary relief requesting orders for Father to administer prescribed medication to the children, to note be vulgar in the children's presence, to recalculate the child support payable, and to obtain a provision for costs in the amount of $ 5,000
- **August 13, 2021**: Father countered with a notice for case management announcing a claim for abuse of procedure.
- Mother then filed an application to strike certain excerpts from the notice of case management, alleging the certain allegations were covered by settlement privilege and further requesting to depose Father's attorney
- **September 22, 2021**: Father filed a Motion for Declaration of Abuse and Dismissal of Plaintiff's Application to vary corollary relief, in which he claimed damages for legal fees

C.B v C.H., 2021 QCCS 5112 (Droit de la famille – 212335)

The State of the Law

- There are recent judgements which support the possibility of condemning a lawyer personally for damages. The position is based on the Court's inherent powers pursuant to article 49 of the C.C.P.
- Article 342 C.C.P. is another provision that deals with abuse, citing "substantial breaches in the conduct of the proceedings"
- In the context of legal costs, it, too, focuses on the parties, rather than their lawyer.
- Nevertheless, its language is more general than that of article 51, inviting a different perception that can also be applied to a complaint under article 49.

The State of the Law (continued)

- Article 342 also speaks of "substantial breaches noted in the conduct of the proceedings". Given that language, should one conclude that, when applying this notion to a sanction against a lawyer, the court's mere observation of the manner in which the proceedings are conducted would be sufficient?
- Based on the above, we conclude that our inherent jurisdiction authorizes us to condemn a lawyer ad litem for abuse of procedure and that the context of such a claim is that of extracontractual liability based on fault, as foreseen in the provisions of the Code of Civil Procedure. Any liability on the client's part would arise through the same channels.

C.B v C.H., 2021 QCCS 5112 (Droit de la famille – 212335)

The Motion to Strike - Breach

- The Motion to Strike targets certain allegations in the father's Notice for Case Management of August 13, 2021 (the "Notice").
- The Notice came in response to the Application to Vary.
- The Notice sets out the communication trail between the parties' lawyers since the service of the Application to Vary, including the dates of transmission of draft settlement agreements, one of which being what Madame's lawyer termed as his client's "Final Agreement".
- The Motion to Strike does not disclose the reasons behind the request to withdraw "excerpts from the Court record", other than simply stating that they were subject to settlement privilege
- The Motion to Strike was clearly unfounded and frivolous and, therefore, abusive, but the degree of abuse there pales in comparison with the Application to Vary, coupled with an incomprehensible refusal to negotiate on the part of the mother's team.

C.B v C.H., 2021 QCCS 5112 (Droit de la famille – 212335)

The Refusal to Negotiate - Breach

- Mother's lawyer sent to the father's lawyer a document entitled "FINAL AGREEMENT FOR IMMEDIATE IMPLEMENTATION AND RATIFICATION ON AUGUST 23, 2021"
- Father's lawyer then made modifications to the agreement and sent them to Mother's lawyer.
- Mother then wrote to Father directly advising him that she refused all modifications
- Such a closed and cavalier attitude towards the father's attempts to settle the file is unacceptable. It is a lawyer's professional duty to make reasonable attempts to settle a dispute without resorting to a trial.
- Separate and apart from the abusiveness of the Application to Vary itself, this breach of professional conduct by Mother's lawyer constitutes a fault that justifies a condemnation for the damages it caused.

C.B v C.H., 2021 QCCS 5112 (Droit de la famille – 212335)

The Application to Vary - Breach

[53] Nevertheless, in addition to the request to strike allegations and for an order concerning the administration of skin cream, the conclusions of the Application to Vary sought four other orders, i.e., the recalculation of child support, a provision for costs, an interdiction on the use of vulgarity and the continuation of an earlier order from Turcotte J.

[54] It would not be an abuse of procedure to seek resolution of such issues before a judge - provided there were a serious dispute over them. As it turns out, there was no serious dispute, or any dispute, to resolve. All four requests were either withdrawn by [Madame's lawyer] without making any representations or already agreed to in the revised Final Agreement of August 11th.

[55] The contents of the Final Agreement make it clear that all contentious issues between the parties would have been resolved had the mother agreed to sign it, but she did not agree, at least not before the parties were in court on October first.

[56] That day, after it became clear that there remained nothing to be resolved, the Court asked [Madame's lawyer] what his client's position was with respect to signing the Final Agreement. After a short suspension to allow consultation with her, he informed the Court that the mother would agree to sign the Final Agreement, but on the condition that the father withdraw his motion for abuse of procedure. The father refused and the agreement was never consummated, at least on that day.

[57] Upon hearing her position, the Court voiced disappointment that the mother seemed to be putting her financial interest ahead of the best interests of her children. That is unacceptable and, in the circumstances, quite surprising. She clearly is a good mother and such a position is completely contrary to what one would have expected from her. The fact that it was expressed after consultation with [Madame's lawyer] during the suspension cannot be disregarded in the context of the present matter.

[58] In light of the above, the Court declared at the hearing that the father "has summarily established that the Plaintiff's Application to Vary Corollary Relief may constitute an abusive procedure and hereby offers the opportunity to the Plaintiff to show that said proceeding is not excessive and unreasonable and is justified in law" We also advised that we considered that [Madame's lawyer] also appeared to be at fault in this regard, and invited him to show that it was not appropriate to hold that there had been an abuse of procedure by either him or his client.

C.B v C.H., 2021 QCCS 5112 (Droit de la famille – 212335)

Decision:

The Court found no justification for forcing a half-day court hearing, with all the preparation and cost that this involves.

The facts shown on the face of the file, as discussed above, make it more than probable that it was principally the mother's lawyer who was dictating the strategy and fomenting the attitude that led to this lamentable spectacle.

In spite of the father's efforts to settle all issues and the mother's backing off of earlier complaints, and in complete disregard for a judge's warning about a possible abuse of procedure, she and her lawyer forged ahead with the October 1st hearing

The Court concludes that this was done with the intent to cause prejudice to the father and constitutes behaviour that is excessive, unreasonable and contrary to the requirements of good faith and the dictates of the Code of Civil Procedure.

The court found [madame's lawyer] personally liable, along with the mother for abusive proceedings and behavior in the file. The court apportions 75% of the liability for the damages caused to [madame's lawyer], and 25% to the mother.

The common expert in the era of proportionality: lessons taken from the first few years of application

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The rise of the common expert as a concept

- The last few rounds of amendments to the *Code of Civil Procedure* have brought the common expert to the forefront of procedure (see Art. 148(4), 158(2), 233 and 234 C.C.P.)

- The real push however has come from the Courts themselves, as the time devoted to expert testimony has really tested the boundaries of access to justice (although it is wrong to say that default is common expert: *Webasto* c. *Transport TFI 6*, 2019 QCCA 342)

At first glance, a fantastic idea

Conceptually, common experts should be beneficial to both the parties and the system:

1. Reduced court time devoted to expert evidence. In fact, greater chance of avoiding expert testimony entirely;
2. Reduced costs for the parties (splitting the bill);
3. Possible determination of issue(s) pre-trial

The mixed results

- Unfortunately, the reality of common experts has been somewhat less than what was hoped

- Drawbacks have included:
  - Difficulties in the communications between the parties and the expert (does *ex parte* apply?)
  - Challenges in controlling the cost of the common expert, particularly when the parties are not on the same page as to the scope of work
  - Higher costs resulting from the occasional need for each party to hire its own expert to advise and critique
  - Delays

Communication with the expert

- Issue is whether the common expert should communicate with one party in the absence of the other

- Ideally, the issue should be addressed in the mandate letter signed by both parties or in the order naming the expert to avoid problems. Costs must be factored in

- Although *ex parte* communications are not ideal (see Droit de la famille – 201670, 2020 QCCS 3614), the Court of Appeal has ruled that it is not grounds to disqualify the expert (*Droit de la famille — 141212,* 2014 QCCA 1071).

Scope and costs are live issues

- Controlling costs are a challenge, particularly when the parties are not in agreement as to scope (see *Labranche* v. *Énergie Éolienne des Moulins*, 2018 QCCA 1139)

- Moreover, it is normal that the expert and the parties encounter new issues when the work progresses. Question is whether the parties need to amend the mandate letter or seek directions from the Court

Cost reduction is far from a given

- Depending on the field in which the common expert is filing a report, the parties often need to hire their own experts to review the report and provide an opinion. Also often need the assistance of an expert to cross-examine the common expert before the Court (see N. Aubin and C. Piché, *Les paradoxes de l'expertise commune au Québec*, (2022) 52 R.G.D. 5, at page 24 and following)

- Possibility also exists to produce an expert report with leave of the Court, although party seeking to do so will have to show more than a simple disagreement with the conclusions (*177352 Canada Inc*. v. *Bergeron*, 2021 QCCS 3337):

> [19]La possibilité de produire un rapport de contre-expertise voulant s'opposer à l'expertise commune existe à l'évidence, mais l'application de cette mesure doit demeurer limitée, compte tenu des objectifs mêmes de l'imposition d'une expertise commune, et surtout de l'acceptation préalable de ce moyen par les deux parties.

Delays are also an issue

- A party that is dissatisfied with the delays related to the common expert has little recourse, save to seek guidance from the Court
- Delays can be caused by the expert himself/herself or the failure of one of the parties to communicate information to the expert in a timely manner
- It can also be very difficult for a party to criticize the fees or delays of the common expert

Some good practices greatly increase the effectiveness of common experts

- None of what is above is to say that common experts are ineffective or not worth the effort
- Some good practices serve to increase the effectiveness of the measure
- First, common expert reports are more suited to secondary or tertiary issues in the case. They rarely yield good results when dealing with the central issue of the case (see Court of Appeal's decision in *Webasto,* par. 35-36 and *9310-7720 Québec inc*. v. *Groupe Pelco inc*., 2019 QCCS 2919)

Good practices (continued)

- Second, the parties should invest more time and money then they presently do in order to negotiate a proper mandate letter for the common expert, which should include clear instructions as to scope, budget, deadlines and a communications protocol. If they are unable to agree, a Court ruling on the matter avoids a lot of subsequent issues

- Third, in complex cases where the parties have agreed on a common expert, provide the possibility of the expert having access to his own attorney to resolve certain issues

Conclusion

- Common expert reports can be powerful tools in the search for proportionnality, provided that serious thought is given to the issue at the outset of the file

- However, lawyers do their clients (and the system) no favors when they agree to a common expert or dismiss the idea without good reason