Litigation

Proportionality: Economics Comes to the Courtroom

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The Problem

In 1642 John Cooke, later the prosecutor of King Charles I (and even later hanged, drawn and quartered as a regicide) proposed sweeping reforms to the civil procedures of the English courts. He identified disproportionate costs, extensive delays and a confusing structure of different courts, along with barriers to ordinary persons accessing the courts as being inimical to a country said to be governed by the rule of law. He proposed the merger of the English courts, pro bono service by lawyers and other reforms aimed at making the legal system accountable to reasonable expectations of a system of justice.

Fast forward to modern times and there has been an exhaustive public examination over the past 15 years of our various rules of civil procedure. Clients—and corporate counsel in particular—have asked tough questions about the value of proceeding with litigation in a justice system rife with lengthy delays and antiquated procedures. This has now culminated in new rules across much of Canada.

In this article, we examine one feature of these changes: the idea that proportionality as a principle should inform the management of civil cases. We review the different experiences and initiatives across Canada, and make some comparisons with other jurisdictions.

One conclusion we have drawn by comparing notes across the country and from examining the experience of international examples is that the culture of litigation remains very local. Actual results may be more dependent upon that local culture than on specific rules. The success of any reform appears to be as dependent upon changes to the perception of what constitutes good lawyering as much as changes to the rules themselves.

There are many enduring obstacles to successful reform of civil procedures:

- the system has an abundance of independent actors with differing incentives
- litigants often have opposing procedural goals
- lawyers may reject as unwelcome and inexpert the management of cases by judges
- judicial culture is isolated from the forms of accountability that affect other areas of government service or private sector performance
- the victims of cost, delay and other ills of the system lack a coherent and unified voice to advocate for change.

Despite these obstacles men and women of good will have made significant changes to bring our system of justice closer to the realization of its ideals. We express the hope that the latest roll out

of comprehensive reforms will usher in a new age of effective and impartial adjudication of disputes according to law. Perhaps John Cooke's troubled spirit may at last feel heard.

Proportionality

Ontario, British Columbia and Québec have now enshrined proportionality as a goal in the general rules of civil court. Alberta also has a new set of civil rules coming into force on November 1, 2010 and although proportionality is not expressly a central feature there are changes to the case management system which may enable proportional approaches to feature more prominently.

Since 2003, Québec's Code of Civil Procedure has included the following language:

> 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.

In Ontario as of January 1, 2010, proportionality has become a governing principle under the Rules of Civil Procedure as follows:

> In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

In British Columbia as of July 1, 2010, the Object Rule will include the following language:

> Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
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> a) the amount involved in the proceeding,
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> b) the importance of the issues in dispute, and
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> c) the complexity of the proceeding.

As discussed below, many feel that Québec's proportionality rule has had a limited impact. Clearly some judges in some circumstances have felt empowered to reject applications to amend or to otherwise delay the period of time required to make a case ready for trial. Unfortunately the delay to trial after a certificate of readiness has been filed remains 18 to 24 months. Thus in some senses the change in rules in Québec has resulted in a place where litigants are told to hurry, hurry—then wait.

Ontario is just gaining experience with proportionality being expressed as a general principle and as an explicit factor to be taken into account in the discovery of documents and parties.

In addition to embracing proportionality, British Columbia has imposed new limits on oral discovery of witnesses, less generous document disclosure standards, more active judicial case

management and other rule changes intended to make proportionality a reality in the management of cases.

Québec's Recent Experience

Since Québec has had several years of experience with the principle of proportionality, its experience may be instructive for other provinces. The changes in 2003 occurred in the context of a significant reform of the Québec *Code of Civil Procedure* (C.C.P.). As already noted, the Québec legislature adopted the principle of proportionality as a general principle.

The power of the courts to intervene was increased, since this principle may be raised *ex officio* by a judge when required by the concerns of justice.

The Supreme Court of Canada recently addressed its foundation in the context of a debate relating to the authorization to institute a class action under Québec law [*Marcotte v. Longueuil (City)*, 2009 SCC 43, paragraph 43]:

> The principle of proportionality set out in art. 4.2 C.C.P. is not entirely new. To be considered proper, a proceeding must be consistent with it. [...] Moreover, the requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which, while frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system. [...]

The principle of proportionality applies to all stages of a proceeding. It may be relied upon independently or serve as a guide in the application of more specific rules provided in the C.C.P. In that regard, the Supreme Court continued by saying:

> [...] There are of course special rules for the most diverse aspects of civil procedure. The application of these rules will often make it possible to avoid having recourse to the principle of proportionality. However, care must be taken not to deny this principle, from the outset, any value as a source of the courts' power to intervene in case management.

The judge has discretionary powers to ensure that the parties do not waste time or money, and the lawyers must assist the judge to ensure proper case management.

Some situations in which the courts have relied upon this principle include:

- To determine the reasonableness of a delay provided for in the C.C.P. (*Khalifé v. Centre universitaire de santé McGill*, J.E. 2006-1639 (S.C.))
- To limit taxable expert fees in the calculation of costs (*Excavation Louis Saint-Denis Inc. v. 9111-2748 Québec Inc.*, [2006] J.Q. no 14220 (Q.C.))
- To exclude from the evidence an expert report that does not appear relevant for the purpose of the action (*St-Adolphe d'Howard (Municipalité de) v. Chalets St-Adolphe inc.*, J.E. 2007-2050 (Q.C.A.))

- To order a consolidated hearing of multiple motions for authorization to institute a class action (*Option Consommateurs v. Banque Amex du Canada,* J.E. 2006-1753 (S.C.))
- To limit additional evidence to be submitted by one of the parties to the action with the court's permission (*Wightman v. Widdrington (Succession de)* 2007 QCCA 440, par. 29 (Q.C.A.)).

Yet the courts approached the proportionality rule with caution. Indeed, the courts promptly concluded that this proportionality principle does not operate to bypass the C.C.P.'s other specific provisions. For instance:

- An out-of-court examination cannot be justified on the basis of the principle of proportionality in an action where the amount claimed is less than $25,000, which is otherwise prohibited under s. 396.1 C.C.P. (*Bienstock v. Candappa,* [2005] J.Q. no 6022 (Q.C.))
- The rule regarding the place of instituting proceedings provided in s. 68 C.C.P. cannot be bypassed on the basis of the principle of proportionality (*Chisholm v. Resco Canada inc.,* J.E. 2005-1381 (S.C.))
- The principle of proportionality does not take away the defendant's right to amend its proceedings to raise a new defense (*Royal & Sunalliance, compagnie d'assurances v. Rassemblement des employés techniciens ambulanciers du Québec métropolitain (RETAQM) (Confédération des syndicats nationaux),* B.E. 2006BE-302 (S.C.))
- The court may not set aside the provisions of s. 941 C.C.P., which provide that any commercial arbitration requires a minimum of three arbitrators, on the basis of the principle of proportionality (*Thésaurus inc. v. Xpub Média inc.*, J.E. 2007-2053 (Q.C.)).

Section 4.2 C.C.P. therefore aims to avoid any disproportionality between the ultimate purpose of the action and the procedural means employed. But this new rule comes with certain practical restrictions, as demonstrated by the case law developed since the adoption of this principle in 2003. The evolution of its scope in Québec law remains a work in process.

Ontario's Changes

The Ontario changes—while described as more modest than the wholesale rewrite undertaken in British Columbia—clearly have potential to significantly alter practice. The most significant changes include:

a) Limits on the length of discovery to seven hours for each party, unless the parties consent or the court otherwise orders

b) An explicit rule requiring that oral and documentary discovery requests be assessed having regard to the reasonableness of the time required, the expense of production, the prejudice to the party being discovered, the effect on the orderly progress of the action and the availability of the information or document from other sources

c) Incorporation of a summary judgment rule similar to the one currently in force in British Columbia, which permits judges to decide matters of credibility on affidavits and to employ mini-trial methods to make early judicial determinations.

British Columbia's New Rules

British Columbia's new rules represent an extended period of debate, revision and compromise. But they are certainly the boldest attempt to reform civil procedure in a generation. Some of the changes proposed in the early stages have been removed or made optional, but the potential for a significant shift in the way in which civil disputes are resolved exists nonetheless. Some of the more notable changes intended to make proportionality (as well as other objectives) real include:

a) Changes to court forms such as a requirement that the responding party's pleading specify, in respect of any denial, "the defendant's version of that fact."

b) The option for either party to request a Case Plan, which on request becomes mandatory and must address timetables, amendments, discovery, witness lists, experts and admissions, length of trial and dates among other goalposts for the case.

c) The new standard for disclosure of documents is those used to prove or disprove a material fact, or any document on which a party intends to rely.

d) A seven-hour limit on oral discovery, unless the parties agree or the court orders otherwise.

e) New rules respecting expert witnesses that explicitly govern their duty to the court, the encouragement of joint experts, and detailed requirements governing their instructions and form of report. (Ontario has introduced similar provisions)

Even more expeditious rules govern fast-track litigation involving $100,000 or less or in which the trial is three days or less.

The Times—Are They A Changing?

Given the persistence of the issues of delay, cost and complexity in the civil justice system, it would be a brave soul to predict that any of these sets of changes will succeed fully.

Despite the intractable nature of the problem, these reforms occur in the context of massive changes to the litigation environment. The number of large trials has plummeted. The cost of litigation has risen much more rapidly than many other costs. Large numbers of cases of all sorts are now resolved by mediation or arbitration and outside the sight of the courts. Indeed some areas that used to occupy substantial amounts of judicial capacity such as family litigation and, in some jurisdictions, petty crime and motor vehicle tort litigation are no longer considered appropriate for resolution by a conventional trial.

If clients demand different approaches, change is more likely to come. For example, the corporate counsel community will be pivotal in shaping the client response to the opportunities for timely and efficient litigation created by the reforms.

Similarly, the bar will be emboldened if judges enforce both the spirit and intent of the principle of proportionality in the cases before them and endorse counsel work that dares to be different. The next generation of litigators may soon regard effective case management skills as important to excellent counsel work.

What will effective change look like? How can in-house counsel help effect the intent of the new rules?

Discovery of Documents & Witnesses

The oral discovery of witnesses has long been the most variable element in Canada's civil systems of justice. The English system of civil procedure has no tradition of oral pre-trial examination of witnesses. At the other extreme is the United States where for most of the post-WWII period there was a relatively unlimited right to pre-trial oral examination of witnesses. The result was that by the 1990s it was not uncommon to have hundreds of such examinations before an American civil trial. In a typically mid-Atlantic compromise, Canada's common-law provinces allowed the general right to examine each party or one representative of a corporate party. Yet even with this moderate approach, it was not unknown to see cases with dozens or hundreds of days of discovery.

Similarly, the period in time at which oral discoveries occurred varied enormously from jurisdiction to jurisdiction. When there were lengthy delays to trial, discoveries were often delayed until just before trial. Settlements often occurred on the courthouse steps both because of the impending trial date and the late realization of both the merits of the claims and defences.

Québec of course has its own traditions of oral examination, including the right to public examination of a plaintiff on oath before the filing of a defence—most famously used in the Brian Mulroney libel case against the Government of Canada.

Each of Ontario and British Columbia permit parties to consent to longer discoveries or to seek court approval. Ultimately, of course, counsel's decision is informed in part by how the case-law for court permission develops. In-house counsel may well ask why consent is being considered for longer discoveries and why an application for a longer discovery is necessary. Client demand—or, sadly, the lack thereof—for more efficient discovery will influence the litigation strategy.

For too long the "no-stone-unturned" version of the process has been the measure of excellence in counsel work. When this shifts to valuing strategically effective discoveries, we will know that this aspect of our way of litigation has changed for the better.

Discovery of Electronically-Stored Documents

The proliferation of electronic information is also challenging litigation counsel to manage risks for clients—both shielding defendants from overly broad disclosure requests and sorting through masses of disclosed files on behalf of plaintiffs—during the discovery phase of the litigation cycle. Managing this information strategically and cost-effectively can be a daunting task.

Commonly referred to as "e-discovery," the cost for a party to exhaustively review all of its e-mails and other documents stored electronically in search of what might be relevant can vastly exceed the amount in issue in any particular case. At least in Ontario, it is anticipated that over time, the new proportionality principle will put a stop to runaway e-discovery costs.

Summary Trials

British Columbia's experience with the summary trial rule (known locally as 18A trials) is perhaps a useful guide to how significant change can occur.

As with the new Ontario rule, British Columbia's rule permits a judge to decide questions of credibility in the absence of live witnesses and on affidavit evidence alone. The practice has now grown to the point that the parties often employ intermediate forms of enquiry such as cross-examination on affidavit and third party examination to flesh out the factual record. The impact of this rule has been truly revolutionary: indeed, **slightly more than half the civil trials in British Columbia are now decided** under this rule!

The rule's current popularity was some time arriving. Initially it was seen as a modest expansion to the summary judgment rule that was only used in the rare case where no significant issue existed.

Then with the encouragement of favourable case law, parties started bringing cases by agreement to a summary trial with both sides frequently seeking judgment. Today some areas such as employment cases almost always occur under this rule because of its speed, cost and effectiveness. Its effectiveness has not been restricted to simple cases and effective resolutions have now resulted from long summary trials that have taken place over several weeks.

The central lessons taken from this experience are that:

- when both parties benefit the rule is more likely to be employed
- when the approach is flexible most factual disputes do not require a full trial for fair adjudication
- when the cost of the procedure makes adjudication affordable parties will still seek judicial resolution rather than abandon the case or pay more to litigate than what is thought merited.

Will Ontario's experience mirror that of British Columbia? Once again judicial treatment of the rule and client demand will play pivotal roles in determining the effectiveness of this rule. Certainly it has the potential to profoundly alter the practice in Ontario as it has already done in British Columbia.

Judicial Case Management

Every jurisdiction has some form of judicial case management. Perhaps in this area more than any other, the scope and character of future change is unpredictable. Yet it is obvious that there is great potential for clients to demand change when dealing with litigation between sophisticated parties. After all, instructions in cases like these are most frequently determined by corporate counsel. Under the amendments to Ontario's Rules, case management per se has been

curtailed. Yet judges have been given extensive new powers to make pre-trial orders that could significantly reduce the length and complexity of a trial when it takes place.

Case management was a central feature in the vigorous debate over the proposed rules in British Columbia. Some expressed the view that the judicial branch should not become involved with, much less responsible for, the fundamental management of a case. The other side of the spectrum advanced the view that unless case management was wrestled away from the parties, the system would never come under control. They argued that only the judiciary were free of the natural partisan bias of all parties to litigation.

In the final result, British Columbia's new rules provide for both case management and trial management with various provisions for party consent and judicial discretion. Unlike other jurisdictions a trial date can be attained after the close of pleadings. Accordingly the document disclosure, witness discovery and trial preparation work can and does take place in the context of an approaching trial date.

The time to trial in British Columbia has been substantially reduced such that short trials can be heard rapidly. Most civil cases are now determined under the summary trial rule, which provides for trial on affidavits alone.

The new version—judicial case management if necessary, but not necessarily judicial case management—represents the classic Canadian compromise. Whether British Columbia's tumultuous and creative legal culture will respond in a fashion that advances the goal of the new rules remains to be seen.

Conclusion

It is not coincidental that the changes in Québec, Ontario and British Columbia have followed one another. Despite the local character of any litigation culture, we face common problems. Both the aspects of the problem and possible solutions are more widely shared in today's web-enhanced community.

One theme of failed efforts in the past has been the absence of a determined voice on behalf of clients. Reform has depended on the efforts of public spirited individuals like John Cooke in the 17th century. Today there is an opportunity for clients—particularly for corporate counsel with professional credentials in the law—to demand change.

The same web discussions that produced this current wave of reform has also produced client communities who may form the most powerful engine for change. Once clients realise the overall benefit of more efficient and effective procedures—and their ability to demand better from the system—then confidence in the role of judicial resolution may return. Litigation will then more fully play the vital element in the rule of law it is intended to fulfill.

About the Authors [to be included in a ¼-page ad for Lexpert]

Geoffrey Cowper, QC, the leader of Fasken Martineau's Litigation practice, practices in a wide variety of public and private areas and both domestically and internationally. Geoff is ranked by Canadian Legal Lexpert Directory and Lexpert/American Lawyer and Chambers Global. Best Lawyers in Canada named him Vancouver's Corporate and Commercial Litigator of the Year for 2010.

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