# FIGURES, SPACES AND PROCEDURAL PROPORTIONALITY

By Dr. Catherine Piché (D.C.L., McGill), Professor of Civil Procedure and Evidence Law, *Université de Montréal*, Québec, Canada [1]

Outline:



Article:

Proportionality in private law is widely perceived as being neither simple, neither obvious, neither permanent, neither normal.[2] Sometimes considered as a concept *disproportionate* to law rhetoricians' talents, it is instead referred to as a "chameleon" principle,[3] subject to changing and contextual interpretations. Proportionality is, nonetheless, enshrined in procedural laws around the world, implicitly or expressly, as a principle or policy. It has become a fundamental principle of civil procedure around the world. Accordingly, it is critical to law reform discussions here and elsewhere.

In this article, I first attempt to define proportionality in the context of its historical evolution. I then discuss the ways in which the principle has been applied in different legal traditions, and specifically in the Canadian province of

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[1] This paper is a preparatory work for a future presentation of July 28th 2011 at the International Association of Procedural Law World Congress on Procedural Justice, Heidelberg, Germany. It is greatly inspired by a previously published article entitled "La proportionnalité procédurale: une perspective comparative" (2009-2010) 40 R.D.U.S. 551.

[2] Martine Behar-Touchais, « Droit privé – Rapport introductif », Petites affiches, 30 septembre 1998, no. 117, p. 3 (PA199811701) [translated by author].

[3] Petr Muzni, *La technique de proportionnalité et le juge de la Convention européenne des droits de l'homme. Essai sur un instrument nécessaire dans une société démocratique* (Marseilles : PU Aix-Marseille, 2005).

Quebec, where proportionality exists in a novel, innovative and inclusive form in Art. 4.2 of the Quebec *Code of Civil Procedure*. I later critically discuss the value of proportionality as a fundamental principle of procedural law, and address reform ideas and perspectives. I conclude the article insisting upon a certain evolution and change in culture of the principle, a broader and more generous interpretation of this principle, and an important revamping of the ethics and professional liability codes, taking the principle into consideration.

## I. DEFINITIONS AND TRADITIONS: FROM GEOMETRY AND ARITHMETIC TO PROPORTIONAL FIGURES, SPACES AND PROCEDURES

Thinking about proportionality often brings us back to primary school in mathematics class, where the notion was first taught to us. Our teachers then mostly spoke about mathematical proportionality, specifically in geometry and arithmetic. In the often blurry world of numbers, arrows and figures, we started understanding proportionality as a general principle. As a principle requiring equal distances, equal numbers, equal proportions.

The majority of us future jurists then only occasionally referred to proportionality until entering law school and studying constitutional law, administrative law and civil procedure law. In these three courses, proportionality had its place, and a very important one. In civil procedure law, we were told that procedures needed to be proportional, principally to curb the ever increasing procedural abuses that were being reported in various legal systems around the world. Many of us then practiced law and attempted to understand exactly how this very theoretical and subjective concept could play out in court procedures. In some instances, we were able to see and experience first-hand the tremendous benefits of proportionality.

Proportionality is generally understood to refer to ratios, to the forming of relationships with other parts or quantities. In law, proportionality largely depends upon the judge's interpretation and judgment, based on the ways in which the parties have presented their case, on legal strategy and argument. Legal proportionality, accordingly, depends more fundamentally on the use of language than mathematical and arithmetical proportionality. It involves a fragile equilibrium between the means chosen by the parties, lawyers and judges, to implement a fair and reasonable outcome to the case. An equilibrium largely dependent upon language.

The concepts or notions of "fairness", "justice", "reason(able)" are all very subjective legal concepts that are often used to embrace or refer to proportionality, but that make proportionality tests very challenging. Another challenge to proportionality determinations is the fact that the common law

adversarial system was designed to resolve conflict between *adversaries*, as opposed to focusing more directly on costs, efficiency or proportionality.[4] The civil law system, by contrast, gives adjudicators a greater role in determining the procedure followed in the prosecution of the case, which may mean that judges may naturally be inclined to be more concerned about these fundamental considerations.[5]

What must nonetheless be emphasised is that procedural proportionality must be preserved and embraced to ensure that the judicial system is not so burdened that it will be unable to resolve disputes in a timely, efficient and efficacious fashion. As will be further discussed in Section III, proportionality must also be furthered because it encourages time and cost efficient disputes and thus arguably brings greater public confidence in the civil justice system.[6]

Aristotle was one of the first great rhetoricians in history to publicly advocate enhanced proportionality. He believed that justice and proportionality needed to be intrinsically linked, as he explained in *Éthique à Nicomaque* that "proportion is a means and the just a proportion".[7] For him, the two following forms of proportionality served justice: arithmetical proportionality and geometrical proportionality.[8]

Proportionality officially became a fundamental precept of European law with Article 5(4) of the *Treaty on the European Union* in 1956.[9] That paragraph provided

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[4] Judith Resnik, "Managerial Judges" (1982) 96 Harv. L. Rev. 374; Robert F. Peckham, "The Federal Judge as a Case Manager: The New Role in Guiding a Case from Trial to Disposition" (1981) 69 Cal. L. Rev. 779.

[5] Glendon, Gordon & Osakwe, *Comparative Legal Traditions* (Eagan, Minnesota : West Publishing Co., 1994), p. 167; John Anthony Jolowicz, *On Civil Procedure* (Cambridge :CUP, 2000), p. 20.

[6] See on the public's confidence in the civil justice system: Lind, E. A., and T R. Tyler, *The social psychology of procedural justice* (New York: Plenum Press, 1988). See also, E.A. Lind et al., The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration and Judicial Settlement Conferences (Santa Monica, CA: Rand Corp., 1989); Mary Stratton & Diana Lowe, "Public Confidence and the Civil Justice System: What Do We Know About the Issues?", prepared pour le Justice Policy Advisor Subcommittee on Public Confidence, Canadian Forum on Civil Justice, 2006 (unpublished).

[7] [Translated by author]. Aristote, *Éthique à Nicomaque*, Book V, 3 (Paris : Librairie philosophique Jacques Vrin, 1990), p. 230.

[8] *Ibid*.

[9] Also see J.J. Cremona, « The Proportionality Principle in the Jurisprudence of the European Court of Human Rights », Springer Verlag, Berlin-Heidelberg- New York, 1995, p. 330; Amrani-Mekki S., Le principe de célérité, *Revue française d'administration publique* 2008/1, n° 125, p. 43-53.

that "[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." Some years later, after having appeared in administrative law and constitutional law, mostly in Germany,[10] proportionality emerged into procedural laws more directly with the Woolf Inquiry into Access to Justice between 1994 and 1996.[11]

In his *Access to Justice Report* of 1996,[12] Lord Woolf sought to create a better balance between the parties, the lawyers and the judge, to ensure a greater proportionality between the nature of the case and the procedure utilised, to attenuate the more negative effects of the adversarial system. He identified several principles that the civil justice system needed to implement for greater access to justice:

> (a) Be *just* in the results it delivers;
> (b) Be *fair* in the way it treats litigants;
> (c) Offer appropriate procedures at a reasonable *cost*;
> (d) Deal with cases with reasonable *speed*;
> (e) Be *understandable* to those who use it;
> (f) Be *responsive* to the needs of those who use it;
> (g) Provide as much *certainty* as the nature of particular cases allows; and
> (h) Be *effective*: adequately resourced and organised. (italics in the original)[13]

He advocated a more efficacious use of case management through timetables and limited disclosures and expert evidence, and encouraged the parties to be more responsible in conducting their case. Proportionality was to become a fundamental principle of English civil procedure law, at the core of "an effective

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[10] See e.g., Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* 171-74 (1996) and Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, 13 Y.B. EUR. L. 105, 105 (1993).

[11] Ref.

[12] The Right Honourable The Lord Woolf, Master of the Rolls, *Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, London, Her Majesty's Stationery Office, July 1996, [found online] http://www.dca.gov.uk/civil/final/index.htm (23/06/11) [*Woolf Report*]. Also see Dwyer, D, *The Civil Procedure Rules Ten Years On*, Oxford University Press (2009). Also see Michael Adler, "The Idea of Proportionality in Dispute Resolution" (Dec. 2008) 30:4 J. of Soc. Welfare & Fam. Law 309.

[13] *Ibid.*

contemporary system of justice":

> Rule I of the new procedural code, which imposes an obligation on the courts and the parties to further the overriding objective of the rules so as to deal with cases justly. *The rule provides a definition of 'dealing with a case justly', embodying the principles of equality, economy, proportionality and expedition which are fundamental to an effective contemporary system of justice*. These requirements of procedural justice, operating in the traditional adversarial context, will give effect to a system which is substantively just in the results it delivers as well as in the way in which it does so. [emphasis added][14]

Lord Woolf emphasized that "to preserve access to justice to all users of the system it is necessary to ensure that individual users do not use more of the system's resources than their case requires."[15]

England's Civil Justice Reform Group later adopted proportionality as an overarching principle of its Civil Procedure Rules, in Part I:

> [d]ealing with a case justly includes, so far as is practicable, […] dealing with the case in ways which are proportionate
> i. To the amount of money involved;
> ii. To the importance of the case;
> iii. To the complexity of the issues; and
> iv. To the financial position of each party; […]

In fact, proportionality was also incorporated into the costs assessment test. Interestingly, Lord Woolf himself provided a detailed interpretation of proportionality and of its applications in the now famous case of *Lownds v Home Office*[16]. He explained, in an extract reproduced below, that proportionality is injected with considerations of reasonableness and necessity, that the two considerations have a true impact on a conclusion of disproportion, and that the approach to proportionality determinations must be two-staged:

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[14] *Ibid*.

[15] *Ibid*, Ch. 2 [17].

[16] [2002] EWCA Civ 365; [2002] 1 WLR 2450,

[31] […] what is required is a two-stage approach. There has to be a global approach and an *item* by *item* approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the [relevant proportionality] considerations […] If the costs as a whole are not disproportionate according to that test then all that is normally required is that each *item* should have been reasonably incurred and the cost for that *item* should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each *item* was necessary and, if necessary, that the cost of the item is reasonable. […] reasonable costs will only be recovered for the *items* which were necessary if the litigation had been conducted in a proportionate manner…

[37] Although *we emphasise the need, when costs are disproportionate, to determine what was necessary*, […] *a sensible standard of necessity has to be adopted*. This is a standard *which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required*. […]

[38] *In deciding what is necessary the conduct of the other party is highly relevant. The other party by co-operation can reduce costs, by being uncooperative he can increase costs*. If he is uncooperative that may render necessary costs which would otherwise be unnecessary and that he should pay the costs for the expense which he has made necessary is perfectly acceptable. Access to justice would be impeded if lawyers felt they could not afford to do what is necessary to conduct the litigation. Giving appropriate weight to the requirements of proportionality

> and reasonableness will not make the conduct of litigation uneconomic if on the assessment there is allowed a reasonable sum for the work carried out which was necessary. [emphasis added][17]

While the extract is, with respect, written sometimes confusingly, it does provide leads to judges and lawyers regarding the application of proportionality to real cases and the method that must be preferred to evaluate it. In it, Lord Woolf recognizes that reasonable costs will be recoverable for items which were necessary if the litigation has been conducted in a proportionate manner, that costs must always be *necessary*, and that cooperation between lawyers works toward keeping costs of litigation low. Accordingly, the more lawyers communicate, cooperate and are courteous to one another, the lower the costs of litigation are likely to be. In fact, in a later 2009 Report discussing the costs of civil litigation in the United Kingdom, Lord Jackson interestingly recommended to embrace proportionality, and to ensure that the costs system be based on legal expenses that reflect the nature and complexity of the case.[18]

That is how geometry and arithmetic have brought us to think about and discuss proportional figures, spaces and procedures. These modern ideas and suggestions were eventually imported into North America, and elsewhere, such that it now is widely recognized that the costs incurred by the parties and the public in the provision of judicial services – as well as other legal procedures – should always be made *proportional* to the matter in dispute. Proportionality thus requires that we "match the extensiveness of the procedure with the magnitude of the dispute."[19] In the next subsection, I address different approaches to procedural proportionality, focusing upon *Québécoise* proportionality.

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[17] *Ibid*.

[18] Lord Justice Rupert Jackson, "Review of Civil Litigation Costs: Final Report", December 2009, found online at http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf. (the objective of the study was to " carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.")

[19] Victorian Law Reform Commission, "Civil Justice Review", Report 14 (2008), para. 4.1.1.

## II. PROPORTIONALITY FROM POLICY TO PRINCIPLE: ONE INNOVATIVE LEGAL APPLICATION FROM "LA BELLE PROVINCE"

Proportionality exists both in principle and in policy under national civil procedure statutes and codes.[20] It has also officially been made a part of international procedural law with the *ALI/UNIDROIT Principles of Transnational Procedure*.[21] Indeed, the Principles refer to the concepts of "reasonable", "fair", "significant", "not excessive", relative to court procedures, in such a way as to suggest that they must be proportional. Principle 11 provides, in relevant part, that

> 11.1 The parties and their lawyers must conduct themselves in good faith in dealing with the court and other parties.
>
> 11.2 The *parties share with the court the responsibility* to promote a fair, efficient, and *reasonably speedy resolution* of the proceeding. The parties must *refrain from procedural abuse*, such as interference with witnesses or destruction of evidence. [emphasis added]

Accordingly, at the international level, the parties and the court share an obligation to promote fair, efficient and reasonably speedy resolution of court proceedings. Interestingly, they together are made responsible for the fundamental objectives of the civil justice system. Proportionality is implicit, and permeates as a policy rather than a principle. That is not the case at the national level, where the objective of proportionality is often stated more broadly, without designating a party or actor responsible for its application or implementation. For example, in Hong Kong, one of the underlying objectives of the civil procedure civil justice reform rules is to merely "promote a sense of reasonable proportion and procedural economy in the conduct of proceedings."[22] Proportionality is, in that case, a principle applicable to all procedures chosen by the parties, but no actor is specifically designated to enforce its existence, or made responsible or sanctioned for disproportionate procedures.

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[20] See for example __.

[21] *ALI/UNIDROIT Principles of Transnational Civil Procedure,* Rev. dr. unif. 2004-4 [online] http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf (June 29, 2011).

[22] Judiciary, *Civil Justice Reform*, http://www.civiljustice.gov.hk/eng/home.html (June 29, 2011).

Three Canadian provinces have recognized the need to address the great costs and delays incurred in their justice systems, and introduced the requirement of proportional procedures into their laws to palliate access to justice issues: Quebec, Ontario and British Columbia.[23] I herein address what I consider to be an innovative and unique *Québécoise* procedural proportionality.

**The Principle of Procedural Proportionality in "*La Belle Province*"**

Proportionality was formally codified in the Quebec civil procedure law reform of June 2002, which brought the enactment of the *Act to reform the Code of Civil Procedure* (S.Q., c. 7). The Act's purpose was to provide speedier, more efficient, and less costly civil justice, improve access to justice and increase public confidence in the civil justice system. The reform codified a rule, in Article 4.1 of the *Code of Civil Procedure* ("C.C.P."), that litigants must master their case, and that they must not act unreasonably or excessively. They are, instead, required to be litigants in "good faith".

Importantly, Article 4.2 C.C.P. introduced proportionality, as a cornerstone of the reform, providing that

> [i]n any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of 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*. [emphasis added][24]

Quebec's 2003 reform promoted a "new environment" in which the courts were invited to increasingly intervene in case management.[25] This new procedural and judicial culture simultaneously provided that the parties should have increased

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[23] See e.g., Quebec *Code of Civil Procedure,* R.S.Q., c. C-25; Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; and British Columbia Rules, B.C. Reg. 241/2010, July 30, 2010.

[24] Also see *Rapport d'évaluation de la Loi portant réforme du Code de procédure civile* [Report on the implementation of the Act to reform the Code of Civil Procedure], Ministère de la Justice du Québec, 2006, p. 9. The report is available (in French) at: http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crcp-rap4.pdf.

[25] *Pharmascience Inc. c. Option consommateurs* [2005] J.Q. no. 4770 (C.A.), at par. 30. Also see *Dubois* c. *Robert*, 2010 QCCA 775 (par.170) and *Droit de la famille – 10288*, 2010 QCCA 246 (par.17), on the level of intervention by the courts in that regard.

control over their case, as per Art. 4.1 C.C.P. In fact, the combination of articles 4.1 and 4.2 C.C.P. increased the judge's role in that respect, to avoid excessive costs and delays, and bring a fairer balance in the use of the courts by the parties.[26]

Procedural proportionality found its natural place in this new culture, moving along from a mere procedural policy to what the Supreme Court of Canada recently deemed to be a "fundamental" principle of civil procedure, as opposed to a simple interpretative principle.[27] Indeed, the Supreme Court noted, last year, that:

> 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.[28]

*Québécoise* proportionality is unique in Canada – and perhaps even around the world. First, it requires both parties *and* judges, in first instance and on appeal, to promote proportionality. They will have to act - or adjudicate – in view of simplifying or accelerating court procedures and/or hearings, or otherwise reducing court delays.[29] Thus, the parties are not the only ones responsible for

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[26] L. Chamberland, *La règle de la proportionnalité: à la recherche de l'équilibre entre les parties?* [The proportionality rule: the search for a balance between the parties?], in *La réforme du Code de procédure civile, trois ans plus tard* [Reform of the Code of Civil Procedure, three years later], Service de la formation continue du Barreau du Québec, Volume 242, Éditions Yvon Blais, 2006, pp. 26-27.

[27] *Marcotte c. Longueuil (Ville)* [2009] 3 R.C.S. 65 [« *Marcotte* »].

[28] *Ibid* at para. 43.

[29] Denis Ferland & Benoît Emery, *Précis de procédure civile du Québec*, Tome I (Cowansville : Yvon Blais, 2003), p. 17. Appeal judges are also bound by proportionality considerations and by virtue of Art. 508.2 C.C.P., at any stage of the proceedings, they may, on their own initiative or at the request of a party, convene the parties to confer with them on the possibility of better defining

their file's proportionality, and neither are their lawyers. Judges too have to ensure that the recourses and procedures followed chosen are proportionate to the nature and finality of litigation, in light of costs and time considerations.[30] They will be expected to intervene to rectify a situation where disproportionate procedures are found to exist. They are permitted to restrict the number of pleadings and documents, shorten or extend the time limits prescribed by the Code, or prescribe their own deadlines. While they must use their powers proportionately, judges are permitted to found their management decisions on considerations of procedural proportionality.[31]

Second, Quebec proportionality is unique because it applies largely in time, at all stages of the action, from service of process at the introductory motion to trial on the merits.[32] Parties and their lawyers are required to be able to justify each decision, strategy and choice in the management of their file. They must always consider the following considerations: will the procedures I have chosen allow my case to be ready for a court hearing after the Code-prescribed 180-days delay for inscription of the case for trial? Are judicial and extrajudicial costs high? What kinds of recourses, procedures and interests are at stake? Are the substantive law and evidence more complex than usual? What are this procedure's principal objectives and uses? How will the chosen procedures advance the case?

Third, Quebec proportionality is unique because it has been interpreted loosely and generously since the recent decision of the Supreme Court of Canada in *Marcotte*.[33] Indeed, the Supreme Court then referred to both individual proportionality, evaluated within the file, relative to the parties and the chosen procedures, and to a more collective proportionality, which considers judicial resources and individual hearing times, relative to other files active within the court system.[34]

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the matters really at issue and on possible ways of simplifying proceedings and shortening the hearing.

[30] *Commission des normes du travail* c. *Groupe-conseil GIE inc.*, 2010 QCCA 1133 (par.7); J2 *Global Communications Inc.* c. *Protus IP Solutions Inc.*, J.E. 2010-676 (C.S.) (par.59), inscription en appel le 7 avril 2010 (C.A.), 500-09-020615-100.

[31] Ferland & Emery, *supra* note 29.

[32] *Bal Global Finance Canada Corporation* c. *Aliments Breton (Canada) inc.*, 2010 QCCS 325, appel accueilli le 22 juillet 2010, 2010 QCCA 1369.

[33] See *Marcotte*, *supra* note 27

[34] *Ibid* at par. 43. Also see *Rapport d'évaluation de la Loi portant réforme du Code de procédure civile*, L.Q. 2002, ch. 7, March 2006, online :

Accordingly, *Québécoise* proportionality has been interpreted as being concerned with both the use of public court services and resources by the litigants, and their use by the entire population. It thus serves to ensure an optimal and equitable use of these services by all citizens.[35] That is why the Quebec Court of Appeal recently denied more than one motion to appeal from a decision of the Superior Court, reasoning that the sums and interests at stake did not justify utilizing great public resources to appeal a decision of first instance.[36] This will not mean that courts, however, will dismiss a lawsuit or deny a certain procedure when it was not instigated through the most adequate procedural vehicle,[37] because such a decision would require the parties to reproduce the action or procedure over, in a way contrary to the spirit of economy of *Québécoise* proportionality.

Fourth, proportionality in Quebec's procedural law is unique because it is framed very tightly within the rest of the Code, such that sanctions are actually provided in the Code for disproportionate procedures. Precisely, Art. 4.2 C.C.P. must be read in conjunction with articles 54.1ff. C.C.P., which define the notion of "abusive proceeding" and allow the courts, at any time and even on their own initiative, to declare an action or pleading abusive. This abuse may originate from a strategic lawsuit against public participation or from any other type of lawsuit.[38] Article 54.1 reads as follows:

> A court may, at any time, on request or even on its own initiative after having heard the parties on the point, declare an action or other pleading improper and impose a sanction on the party concerned.

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http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crcp-rap4.pdf (July 4 2011), p. 38. The Supreme Court in *Marcotte* nonetheless reaffirms the notion of collective proportionality much more vigorously.

[35] On this point, see *Matic* c. *Trottier*, 2010 QCCS 1466 (par.61 to 66) [*Matic*].

[36] *Caron* c. *Remax Westmount*, 2010 QCCA 716 (par.8) and *Garcia Marin* c. *Toitures Raymond et Associés inc.*, 2010 QCCA 79 (par.3).

[37] *Beaulieu* c. *Falardeau*, J.E. 2010-1227 (par.39).

[38] Articles 54.1ff C.C.P. were first enacted to respond to procedural abuse coming from these kinds of lawsuits. The articles were eventually applied to all kinds of abuse in any kind of lawsuit.

> The procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.

Interestingly, because it aims to strike a fair balance between the parties, Article 54.2 C.C.P. reverses the burden of proof in the motion through which the abuse of procedure is sought to be established. Articles 54.3ff. C.C.P. further establish that on ruling that the pleading or action is improper, the courts may subject the action or pleadings to certain conditions, require undertakings from the parties with regard to the orderly conduct of the proceedings, or recommend to the chief judge or justice that special case management be ordered. They thus expressly provide a sanction for disproportion. The relevant articles read as follows:

> 54.3. If the court notes an improper use of procedure, it may dismiss the action or other pleading, strike out a submission or require that it be amended, terminate or refuse to allow an examination, or annul a writ of summons served on a witness.
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> In such a case or where there appears to have been an improper use of procedure, the court may, if it considers it appropriate,
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> (1) subject the furtherance of the action or the pleading to certain conditions;
> (2) require undertakings from the party concerned with regard to the orderly conduct of the proceeding;
> (3) suspend the proceeding for the period it determines;
> (4) recommend to the chief judge or chief justice that special case management be ordered; or
> (5) order the initiator of the action or pleading to pay to the other party, under pain of dismissal of the action or pleading, a

> provision for the costs of the proceeding, if justified by the circumstances and if the court notes that without such assistance the party's financial situation would prevent it from effectively arguing its case.
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> 54.4. On ruling on whether an action or pleading is improper, the court may order a provision for costs to be reimbursed, condemn a party to pay, in addition to costs, damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs incurred by that party, and, if justified by the circumstances, award punitive damages.
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> If the amount of the damages is not admitted or may not be established easily at the time the action or pleading is declared improper, the court may summarily rule on the amount within the time and under the conditions determined by the court.
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> 54.5. If the improper use of procedure results from a party's quarrelsomeness, the court may, in addition, prohibit the party from instituting legal proceedings except with the authorization of and subject to the conditions determined by the chief judge or chief justice.

In sum, a joint reading of articles 4.1, 4.2 and 54.1ff. C.C.P. confirms the need for judges to ensure the respect for proportional procedures not just curatively but preventively and prospectively as case manager of the file.[39] This will require the judge to anticipate potential hurdles and challenges in the case's development, discuss these hurdles and challenges with the parties, address all management issues, and later sanction the parties for disproportionate procedures or improper uses of such procedures.

One immediate reaction when reading these articles is to wonder why these powers are not also made applicable to the attitudes and strategic choices of the

[39] See *Droit de la famille – 10859*, 2010 QCCA 753 (par.4) and *Syndicat des copropriétaires du 4576-4578 Harvard* c. *Silberman*, 2010 QCCA 270 (par.10)).

parties, as well as to the evidence that they will have chosen.[40] In a way similar to Lord Woolf in the *Lownds* case,[41] one could argue that with greater cooperation, communication and proportional strategic decision-making, the civil justice system would have greater chances of meeting the stated objectives of justice, speed and fairness. In that sense, Québécoise proportionality should be interpreted even more broadly.

Interestingly, since the last reform of 2002, the *Comité de réforme du Code de procedure civile* has worked actively on a revised Code.[42] The project has not yet been addressed and studied in parliamentary committee, and hence remains confidential at this stage. What is envisaged in it is a revised version of procedural proportionality, applicable to much more than the procedure itself, and existing both as a policy and as a principle. Cooperation between the parties and lawyers, and between the lawyers themselves, is envisaged to form a cornerstone of the proposed reform principles. This suggested reform generally goes a long way toward improving and clarifying the law.

In the rest of Canada, proportionality has also become increasingly more important to provincial civil justice systems. Specifically, in Ontario, Rule 1.1 of the *Rules of Civil Procedure*[43] provides that "[t]he 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."[44] Interestingly, Rule 31.05.1 makes proportionality specifically applicable to discoveries, notably limiting the hours of examination to seven in total:

> 31.05.1 (1) *No party shall, in conducting oral examinations for discovery, exceed a total of seven*

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[40] See on this latter suggestion : Yves-Marie Morissette, « Gestion d'instance, proportionnalité et preuve civile : état provisoire des questions » (2009) C. de D. 381.

[41] *Lownds*, *supra* note 16.

[42] Include reference when provided and made public.

[43] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 1.04 (1.1) [*Ontario Rules*]. For an interesting discussion of proportionality in Canadian common law provinces, see: Radu Razvan Ghergus, « The Curious Case of Civil Procedure Reform in Canada, So Many Reform Proposals with So Few Results» (unpublished thesis, 2009, U. of Toronto): https://tspace.library.utoronto.ca/bitstream/1807/18308/1/Ghergus_Radu_R_200911_LLM_thesis.pdf.

[44] See *Blenkhorn et al. v. Mazzawi et al.*, 2010 ONSC 699, par. 23-24. Also see : *Tucci v. Pugliese, Aviva and Pilot*, 2010 ONSC 2144, par. 31 ss; *Mawji v. AXA Insurance*, 2010 ONSC 2146, par. 36 ss.; Van Blankers v. Stewart, 2010 ONSC 3978, par. 60 ss.; Polywheels Inc. (Re), 2010 ONSC 2445, par. 5.

> *hours of examination*, regardless of the number of parties or other persons to be examined, *except with the consent of the parties or with leave of the court*.
>
> Considerations for Leave
> (2) In determining whether leave should be granted under subrule (1), the court shall consider,
> (a) the amount of money in issue;
> (b) the complexity of the issues of fact or law;
> (c) the amount of time that ought reasonably to be required in the action for oral examinations;
> (d) the financial position of each party;
> (e) the conduct of any party, including a party's unresponsiveness in any examinations for discovery held previously in the action, such as failure to answer questions on grounds other than privilege or the questions being obviously irrelevant, failure to provide complete answers to questions, or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy;
> (f) a party's denial or refusal to admit anything that should have been admitted; and
> (g) *any other reason that should be considered in the interest of justice*.
> [Emphasis added]

In addition, the discovery procedure is limited in time and space,[45] and is appreciated for its relevance to the facts in litigation, according to a discovery plan and list of factors. The discovery plan must also take into consideration several indicators of proportionality.[46] Courts are thus invited to evaluate the costs, time and impact of a certain chosen procedure on the litigation in general.[47]

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[45] Rule 29.2.03(1) of the *Ontario Rules*.

[46] Rule 29.1.03(3)e) of the *Ontario Rules*.

[47] Dan Michaluk, "Ontario courts ease into the era of proportionality", 17 février 2010 [online] http://www.slaw.ca/2010/02/17/ontario-courts-ease-into-the-era-of-proportionality (June 31, 2011). See for example, *Romspen Investment Corporation v. Woods et al.* , 2010 ONSC 30005, par. 17 ("All of this, however, must be filtered through the lens of proportionality, such that what has

Importantly, Ontario lawyers have an implicit duty in the *Ontario Rules* to cooperate and be courteous with one another during litigation. Lawyers are also explicitly required, in a more formal obligation not yet mandatory[48], to present and conduct their files according to courtesy, professionalism and ethics principles formulated by the *Advocates' Society*.[49] By these principles, lawyers are strongly *encouraged* to respect proportionality in civil procedures, but contrary to Art. 4.2 C.P.C., they are *not obliged* to do so.

In July 2010, British Columbia similarly amended its civil procedure rules to include the principle of proportionality. The principle lies in Rule 1-3 of the British Columbia *Supreme Court Civil Rules*,[50] which reads as follows:

> The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> 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 appropriate to
>
> (a) The amount involved in the proceeding;
> (b) The importance of the issues in dispute, and
> (c) The complexity in the proceeding.[51]

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been requested has to be considered within the context of the particular case, to ensure that it is not overly onerous when measured against what is at stake on a variety of levels. Thus, even if the response to the above question is 'yes, the response could assist the trial judge in making a determination regarding a matter in issue,' a second question must be asked: 'is there enough at stake, in terms of significance or money, to justify the time and expense of the disclosure sought?'").

[48] Martin Teplitsky, "Making civil justice work: A new vision" 27 *Advocates' Soc. J.*, No. 3, 7-15 (2008); "Civility: A Cornerstone of Professionalism", Ontario Lawyers' Gazette, hiver 2008 [en ligne] http://www.lsuc.on.ca/media/olg_winter08_professionalism.pdf (6 mai 2010).

[49] Advocates' Society [online] http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility-english.pdf (July 4, 2011).

[50] B.C. Reg. 241/2010, July 30, 2010.

[51] B.C. Reg. 168/2009 (filed on July 7, 2009). See online http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/168_2009_01 (July 4, 2011).

[emphasis added]

While this rule is interesting for its scope and reach, relative to the objectives of civil justice, the inclusion of the expression "so far as is practicable" unfortunately gives the provision a lot less weight. Nevertheless, the evaluation of proportionality according to the amount and sums at stake, importance of the issues and complexity of the litigation is an effective formulation of the principle.

Interestingly, this newest version of the British Columbia rules also has a simplified court procedures system – a "fast-track litigation proceedings" system, in Rule 15, which applies to claims in an action valued at $100,000 or less. In these cases, case planning conferences are generally required,[52] examinations are limited to two hours,[53] and the trial is held expeditiously.[54] Finally, contrary to Ontario, British Columbia does not have courtesy and professionalism rules applicable to litigation lawyers directly.

## III. REFORM IDEAS

### A. Critical Views of Proportionality

Many important issues may be raised regarding the value of proportionality as a fundamental principle of civil justice, particularly in light of the steady interest in and codification of the principle in many legal systems around the world. Essentially, can the greater speed of execution of proportional justice affect the fairness and quality of judicial procedures and processes and their results? Does it threaten the right to a fair trial, and impair due process guarantees? Conversely, does a proportional system of civil justice necessarily bring fair and reasonable outcomes for the parties?[55]

Acting proportionately may mean, for a lawyer, that one argument or question yet to be explored is willingly left aside unexamined. At the same time, when a judge adjudicates proportionately, it may be because he or she has chosen one solution or outcome over the other, choosing not to address one perspective or argument. Does that mean that judicial processes and their outcomes will be less equitable or just because they are made more efficient, more expeditious, and

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[52] Rule 15 (7)-(9) of the B.C. *Supreme Court Civil Rules*.

[53] Rule 15(11) of the B.C. *Supreme Court Civil Rules*.

[54] Rule 15(13) and (14) of the B.C. *Supreme Court Civil Rules*.

[55] See on this topic: Colleen M. Hanycz, « More Access to Less Justice : Efficiency, Proportionality and Costs in Canadian Civil Justice Reform» (2008) 27:1 C.J.Q. 98.

less complete?

In addition, one can wonder whether proportional justice and proportionate procedures lead to greater confidence in the civil justice system. This issue must be situated within the contemporary crisis of civil justice and lack of confidence felt by the users of the system who react by deserting the courts.[56] One may argue that the lower costs of procedure will bring greater confidence in the system. Court users will then believe that their file was managed more efficiently (and costs efficiently) and they may then have greater confidence in the system because it will appear more just and equitable.[57]

Another challenge with procedural proportionality is its difficult application in certain kinds of litigation such as litigation involving higher stakes or important rights and interests. In this case, higher costs of litigation may appear "necessary", to the detriment of parties with lesser resources:

> Although disputes of relatively low value or importance should clearly not require disproportionate private or public resources for their resolution, there is a vexed policy issue as to whether high value civil disputes should be permitted to consume substantial publicly funded court resources, particularly where the parties in dispute are commercial leviathans involved in a commercial dispute with purely financial dimensions and where such parties can readily afford the costs of mediation, arbitration or other 'private' methods of resolving their dispute.
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> There is also an important question about whether the 'imposition' of 'proportionality' in

[56] Ref.

[57] Lind, E. A., and T R. Tyler, *The social psychology of procedural justice* (New York: Plenum Press, 1988). Also see, E.A. Lind et al., The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration and Judicial Settlement Conferences (Santa Monica, CA: Rand Corp., 1989); Mary Stratton & Diana Lowe, "Public Confidence and the Civil Justice System: What Do We Know About the Issues?", prepared for the Justice Policy Advisor Subcommittee on Public Confidence, Canadian Forum on Civil Justice, 2006 (unpublished); Pierre Noreau, "Accès à la justice et démocratie en panne: constats, analyses et projections", Observatoire du droit à la justice, Centre de recherche en droit public, 2010 (unpublished).

> certain contexts may favour certain litigants, including those with disproportionately greater resources.
>
> […] in such cases, whether the likely legal costs are 'proportionate' to the importance and complexity of the issues in dispute will inevitably involve value judgments and subjectivity[58]

Proportionality must not impair greater justice objectives; it must instead work in favour of true improvement of the system. As explained by the Victoria Law Reform Commission, "the concept of proportionality reflects an inherent tension between ideas of utility and those of autonomy, where proportionality may be seen to be an 'effectiveness' measure at the sake of individual justice."[59] My view is that one way to ensure the respect of individual justice is to involve and make lawyers responsible for proportional procedures both in civil procedure statutes and in ethics and professional responsibility codes.

Indeed, is proportionality compatible with the current ethics rules made applicable to lawyers? When lawyers manage the file and choose procedures proportionately, do they act in conformity with the rules, in the best interest of their client? Are they as diligent and competent as the rules require, at least in theory? Do they explore all facets of the case, and use all instruments possible to serve their client? I answer negatively, *in theory*. Proportionality requires lawyers to act reasonably and to ensure that costs are incurred as is *necessary*. Accordingly, the question is legitimate, and requires that the professional ethics rules be amended, to reflect the contents of civil procedure laws and codes, and the policy of proportionality.

### B. Changing the Legal Ethos of Litigants and Judges

Discussing the high costs of civil justice in Australia, Dr. Peter Cashman once referred to the following Scottish proverb: "law's costly, tak' a pint and 'gree".[60] I

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[58] Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), para. 4.1.4.

[59] *Ibid*.

[60] Peter Cashman, "The Cost of Access to the Courts", 9-11 February 2007, Canberra (Aus.), found online at http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2007/Confidence%20courts/papers/Cashman.pdf.

believe this proverb signifies that litigants should generally aim to solve their case amicably, over a pint of beer, rather than litigate to trial. But how does this proverb relate more directly to proportionality in civil procedure? It suggests that parties should be thinking about the costs of litigation, as well as discussing, communicating, and negotiating. Taking the proverb one step further, it suggests reasonableness, and perhaps proportionality.

Lawrence M. Friedman has defined legal culture as the prevailing "legal consciousness – attitudes, values, beliefs, and expectations about the law and the legal system" within a community.[61] Beyond the codification of proportionality in civil procedure codes and statutes, a profound change in legal culture is required to fully implement the principle into national laws and practices. This change in culture must come in parallel with a revised, enhanced attitude by the actors, and by a fundamental review of the foundations and philosophy of civil justice systems such as Quebec's.

First and foremost, court users arguably desert the courts because they do not have confidence that they will lead to a fast, efficient and fair resolution of their disputes. To bring greater confidence in the system, there must be a greater exchange of information between the parties, as well as greater disclosure – in anticipation – of the costs of litigation and related lawyer fees. Importantly, the client must fully participate in the proportionality inquiry, instead of being a silent witness of his or her case.

Second, lawyers must be more precise and concise in court procedures. They must conduct discovery and work with evidence that is better suited and targeted to the case, accept to have common experts, choose to have limited authorities. They must be more *reasonable*, without violating the ethics and professional responsibility rules.

Third, litigation must not be a battle, and all references to *adverse*ness, *advers*aries or *conflict* must be eliminated as much as possible in favour of the words "collaboration" or "collaborators".[62] Interestingly, in a recent 2009 study, the

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[61] Lawrence M. Friedman et al., *Legal Culture and the Legal Profession* 1 (1996).

[62] On this topic, see : Julie MacFarlane, *The New Lawyer* (Vancouver, B.C. : UBC Press, 2008). Also see Grimm, Ilan Weinberger and Lisa Yurwit, *New Paradigm for Discovery Practice: Cooperation*, 43-DEC MD. B.J. 26, 28 (2010) ("Cooperation decreases costs by eliminating costs associated with the voluminous filing submitted to the court in connection with a dispute …. Moreover, cooperation fosters goodwill and an amicable environment, which could lead to a speedier resolution – through settlement or otherwise – with lower costs than antagonistic interactions."), referred to in Jordan M. Singer, "Proportionality's Cultural Foundation"…., at 18. Also see John L. Carroll, *Proportionality in Discovery: A Cautionary Tale,* 32 Campbell L. Rev. 455, 460 (2010) ("If

Federal Judicial Center found that 63.8% of plaintiff attorneys and 61% of defence attorneys agreed that the parties in their cases "were able to reduce the cost and burden of the named case by cooperating in discovery."[63] Similarly, more than 95% of respondents in three surveys by the American Bar Association Section of Litigation, American College of Trial Lawyers, and National Employment Lawyers Association confirmed that when lawyers are collaborative and professional throughout the litigation process, clients end up paying less.[64]

Fourth, judges should follow along with the reform of civil procedure, and embrace procedural proportionality initiatives. They should seek to better adapt their role to the necessity of proportionality and make a steady effort to ensure the respect of the principle.

Firth and finally, technology should be embraced in civil justice systems around the world. The shift to paperless justice can create an infinite list of efficiencies, bringing quicker communications, reduced costs, and more efficient processes.[65] As indicated in the Sedona Principles[66], in any court proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account the nature and scope of the litigation, including the importance and complexity of the issues and the interest and amounts at stake.[67] The process should consider the relevance of the available electronically stored information, its importance to the court's adjudication in a given case, and the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.[68] With technology will come great efficiency, efficacy, speed and proportionality in court procedures. This technology must be well-suited and adequately built into the statutes and rules such that fairness and due process guarantees are thoroughly respected.

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courts and litigants approach discovery with the mindset of proportionality, there is the potential for real savings in both dollars and time to resolution.").

[63] Emery G. Lee III and Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (2009) at 30-31 & Fig. 17.

[64] ABA Section of Litigation Member Survey: Detailed Report at p. 3, Dec. 11, 2009 (95% of respondents agreeing or strongly agreeing), cited in Singer, at 19.

[65] See e.g. Sedona Canada Principles _ E-discovery.
[66]

[67] Ref. Also see *GRI Simulations Inc. v. Oceaneering Int'l Inc.*, 2010 NLTD 85 (CanLII).
[68] Ref.

In the end, if legal culture is the "law in lawyers' heads"'[69], and we really want lawyers to think about procedural proportionality as more than a mathematical figure or space, then we must begin to think about how to change what lawyers think in their head. And it begins here, when we scholars talk about proportionality, and in forums such as this congress of the International Association of Procedural Justice, where discussions and debate are held and contribute to reforming the law.

Thank you.

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[69] Lynn M. Lopucki, *Legal Culture, Legal Strategy, and the Law in Lawyers "Heads*, 90 NW. U. L. REV. 1498 (1996).