

SUBSTANTIAL BREACHES UNDER ARTICLE 342 CCP

Posted on August 8, 2020

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With a view to increase procedural efficiency and promote access to justice, a major reform of civil procedure has been implemented over the last two decades by the Quebec legislature. The reform has been characterized in particular by the affirmation of guiding principles for the conduct of proceedings, such as cooperation by the parties^[1] and the proportionality of proceedings^[2]. These legislative changes have sought to increase the parties' accountability towards the orderly conduct of proceedings and promote a more efficient use of judicial resources.

The adoption of these new provisions, and particularly article 342 CCP, aimed at sanctioning substantial breaches of procedural obligations, upended the way we conceived the duties of the parties. Under the previous *Code of Civil Procedure*^[3], only egregious procedural misconduct tantamount to abuse of process was likely to be sanctioned.^[4] Today, litigants have a positive obligation to conduct themselves in accordance with the guiding principles of procedure, failing which they risk being penalized for substantial breaches of that obligation.

Legislative history of procedural abuse

Before the codification of the concept of procedural abuse, the courts, pursuant to the civil liability regime, were already sanctioning abuse of process by requiring the party at fault to reimburse the solicitor-client fees it had unduly caused the other party to incur.^[5] Procedural abuse was not clearly defined however, and was therefore limited to overt situations where a party took action against another party for no justifiable reason, and with no purpose other than to cause harm.^[6] Over time the concept was extended to cover other baselessly filed proceedings that cause undue inconvenience to the other party.^[7]

The concept of procedural abuse was codified in Quebec law in 1984.^[8] It was then associated with a frivolous, clearly unfounded or dilatory action or proceeding. In 2009 the concept was broadened to include an application or pleading that is vexatious, quarrelsome, in bad faith, excessive, unreasonable, intended to cause prejudice to another person or an attempt to defeat the ends of justice (particularly SLAPP suits).^[9]

The most recent legislative changes go even further. In addition to maintaining the rules on abuse of process (and even increasing their scope by specifying that procedural abuse can occur "regardless of intent"^[10]), the

CCP tightens the requirements in terms of conduct by prescribing the conduct that the parties are bound to adopt. They must in particular act in accordance with the guiding principles of procedure such as proportionality, cooperation and transparency.^[11] The legislature is also sending a clear message that judicial resources are not to be utilized without a justifiable reason.^[12]

Introduction of article 342 CCP

It should be noted that there is a major gap between the conduct expected of the parties and conduct that is sufficiently reprehensible to constitute procedural abuse as contemplated by the legislation.^[13] What will the consequences be if a party, while not acting in a flagrantly abusive manner, nevertheless does not respect its procedural obligations? A mechanism for sanctioning substantial breaches of these obligations was introduced in that regard in article 342 CCP:

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.

The “substantial breach” concept

The concept of a “substantial breach” has not been defined by the legislature, which thus gives the courts considerable discretion in this regard. Four years after the coming into force of article 342 CCP, the Quebec Superior Court, in *Gagnon c. Audi*^[14], confirmed the following principles:

- One of the aims of article 342 CCP is to ensure that the guiding principles of procedure are respected;
- A substantial breach is to be distinguished from an outright abuse of procedure, although the distinction is often tenuous;
A substantial breach lies somewhere between a trivial breach and a grievous one;
- A substantial breach pertains to the procedural aspects of a proceeding rather than its merits, and can occur at any stage of the proceedings.^[15]

The case law features several representative instances that can guide courts in determining whether a breach is sufficiently serious to trigger the application of article 342 CCP:

- An employer's repeated failure to respect the deadlines in the case protocol where its employee is waiting for the judicial resolution of a claim for salary is a substantial breach of that judicial contract.^[16]
- Failure to provide requested information after all objections have been dismissed, and concealing relevant information by maintaining for over a year that the information did not exist, constitute a

substantial breach of the duties of cooperation and transparency.^[17]

- Persisting with proceedings that are unnecessary, and disproportionate in terms of costs, despite the Court's disapproval, constitutes a substantial breach of the proportionality rule.^[18]
- Filing multiple amended proceedings and a significant number of new exhibits on the last business day before the hearing represents a substantial breach of the duty of diligence.^[19]

Determination of the amount of costs awarded

When sanctioning procedural abuse, courts have the power to order the party at fault to reimburse the costs that its procedural misconduct has caused the other party to incur. This means that the perpetrator of the abuse may be liable for reasonable solicitor-client fees.^[20]

Whereas *compensation* for procedural abuse is intended to indemnify the victim, the purpose of a reimbursement order under article 342 CCP is to punish the party at fault.^[21] That is why the initial amount of the claim for fees will be adjusted in accordance with the context and seriousness of the breach.^[22] Courts can thus choose to order reimbursement of only part of the fees incurred if they consider that the breach is not sufficiently serious to justify awarding a higher amount.^[23] By way of example, in *Latouche v. Lavoie*^[24], the Superior Court stated that it would also be possible to order payment of an amount greater than the professional fees directly attributable to the breach, up to and including the total amount of the fees incurred for the matter as a whole, should the intensity of the fault justify doing so.^[25]

Conclusion

By virtue of article 342 CCP, litigants now have a vested interest in exercising their rights in accordance with the guiding principles of procedure, particularly those of proportionality and cooperation. Otherwise, they run the risk of being ordered to pay an amount commensurate with the gravity of their fault. There is every indication that the application of article 342 CCP by the courts will echo the stated will of the legislature to promote cooperation by the parties and their reasonable use of procedural mechanisms so as to render civil justice more efficient and accessible.

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[1] *Code of Civil Procedure*, CQLR c C-25.01, art 20 [the “**CCP**”].^[ps2id id='1' target='']

[2] Art 18 CCP.^[ps2id id='2' target='']

[3] *Code of Civil Procedure*, CQLR c C-25.^[ps2id id='3' target='']

[4] *Acadia Subaru c. Michaud*, 2011 QCCA 1037, at para 42.^[ps2id id='4' target='']

[5] The evolution of the abuse-of-process theory in the case law is explained by Jean-Louis Baudouin et al. in *La responsabilité civile*, vol. 1, 8th ed, Cowansville, Yvon Blais, 2014, at paras 234 and following.^[ps2id id='5' target='']

[6] The applicable criterion at that time was bad faith (see *ibid* at para 235). [ps2id id='6' target='']

[7] The courts developed the criterion of temerity in this regard. This entailed determining whether a prudent and reasonable person placed in the same circumstances as the respondent party at the time the proceeding was filed, would have concluded that there were no justifiable grounds for the proceeding. See *Royal LePage commercial inc c. 109650 Canada Ltd*, 2007 QCCA 915, at para 46.[ps2id id='7' target='']

[8] *Code of Civil Procedure*, RSQ c C-25, art 75.1-75.2 as in effect in 1984.[ps2id id='8' target='']

[9] *Code of Civil Procedure*, RSQ c C-25, art 54.1 as in effect in 2009.[ps2id id='9' target='']

[10] Art 51 CCP.[ps2id id='10' target='']

[11] Art 17-24 and preliminary provision of the CCP.[ps2id id='11' target='']

[12] This legislative intent is reflected not only in the preliminary provision of the CCP, but by the promotion of private dispute resolution methods in articles 1 to 7.[ps2id id='12' target='']

[13] Articles 51 to 54 CCP.[ps2id id='13' target='']

[14] *Gagnon c. Audi Canada inc*, 2018 QCCS 3128 [**Gagnon c. Audi**].[ps2id id='14' target='']

[15] *Ibid* at para 48.[ps2id id='15' target='']

[16] *Mercier c. Essor Assurances placements conseils inc*, 2020 QCCQ 2207.[ps2id id='16' target='']

[17] *Lévesque c. Videotron*, 2019 QCCS 1379.[ps2id id='17' target='']

[18] *Gagnon c. Audi*, supra note 14.[ps2id id='18' target='']

[19] *Cessna Finance Export Corporation c. DAC Jet International Ltd*, 2018 QCCS 3214.[ps2id id='19' target='']

[20] Before ordering payment of costs under either article 54 CCP or 342 CCP, the Court must determine the reasonableness of the amount claimed in light of the lawyer's hourly rate and the time that was necessary to devote to the matter at issue (See **Layla Jet Ltd** c. *Acass Canada Ltd*, 2020 QCCS 667, at paras 14-16 [*Layla Jet*]).The method for assessing reasonableness is described in *Groupe Van Houtte inc c. Développements industriels et commerciaux de Montréal inc*, 2010 QCCA 1970, at para 124., [ps2id id='20' target='']

[21] *Gagnon c. Audi*, supra note 14 at paras 43-44.[ps2id id='21' target='']

[22] *Layla Jet*, supra note 20 at para 19.[ps2id id='22' target='']

[23] *Ibid*.[ps2id id='23' target='']

[24] *Latouche c. Lavoie*, 2017 QCCS 2932.[ps2id id='24' target='']

[25] *Ibid* at para 206.[ps2id id='25' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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