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PAPER 4.1

Intervention: The Need for Aggressive Case Management

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INTERVENTION: THE NEED FOR AGGRESSIVE CASE MANAGEMENT

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I. Introduction

One of the findings of the Civil Justice Reform Working Group during their preparation of *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006) was that litigants, irrespective of size and resources, want early and cost-effective resolution to their disputes and that they want an opportunity to be heard.

In the authors' view, lawyers are standing in the way of their client's desire.

Lawyers (including the authors!):

(1) take any adjournment proposal that comes their way;

(2) won't schedule hearing that does not fit perfectly with their personal calendar;

(3) overestimate trial length and then use every moment of that period;

(4) file experts reports as a precautionary measure without a true assessment of need..

The Task Force found that the vast majority of cases are not proceeding to trial. Estimates from 1995 to 2002 places the general civil trial rate (the rate of civil actions that have been initiated and proceed to trial) for the Vancouver courts at 1.3% to 3%. Data from August 2004 until July 2005 shows that the trial rate for non-family civil matters in BC was just over 1%.[1]

The benign explanation is that the low rate of trials represents a high rate of early and satisfactory settlements. However, evidence suggests the contrary. Pre-trial resolution of legal disputes has been both costly and late in the litigation process.[2] Are clients settling because there is a true meeting of the minds based on litigation risk, or because they are exhausted by pre-trial expenses and daunted by the impending trial expense?

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1 *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006) Appendix L: The Trial Rate at 90.

2 *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006) Appendix L: The Trial Rate at 93.

II. Case Studies

The authors have encountered three particular problems with the system as it currently stands. The first is that the pool of cases proceeding to trial is so slim that the case law that emerges is not representative or meaningful for the ones currently in the system. Second, settlements area in complex multi-party cases are now driven almost entirely by litigation costs rather than the merits. Third, access to justice improvements made by the legislature has been undermined by the slow progress of the litigation.

A. "Leaky Condo" Cases

It is incredible to think that of the 400+ cases that have been initiated in BC dealing with leaky condos, only one has proceeded to trial. *Strata Plan NW 3341 v. Canlan Ice Sports Corp.*, 2001 B.C.S.C. 1214 dealt with a project in the municipality of Delta. In that case, the project developer, designer, general contractor, and the municipality of Delta were all held jointly liable to the owners of a strata corporation for over $3 million in repair costs. Since 2001, this case has functioned as virtually the only authority guiding trials and settlement in the area of leaky condo cases and yet, in our view, the case is fundamentally flawed given the absence of a full presentation of the issues. Judgment was made against the project developer, designer and contractor and yet only the municipality defended itself at trial. The focus of the judgment deals with the liability assessment of the municipality. Indeed, the fact that there was only one party defending the action on the merits may have been the only reason that the action was viewed as economic to take to trial by both sides.

Thus, there are no proper considered decisions dealing with the liability of developers, designers, contractors or architects in the leaky condo context yet, settlement is being improperly guided by one unique (and arguably rogue) case. In our view, there is a clear need for judicial intervention in assisting to move the leaky condo cases through the case for speedy, fair and efficient deliberation at trial. We believe that this would result in more judgments which would naturally result in more representative and relevant cases to better direct any settlement process.

The traditional leaky condo case includes 8-12 defendants. These range from architects and developers all the way down to plumbers and landscape contractors. There are many examples of parties at the lower end being added with very little, if any, evidence of fault. However, leaky condo trials are often set down for 40 days. A Scott Schedule may only allocate $5,000-$25,000 in costs to a particular lower end defendant. However, in this context, it takes a very bold/brave/foolhardy plumber to stand on principle and go to trial in order to establish a lack of fault. Rather, a rational economic case can be made to pay $5,000-$25,000 in many settlements based solely on a desire to avoid trial costs.

B. Class Actions

The legislature implemented class action legislation to address the economic barrier created by litigation for small, but uniform, claims. Under proper conditions, claims were now allowed to be aggregated in order to make it attractive for a lawyer to take on the case on contingency.

While the legislation does adequately address the economic barrier, it has not addressed the time barrier.

Indeed, class actions have been amongst some of the slowest moving pieces of litigation in the BC judicial system.

This notwithstanding that the courts are given substantial case management powers in class actions. Class actions are subject to mandatory case management. Furthermore, under s. 12 of the *Class Proceedings Act* the court has the power to "at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate."

Notwithstanding these powers, the cases have moved very slowly. Why? In the authors view there has been a perception that class actions are "too important" to restrict argument and presentation. Long blocks of time are reserved for routine motions. Lawyers' schedules are granted excessive deference. And the assignment of a particular case management judge has often increased delays as the schedule of that precise judge must be accommodated.

This has all resulted in excessive delays that are the perfect example of "justice delayed" being "justice denied." Class membership has slowly fallen away through death while class counsel seek recovery, thereby undermining the powers of aggregation that underlie the procedure.

Thus, we believe that delays and sluggishness in the class action procedures could improve with a much greater role for judicial oversight and case management.

The new Civil Procedure Rules of the BC Supreme Court ("the new rules") attempt to address these concerns through rather sweeping changes to civil litigation procedure that affect all stages of a legal action: the initial pleadings, case management, settlement, discovery, the use of experts, timelines and trial. This paper will focus on the changes that will be made to the case management system.

III. Summary of Changes

Under the existing regime, there is limited fast-tracking and case management through the following four tracks:

(1) Small Claims Court (Provincial Court) for cases involving less than $25,000;

(2) the Fact Track under Rule 66 for cases that can be tried in two days or less;

(3) the Expedited Litigation Track under Rule 68 for cases in the pilot registries involving $100,000 or less and involving matters dealing with money, real property or personal property;

(4) the Case Management Track for complex cases that are scheduled to take 20 days or more in trial[3]

In addition, pre-trial conferences are mandatory for all civil trials between four and 19 days long to ensure that cases are ready to proceed to trial and identify any cases that might exceed their estimated trial length.[4]

Beyond these regimes, unless it is determined by the court that the case needs management direction, management of cases estimated to take between one to 19 days of trial time is largely left in the hands of counsel. According to the Practice Directive of November 20, 1998, counsel can apply for case management for trials that are one to 19 days in length but must write a letter setting out "cogent reasons why a case management judge should be appointed." This provision was intended as a limiting provision; however, for the courts found themselves being overwhelmed by the popularity of case management and felt the only solution would be to reduce the caseload with a needs requirement.[5]

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3 *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006) Appendix B: Proportionality at 58.

4 Practice Directive November 20, 1998.

5 Notice re: Case Management November 20, 1998: "By a Notice to the Profession dated December 20, 1996, and commencing on February 3, 1997 all civil actions with an estimated trial length of 11 days or more were directed to be managed by the trial judge. The unexpected popularity of the program has simply overwhelmed the ability of the court to manage it. The number of cases in the program is more than double what was anticipated"... "The Practice Direction deals with case management of civil actions in general. It restricts pre-trial management of cases of less than 20 days in length to those that are in need of management; otherwise, it leaves pre-trial management in the hands of counsel."

The existence of case management in the lower date range has been relatively rare, and the effectiveness of case management in the higher date range has been "hit and miss."

The fact that a case management judge may remove a case from case management when he or she is of the view that case management is no longer necessary, and the fact that the case management judge is presumptively not the trial judge, indicates that the old rules contemplate a relatively hands-off approach to case management.[6]

That will now change.

A. Enforced Management: The Case Plan

The principle of proportionality is a fundamental driver that overarches the procedural changes in the new rules. The idea is that the amount of procedure for any given case should be directly linked to the value, complexity and importance of that case.[7] In that sense it is a case by case assessment. The new case management regime and the need for a "case plan" create the mechanism for that assessment through judicial intervention and consideration of proportionality in each case.

The new rules eliminate the Writ, Statement of Claim, Appearance and Defence. Instead, an action is initiated by filing just one document referred to as the Dispute Summary.[8] The opponent puts in their position through the filing a Response.[9] After the Dispute Summary and Response have been filed and exchanged, Rule 4-1(1) provides that parties to an action generally cannot take any further steps until a case plan order has been made.[10]

B. Consent Proportionality

The theory underlying the case plan is "Judicial Intervention if necessary, but not necessarily judicial intervention." Specifically, case plan orders can be made by consent, but where this is not possible, must proceed by way of a case planning conference with a judge.

A consent case plan order is made out in Form 13 and must be signed by the parties. The following five areas must be agreed upon by the parties:

(1) Document Production

- Completion dates for delivery of lists or exchange of documents that have not already been exchanged.
- Completion date for delivery of supplemental documents.
- Completion date for exchange of documents.
- Completion date of an electronic document protocol.

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6 Practice Directive November 20, 1998.

7 *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006) Appendix B: Proportionality at 53.

8 Rule 2-1.

9 Rule 2-3.

10 There are a few exceptions, found in Rule 4-1(2), which include filing or amending a case record, adding, substituting or removing a party, exchanging list of documents, delivering a notice to admit, filing for default judgment or summary judgment, participating in a dispute resolution process such as mediation or making an offer to settle. The Court may also allow a party to bring an application that is not one of the examples listed above before a case plan order is made but such application must be made by requisition and must be supported by a letter signed by the party or the party's lawyer setting out the reasons why.

(2) Examination for Discovery

- The names, time limit and completion dates of persons who will be discovered.

(3) Expert Witnesses

- The names of experts to be called and completion dates for the steps in the delivery of reports.
- Where there is not a joint expert, the experts must confer and deliver a report summarizing their points of difference.

(4) Witnesses

- The completion date to deliver the lists of witnesses to be called at trial and summary of each witnesses' evidence.

(5) Trial

- The estimated length of trial.
- The mode of trial.
- The date by which and the party by whom the Notice of Trial will be filed.

Hopefully the need to negotiate this plan early in the process with the participation of the clients will "keep the lawyers honest" and force them to agree to a substantially tighter schedule that the present slow drift towards trial.

The case plan must be filed and approved by the court. Because the consent case plan orders are made before the court on a pre-trial application, the court arguably still retains some supervisory jurisdiction to ensure that the goal of proportionality is being respected, even if the parties propose to "opt out" of the objective.

The authors perceive two weaknesses with the present draft of the consent plan form. First, there should be a specific requirement that the parties provide for a time frame when the parties will consider mediation or other alternate dispute resolution techniques. Second, the trial section should require lawyers to indicate when they will be ready for trial, rather than simply providing a date by which a Notice of Trial will be filed. There should be a fixed deadline to the litigation agreed to (or imposed) from the outset of the litigation. The consent case plan should be able to trigger immediate assignment of a trial date within the time frame provided.

The consequences of non-compliance with a consent case plan order are real. Under Rule 4-2(4)(b) the court may award costs of an application to enforce compliance in a lump sum to be fixed as four times the costs of the application or any other multiple of the costs that the court sees fit. In addition, the court has broad powers to make any order under Rule 20-5 for non-compliance with the rules including dismissing the proceeding entirely.

C. Imposed Proportionality

If the parties cannot agree on a consent case plan, and the parties actually want to move the case forward, a case planning conference can either be requested by either party or directed by the court anytime after the Response has been filed.

A notice of the case planning conference must be delivered at least 35 days prior to the case planning conference.

The claimant must file and deliver a "resolution plan" within 15 days after either having delivered or received the notice. Each other party of record then files and delivers its resolution plan 15 days after having receiving the claimant's resolution plan. These resolution plans will "draw the battle lines" between the parties.

The resolution plan must be in Form 15 and contain a summary of the following items:

(1) the nature of the action;

(2) the major impediments to achieving a resolution of the action;

(3) the steps the party believes will lead to a resolution of the action;

(4) if the parties disagree in relation to any of the following steps in the action, the parties must indicate their position on that step:

- discovery of documents,
- examinations for discovery,
- expert witnesses,
- witnesses,
- trial type, length and date.

After the exchange of the resolution plans, the case planning conference will occur.

In addition to lawyers, the case planning conference must also be attended by the parties themselves. Where the parties are not individuals, someone who has full authority to make decisions on behalf of the party must attend. Where a person is required to appear but does not, the court can proceed without them, adjourn the case planning conference, or order that they pay costs.

At the case planning conference, a judge must make a case plan order in Form 16. According to Rule 4-5(4) a case plan order must identify the experts that may be called at trial (by name or area of expertise). If no experts are identified at the time of the case planning conference, the judge will order that these be identified at a subsequent case planning conference or by an amendment to the case plan order. Otherwise, the court will direct that a party is not entitled to call any experts at trial.

While this is the only area mandated to be covered in a case plan order, Rule 4-5(1) empowers the case planning conference judge to make a wide of range of orders including setting a timetable for steps to be taken in an action, setting a trial date and fixing the length of trial. In addition to these the judge is empowered to do the following:

- striking case records;
- requiring amendment of an originating case record to provide details of the facts, relief sought or legal basis on which the relief is sought;
- respecting the length and contents of records;
- respecting discovery, listing, production, exchange or examination of documents or exhibits, including setting limits on any of these;
- respecting discovery and examination of parties, including setting limits on these;
- respecting witness lists and evidence summaries;
- respecting experts including that the evidence on any one or more issues be given by one jointly instructed expert, the number of experts that can be called, that the experts must confer prior to preparing their reports, setting a delivery date of expert reports, respecting the issues on which an expert may be called;
- respecting offers to settle;
- giving directions for the conduct of a pre-trial application, including that an application may be made by written submissions;

- requiring parties to attend a mediation, mini-trial, settlement conference, neutral case evaluation or any other dispute resolution process;
- authorizing the parties to try one or more of the issues independently;
- any other orders the judge considers will facilitate a just, efficient and proportional resolution of the action..

The case planning conference judge can order that he or she is seized of any or all pre-trial applications. The same judge may also preside at the trial.

The authors feel that while the scope of possible judicial management available in Rule 4-5(1) is broad, many of these areas should have been mandatory rather than permissive. The setting of a timetable and trial date, for example, would be two keys areas that should be included in each case plan order. The authors understand that the intention is for a trial date to generally be set at this hearing.

Again, the presence of clients will hopefully help prevent lawyers and the court from defaulting to the presently leisurely timelines.

The case planning conference judge will not hear any application supported by affidavit evidence at the case planning conference.

The consequences for non-compliance of orders arising from the case planning conference attract the same potential costs as with non-compliance for consent orders. That is to say, any orders the court sees fit to award pursuant to Rule 20-5 and four times (or potential more if the court likes) the costs of the application.

IV. Why the Changes are Positive

The authors believe the new rules contain all the elements necessary to create real improvement in case management.

The new rules go broader and deeper that existing initiatives. The following table compares the new rules relating to case planning and management against Rule 68 expedited litigation pilot project.

Expedited Litigation under Rule 68	Case Planning under Part 4
Only applies to: • matters filed in one of 4 pilot registries • where claims are for money, real property or personal property • where the total amount claimed is less than $100,000 • does not apply to family law or class action proceedings	Applies to all actions except family law
Writ and Statement of Claim or Petition	Dispute Summary (DS) or Petition
Appearance Statement of Defence	Response

Interlocutory matters are restricted until a case management or trial management conference has taken place	Interlocutory matters cannot generally be filed until: case plan order has been made, either by: • consent • case planning conference (CPC) case plan must contain following parameters: • document production • oral examination for discovery • expert witnesses • lay witnesses • trial case planning conference • must be attended by both parties and lawyers
List of Documents • must be delivered within 15 days after close of pleadings or after action becomes an expedited action	Judge or parties agree on timing of document discoveries • scope restricted
No examinations for discovery unless by consent or court order If allowed, must be under two hours unless by consent or court order	Judge or parties agree to extent and timing of discoveries • default rule restricts to 2 hours
Witness list delivered within 60 days after close of pleadings or 60 days after becoming an expedited action (whichever is later) including summary of the evidence expected	Judge or parties agree on timing of document discovery
Can call one expert of party's choosing	
Case Management Conference • can only be requested after exchange and inspection of documents has been completed • can be directed by court at any time • party and lawyers must attend	Can request further conferences as required
Trial Management Conference • held 15 to 30 days before the start of trial • trial brief required – includes list of witnesses and list of expert reports	• Held between 15 and 30 days before the day set for the start of the trial • Must be conducted by a judge • Must file a trial brief • Lawyers and parties must attend
Trial Date set at Case Management Conference	Trial date can be assigned at case planning conference

A major improvement of the new case plan system is that it is "front loaded" rather than "rear loaded." As litigators, our timelines are often counted backwards from trial, and as a result, there is a hazard of lingering too long in the discovery and pre-trial motion stage with little pressure from a far off and still uncertain trial date. The new process forces parties to set limits and deadlines early. The rules do allow for this to be done by consent but force the parties to cover key areas, ensuring that the process does not have the potential to get derailed when parties are left to their own devices. Where consent is not possible, the new rules force parties to outline their reasons for disagreement and their inability to consent to timelines on key areas. The inability to consent to a plan also triggers the case planning conference before a court. A party can request a case planning conference anytime after the reply period whereas under the pilot project, parties had to wait until the document exchange and investigation had been completed. Because the case planning conference provisions mandate that the case planning judge must issue an order, the combined effect of these provisions is that all cases ought to have early and realistic milestones for pre-trial steps and deadlines, always with an end in sight.

Another improvement is the emphasis that has been placed on focusing issues, establishing points of contention, and distilling down evidence to its key components. The resolution plan, for example, cuts through smoke, mirrors, and confusion; in that it forces the parties to clearly spell out what is holding them back from achieving a resolution and mandates that they lay out the steps to overcome these obstacles. It is no longer simply enough to state that the opposing party is in the wrong; the wrong must be framed with the mechanism to resolve the conflict in sight. This narrowing of issues is also reflected, for example, in the requirement that where there is more than one expert, the experts must confer and deliver a report summarizing their points of difference. Again, this should assist the court in getting to the crux of the disagreement.

A third improvement is the greater presence and voice of the clients in the process. This is evident not only in case planning revisions to the rules but in the case initiation phase. Parties are required to personally sign the initiating documents (the dispute summary and the response) and certify as to the truth of the facts. Like with the pilot project, parties (or suitable representatives who are empowered to make decisions on behalf of parties who are not individuals) are required to appear to the case planning conference with the lawyers. It is our view that this greater involvement of the parties in the process has the potential to help bridge the crisis of confidence between the public and the legal system that exists at present. Clients will not tolerate the delays to which lawyers have been accustomed.

Finally, there is much more clout given to the oversight and enforcement powers of the court. The case planning conference judge has all the powers to set deadlines and to ensure that they are respected.

But in this last substantial improvement lies the greatest risk to the project. Will judges exercise all the powers they have been given? Lawyers need correction and discipline from a "higher power." Will judges give us the "tough love" we need?