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BARRISTERS & SOLICITORS

Minutes

To: CBA Civil Litigation North Section

From: Samuel Edmondson

Date: **April 11, 2018**

Re: April Meeting Minutes
An Update from the Bench
Speaker: Justice G.M. Currie

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1. Administrative Update (distributed separately from these Minutes)
2. Speaker
3. Administrative Discussion

Speaker

Justice G.M. Currie spoke to our group, providing an "Update from the Bench". As was expected, we had a good turnout with 16 members attending.

Justice Currie had one principal topic, as well as some comments on additional comments respecting chambers and trial advocacy. The following summary is *my* take from Justice Currie's presentation and while I have tried to maintain the order and content, my notes and recollection are not perfect and I apologize for any omissions over oversights.

The main subject was in respect of three procedures introduced in the amendments to the Queen's Bench Rules which came into force in 2013. These procedures are:

1. Case conferences, under Rule 4-4;
2. Assignment of case management judges, under Rule 4-5; and
3. Post-pleadings conferences, under Rule 4-11(6).

These options are infrequently exercised in matters before the Court of Queen's Bench.

Case Conferences

Case conferences are "one time" conferences before a judge, and are administrative in nature. They can be brought in two general ways:

1. A judge may, on their own, direct that a case conference occur; and
2. A party may, either unilaterally or jointly with other parties, apply to the registrar for a case conference to be convenened.

A judge sitting in a case conference is empowered to make procedural orders.

A case conference differs from a case management judge being assigned in that it is intended as a singular event, to address procedural and administrative matters in litigation before the Court. A case conference differs from a post-pleadings conference in that a post-pleadings conference is intended to be a "mini" settlement conference.

Assignment of a Case Management Judge

Case management judges are judges who, pursuant to a Rule 4-5 application being granted, become seized of all applications in litigation, up to but not including trial. A case management judge may be assigned on application to the Chief Justice of the Court of Queen's Bench, which application should explain *why* a case management judge should be assigned. The Chief Justice has advised that, except where there is no basis, most applications for assignment of a case management judge are granted.

A recent decision of the Saskatchewan Court of Appeal (*Babich v Babich*, 2017 SKCA 48) held that if a judge is involved in a pre-trial or other settlement role, it is inappropriate for that judge to sit at trial. The same applies to interim applications for orders, if the judge has been involved in settlement aspects of the litigation.

A case management judge assignment differs from a case conference judge in that a case management judge is intended to have significant involvement in procedural and substantive matters throughout the action.

A case management judge assignment differs from a post-pleadings settlement conference in that a post-pleadings settlement conference is aimed solely at settlement discussion.

As an editorial note, Rule 4-7(e) arguably provides that a case management judge may facilitate settlement discussions. Rule 4-9 provides that a case-management judge may not preside at trial without the consent of all parties, and agreement of the case-management judge. In light of the reasons in Babich*, additional attention should be paid by counsel to the judge who sits at various points in the litigation process, especially where case management and additional settlement options have been utilized.*

Post-Pleadings Conferences

Rule 4-11(6) allows parties to *jointly* request a post-pleadings conference to have settlement discussions involving a judge early in the litigation process. A post-pleadings conference can be held before mediation, although you should request that the judge expressly make an order that it may occur before mediation. Alternatively, a post-pleadings conference can be concurrent with mandatory mediation.

A judge sitting for a post-pleadings conference is empowered to require specific steps – either related to disclosure between the parties or for filing of materials with the judge – before the post-pleadings conference.

A post-pleadings conference is *only* about settlement discussion.

Chambers Applications and Trial

As an overriding consideration, counsel should ensure that their advocacy:

1. Provides the judge with an understanding of the circumstances and issues; and
2. Attempts to persuade the judge to grant the requested remedy.

These comments are aimed at achieving these two overarching objectives.

Chambers

Start by introducing yourself. The judge or clerk may not know or remember your name, and it is of assistance to them to have your name. In addition, other judges of the Court have asked that Justice Currie pass on:

1. Let the Court know who you act for;
2. Identify clearly what you are asking for;
3. Identify why the sitting judge should grant the requested remedy/remedies.

In straightforward applications, it may not be of assistance to prepare and file a brief. However, submitting a written brief can be very helpful to the Court, and to you. In hearing an application, the judge may be taking notes on your submissions, however the judge may not hear your submission clearly, may not take from your submission what you intended, and their notes may not be complete. Further, the judge may take a different view of some things than you might say or expect. Your brief allows you to state your case in a way which does not rely on notetaking, and in the manner that you see fit.

If at all possible, exchange briefs and file briefs in advance. While this may "show your hand", again it allows you to state your case in the manner you see fit. Further, you will be better informed of the opposing case.

Justice Currie has noticed that counsel sometimes repeat themselves. An example of this is where "in conclusion", counsel goes on to restate their argument. Keep an eye on the judge indicating that they have already heard your submissions.

Rebuttal is not an opportunity for you to restate your case, or to respond to opposing counsel submissions. It is intended for brief submissions on new matters raised – not matters that should have been in your submissions.

Chambers and Trial Advocacy

Fundamental to both chambers and trial advocacy is the need to know the facts of your case well. This is necessary for you to respond if evidence comes out or questions are raised which must be addressed. As an example, if the judge inquires as to the applicability of a binding or persuasive case – if you know your facts well, you will be positioned to advise if the authority fits your case, or is distinguishable.

Preparation is key, even when it is difficult to set aside time to do so. Where possible, try to think about opposing arguments. This will help with your own presentation, and when questions arise.

When filing cases with the Court, it is very helpful to the judge if you highlight the applicable sections. Justice Currie advises that this is helpful to him even if the highlighting is not the perfect digital rectangles, and even if the passage(s) are highlighted by underlining. Simply stated, a judge may not have time to review entire cases for all matters before the Court on a given day.

Be prepared to accept rulings from the Court during your submissions. As an example, if the Court makes a ruling on an evidentiary matter, accept that the decision has been made and move on – don't keep arguing it.

Although many of us did not go to school to do maths, it is not appropriate to place more than simple calculations before the Court without the calculations and methodology and expect the Court to do the math for you. Provide calculations, where you can – if you cannot do the calculations, find someone else at your office who can or hire out the calculations. Providing calculations and methodology for calculations is an opportunity for you to be persuasive. The judge may approve your calculations, or may use them as a starting point in their deliberation and adjudication of your matter.

Questions from the Members

1. Is there a guideline for when matters should be set for morning chambers, or when a special sitting should be scheduled?

   There is no formal rule about when a special sitting should be scheduled. As a rough rule of thumb, if you anticipate that the matter may take an hour or more, consult with opposing counsel as to requesting that the local registrar arrange a special sitting. If there is not agreement with opposing counsel, you can make the suggestion at the normal chambers sitting or proceed at the normal chambers sitting.

2. For post-pleadings conferences, how much information should be provided – either to opposing parties or to the Court?

   The judge sitting at post-pleadings conferences is able to direct whether more information is necessary – either for the Court, or to be exchanged between the parties. How much information will depend on the circumstances.

3. There was a request for comment on the strength of the bench, and vacancies.

   There are currently four (4) vacancies in the Court of Queen's bench, down from six (6) not so long ago. Going forward there will be other judges electing to supernumerary, which will require more appointments or further strain will result. The two recent

appointments will help, however new Justices have a steep learning curve – especially in areas outside of their practice areas prior to appointment.

In view of *Jordan*, criminal matters are being prioritized to some extent by the Court of Queen's Bench. The result is that civil matters are more being pushed back/delayed.

4. Are there any positive or negative practices of counsel that assist you (or do not assist you) in adjudicating matters?

   A negative practice, which appears more often in family law matters, is long affidavit evidence, often rife with opinion and argument. Justice Currie recognizes that it can be difficult for parties to overcome their emotional involvement in preparing affidavit, however it is the role of counsel to tell their client that they cannot include opinion and argument in their affidavits.

   A positive, Justice Currie sees more counsel coming before him more prepared, and seeming to anticipate opposing arguments. The result is that counsel seem more able to focus on the real facts and issues.

5. Are there cases where post-pleadings conferences may be most beneficial?

   It's difficult, as it will depend on the facts and issues in each case. However, an example where a post-pleadings conference may be very helpful is where there is enough in dispute to warrant the action, but not a huge amount. Where between counsel it appears that there is are only minor issues or amounts standing in the way of settlement, a post-pleadings conference could be helpful in encouraging the clients to come to an agreement.

6. Are case conferences, case management judge assignment, and post-pleadings conferences available in family law matters?

   Unless there is a rule in Part 15 precluding application of rules 4-4, 4-5, or 4-11(6), such processes are applicable to family law matters.

Administrative Discussion

Following Justice Currie's presentation, the meeting had some discussion with respect to administrative matters:

1. With respect to budgetary concerns raised by CBA SK with respect to Wednesday "buffet" lunches. The members were unanimous that a reasonable increase in the per-meeting cost is preferable to rescheduling to another day, or having a served meal.

2. The members were asked whether they have any issue with Samuel Edmondson continuing as Chair, and Tom Baldry continuing as Vice-chair for the CBA SK Civil Litigation North Branch Section. No objections were raised.

3. Members were again asked to put their name forward if they wish to carry out any of the executive roles. Andrea Rohrke advised that she would continue as Law Reform Liaison if no other members put their name forward.