Scharfstein | Gibbings | Walen | Fisher LLP

BARRISTERS & SOLICITORS

Minutes

To: CBA Civil Litigation North Section

From: Samuel Edmondson

Date: **March 14, 2018**

Re: March Meeting Minutes
Addressing Slow and Stalled Litigation
Speaker: Jon Danyliw, Miller Thomson

---

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

Speaker

Jon Danilyw prepared a handout for his presentation. His handout covers a great deal of the discussion, so I include only the following discussion points which followed:

a. There was some discussion about the process and efficacy of requesting case management or case conference judges.
    i. Manny indicated that he had recently made a request, and had been advised that it may take some three to four months for a judge to be available with the current judicial vacancies and workload of the judges of the Court of Queen's Bench.
    ii. Samuel indicated that in past instances there had been relatively quick appointments and coordination of meeting with a Justice for case conference or case management.
    iii. There seemed to be consensus that a case conference or case management can be productive and efficient for:
        1. Avoiding repeated procedural applications where a party is not participating in moving the litigation forward;
        2. With self-represented litigants, who may not know the process or who need to hear their obligations as litigants from a judge;
        3. Not just complex litigation, but smaller litigation as well (editorial comment: particularly where interlocutory or procedural application costs will be disproportionate to the amounts in dispute).
b. There was some discussion about applications to strike actions for want of prosecution.

i. Historically most applications have been required to evidence actual prejudice to be successful, notwithstanding that the test calls for weighing:
    1. The length of delay;
    2. Explanation for the delay; and
    3. Prejudice accrued or accruing as a result of the delay.
ii. There may be a trend in decisions away from the traditional significance of requiring that prejudice be established. Courts seem to be more likely to strike simply on the basis of a lengthy delay, even where prejudice is not necessarily made out.
iii. Strategically, defendants may want to simply let a case lie dormant rather than prompting a plaintiff to continue their action. This may mean that a claim remains on the client's books and is discussed annually as part of their financial auditing.

c. In addition to the procedural tools in Jon's materials and presentation, on instance where the Court may intervene in stalled litigation is with respect to compliance in serving affidavits of documents. Rules 5-12 to 5-14 allow for an application to compel service of an affidavit of documents, and to strike a pleading for failure to comply with an order compelling service of an affidavit of documents. (editorial comment: this will very likely depend upon the sitting judge hearing your appearance day notice)