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SLOW AND STALLED LITIGATION – KEEPING THINGS MOVING

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All litigators, whether acting for the Plaintiff or Defendant, have been faced with slow and stalled litigation. We are all familiar with the claim against our client that seems to fizzle out after mandatory mediation, or those cases where document disclosure is just not forthcoming. We have likely all felt the frustration of waiting months for replies to undertakings given at questioning despite numerous and repeated requests to opposing counsel.

With the "recent" amendments to *The Queen's Bench Rules* in 2013, the Court of Queen's Bench has signalled a shift in how it will handle litigation matters in an attempt to make the litigation process more efficient, accessible and affordable.

Queen's Bench Rules – Part 1: Foundational Rules

The Foundational Rules in Part 1, not surprisingly, are intended to form the foundation for all other rules. Rule 1-3(1) states:

> 1-3(1) The purpose of these rules is to provide a means by which claims can be justly resolved in or by a court process in a timely and cost effective way.

The Honourable Danyliuk, J. has commented on the importance of the foundational rules in several decision. For example, at paragraph 15 of his decision in *Brooks v. Brooks*, 2013 SKQB 325, he wrote:

> In every case commenced, the foundational rules must be considered by the court, counsel and the parties. These rules are located in Part 1, and in particular Rule 1-3 of *The Queen's Bench Rules* has application in this case. The rules and the court's process are to be used to identify the real matters in dispute, and to facilitate the quickest means for resolving claims at the least expense. Parties are obliged to communicate in an open, honest and timely manner. These rules are much more than mere slogans. They are not aspirational. The foundational rules are overarching statements of principle which will strongly influence and guide the manner in which litigation is to be conducted in the province. It is the expectation of the court

> that they be considered in each case and that counsel and the parties conduct themselves in accordance with same. Failure to do so will not be without consequences.

The remainder of Rule 1-3 sets out specifically those matters identified by Danyliuk J., above and also set out the obligations of the parties to litigation. Rule 1-3(3) requires the parties to litigation to identify the real issues in dispute to facilitate the quickest means of resolving the claim, to periodically evaluate alternative dispute resolution mechanisms, and to refrain from taking proceedings that do not further the purpose and intention of the Rules.

Queen's Bench Rules – Part 4: Managing Litigation

Part 4 of The Queen's Bench Rules starts with Rule 4-1 which states:

> 4-1 Responsibilities of the parties to manage litigation
> The parties are responsible for managing their dispute and for planning its resolution in a timely and cost effective way.

This Rule recognizes that it is the responsibility of *all* parties involved in litigation to move the matter along, not just the plaintiff in an action. Obviously, our clients who are defendants in an action may not have a particular interest in ensuring the claim against them proceeds in a timely manner. Often counsel and their clients alike are content to wait and see if and when the plaintiff will make their next move.

This is not to suggest that such an approach is inappropriate. It is, after all, the plaintiff's claim. That said, defendants in an action ought to avoid conduct that unduly delays the matter when the plaintiff is making efforts to move the matter along.

When, despite your best efforts you are faced with stalled litigation, Part 4 of the Rules does provide some avenues by which the Court can provide assistance.

Request for a Conference with the Court

Rule 4-4 permits a party to file a request for a conference with the Court. Upon receipt of such a request, the local registrar shall schedule a date for the conference, where the participants may consider a number of items, such as potential dispute resolution

possibilities, simplification or clarification of the claim, setting dates by which a step in the action is expected to be complete, case management by a judge or any other matters that may aid in the resolution of a claim. The Court has the authority to make procedural orders pursuant to this Rule.

Case Management

In particularly complex cases or those with a number of parties an option may be to seek the appointment of a case management judge pursuant to Rule 4-5. The formal request for appointment of a case management judge is made to the Chief Justice of the Court.

The case management judge is there to assist the parties throughout the litigation process and will generally hear every application filed for that action. The case management judge will not sit on the trial of the matter or an application for summary judgment unless all parties and the judge agree.

Dealing with Excessive Delay

When dealing with excessive delay, an application to dismiss the claim may be made under Rule 4-44. Despite the amendments to the Rules, the three step test for dismissal of a claim for want of prosecution developed under the previous rule remains in use. Essentially, the applicant must show that the delay in the case was inordinate, the delay was inexcusable, and that the delay is likely to cause serious prejudice the other parties.

Generally, a defendant will have to demonstrate that they will suffer serious prejudice before the Court will dismiss an action. If the evidence in the case is primarily in the form of documents that have been preserved or if questioning of witnesses has taken place, the prejudice caused by the passage of time may be sufficiently ameliorated that even a delay of several years may not lead to the dismissal of the claim. Ultimately, the Courts attempt to strike a balance between a plaintiff's right to their day in court and a defendant's right to have proceedings dealt with expeditiously.

Application for Summary Judgment

Pursuant to Rule 7-2, a party may apply for summary judgment on some or all of the issues in an action. Rule 7-2 indicates that such an application can be made after pleadings are closed but before the matter is set down for trial. We should also be aware that because the Court is being asked to determine part or all of the matter, mandatory mediation must also occur before such an application can be heard.

Summary judgment may be sought for the whole action or to seek judicial assistance in focusing the proceeding. On an application for summary judgment, the Court is not bound by rigid rules, but can shape an adjudicative process that is proportionate in the circumstances and meets the needs of the particular case.

On such an application, the Court will first determine whether there is a genuine issue requiring a trial based on the evidence before the Court. If the judge can reach a fair and just decision on the merits based on the evidence before it, there will be no issue requiring a trial and the judge can resolve the matter. If there does appear to be a genuine issue requiring a trial, the Court should then determine if a trial can be avoided by weighing the evidence, evaluating credibility of a deponent or drawing any reasonable inference from the evidence, or if those powers should be exercised only at trial. The Court also has the ability to order that oral evidence be presented by the parties.

In an application for summary judgment, the evidence is crucial. Even in what appears to be a straightforward case, the Court must be confident it can find the facts and apply the relevant legal principles to fairly resolve the dispute. The purpose of a summary judgment application is to provide final judgment on an action. As such the materials filed should be as complete as that which would be considered at a trial. The parties are expected to put their best foot forward so that the Court can determine the application and, where appropriate, the issues between the parties.

Final Comments

While it generally falls upon counsel for the plaintiff to move matters along, all parties to litigation have an obligation to ensure claims are dealt with expeditiously.

When faced with undue delay, whether from the plaintiff or a defendant, the Rules provide several alternatives to manage the litigation, other than the traditional method of filing an application with the Court to compel the other parties to complete the next step in the process. Some of these may provide useful tools in advancing the litigation or even resolving the matter altogether.