Keeping on Track

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Presented by:

Deirdre McKenna

Davidson & Williams LLP

Lethbridge, Alberta

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Introduction

The most helpful pieces of advice for "keeping things on track" on litigation files I have received from other lawyers over the years I have practiced are: "*pick up the phone, and call the other lawyer*" and "*start your case with the end in mind*." Every time I follow that advice, I wish I had done it earlier in the process.

Neither of these pieces of advice have a direct application to the Rules of Court which is the topic of this particular paper. The Rules of Court are where a lawyer should turn to when the above advice doesn't work or only gets you part of the way.

Proportionality: the Organizing Principle for Litigation Management?

The absence of effective litigation management, or "keeping on track" has been identified for many years by many authors and task forces as a significant barrier to access to justice and has led to changes to the principles of the rules of procedure for litigation matters in most Canadian provinces.[1] The new Rules of Court for Alberta includes Litigation Management- Part 4.

Rule 4.1 states a general rule that "*the parties are responsible for managing their dispute and to plan its resolution in a timely and cost-effective way*." Rule 4.2 then provides some more specific direction about what this joint, party based responsibility entails, which includes adhering to the foundational principles of the rules enumerated at Rule 1.2, which include: honesty, openness, settlement, credibility, analysis, re-evaluation and effectiveness.[2]

Neither Rule 4.1 or 1.2 specifically discuss counsel applying the principle of proportionality in considering the management of litigation matters,[3] but the recent decision of the Supreme Court of Canada in *Hryniak v. Mauldin* would indicate it should likely be the primary lens though which counsel seek to make decisions on what steps that should be taken to bring a case to a resolution.[4]

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[1] *Access to Justice, Final Report*, by the Right Honourable Lord Woolf, Master of the Rolls, July 1996, *Final Report to the Lord Chancellor on the civil justice system in England and Wales*; Canadian Judicial Council, *Access to Justice: Report on Selected Reform Initiatives in Canada*, 2008; *Civil Justice Reform Project: Summary of Findings and Recommendations*, by the Honourable Coulter Osborne Q.C., November 2007 (the **Osborne Report**).
[2] As summarized in *Gallant v. Farries,* 2012 ABCA 98 at para 19.
[3] Rule 1.2(4) states: (4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.
[4] *Hryniak v. Mauldin*, 2014 SCC 7

The Supreme Court made the following general observation in that case: *Counsel should always be mindful of the most proportionate procedure for their client and the case.*[5]

The decision in *Hryniak* was clearly intended to issue a significant challenge to the status quo of civil litigation in Canada. The Supreme Court was considering the application of the Ontario rules for summary judgment, which had been amended in 2010 in response to recommendations arising from the Osborne Report that the rules of procedure be modified to reduce cost and delay in civil litigation.[6] It is unusual for the Supreme Court to hear cases on civil procedure, and in this decision the Court took the opportunity to comment on what the Court characterized as a necessary "culture shift" by judges and lawyers to focus on the concept of simplified and proportionate procedures to ensure people obtained resolution in a more timely and cost effective way (i.e. access to justice) as opposed to the traditional process.[7] Karakatsanis J. wrote:

> The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.[8]

The principle of proportionality is a central theme in the Ontario Rules of Civil Procedure. However, the Supreme Court held that even where the principle of proportionality is not specifically or centrally codified, the principle is implied and any exercise of discretion by a court requires the application of proportionality, meaning:

> …taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation.[9]

The Supreme Court also provided the following direction to counsel:

> …[C]ounsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.[10]

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[5] *Ibid* at para. 73.
[6] *Supra* note 1.
[7] *Supra* note 4 at para 27.
[8] *Supra* note 4 at para 28.
[9] *Supra* note 4 at para 31.
[10] *Supra* note 4 at para 32.

Most judicial discussions about the foundational rules in our rules of court, specifically rule 1.2, have not explicitly focused on the concept of proportionality to date, but that can be expected to change.[11]

Litigation Plans

The new Rules of Court enumerate two models for the management of litigation before trial. They are the party directed model (Part 4- Division 1) and the case management model (Part 4-Division 2).

The Rules adopt an approach of party responsibility for litigation management, with judicial case management available only if absolutely necessary.

Rules 4.1 to 4.9 set out the rules for litigation plans. Rule 4.1 states a general rule that *"the parties are responsible for managing their dispute and to plan its resolution in a timely and cost-effective way."* Rule 4.2 then provides some more specific direction about what this joint, party based responsibility entails, and at 4.2(b) states it is the responsibility of parties to respond in a substantive way and within a reasonable time to any proposal for the conduct of an action in a standard case.[12] Rule 4.7 also states that when a plan is in place, the parties are jointly responsible for monitoring and adjusting dates.

Litigation plans are required for complex cases and are optional for standard cases. The standard case designation is the default rule if the parties do not agree or obtain a court order that a case is complex (rule 4.3). However, under rule 4.4(2) a party is permitted in any standard case to propose a litigation plan or a proposal for the completion or timing of any stage or step in the action. If the proposal is ignored, the party may apply to the court to obtain an order setting the plan in place. The key is to ensure that when you wish to obtain a litigation plan, you provide sufficient time for the other parties to review and comment on the plan before applying for an order.

In April 2012, LESA held a Conference called "Case Management, Litigation Plans and the "Drop Dead" Rule." Under the topic of litigation plans, two counsel provided helpful papers on their views on how to move forward with litigations plans.[13] Both authors noted there had been very few reported cases considering litigation plans. This continues to be the case and there remains no reported decisions considering many of the questions raised in the previous papers on litigation plans: when a case should be held to be complex over the objections of one or more parties; whether

[11] In *Medicine Shoppe v. Devchand*, 2012 ABQB 375, the Court considered an application to compel answers in a cross examination of an affidavit filed in support of an application for a stay due to an arbitration clause and noted at para 11 that proportionality was a foundational rule for application of the rules of court, but it did not explicitly inform the decision in that case.

[12] *Weins v. Dewald*, 2011 ABQB 400 at para. 16, appeal dismissed at 2012 ABQB 172.

[13] *"Moving Ahead: Litigation Plans in Action"* by R.L. Duke QC, *"Litigation Plans-Defence Perspective* by J.T. Eamon (Legal Education Society of Alberta, Case Management, Litigation Plans and the "Drop dead" Rule Conference, April 2012)

and what kinds of terms a court will direct in a litigation plan, if parties cannot agree; what the obligations of a defendant might be in proposing a litigation plan; what the consequences of failing to meet the deadlines in a litigation plan are; and whether it is necessary to fix all the possible dates in a litigation plan at once.

In the reported cases, litigation plans still most often arise as an issue where a plaintiff is seeking to protect themselves from a potential delay application (given the decision in *Weins v. Dewald* that since it has been held an agreed upon or court ordered litigation plan can significantly advance an action).[14] Another instance where litigation plans arise in reported cases is when a Master is dismissing a summary judgment application.

Often the Master will either recommend the parties consider a litigation plan or direct it.[15] In cases where a plaintiff is successful in resisting an application for dismissal due to delay, the Master has directed that the plaintiff obtain an agreed upon litigation plan or apply for a court ordered one within a short time frame or the defendant is open to apply to have the case dismissed.[16]

Joint Responsibility to Manage Litigation

The precise meaning of what the joint responsibility manage litigation identified in rule 4.1 means to a defendant remains somewhat unclear.

Justice Graesser noted in *L.C. v. Alberta* that while the new rules contemplate greater co-operation amongst counsel in moving an action towards a resolution, "*litigation remains an adversarial process and …A defendant is not required to assist a plaintiff in making its case against the defendant*.[17] He noted that *"[t]here is nothing in the new rules to suggest that a defendant may not adopt a responsive position, so long as a defendant adheres to litigation plans and case management directives complied with the Rules and does not unduly delay an action*.[18]

However, once defendants and are asked to engage in a litigation planning process, they should be prepared to do so openly. A local colleague recently related an experience where the parties to the action had negotiated a litigation plan to set dates for the final steps to be ready for trial. A few months after the plan was agreed to one of the defendants applied for summary dismissal arising

[14] *Supra* note 13.
[15] *Anderson v. Sun Taxi (Ft. McMurray) Inc.* 2012 ABQB 700 (recommending litigation plan and summary judgment application dismissed); *Trachuck v. Southward Energy Ltd.,* 2010 ABQB 823 (recommending litigation plan after an application for dismissal due to delay).
[16] *Gaastra v. Tri-Link Consultants Inc.* 2011 ABQB 109 at para 38; *Barcellona v. Einarson*, 2012 ABQB 56 at paras. 28-29; *Powder Creek Farms Ltd. v. CNH America LLC*, 2013 ABQB 622 at para 110;.
[17] *L.C. v. Alberta* 2011 ABQB 12 at para. 76
[18] *Ibid* at para. 102.

out of a central issue and sought to have the litigation plan and the steps therein suspended until the summary dismissal application was heard. In a ruling from the bench, the Master declined to do so, given the issue wasn't new and the defendant had recently participated in litigation plan process without raising the fact they wished to bring a summary dismissal application.

It should also be remembered that in July 2013, the rule for dismissal for long delay (r. 4.33) was amended to add a deadline of two months for a defendant to provide a substantive response to a written proposal from a party for a standstill agreement, and that the calculation of delay for automatic dismissal will not include a year after a party proposes to other parties it would like to expand the period for advancing an action. As such, if other parties propose an extension on any stage in the litigation, a defendant should respond with clear notice that they do not agree or the time clock will be extended by one year.

Applying Ontario's Discovery Plans to the Litigation Plan Rules

There is nothing in the rules relating to Litigation Plans, especially for standard cases, to prevent parties from entering into a series of litigation plan for dealing with different stages of the case. For instance, parties could utilize a litigation plan that only deals with the disclosure stage of the action only, but in more detail than may be typically done by counsel in litigation plans to date (typical plans often set target dates for the completion of questioning only).

One of the reforms to the Rules of Civil Procedure in Ontario in 2010 was significant changes to the discovery process, including placing time limits on the total number of hours parties are permitted to questions (2 hours for cases under "simplified rules" and 7 hours for standard cases), as well as the introduction of the requirement of a Discovery Plan between the parties prior to any form of documentary production or oral questioning occurred (rule 29.1.03).[19]

The speed and volume of documentary discovery and questioning had been identified for many years in Ontario as a key cause for delay and expense in resolving civil disputes. This first led to the creation of an Ontario Bar Association working group which issued a *Discovery Best Practices* guideline. They focused on trying to encourage parties to collaborate on the documentary and questioning process to avoid problems like incomplete, untimely, disorderly and excessive disclosure, and "two-stage discovery process.[20]

[19] *Rule of Civil Procedure*, R.R.O. 1990, Reg. 194, r.29.1
[20] *DISCOVERY BEST PRACTICES: General Guidelines for the Discovery Process in Ontario*- Ontario Bar Association, www.oba.org/cbaon/Discovery/DTF GeneralDiscoverybest.pdf.

In 2010 new rules were introduced requiring discovery planning. The parties to a lawsuit are under an obligation to meet as early as they can in the process and develop a written discover plan that is meant to take a flexible approach to discovery that only uses processes that are necessary and justified. The discovery plan is mean to set expectations for the timing of production of documents, agreements as to the scope of documentary discovery, establishing who will be questioned and when.[21]

Some courts have gone so a far as to note parties should also include a process for resolving disputes over objections to questions and undertakings that doesn't involve applications to the court.[22] Although there are lawyers who remain critical of discovery plans[23], the Ontario courts continue to insist it is an obligation counsel must attend to.[24] The Ontario Bar Association has created model documents for discovery planning[25] and reviewing them may assist in considering or preparing a litigation plan under our rules that deals solely with the discovery (documents and questioning) to attempt to ensure a quicker and more efficient process.

Summary Trial / Summary Judgment

In *Islam v. Mozumder*, Justice Veit commented that the new rules of court fixed a "spotlight" on the potential offered by summary trials:

> Rule 1.2....states that the purposes and intention of the new Rules is to resolve claims fairly and justly by way of a court process which is timely and cost-effective. Summary trials, which by definition constitute a paring-down of the usual trial process, may-in some circumstances- be a mechanism for fulfilling the purpose and intention of the new Rules.[26]

Justice Veit's comment regarding increased focus on summary trials may be even more apt, given the earliest comments from the bench to date about the application of the Supreme Court's directions in *Hryniak*. In *Orr v. Fort McKay First Nation*, Justice Brown, of the Alberta Court of Queen's Bench, in reviewing an appeal from a Master dismissing an application for summary judgment, concluded that the test the Supreme Court directed be applied to summary judgment under the

[21] *Passey Estate v. Forest Cluny*, 2013 ONSC 3206 at para 26.
[22] *Kaynar v. Champlain,* 2013 ONSC 1754 at para 38.
[23] *Why Discovery Plans Add Unnecessary Complications,"* The Lawyers Weekly, June 25, 2010
[24] *Supra* notes 21 and 22
[25] www.oba.org/Advocacy/E-Discovery/Model-Precedents
[26] *Islam v. Mozumder* 2012 ABQB 773 at para 17.

Ontario rules did not apply to summary judgment matters in Alberta as the Ontario rule provided for a process that was comparable to our summary trial process, not summary judgment.[27]

Although the *Hryniak* decision is recent and there has been insufficient time for extensive judicial comment from the Alberta Courts, this early indication in *Orr* suggests that counsel should be focusing efforts on utilizing the summary trial process. This would be especially the case given the view of the Alberta Court of Appeal in *Gallant v. Farries* respecting the limited utility of trials of an issue.[28]

The Summary Trial Process

Rules 7.5 to 7.8 set out the process by which a party applies for a summary trial and a judge rules on whether a summary trial process will be permitted. One change to the summary trial rules, which existed under the old rules, was to conflate the former two-step process into a one-step process. Under the previous rules an applicant would make their initial application for a summary trial and that would be heard first, often in morning chambers, with the summary trial proceeding only if the court held it was appropriate.

Justice Veit argued in *Islam*, that while this change was likely made with the intent that is would improve the efficiency of the process, in actuality it had made matters worse for litigants, creating further potential for expense, inefficiency and delay.[29]

In a more recent case *Moncrieff v. Hayne*, Justice Jerke considered (and ultimately rejected) an application for a summary trial.[30] In that case the parties had sought a ruling on whether the matter was appropriate for summary trial as an alternative to a summary judgment application. Justice Jerke also expressed concern about the uncertainty created by the one step summary trial rules:

> ...[T]he rules expressly provide that a respondent has the right to wait until 5 days before the date scheduled for the summary trial to give notice of objection, and then have their objection heard at the time originally scheduled for the summary trial hearing. One of the concerns with the summary trial process is that it is difficult for anyone to know whether the summary trial will be permitted to occur until the date actually scheduled for the summary trial.[31]

[27] *Orr v. Fort McKay First Nation* 2014 ABQB 111 at paras 15 & 19-20.
[28] *Supra* note 2.
[29] *Supra* note 26 at paras 24-31.
[30] *Moncrieff v. Hayne* 2013 ABQB 253
[31] *Ibid* at Appendix A

Justice Jerke recommended parties follow a process of obtaining a ruling in advance of the scheduled date for the summary trial and proposes the following bifurcated process in Appendix A to his written reasons for parties to follow, which are attached at the conclusion of this paper.

Such a process would create less risk for a respondent to be involved or committed to the process allowing them to file evidence limited to explaining its position that a full trial was needed to resolve the issues before the Court, and then evidence in support of their defence (or claim) only once a court ruled a summary trial was appropriate.

This process could avoid the situation the defendant/ plaintiff by counterclaim found itself in *Westjet v. ELS Marketing*. In *Westjet* the court granted the plaintiffs judgment in a summary trial in a contractual dispute.[32] The defendant had a counterclaim for damages for breach of contract, but in the eyes of the court had no meaningful evidence about the substance of the counterclaim. As such the counterclaim was also dismissed. The Court noted the rules required a one step process and held:

> The one-step process does not allow a respondent merely to object to the matter being heard on a summary basis while declining to provide evidence; he must be prepared for the summary trial to proceed notwithstanding his objection.[33]

Other Techniques

Some recent decisions in the areas of Notices to Admit (rule 6.37) and the Questioning of a Witness (rule 6.8) provide helpful reminders of the value these processes might have in either moving a matter forward and narrowing issues for questioning, or assisting in ensuring success in winning (or resisting) an application for summary judgment or summary trial.

a. Notices to Admit

Notices to Admit, or, if possible, agreed statements of fact on non-contentious issues can create efficiencies and focus issues in an action.

While Notices to Admit have most traditionally been used to establish certain facts after questioning, or as counsel prepare for trial, rule 6.37(1) expressly states that Notices to Admit can be used in "applications" as well as "originating applications, summary trial or trial:

[32] *WestJet v. ELS Marketing Inc.* 2013 ABQB 666
[33] *Ibid* at para 74

6.37(1) A party may, by notice in Form 33, call on any other party to admit for the purposes of an application, originating application, summary trial or trial, either or both of the following:

(a) any fact stated in the notice, including any fact in respect of a record;

(b) any written opinion included in or attached to the notice, which must state the facts on which the opinion is based.

Rule 230(1) had more ambiguously referred to using a notice for any "cause matter or issue.[34]

In *Andriuk v. Merrill Lynch Canada Inc.*, Justice Martin upheld a Notice to Admit that had been served on the Defendants in a class action, before the Defendants had provided their defence and before certification of the action as a class action.[35] The Defendants had argued the Notice to Admit was premature and that the purpose of a Notice to Admit is directed to removing the need to prove facts at trial. Justice Martin disagreed, noting that admissions that do away with the need for proof at any time in the process can be useful; sometimes their purpose can replace or limit questioning. At paragraph 21 Justice Martin stated:

> Parties seek admissions to obviate the need to prove that fact in issue and this has value at various points in the litigation process. While a Notice to Admit may be useful, as noted in *Southern Petroleum,* to crystallize certain facts after discovery and before the trial begins, it is also useful at other times, including the beginning. Among the express purposes of the new rules is the intention to help parties and courts identify the real issues in dispute and to facilitate the quickest means of resolving a claim at the least expense (see rule 1.2(1)(2)). A Notice to Admit advances these purposes and is not, on its face, or by intention limited to proof of evidence at trial.

Although the Plaintiff had argued the admissions sought in their Notice to Admit were relevant to upcoming interlocutory motions (counsel conflict and certification), Justice Martin concluded that it was not necessary to establish this connection as rule 6.37 is broad enough to allow a party to seek admissions to be used at trial even before a defence has been filed.[36]

b. Questioning a Witness under Rule 6.8

In *Primrose Drilling Canada Ltd. v. Yangarra Resources Ltd.* Justice Tilleman considered and significantly broadened the scope of the questioning of a witness under rule 6.8.[37] The Court

[34] R. 230.(1) A party may by notice in writing call on any other party to admit, for the purposes of the cause, matter or issue only, any fact mentioned in the notice, including any fact in respect of a document.
[35] *Andriuk v. Merrill Lynch Canada Inc.*, 2011 ABQB 59.
[36] *Ibid* at para 25.
[37] *Primrose Drilling Canada Ltd. v. Yangarra Resources Ltd.*, 2013 ABQB 492

overturned the prior decision of a Master and held that in responding to an application brought by Primrose for summary judgment, Yangarra was entitled to conduct its questioning of its own witnesses (subpoenaed pursuant to rule 6.20), who were employees of the Primrose, as cross examinations, as the witnesses status as employees of the opposing party made them sufficiently adverse in interest.

Justice Tilleman noted:

> Giving a broad interpretation to Rule 6.8 and allowing cross-examination of presumably unfriendly witnesses with sufficient commonality with the adverse party, in my view, enhance the information-gathering function of that Rule.[38]

This interpretation of rule 6.8 could cause it to become a more useful tool for counsel when considering if summary judgment or summary trial applications are appropriate for their matters in light of *Hryniak*.

Conclusion

Justice D.M. Brown, an Ontario Superior Court Judge, recently commented in an Ontario Bar Association session on *Why the Civil Trial is Worth Saving*, that as counsel reflect on the impact *Hryniak* might have on managing their litigation files, they should carefully consider paragraph 73 of the Supreme Court's decision:

> A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. **Counsel should always be mindful of the most proportionate procedure for their client and the case**.[39] [emphasis added]

Justice Brown then provided his view on what he considers the "bottom line" or key question for litigation management:

> **Let's remain focused on the key question in any civil case: what means will best ensure that the merits of this particular case, with its particular facts, and its particular simplicity or complexity, will be determined fairly, quickly and cost-effectively?** In some cases it will be a summary judgment motion; in other cases some variant of a trial, whether hybrid or some be-spoke creation. Bench and Bar

[38] *Ibid* at para 57.
[39] *Supra* note 4 at para 73.

must continue to focus their case management conversations on this key question.[40] [emphasis added]

[40] *Utrum Regulae Sint Impedimenta Vel Non ? Part II: The Hryniak Addendum*, Mr. Justice David M. Brown, SC.J. (Ontario Bar Association Institute 2014: *Why the Civil Trial is Worth Saving*, February 6, 2014.

Part of Appendix A

Moncrieff v. Hayne 2013 ABQB 253

Step 1:

An application in Form 36 is filed, returnable in regular chambers. The application should be supported by an affidavit and other evidence to be relied on by the applicant *(rule 7.5(2)(d)).* A summary trial is a trial so the following points should be remembered:

- Evidence should conform to the law of evidence.
- Each witness should provide one fresh affidavit.[FN1]

Step 2

If the respondent consents, or does not object to the summary trial process the parties may submit the application by way of a desk application or speak to the matter in chambers. The chambers judge will review the application and may order the application to summary trial and direct the clerk to set the matter for summary trial hearing.

Step 3

If the respondent objects to the application (*rule 7.8)* the respondent may provide an affidavit limited to evidence required to determine the objection.

Step 4

The chambers judge will hear the application and if the objection is dismissed (*rule 7.8(3))* may order the application to summary trial and direct the clerk to set the matter for a summary trial hearing.

Step 5

The clerk fixes a date for hearing.

Step 6

The respondent files its affidavit and other evidence *(rule 7.6)*.

Step 7

If necessary, a conference is held with the assigned judge to resolve evidentiary issues (*rule 7.5(3)*) or applications to adduce viva voce evidence.

Step 8

Summary trial proceeds on the hearing date. The Judge makes a decision after summary trial and grants judgment unless rule 7.9(2) applies.