

## CASE MANAGEMENT – OTHER CONSIDERATIONS

### The Rule 77 Grab Bag

When one considers Rule 77 and the effect that case management has had on the practice of law, matters such as case conferences, timetables and mandatory mediations come to mind. Those procedures, for the most part, apply to every case managed action and most lawyers are familiar with these terms. However, occasionally matters will arise under case management that one does not have to deal with on any regular basis. This paper will attempt to identify some of those issues, so that informed counsel can avoid coming into conflict with the Rule 77 and other case management practices.

#### THE SCOPE OF RULE 77

Currently, with a few exceptions, Rule 77 applies to all proceedings commenced in Ottawa, and approximately 25% of all proceedings commenced in Toronto. As of July 3, 2001, Rule 77 will apply to **all** actions and applications commenced in Toronto and Ottawa, with a few exceptions. These exceptions are set out in Rule 77.01(2).

Rule 77 does not apply to proceedings to which the Toronto Family Case Management Rules apply, proceedings placed on the Commercial List, or proceedings under Rules 74 and 75, Rule 64, the *Construction Lien Act*, the *Bankruptcy and Insolvency Act* and the *Class Proceedings Act, 1992*. These categories have now been expanded by an amendment to Rule 77.01(2), to include:

- i.) applications for the removal or replacement of personal representatives under the *Trustee Act*;

- ii.) applications under Part V of the *Succession Law Reform Act*;
- iii.) applications for guardianship of property or persons under the *Substitute Decisions Act, 1992*;
- iv.) applications for equalization under the *Family Law Act*;
- v.) applications for guardianship under the *Children's Law Reform Act*.

One should note that actions governed by the Simplified Procedure (Rule 76) will proceed on the case management fast track (see Rule 77.06(8), Rule 77.13(7), Rule 77.14(9) and Rule 77.15(4)).

#### THE OTTAWA RULES:

(with thanks to Case Management Master Robert Beaudoin)

Subject to the specific exceptions noted above, Rule 77 has applied to all actions and applications commenced in the Regional Municipality of Ottawa-Carleton (now the City of Ottawa) since January 2, 1997. While the Rule itself does not generally change from jurisdiction to jurisdiction, Toronto counsel venturing to Ottawa should be aware of some differences in the **practice** of case management.

#### The Case Conference Form

Although Rule 77.13 governs all case conferences, the Rule itself does not mandate the use of any particular form. In Ottawa, the Case Conference Form was created to initiate a case conference and to record the disposition of the case management judge or master. The Case Conference Form (a copy of which is appended to this paper) should be filed when requesting a case conference (there is no fee), and is typically used to create or amend a timetable, or to adjourn a settlement conference date. The Case Conference Form is not used in Toronto.

### Early Timetabling

The amended Rule 77.10 compels the plaintiff to file a timetable or request a case conference within 180 days after the commencement of a proceeding. While this new Rule applies to all proceedings commenced in Toronto after July 3, 2001, it does **not** apply to proceedings commenced in Ottawa.

### Motions

Master Beaudoin only hears oral motions on Tuesday and Thursday mornings. In addition, he will also hear motions by teleconference, usually at 8:30 a.m. or after 5:00 p.m. The motion must be confirmed by filing a motion confirmation form two days before the hearing. Master Beaudoin does **not** require a factum or book of authorities, but he does appreciate receiving an outline or a summary of the argument.

The case management office in Ottawa does not fax copies of the disposition of motions brought in writing. A computer is available in the civil filing office to review the result of any motion, or a copy of the disposition can be obtained from the court file.

### Settlement Conference Briefs

According to Rule 77.14, settlement conference briefs are to be delivered by the plaintiff 10 days before the conference and by any other parties five days before the conference.

There is no specific sanction in Rule 77.14 for failing to abide by these timelines.

However, effective April 1, 2000 in Ottawa, **failure by the plaintiff to comply with this timeline will result in the action being dismissed without further notice and failure by the defendant to comply will result in the defence being struck and the case being listed for assessment without further notice.**

### The Important Numbers

Susan Treganowan, Secretary (to arrange motions by teleconference)	613-239-1066
Kathy Estabrooks, Case Management Coordinator	613-239-1047
Fax Number	613-239-1310
Conference Call Number	613-239-1567

### MOTIONS

Rule 77 has to some degree changed motions practice in Toronto actions. While another speaker will discuss motions generally under case management, a few points are worth noting in this “grab bag” paper.

### Venue

According to Rule 77.01(5), all motions in a case managed proceeding must be heard in the county where the proceeding was commenced, unless the court orders otherwise.

This is a substantial change from Rule 37.03(2), under which all motions are brought in the county where the responding solicitor or self-represented litigant is located. Under what circumstances can a court outside of Toronto take jurisdiction over a motion in a Toronto case managed action? Apparently, never.

In the case of *Gluchowski v. Eisenberg*, [1999] O.J. No. 440 (Case Management Master Haberman), the Master had made an Order regarding dates for continued examinations for discovery. A few days before the scheduled discovery, the plaintiff informed Master Haberman that his solicitors had obtained an Order removing them as solicitors of record, and he therefore requested an adjournment of the discovery dates. Since a case management master in Toronto becomes seized of an action once they make **any** order,

the Master made inquiries to determine how the Order had been obtained without her knowledge. It turned out that the solicitors for the plaintiff had brought the motion in Hamilton, where the plaintiff resided. The Judge who granted the Order apparently was unaware that the action was case managed, since the “CM” suffix had been left off the court file number and the affidavit material did not refer to the fact that the action was case managed nor that the discovery dates had been set by court order. The Master therefore informed the parties that the Order removing the plaintiff’s solicitors from the record had no force or effect.

In a subsequent motion, counsel for the plaintiff argued that, even though all motions are to be brought in Toronto pursuant to Rule 77.01(5), the judge in Hamilton had implicitly “ordered otherwise” in making the Order removing the solicitors from the record, and that the Order was therefore binding. The Master did not accept this argument.

According to Rule 77.12(1), a motion in a case managed proceeding can **only** be heard by a case management judge or master. Therefore, it is only a case management judge or master that can “order otherwise” pursuant to Rule 77.01(5). Master Haberman held that the judge in Hamilton lacked jurisdiction to make the order removing the law firm as solicitors of record, and they were forced to attend examinations for discovery with the plaintiff.

#### Out of Town Counsel

While Toronto counsel are generally pleased to be able to bring all motions in Toronto, responding parties outside of Toronto are not. The cost of attending in Toronto for all motions in a proceeding can be prohibitive for some litigants who retain counsel outside of Toronto. The solution is found in the amended Rule 77.12(2.1)(b). In addition to

personal attendance, motions can now be made in writing, by fax **or under Rule 1.08 (telephone and video conferences)**. Use of videoconferencing has been explicitly approved by the court in a case management trial setting (*Wright v. Wasilewski* (2001), 52 O.R. (3d) 410), and the use of this technology is entirely consistent with the purpose of case management as expressed in Rule 77.02.

### RELATED ACTIONS

It is not unusual to come across multiple related proceedings where one of the actions is case managed and others are not. Most of the time, these actions are ordered to be tried together, on consent. The practice has been to move the non-case managed actions into case management, to be governed by a common timetable. Rule 77 was amended as of January of 1999 to reflect this practice (see Rule 77.11(1.1) and (1.2)). As of July 3, 2001, every Toronto action will be case managed. What about related actions outside of Toronto?

Until the amendment to Rule 77 in 1999, arguably only actions in Ottawa and those randomly selected by the registrar in Toronto were eligible for case management.

However, Rule 77.01(1.1) allows case management to be applied to actions commenced anywhere in Ontario, as long as they are brought into case management pursuant to Rule 77.11(1.1), on notice to all affected parties. In most cases, when a case management master becomes aware that there are related actions not then subject to Rule 77, an order will be made that all parties in the related actions participate in a case conference to deal with the issue of trial together. It is important to note that the case management judge or master can bring the related actions into case management on his or her own initiative, as

long as the order is made on notice to all parties. For example, in *Talon Consulting Inc. v. Fenton*, [1999] O.J. No. 194 (Case Management Master Polika), the plaintiff brought a motion to sever or stay the counterclaim from the main action. There were three other related actions, two of which were on the Commercial List and the third was a non-case managed proceeding. Master Polika held that the plaintiff's request to stay or sever the counterclaim was not only contrary to the fundamental governing rule prohibiting a multiplicity of proceedings, but was also contrary to the purpose and objects of Rule 77. Master Polika therefore dismissed the plaintiff's motion. Without any such request from either of the parties, Master Polika suggested that the non-case managed action should be moved into case management, and he ordered counsel in both actions to participate in a case conference so that an order for trial together could be made.

#### INDIVIDUAL MANAGEMENT – RULE 77.09.1

Since Rule 77 was implemented, a team approach to case management has been utilized. In practice, a case management master becomes seized of a matter once they make any order, and thereafter all motions and conferences within a master's jurisdiction will be handled by that same master. There is no similar practice with respect to judges, and cases are still handled by judges using a team approach. Notwithstanding this usual practice, it has always been possible to have a single judge appointed to manage a case, pursuant to Rule 37.15 and in keeping with the purpose of case management set out in Rule 77.02.

In order to codify the current practice, Rule 77 has been amended to add Rule 77.09.1 – “ASSIGNMENT OF A PARTICULAR JUDGE”. On the consent of the parties, or on a

party's motion, a judge (or in exceptional circumstances, two or more judges) may be assigned to manage a proceeding. The assigned judge, or group of judges, may then assign a case management master to assist in managing the proceeding. Rule 77.09.1(5) sets out the criteria to be used in determining whether to assign a proceeding to a particular judge or group of judges.

#### A FINAL NOTE

100 % case management will arrive on July 3, 2001. Litigation counsel in Toronto who have been able to substantially avoid the operation of Rule 77 in the past will no longer be able to do so. Operating efficiently under case management requires a different mind set than most litigators have employed in the past. Lawyers no longer exclusively control the flow of the case through the legal system. Judges and masters can, and often do, make procedural orders on their own initiative. Timetables are expected to be followed. Lawyers who choose to learn about case management and how Rule 77 works in practice will be providing a better service for their clients. Used properly, case management will reduce unnecessary cost and delay for your clients, and will promote more effective litigation.

ADAM K. WAGMAN



Howie, Sacks & Henry LLP  
Personal Injury Law

Civil Litigation 100% Case Management Alert  
May 31, 2001

**SHORT TITLE OF PROCEEDING**

**CASE CONFERENCE FORM**

**REQUESTED BY:**

**DATE SCHEDULED:**

1. **Brief Statement of facts and law:**
  
2. **Purpose of the Case Conference:**
  - a) Identification of Issues
  - b) Explore methods to resolve contested issues
  - c) Secure parties' agreement on a specific schedule
  - d) Review and amend the timetable for the proceeding
  - e) Other procedural matter (specify)

3. Disposition of the Case Management Judge/Master:

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Date

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Judge/Master

Prepared by: ( Law Firm )