The Supreme Court of the Northwest Territories

NOTICE TO THE PROFESSION

CASE MANAGEMENT PROCEDURES

GENERAL GUIDELINES

With the advent of the revised Rules of Court, it was thought appropriate to issue some general guidelines respecting "case management". Part 19 of the Rules sets out a comprehensive scheme for pre-trial case management. There may, however, be confusion over the practical implications of these provisions.

The purpose of Part 19 is to provide flexibility in procedures so as to facilitate matters for trial or to effect a pre-trial settlement. It is premised on the "multi-door courthouse" approach: one way to get into system (by starting an action) but, once in the system, many options (beside a trial) to choose from. The rules can accommodate a wide variety of steps from the traditional pre-trial conference to a highly involved settlement-oriented colloquy. The objectives are nevertheless the same: the resolution of disputes without trial if possible and, if a trial is required, the simplification of issues so as to make the entire process more efficient in both time and money for the litigants.

It cannot be over-emphasized that there is no set procedure to be adopted. It is left to the parties and/or the case management judge to adopt those procedures most appropriate to the case. And just as the procedures may differ from case to case, they may also differ from time to time in any one particular case. There is a wide discretion to do that which will be effective.

Appointment of Conference Judge:

Part 19 envisages the appointment of a "conference judge" for case management of a particular case. The parties may apply to have a conference judge appointed or the court could do so on its own motion. The expectation is that in the normal course the appointment would be made at the request of the parties since they are the ones most familiar with the

requirements of the case. The request may be made by formal motion or by a joint request directed to the Senior Judge of the court. The appointment of a specific judge, however, is by the court and not by the parties. The court may seek the advice of counsel in this regard but is not bound by such advice.

As an operative principle, the conference judge will be one of the resident judges of the court. It is impractical to expect a deputy judge to be familiar enough with the procedures and schedules in this jurisdiction, or to have the necessary time available, so as to be effective in a case management role. This does not, of course, preclude a deputy judge, if sitting as a trial judge in a specific case, from holding such conferences as may be necessary before and during the trial. It also does not preclude the appointment of a deputy judge to act in a specific capacity, such as presiding over a mini-trial or a settlement conference (as discussed below).

There may be any number of reasons why a particular case would be made subject to case management: complexity of issues, multiplicity of parties, anticipated length of trial, encouraging prospect of settlement. Case management may also be viewed by the court as a necessary step to define issues, procedures, and schedules, so that a case may be brought to trial expeditiously. As a general guide, in any case where management may be helpful, a conference judge will be appointed.

Varieties of Case Management Procedures:

Once a conference judge is appointed, the variety of procedures available include:

(a) pre-trial conference;

(b) case management;

(c) settlement conference;

(d) mini-trial;

or any combination of these. The varieties of procedure are mirrored by the varieties of function undertaken by a conference judge. The function in any particular case and at any particular time may be located at some point on a continuum from a relatively passive role to an active interventionist role.

Pre-Trial Conference:

A pre-trial conference, in the context of case management, does not differ from the traditional form of pre-trial conference. As set out in Rule 231 of the 1979 Rules of Court, the primary objectives of such a conference were the simplification of issues and exploration of the possibility of admissions. If such a conference helps in any way to facilitate a settlement then all the better. Such a conference would ordinarily be expected to be held at least once prior to every trial.

Case Management:

In larger, longer, and more complex cases, a case management programme may be appropriate. In such cases the objectives are to facilitate the resolution of pre-trial steps, to reduce trial delay and adjournments, and to reduce the duration of those trials which do proceed. The primary purpose of case management is not to settle the case but to prepare the case for trial in the most efficient and cost-effective way. Having said that, one must always keep in mind that a judge has a constant obligation, in the interest of the public, to encourage settlement.

Case management contemplates that the conference judge will hear all interlocutory motions. That way the judge will develop a familiarity with the case. The conference judge will issue all necessary pre-trial directions and may issue formal orders directing the parties to take certain steps. One of the innovations in Part 19 is the power of the conference judge to issue orders and to impose sanctions.

The rules do not impose a prohibition on the conference judge being the trial judge. This was a deliberate decision. In a jurisdiction with a small bench it may be overly problematic to impose such a restriction in all cases. The question of whether the conference judge should not sit as the trial judge will have to be addressed on a case-by-case basis. Some of the factors that will be relevant to the question will be the extent of the conference judge's participation in settlement discussions and the nature of interlocutory proceedings presided over by the conference judge. Certain types of interlocutory decisions may cause the conference judge to form conclusions about issues that will be material at the trial (or at least leave a perception of same).

A standard step in case management is the establishment of a case management programme. The purpose of the programme is to set out a time schedule within which the pertinent pre-trial interlocutory steps will be completed. It is recognized of course that each case will have its unique aspects. Steps that are necessary in one case may be inappropriate and unnecessary in another. Counsel would ordinarily be asked to draft a proposed programme for approval by the conference judge.

The following is a list of possible steps to be considered in the preparation of a case management programme:

(a) What, if any, amendments to the pleadings or demand for particulars are contemplated; what other parties, if any, may be joined; what motions are anticipated; and the date by which pleadings will be closed;

(b) Discovery and production of documents by the parties and preparation of an agreement as to the admissibility of documents;

(c) Examinations for Discovery (or interrogatories) of the parties;

(d) Notice to Admit Facts and delivery of responses; and filing by plaintiff's counsel of a Statement of Admitted Facts;

(e) Exchange of expert reports, if any; consideration of the use of a neutral expert; and convening a conference of all experts of all parties;

(f) Trial of separate issues before or after the main trial including a possible reference of issues to a Special Referee (as per Rule 432);

(g) Contemplated pre-trial applications, if any, including the possibility of holding a mini-trial;

(h) Review of estimated length of trial, considering witnesses to be called by each party;

(i) Necessity of one or more pre-trial case management conferences;

(j) Format to explore early settlement possibilities, including potential for a settlement conference or other alternative dispute resolution techniques;

(k) Filing a Statement of Agreed Facts and Issues;

(l) Preparation and filing of Trial Briefs;

(m) Consideration of whether case management judge can preside as trial judge; and

(n) Other matters.

After the programme is set, or even if a formal programme is not set at first, one or more case management conferences may be held. If a programme is set then counsel would be expected to implement it without the intervention of the conference judge. If problems arise then they could be addressed in a case management conference or by a formal motion.

As a general practice, the conference judge will hear motions in public chambers (on the record) but will preside at case management conferences in private chambers (without a court reporter).

After each case management conference, the conference judge would prepare a memorandum outlining in general the subject-matter of the conference and any directions made at the conference. Ordinarily counsel would be advised if any of the directions made should be converted into a formal order. The preparation of a memorandum will provide at least an informal and basic record of steps taken at the conferences.

It is conceivable that a party may wish to appeal a direction given at a case management conference. In such a case, if the aggrieved party concludes that the judge's memorandum, or any formal order arising therefrom, is an insufficient record for purposes of an appeal, that party could apply to the conference judge by formal motion for a

reconsideration on the record and then, if still dissatisfied, appeal on the basis of that record.

Case management conferences may be held at any time upon the request of counsel. In addition, the parties may request that, as part of the case management process, the case be referred to a settlement conference or a mini-trial.

Settlement Conference:

Pre-trial conferences and case management are essentially facets, albeit expanded ones, of the traditional trial process. Settlement conferences and mini-trials, on the other hand, are essentially alternative dispute resolution procedures designed to avoid trials. And, as with practically all types of alternative dispute resolution procedures, a necessary prerequisite to success is that the litigants are acting in good faith to try to resolve an honest dispute.

A cogent description of the settlement conference procedure was given by Justice W.J. Wallace of the British Columbia Court of Appeal in a 1992 paper prepared for the National Judicial Institute:

> Perhaps it is easier to define a settlement conference by saying what it is not — it is not a hearing to define the issues; nor to ensure appropriate preparation for trial; nor to expedite the trial process; nor to state an opinion of the probable result of the litigation as a settlement mechanism. Its sole purpose is to effect a settlement. Counsel and their clients come to the hearing with that sole objective. Since they are aware when they request the conference of the wide area in which the settlement discussions may range, they cannot complain of being "dragooned...into arrangements of which they do not approve". The role of the settlement conference judge has been described by our Chief Justice as one designed to assist the parties towards settlement without "twisting wrists".
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> The format and procedure is that which will most effectively achieve the desired objective. The one essential condition of a successful settlement conference is that the parties or representatives with full authority to settle the case are present or readily available. Other than that the nature and variety of devices used to resolve the litigation are limited only by the ingenuity of the judge and counsel.

The role of the judge is primarily that of an objective mediator who keeps the discussion on track in an atmosphere of reason and good-will. The judge may, but is not necessarily expected to, express an opinion of the likely outcome of the case.

The following are some of the areas that may be canvassed at a settlement conference:

- the possibility of success on the various issues and the exposure of the defendants to the

damages claimed;

- the financial resources available to the parties to meet a possible judgment;
- their insurance coverage;
- the benefits of the certainty of an immediate settlement as contrasted with the prospect of an uncertain result in the future;
- the legal costs of the litigation to date, and to trial, and to possible appeal;
- the offers and counter-offers made;
- the cost in time, money and inconvenience which the parties, their employees, witnesses, and experts will incur during the course of the litigation; and
- the worry and concern of the litigants during the litigation period.

The conference itself may be relatively informal with the judge and all participants sitting around a conference table. Counsel may be accompanied by their clients. At a minimum, the participants should be able to make binding settlements or be in a position to receive instructions quickly. Counsel may, in most cases, prepare a written brief containing a succinct outline of the relevant facts and issues and the respective positions of the parties.

As a general rule, the settlement conference judge will not be the trial judge.

A settlement conference, as well as a mini-trial, may be requested by the agreement of all parties even in a case that has not been subject to case management previously. And, it should be remembered, that all of these procedures can, in appropriate circumstances, be conducted by means of teleconferencing or other technological facilities.

Mini-Trial:

Rule 292 of Part 19 specifically recognizes the concept of a mini-trial. It is an *in camera* hearing whereby the presiding judge gives a non-binding advisory opinion on the probable outcome of the case generally or on any specific issues to be determined at the trial. The mini-trial judge will not be the trial judge. It is a procedure best suited to cases which involve areas of legal dispute where neither credibility nor facts are significantly at issue.

A mini-trial may take place in a court room or a conference room. Preferably the clients, or persons who have authority to settle the case, are present. No court reporter is present. Counsel usually submit an agreed statement of facts and a statement of the issues to be resolved. Counsel may supplement the agreed facts by further evidence including *viva voce* testimony (although the witness would not be sworn). Counsel would also be expected to file a brief containing their client's position on the issues, argument (in a succinct form), and authorities. Counsel would make oral submissions. The presiding judge may also give an

opportunity to each litigant to add to his or her counsel's submissions. The presiding judge would then give oral reasons at the end of the mini-trial or written reasons as soon after as possible. The reasons, even though advisory opinions only, would normally be substantial enough so that they will have a persuasive effect on counsel and the parties to move toward settlement. If the reasons are in written form, they would only be released to the participants of the mini-trial. Any material on the court file related to the mini-trial would be sealed (including the advisory opinions if in written form) so that they are not seen by the trial judge.

The format of the mini-trial is flexible. There is no pre-set procedure. The particular format in any case would ordinarily be discussed by the presiding judge with all counsel prior to the hearing.

The advantages of a mini-trial were summed up by Associate Chief Justice T.H. Miller of the Alberta Court of Queen's Bench in a 1992 paper:

> While I recognize that this process is not suited for every lawsuit, it seems to me and to many of my colleagues, that this is a win/win situation for everyone if it results in a settlement. From the court's point of view it is a much better use of our time to spend a half day on a full mini-trial than to tie up a court for three or four days of evidence. From the client's point of view they get the matter resolved and feel that they have "had their day in court". From the lawyer's point of view they are able to close their file and get on with the next case.

Conclusions:

While Part 19 is new to the Northwest Territories Rules of Court, its provisions, in one form or another, have been used by courts in other jurisdictions, as well as by this court on an ad hoc basis, for several years. The various procedures and the flexibility available to the court and to the litigants should result in more efficient and less costly litigation. These guidelines are meant to simply provide an outline of the procedures contemplated by the new rules and the general approach adopted by this court.

Dated this 4th day of June, 1996, and issued by direction of the judges of the Supreme Court.

J.E. Richard
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