TAB 4

Strategies for Avoiding Delay: Settlement and Trial Management Conferences

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Best Practices For The Conduct Of A Child Protection File - Part II

Strategies to Move your Case Forward to Settlement, ADR or Trial

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Strategies for Avoiding Delay:
Settlement and Trial Management Conferences

Introduction:

Delay has often been identified as one of the greatest sources of injustice within child protection proceedings. From the child's perspective, each month that passes without a resolution of the proceedings marks a lost opportunity to establish or to repair family relationships. From the perspective of the parents, the passage of time erodes the parent-child connection and significantly reduces the likelihood of successful reintegration of the child into the family unit. From either perspective, the damage is often irreparable[1]

In 1999/2000, we saw the introduction of the "new" Family Law Rules as well as various amendments to the *Child and Family Services Act*. Many of these legislative changes were intended to ensure that child protection proceedings were dealt with in an expeditious manner.[2] A system of 'case management' was imposed with the intent to effect "earlier dispute resolution, reduction of legal costs, elimination of delays and backlog, efficient allocation of judicial, quasi-judicial and administrative resources, protection of the parties by ensuring that the individual litigant receives information about the time limits provided in the rules and easier access to the most appropriate method of resolving a particular dispute."[3] In theory, in each proceeding a single judge would be responsible for guiding a case from its inception to the point of trial in the

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[1] *CCAS of Toronto v. M(C)*, 1994 Carswell ON 376 (S.C.C.) at para 44

[2] *CFSA* ss. 70(1)(a) and ss. 70(2.1), Family Law Rules, subrules 3(6)(c) and 33(1)

[3] Appendix I, Ministry of the Attorney General Memornadum, Chapter 5 Management of Cases, p. 1

most efficient manner possible, having regard to the needs and interests of all of the parties, with a clear emphasis being placed upon 'dispute resolution', meaning a non-judicially determined 'consent-based' settlement.

Child protection cases pose an additional burden upon the case management judge because there is an identified obligation to not merely approve agreements reached between the active/adult parties but to be satisfied that the objectives of the operative legislation are being met.[4] The case management judge is not permitted to simply accept agreements between the parties that may result in 'litigation drift', but must pro-actively seek to enforce the time-lines set out in the legislation and rules to ensure that children do not remain in 'limbo'.

Statutory and policy purposes of the conferences:

The "new" Rules provide for three types of conferences: case conferences; settlement conferences; and, trial management conferences. Rule 17 of the Family Law Rules sets out the purpose and parameters of each type of conference. Case conferences are required as a first step in domestic proceedings. They are intended to afford the court and the parties an opportunity to look at the issues, resolve issues where possible and consider referral to A.D.R.. In domestic cases, a case conference must be held prior to any motions being heard absent leave being granted by the court. This requirement does not apply in child protection proceedings, presumably because of the urgent and broader social nature of the concerns being addressed and the need for immediate temporary orders to ensure the protection of children.

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[4] eg. *CFSA* ss. 55 and Family Law Rules subrule 33(1)

The second type of conference is the settlement conference. In a policy paper prepared for the Attorney-General in relation to the introduction of the Rules, this conference was described as "what was formerly called a 'pre-trial conference'" and was intended to be held within three months after the close of pleadings in a protection case.[5] As described in the Rules, the purposes of the settlement conference include: "exploring the chances of settling the case, settling or narrowing the issues in dispute, ensuring disclosure of the relevant evidence, noting admissions that may simplify the case, if possible, obtaining a view of how the court might decide the case, considering any other matter that may help in a quick and just conclusion of the case, if the case is not settled, identifying the witnesses and other evidence to be presented at trial, estimating the time needed for trial and scheduling the case for trial, organizing a trial management or holding one if appropriate".[6]

Finally, we have the trial management conference. The intended purpose of this conference, which may be convened by the case management judge or at a party's request, is to explore the use of trial time by " for example, exploring the most expeditious way to introduce evidence and by defining issues".[7] This conference may be convened by the court or a party. The stated purposes of this conference include, "exploring the chances of settling the case; arranging to receive evidence by a written report, an agreed statement of facts, an affidavit or another method, if appropriate; deciding how the trial will proceed; ensuring that the parties know what

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[5] see Appendix I, pp. 5-6

[6] Family Law Rules, subrules 17(5) and 17(7)

[7] see Appendix I, p. 6

witnesses will testify and what other evidence will be presented at trial; estimating the time needed for trial; and setting the trial date, if this has not already been done".[8]

In practice, of course, neither the bench nor the bar have been particularly vigilant about the distinct purposes to which these conferences have been put to use. Often they are all viewed as a forum for general discussion about the case. Nevertheless, these conferences do offer the opportunity to manage cases more effectively. While the principal responsibility for the management of proceedings resides ultimately with the bench,[9] we as counsel must take responsibility for properly preparing for and participating in each step of a proceeding. We can all do a better job for our clients and for the system as a whole if we make the best of what is offered to us within the available frame-work.

Preparation for and participation in useful settlement conferences:

Prior to the settlement conference, ideally, counsel should have completed disclosure to date, contacted relevant third parties (i.e. treatment providers, schools, therapists) and engaged in meaningful discussions with each other about the merits of their respective cases. Each lawyer should by this point in time have thoroughly assessed the strengths and weaknesses, legal and factual, of his or her client's case as well as the opposing party's. Settlement conference briefs, in whatever form the court prefers should have been exchanged and filed. If counsel have done the necessary groundwork prior to the conference, productive settlement discussions can be held

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[8] Family Law Rules, subrule 17(6)

[9] see Appendix I, p. 2

with the assistance of the presiding judge because all participants will be in a position to identify which, if any, of the issues raised in the pleadings really require, or merit, judicial determination and which can be resolved by agreement among the parties.

Where, for example, the parent has pleaded guilty to assaulting the child, it should be possible to reach an agreement as to finding. If the parent's probation terms preclude the return of the child to parental care for a defined period of time and no other family or community placements have been identified, disposition, too, should be resolved. It may become readily apparent that access is the only live issue and that discussion at the conference should focus on settlement of that issue. The case management judge presiding over the conference will not be hearing the trial, if there is to be one, and the settlement conference briefs, which should contain the parties' offers to settle, will not be seen by the trial judge. Candid discussion should therefore be encouraged.

The presence of the parties, and any other persons whose consent to a proposed plan is required, is necessary if productive settlement discussions are to occur. In the case of Children's Aid Societies, the true instructing client must be present. Too often the worker in attendance is not able to make decisions without consulting with a supervisor. In some cases, the branch manager must be consulted about available resources or funding for proposed services and, so, potential agreements cannot be concluded. Counsel must carefully consider what decisions may have to be made at the conference and determine who is responsible for making such decisions. If that person cannot be physically present at the conference, he or she should be available by telephone so that productive negotiations can occur.

If third party professionals or agencies, such as treatment providers, are to play a role in any party's position on finding or disposition, then their position must be readily ascertainable either through actual participation in the conference or by having written confirmation of that position, and commitment to provide the identified services, available to the court and other parties. General discussions about hypothetical programs or support services should not be occurring at the settlement conference. These discussions, and the investigation of such services, should have taken place well in advance of the conference. The court cannot be expected to offer guidance as to the cost, availability or efficacy of assessment, treatment or support services. It is counsel's responsibility to have investigated the client's plan in advance of the conference so that the court can offer an opinion as to the merits of positions that are grounded in reality.

Decisions as to the need to obtain further information, whether about the etiology of injury or parenting capacity, should be have been taken and addressed, by motion if necessary, before a settlement conference is held. The role of the settlement conference judge is not to advise the parties as to how their cases need to be prepared but to realistically assess and advise them as to the merits of the cases as presented and, having done so, provide suggestions and guidance as to possible resolution of the issues.

That having been said, there will be occasions when the settlement conference judge, having heard from both, or more, sides, will identify an area or areas that in his or her opinion require additional or more definitive information and will, properly, suggest a strategy by which that information can be obtained. The judge may be able to assist the parties in reaching an agreement regarding the identification of, payment for and/or parameters of involvement for, an assessor where the available evidence appears to be insufficient to enable the trial judge to

determine a specific issue. If no agreement can be reached on the substantive issues then, at the very least, a time table for the necessary motions and a further settlement conference or trial management conference should be established.

Where it becomes apparent that there is, and will be, no sustainable evidentiary basis for a position taken by a party, e.g. the criminally convicted parent, who has not appealed, opposing a finding, but no consent can be reached, a motion for summary judgment should be considered. The presiding judge can assist in establishing a time table for the exchange of materials and the questioning of witnesses, if such questioning is to be sought, identifying what materials may be relied upon on the motion and determining whether the motion may be heard by the case management judge or must be traversed to another judge.[10] The court can and should play an essential role in ensuring that the matter proceeds in a timely fashion that is consistent with the principles of natural justice.

Conversely, in a case where there is a clear triable issue (or issues) and no agreement is likely to be reached among the parties, the focus of the discussion at the conference should turn to trial preparation. The settlement conference judge can provide invaluable assistance to the parties by offering preliminary direction as to the identification of witnesses, the need for further disclosure, the need to provide requisite notices and in determining whether any pre-trial motions, e.g. for third party disclosure, will be required. Wherever possible, specific time tables should be established for the completion of the necessary steps and these time tables may be

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[10] Family Law Rules, subrules 17(24) and (25); as a general rule the judge hearing a settlement conference about an issue shall not hear the issue, in a child protection case, if a finding that the child is in need of protection is made without a trial and a trial is needed to determine which order should be made under s. 57, any judge who has not conducted a settlement on that issue may conduct the trial.

monitored by requiring counsel to make progress reports and/or by scheduling a further conference.

No settlement conference should end with a simple 'agreement to disagree' that will need to be resolved at some unspecified point in the future. Every court appearance constitutes an expenditure of time and money and, more importantly, an opportunity to bring the litigation to a conclusion or, at the very least, advance toward a conclusion. In practice, we all know that lawyers (and, with all due respect, judges) organize our lives according to our diaries. Scheduled 'must do' dates impel us to do today what we might otherwise put off until tomorrow. A productive settlement conference will at its best result in the resolution of at least some of the issues in the litigation, at its worst, it should require us to pay attention to moving the matter toward resolution. Where there is no apparent opportunity for a consent resolution and the necessary disclosure and assessments have been completed the proceeding can be adjourned to or converted to a trial management conference.

Preparation for and participation in useful trial management conferences:

The trial management conference, utilized properly, serves a number of purposes, some of which are as follows: a) it offers a further opportunity to explore settlement; b) it enables counsel to identify, and therefore prepare for, potential evidentiary problems in the case; and, c) it provides a chance for the court and the parties to realistically assess the time required for and, therefore, the cost of, the anticipated trial. By the time the trial management conference is held counsel should have clearly identified their witnesses, determined the content of their anticipated evidence, their availability (i.e. vacations, maternity leaves, other court commitments), decided

whether or not their evidence in chief can be introduced by affidavit, received and disclosed any documentary evidence to be relied upon (and served any notices as required under statute), served requests to admit and identified all admissions made to date (e.g. prior statements of agreed facts), conducted any necessary questioning, amended pleadings, if required, and canvassed with opposing counsel whether there will be issues requiring *voir dires* at the outset of or during the trial (e.g. on the admissibility of children's statements, the expertise of a proffered witness). Counsel should also, in advance of the trial management conference, have considered whether costs will be at issue and whether security for costs should be sought.

In recognition of the principle that all conferences under the Rules have as an objective the resolution of the issues, all instructing clients should be present for the trial management conference. If, however, the settlement conference was conducted in an effective manner and counse have been responsible about conferring with one another in relation to subsequent developments, the participation of clients at the trial management conference is going to be of limited utility. The central purpose of the trial management conference is to explore the most expeditious ways to introduce evidence and to define the issues. Clients as lay persons are not well-equipped to aid in these discussions.

Whereas the focus of the settlement conference should be substantive and issue oriented, the primary purpose of the trial management conference, if the settlement conference(s) was efficiently utilized, should be directed toward using future court time in the most efficient manner possible. In jurisdictions where the trial management conference is presided over by the case management judge rather than by the trial judge, certain issues cannot be definitively resolved at the trial management conference. Nevertheless, there are many procedural and

scheduling issues that can be dealt with at the trial management conference even when it is presided over by a judge other than the judge who will be hearing the trial. For instance, while the admissibility of evidence at trial must be determined by the trial judge, pursuant to subrule 23(20.1), the trial management judge's direction that a witness's evidence in chief may be adduced by affidavit will prevail unless otherwise ordered by the trial judge.

The trial management conference judge cannot determine whether or not a particular statement from a child may be admitted through the evidence of a social worker at trial, however, he or she can offer an informed estimate of the likely determination of the issue and, failing agreement, offer a realistic estimate of the time required to determine that issue at trial. Similarily, while the trial management judge, if he or she is not to be the trial judge, cannot determine the admissibility of documentary evidence at trial, he or she should be able to estimate, based upon the representations of counsel at the trial management conference, how much time will be required to address the issues raised. The trial management conference judge can certainly question counsel as to whether and on what basis the authenticity of documents will be contested and, if so, who will need to be called on that issue. The trial management judge should canvas with counsel whether there are any outstanding issues relating to disclosure and, if so, how to address same in as timely a manner as possible. At a bare minimum, every one needs to leave the trial management conference with a realistic assessment of when, and whether, a trial can, or should, be heard and the time required for the trial to be heard.

In the best of all possible worlds, there will always be the opportunity for counsel, collectively, to confer with the trial judge about his or her preferences regarding trial procedures. In some jurisdictions, the trial assignment system prevents that from happening on a routine basis

because the identity of the trial judge may not be known until the eve of trial. As a consequence, counsel are under a greater onus to consult and attempt to reach consensus among themselves as to how to address certain issues at trial. The judiciary needs to encourage and, if necessary , mandate, through scheduled monitoring by appearance or tele-conference, consultation and cooperation between counsel. Efficient pre-trial management should eliminate the need for the first day of trial being spent calling hospital and corrections facilities clerks to identify copies of records. By the time that the trial commences, counsel should have agreed as to authenticity and identified which portions of those records are relevant and admissible. Records about which there are substantive grounds of dispute as to admissibility will necessarily be dealt with at trial by the presiding judge. In order to accurately estimate the length of time needed to hear the trial, the trial management judge needs to know whether *voir dires* will be required and how complex they are likely to be.

Conclusion:

There should be no shame in acknowledging that a judge needs to make the final decision in a particular case. The Rules emphasize the desireability of consensual resolution of litigation where ever possible. Such resolution is not always possible, much as it is to be desired. The parents and the Children's Aid Society may each hold positions which are sustainable on the available evidence but sufficiently at odds with one another that no reasonable possibility of settlement exists. In such a case, counsel and the case management judge need to shift their focus from dispute resolution to ensuring a timely and just adjudication through trial or summary judgment.

It does not serve any one's interests to simply permit an application to drift from appearance to appearance. Counsel should be preparing for a potential trial from the outset of each case, disclosure and identification of evidentiary issues should be ongoing. Every court appearance should be scheduled for an identified purpose or purposes and with a clear understanding of what steps need to be taken by the parties prior to the next appearance. Perhaps most importantly, counsel must communicate with one another and they must regularly, and critically, assess the legal merits of their cases. Settlement conferences and trial management conferences, properly used, can serve as invaluable steps in the effective and expedient disposition of child protection cases.

Appendix I

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Chapter 5 - Management of Cases

5.1 - Case Management Regime and Rules

Introduction

The Civil Justice Review has proposed the implementation of a civil caseflow management system on a province-wide basis. [1]

As noted in Chapter 4, a Case Management Working Group has been established to make recommendations regarding the introduction of such a system. The Working Group is co-chaired by Madam Justice Gladys Pardu and by a member of the Bar, as she then was, Ms. Mary Lou Benotto (now Madam Justice Benotto). [2] The Committee membership includes other representatives from the Bench, Bar, Ministry and the Public, including representatives from each of the case management pilot project sites. The Working Group met over a period of six months, with a view to proposing a case management regime and a set of accompanying rules which would achieve the following objectives:

- earlier dispute resolution;
- reduction of legal costs;
- elimination of delays and backlog;
- efficient allocation of judicial, quasi-judicial and administrative resources;
- protection of the parties by ensuring that the individual litigant receives information about the time limits provided in the rules;
- easier accessto the most appropriate method of resolving a particular dispute.

The Working Group presented its Report to the Task Force in June 1996. We a re indebted to the co-chairs and to its members for their considerable efforts and for the contribution they have made to the ongoing development of caseflow management in this Province. Mr. Justice Jack Ground is deserving of some individual acknowledgement for his contribution in spearheading the drafting of the rules included in the Report.

The Civil Justice Review accepts and adopts the Working Group's Report and the draft civil case management rules put forward for province-wide implementation, in principle. A full text copy of those proposed civil case management rules is found at Appendix 2 to this Supplemental and Final

Report.

There is one minor exception to our adoption of these proposed rules in their entirety. The exception pertains to the mechanism for matching mediation appointments to cases in ADR situations. Our different perspective, and recommendation in this respect, will become apparent in the overview which follows. [3]

Overview

The Civil Justice Review has given careful further consideration to the concept of case management since the publication of our First Report, to the consultation feedback which we have received on the subject, and to the report of the Case Management Working Group. Our Supplemental and Final Report recommendations are based upon these deliberations and upon the proposals put forward by the Working Group. The essential features of the case management regime that we recommend be introduced across Ontario, and of the rules which would give it shape, together with the technology requirements necessary to bolster and facilitate the successful implementation of that regime, are these:

a. Case Management Teams

The principal responsibility for the management of proceedings through the system will reside ultimately with the judiciary rather than with the Bar, as has traditionally been the case. However, in order to allocate functions such as early screening of cases into appropriate streams, case management teams consisting of judges, judicial support officers (now to be called Case Management Masters) and a case management co-ordinator are to be established. This concept is more fully put forward and explained in our First Report. [4]

A successful case management regime depends upon the appointment of an adequate number of Case Management Masters to support the work of the case management teams. It is fundamental to success that an analysis of each contested case be possible so that each matter can be resolved in the most appropriate way. It is expected that the Case Management Master will do this sorting and screening at an early case conference; indeed, one of his or her key functions will be to perform the early evaluation, screening and streaming of cases. Where mandatory ADR is in place, the evaluation, screening and streaming process will generally occur after a defence has been filed and the initial ADR session has been held (and the matter has not been resolved).

In addition, the Case Management Master will:

- preside over case conferences
- hear procedural motions
- preside over or assist with settlement conferences and trial management conferences where appropriate and under the supervision of the Case Management Judge
- manage construction lien matters

It is anticipated that a case management co-ordinator would be appointed in each Court to be responsible for day to day administration of case management, including -- subject to judicial supervision -- scheduling.

b. A Single Set of Rules

There should be one set of case management rules that would apply to all civil (non-family) actions and applications commenced in the Ontario Court of Justice (General Division).

c. Court Monitoring Only After Defence

While every proceeding started should be counted by the Court to ensure its control over inventory, only defended cases should be administered. These goals can be achieved by:

i. monitoring the time by which a settlement conference (formerly called a "pre- trial") must be arranged; and,
ii. providing that cases not advanced or resolved within a fixed period of time be automatically dismissed.

In this fashion, the time, energy, and cost expended by the Court in administering cases should be reduced significantly.

d. "Tracks"

The proposed system calls for only two "tracks" of cases: a "standard" track, and a "fast" track. Some case management systems call for a third, or "complex" track of cases. It is felt, however, that those cases which, for whatever reasons, require more intensive case management attention and a tailor-made timetable can obtain that flexibility through the case management mechanisms of the standard track, however.

e. The Streamlining of Time Guidelines

An important lesson learned from the three caseflow management pilot projects was that the rules providing for detailed time limits were cumbersome, and that they led to too much administration and to too many motions to extend time at the judicial level. Accordingly, the province-wide rules presently being proposed will provide principally for only two mandated time limits. Those time limits relate to the period within which an ADR session is to be held following the filing of a response, and the time within which a case is to be ready for a settlement conference.

The draft case management rules found at Appendix 2 of this Supplemental and Final Report, and proposed by the Case Management Working Group, call for the following time limits:

i. that where ADR is available in the region, the parties must attend for ADR within 60 days from the date the first response is filed, and;
ii. that the case must be ready for a settlement conference 90 days after the filing of a defence for the fast track cases and after 240

days for standard track cases.

These time parameters are slightly more ambitious than the 9 to 12 months from initial filing which we recommended in our First Report. The system as we envision it, however, will be free of backlog, will be properly managed and resourced, and will be supported by the necessary technology infrastructure to permit it to work effectively. Much tighter time guidelines than those which are presently in vogue are readily attainable in such an environment, and we applaud and encourage any reasonable time mandate upon which the Bar and the Bench can agree for the more expeditious handling of the public's cases.

A further characteristic of the case management regime which we propose is that cases will be expected to be at trial within two months of the settlement conference being held. This means that standard track cases should be at trial within approximately 10 months of the exchange of claim and defence, and fast track cases within 5 months of that time. Obviously exceptions to these timeframes will occur in more complicated cases, or in other cases which may require longer to "mature", but such extensions will only happen with the concurrence of a Judge or Case Management Master.

In our First Report we established an objective of having cases determined at trial within a framework of 1 to 2 years from start to finish. The efforts of the broadly representative Case Management Working Group, our further consultations, and additional support from other sources such as the recent report of the Canadian Bar Association Systems of Justice Task Force[5] have shown us that there is a will among the participants in the system to work towards even more ambitious objectives. We believe that the streamlined time guidelines proposed here, together with adherence to other time parameters relating to the processing of cases, will make those objectives achievable.

f. Integration of ADR and Mandatory Referral

It is fundamental to the civil justice system, and to the newly proposed case management system, that the public be given the opportunity to explore the most appropriate method of dispute resolution for their particular dispute. In the ensuing Chapter of this Supplemental and Final Report, the Review recommends the implementation of mandatory mediation for all non-family law cases, after the filing of the first statement of defence.[6]

For this recommendation to be effective, of course, it is essential that there be available an adequate supply of qualified and approved ADR providers, and that ADR services be available within the timeframes set out in the proposed rules (60 days after the first defence or responding document). This latter point is important, in order that ADR not become another vehicle for delay in the system.

Case management can operate independently of mandatory ADR, however, although it is clearly preferable that ADR be integrated into the case management system as it expands across the province, where possible. In some regions of the Province it may be necessary that case management operate independently, at least in the short term, while an adequate body of

qualified and approved ADR providers is built up in that region. The case management rules proposed here have been drafted to provide that mandatory ADR can be easily integrated into the existing rules as the ADR "roll out" occurs throughout the province. In the meantime, case management can, and must, proceed.

The Working Group's draft Rule 10 is the rule which anticipates the integration of ADR into the case management scheme and the mandatory referral to mediation. The Group was very concerned that referral to ADR not become an excuse for further delay on the basis that the parties were not able to find a mediator who could complete the mediation within the required 60 days. Its proposed solution to this potential problem is to provide in draft Rule 10 for the Registrar to issue a notice of appointment for mediation upon the filing of the first statement of defence and to provide for dismissal by the Registrar in the event of failure to attend or pay a cancellation fee.

The Review agrees that mandatory referral to ADR must not become a catalyst for further delay. We have concluded, however, that the logistical difficulties and the added administrative burden and attendant costs of such a mechanism, together with the draconian nature of dismissal, outweigh its advantages in blunting potential delay. It would require the computerized scheduling of the timetables of mediators on the roster of mediators and, at the same time, would require the flexibility to account for the myriad of cancellations and re-schedulings which will inevitably occur. In addition, choice of mediator is an important aspect of the acceptability of ADR among users, and the Macfarlane Evaluation [7] identified the lack of choice of mediator and the pre-arranged appointment as two of the features that lawyers disliked most about the court-connected ADR Pilot Project. [8]

Consequently, while we share the Working Group's concern about potential delay, we do not agree with, nor recommend, the automatic issuance of an appointment for mediation upon the filing of a first defence. Instead, we propose in the next Chapter that mandatory referral operate through a roster of qualified and accredited private sector mediators and that the parties be entitled to choose their mediator only from that roster in the absence of leave of the court. It will be incumbent on the parties to ensure that delays are avoided and upon the Judiciary or Case Management Masters to impose cost consequences when such delays unnecessarily occur.

g. Three Types of Conferences

The proposed case management system calls for the following three types of conferences.

i. *Case Conferences*

A Case Conference may be convened at any time by a Case Management Judge or Case Management Master on their own initiative or at a party's request, for the purpose of, for example, resolving issues, creating or amending case timetables, and considering referral to ADR.

ii. *Settlement Conferences*

A Settlement Conference (formerly called a "pre-trial") must be held for the purpose of settling the case or issues in the case according to the following prescribed timelines: 3 months after the close of pleadings for fast track cases; and 8 months for standard track cases.

iii. *Trial Management Conferences*

A Trial Management Conference may be convened by a Case Management Judge or Case Management Master on their own initiative or at a party's request, for the purpose of streamlining the use of trial time by, for example, exploring the most expeditious way to introduce evidence and by defining issues.

h. Timeline Sanctions

Sanctions are included for failure to comply with case management timelines, either established by the rules or by court order. They include:

- dismissal of the action
- a costs award
- striking out of any document
- a case conference being convened
- the creation or amendment of a case timetable

i. Dismissal of Proceeding

If no defence is filed, or motion brought by a party adverse in interest, and the initiating party does not move for judgment within 6 months after the proceeding has been commenced, the case will be automatically dismissed.

j. Simplified Rules Procedure

Those cases falling within the newly enacted Simplified Rules Procedure are deemed to be fast track cases. The proposed case management rules adopt rule 76.05 of the existing Rules of Civil Procedure (no discovery) for those cases.

k. Technology

Civil case management cannot work without a properly functioning technology base. An automated case management system has many hardware and software requirements, but there are many products commercially available on the market today which are capable of managing these requirements.

It is not for the Civil Justice Review to propose hardware and software solutions for meeting these requirements. That is a process which requires technical and other expertise which we do not possess. It is also a process which the Government has begun to address through its common purpose procurement process and the establishment of various technology initiatives within the justice sector. The Technology Advisory Committee -- referred to in Chapter 4 of this Supplemental and Final Report and established to assist in technology implementation for the civil justice system -- is playing a role in this regard.

It is important, however, that the needs for running an automated civil case management system in each of Ontario's civil courts be understood, before solutions are sought. In that respect there are some things which can be said by the Review.

i. *Hardware*

The system should allow for electronic linkages between all necessary participants within a civil court office -- those in the registrar's office, the office of the case management co-ordinator or the trial co-ordinator, and the judiciary -- and, indeed, between court offices themselves.

The hardware should allow an outside source (e.g. a lawyer) to connect to the court's information system electronically. The court should have computers designated solely for such external electronic access. In addition, the hardware should allow access by someone attending the court office in person, with a number of computers in the public area being designated solely for this purpose.

The hardware must be powerful enough to handle with ease an intensive case management software, a high volume of cases and a high user-volume. It must be capable of sending information to and receiving information from counsel and other individuals by facsimile transmission, by E-mail and by other electronic media. It must have capacity for the electronic storage and scanning of documentation.

The hardware must be powerful enough to permit the internal movement, handling and management of electronic data for purposes of providing necessary management information services.

ii. *Software*

Software chosen for purposes of the automated civil case management system should have the ability to carry out the following functions, or be able to connect easily with other software applications that have the ability to carry out the functions. The ensuing list is not in any order of priority. Nor is it exhaustive.

Case Tracking	The ability to monitor the status of a case from commencement to disposition
Multi-case "type" tracking ability	The ability and flexibility to track criminal and other types of cases, as well as civil cases, to allow for otential expansion later in those directions in a co-ordinated and integrated fashion
Event Scheduling and Tracking	The ability to maintain upcoming/previous court appearances and to update the results of court appearances
Document Tracking	The ability to maintain a record of documentation filed with the court office
Cross Referencing	The capacity to link one or more cases together in order that they appear together on lists, and can be scheduled ogether
Multi-faceted Search and	The facility to search by file number, party, event date,

Locate Facility	pending/disposed status, etc.
Resource Scheduling	The ability to track the availability, or unavailability of judges, reporters, registrars, equipment, etc.
Calendaring	The process of being able to see at a glance, a calendar of scheduled activities in relation to a particular esource or group of resources
Automatic Notices, Docketing and List Production	The capacity to generate all requisite notices and court lists automatically, in a number of different formats
Tracking of Rules and Notification for Non-Adherence	The system should have the capacity to permit programming of the rules structure and of a set of consequences if rules are not adhered to
Electronic Filing	The system must be capable of receiving and sending information electronically
Image Storage and Retrieval	The capacity for electronic entry and storage of documents, and the facility to allow a user to view and, in proper cases, to print a document
Internet	The system must have the capacity to provide Internet access when developed to that point
Restricted Access	The ability to restrict access and to differentiate between access rights for different types of users e.g. court staff, lawyers, general public
Client Server/Multi-User Access	The capacity to allow many people access to the system at any one time
Remote Access	Dial-in from modem
Audit Trail	The ability to determine who has accessed the system, when, and for what purpose
Electronic Signature	The system must contain all of the security elements for electronic storage of signatures
Financial	The ability to track, collect and analyze daily financial information and ledgers, and to produce invoices automatically
User Friendly	The system should be easy to use and Windows based. It should feature simple report and retrieval functions and a variety of formats. It should also support a private and public notes facility which would allow a judge, for example, to enter their own private notes about a case or to share information with others using the public notes

Conclusion

Civil case management is a centrepiece of the recommendations earlier put forward by the Civil Justice Review and re-enforced in this Supplemental and Final Report. Its implementation is essential to the successful fulfilment of our "vision" for a modern civil justice system that is speedier, less costly and more effective, as well as "just".

RECOMMENDATION

We therefore recommend that a province-wide system of case management for civil cases, as described in this Chapter, be adopted and implemented in Ontario, and that the draft set of case management rules contained in Appendix 2 to this Supplemental and Final Report, be enacted (with the modifications noted) to effect that result; the proposed system of case management and rules to encompass at least the essential elements as described herein, namely:

- Case Management Teams, consisting of Judges, Case Management Masters and Case Management Co-ordinators;
- a single set of Case Management Rules for all civil (non-family) actions and applications commenced in the Ontario Court of Justice (General Division);
- court monitoring only after defence;
- two "tracks" of cases, namely a "fast" track and a "standard" track, with flexibility for dealing with cases requiring more intensive case management built into the system through the case conference mechanism;
- the streamlining of time guidelines through the provision of only two mandated time limits, namely,
    - an ADR Session within 2 months of the filing of a first response; and,
    - a Settlement Conference within 3 months of the close of pleadings for fast track cases and within 8 months for standard track cases;
- sanctions for failure to comply with case management timelines, including the imposition of costs, the dismissal of actions and the striking out of pleadings and affidavits;
- the integration of ADR and mandatory referral of all civil (non-family) cases to mediation after the close of pleadings;
- three types of conferences, namely a case conference, a settlement conference, and a trial management conference;
- automatic dismissal of proceedings for cases where no defence is filed or steps taken by the initiating party to obtain judgment within 6 months of initiation of the proceedings;
- fast track treatment for Simplified Rules Cases; and,
- a properly functioning technology infrastructure with the minimum hardware and software features described herein.

a. Transitional Provisions

There will be numerous issues of a transitional nature to contend with. In this regard we make the following recommendations:

RECOMMENDATION

We recommend that the proposed civil case management rules apply to all actions and applications commenced after the "implementation date" of case management in accordance with the direction of the Chief Justice.

We further recommend that, in order to avoid an ongoing backlog of existing

cases, the following transitional provisions should apply to proceedings commenced before the implementation date, namely that:

i. if the proceeding is undefended the initiating party should have 6 months from the implementation date to move for judgment or the case will be automatically dismissed by the Registrar; and,
ii. if the proceeding is defended, a Settlement Conference should be arranged within 12 months from the implementation date or the case will be automatically dismissed by the Registrar; and that,
iii. if other transitional issues arise in the case, they be dealt with by a Judge or Case Management Master in the context of a case conference.

b. Advisory Committee

It is important, in our view, that an Advisory Committee be established to provide advice with respect to the implementation of case management and to monitor how the case management system which is implemented, and the rules relating to it, are working.

RECOMMENDATION

We therefore recommend that a Civil Case Management Advisory Committee be established, composed of representatives of the Bench, Bar, Ministry and Public, to develop plans for the implementation and roll-out of case management across the Province, to monitor the operation of the case management system and the rules, and to recommend to the appropriate authorities, including the Civil Rules Committee, changes in policies and procedure necessary to facilitate case management.

c. Timing of Implementation

It is neither feasible nor sensible that case management be implemented on a province-wide basis immediately and all at once. Plans are already underway, however for the expansion of case management from 10% of civil cases to 25% in Toronto, and the initiation of 100% case management in Ottawa by the beginning of next year, and we believe that a reasonable target for the province-wide roll-out to be completed is by the year 2000.

RECOMMENDATION

We therefore recommend that the proposed case management rules be implemented in Windsor and Sault Ste Marie (two of the pilot project centres), and in Ottawa in early 1997; that Toronto (the third pilot project centre), which is presently operating on a basis of 10% case management, expand to 25% by early 1997 and move towards 100% on a graduated basis. Finally, we recommend that the province-wide roll out of case management be completed by January 1, 2000.

Footnotes:

[1] See First Report of the Civil Justice Review (Toronto: Ontario Civil Justice Review, March 1995), at pp. 183 - 184 [hereinafter "First Report"].

[2] Ms. Benotto was appointed to the Ontario Court of Justice (General Division) in May, 1996.

[3] With the reservations noted, the source of much of what follows is to be found in the Working Group's Report.

[4] First Report, supra, note 1, at pp. 187 - 196.

[5] Systems of Civil Justice Task Force Report (The Canadian Bar Association, August 1996), at p. 39. The recommendation there is that 90% of all general civil cases should be settled, tried or otherwise concluded within 6 months of filing of readiness and within 12 months of the date of the case filing; 98% within 9 months of filing of readiness and within 18 months of such filing ; and the remainder within 12 months of filing of readiness and within 24 months of the case filing; except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.

[6] Mediation, and ADR in general, play an important role in family law disputes too. However, the issue of whether or not mediation in that context should be "mandatory" is a difficult and thorny one. ADR in the family law context is dealt with in Chapter 5.2 dealing with ADR and in Chapter 7 dealing specifically with Family Law.

[7] Dr. Julie Macfarlane, Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre (November 1995). Dr. Macfarlane's evaluation covers cases referred to the Centre from January 1, 1995 to September 30, 1995.

[8] Id., at pp. 31 - 35.

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Appendix II

TRIAL MANAGEMENT CHECK LIST

Identify the issues: Child Protection
Finding
Disposition
Access
Adoptability
Payment orders
Costs

Can any of the issues be resolved by summary judgement or agreement?

Retainer:
Do you have authorization from Legal Aid/O.C.L.?
What is a realistic estimate of the cost of the trial?

Witnesses:
Identity
Substance of evidence: What can they say? Will it be useful?
Affidavits: From whom? When are they due? (Rule 23(20.1)
Availability: Are they going away, getting married or giving birth?
Estimated length: How long will the cross-examination be?
Expertise issues: Will there be a challenge?
Opposing party: Do you want to call? Rule 23(11)

Reports:
Notices: Evidence Act s.52, Rule 23(23)
C.V.: Have they been provided? Do they need to be updated or corrected?
Admissibility: Does it meet requirements under the act and rules?
Request to cross-examine: Who will require?

Records/ Documents:
Obtaining: Do you have what you need? Rule 19
Disclosing: Have you shared?
Notices: Evidence Act s.35
Authenticity: Rule 22(1)
Admissibility: Carefully review what you want to rely on and on what basis will it be adduced?

SAF/Requests to Admit
Previous SAFs: Can you recycle?
Admissions contained in previous materials
Admissions made to parties/others
Previous findings

Trial Record

Amending pleadings: Rule 11 (Have you asked for everything you want?)
Transcripts from questioning : Rule 23(13)-(15)

Preliminary issues for trial judge:

Children's statements: Khan
Admissibility/use of records
Taking evidence before trial/use of answers: Rule 23(17)
Representation by agent: Rule 4
Failure to serve reports/affidavits: Rule 23(24)
Unavailable witnesses: Rule 23(17)

Will these issues have to be dealt with through *voir dires* in the course of the trial?
Can pre-trial motions be scheduled with the trial judge?
Will it be possible to arrange for trial audits?

Miscellaneous Issues:

Security for Costs Rule 24(13)-(17)

Appendix III

FILE NAME: _____ File No. _____

TRIAL MANAGEMENT CONFERENCE AND AUDIT

- ☐ Counsel retained
- ☐ Authorization for trial obtained
- ☐ Disclosure completed
- ☐ Agreed Statement of Facts to be prepared

Issues

1. _____

2. _____

3. _____

Positions and Evidence

A. Name of Party_____Tel.No._____Fax No._____

Counsel: _____Tel.No._____ Fax No._____

Position: _____

_____

Witnesses: (Name + Affidavit /Report/ Viva voce/Cross Examination Only)

1._____

2._____

3._____

4._____

5._____

6._____

Estimate of Trial Time _____

B. Name of Party_____Tel.No._____Fax No._____

Counsel: _____Tel.No._____ Fax No._____

Position: _____

_____

Witnesses: (Name +Affidavit/Report/Viva voce/Cross Examination Only)

1._____

2._____

3._____

4._____

5._____

6._____

Estimate of Trial Time _____

C. Name of Party_____Tel.No._____Fax No._____

Counsel: _____Tel.No._____ Fax No._____

Position: _____

_____

Witnesses: (Name + Affidavit/Report/Viva voce/Cross Examination Only)

1._____

2._____

3._____

4._____

5._____

6._____

Estimate of Trial Time _____

Case Management Judge's Directions
(briefs, by whom, deadlines, etc.)

Preliminary Issues for Trial Judge

Total Trial Time:

Urgency and Why:

Special Travel Arrangements & For Whom:

Interpreter/Language:

Trial Dates Assigned:

Trial Audit:

Trial Audit Dates:

Judge's Comments at Trial Audit:

File #: _____

311 Jarvis Street, Toronto, Ontario, M5B 2C4

Date of Request: _____

Origin Date: _____

☐ CFSA ☐ FLA

☐ Summary Judgement

Trial Date Requisition

_____ v. _____

Contact Information

Applicant/Counsel _____	Respondent/Counsel _____
Address _____	Address _____
_____	_____
Telephone _____	Telephone _____
Fax _____	Fax _____
E-Mail _____	E-Mail _____
Other Party/Counsel _____	Children's Lawyer _____
Address _____	Address _____
_____	_____
Telephone _____	Telephone _____
Fax _____	Fax _____
E-Mail _____	E-Mail _____

To be completed by judge:

Case Management Judge: _____ Trial Time Required: _____ days

Assignment Court Date: _____ ☐ To be set by Trial Co-Ordinator
(CFSA trials only)

Additional Requirements: ☐ Trial Management Conference with CMJ ☐ Trial Management Conference with Trial Judge ☐ Trial Briefs

CFSA Matters Only

Trial Issues:
- ☐ Custody
- ☐ Access
- ☐ Child Support
- ☐ Spousal Support
- ☐ Crown Wardship
- ☐ Other _____

Nature of Evidence:
- ☐ Affidavit _____
- ☐ Viva Voce _____
- ☐ Assessments _____
- ☐ Medical Reports ___
- ☐ Other _____

Number of Trial Requests and Reason for Previous Adjournment:
1. _____
2. _____
3. _____
4. _____
5. _____

Current Residence of Children:
- ☐ In Care
- ☐ Mother
- ☐ Father
- ☐ Other _____

Outstanding Interim or Other Order:
- ☐ Placement _____
- ☐ Access _____

Has finding already been made?:
- ☐ Yes, if so, when _____
- ☐ No

Additional Instructions: _____

_____

_____

_____

311 Jarvis Street, Toronto, Ontario, M5B 2C4

Trial Co-ordinator's Report

Date and Time Set for:

☐ Trial Management Conference before CMJ

☐ Trial Management Conference before Trial Judge

☐ Assignment Court

☐ Trial

Trial Judge Assigned: _____

Additional Information: _____

_____

_____

_____
Signature of Trial Co-ordinator