

Keeping Litigation Costs in Check

A Justice Reform Committee in British Columbia, delivered a report in 1988 entitled Access to Justice. That report contained 182 recommendations. One court reform expert commented that they were all good recommendations, but how did the province let things get so bad that it took 182 recommendations to fix it? More on that in a moment.

Surprisingly, the report said very little about the cost of litigation, recommending only that small claims limits be raised from \$3000 to \$5000, and that the Superior Court find a way to do cases under \$20,000 more economically by simpler forms, pre-trial conferences, no discoveries, a less formal trial and early trial dates. If only two of the 182 recommendations related to financial accessibility, it is logical to conclude that the cost of litigation was not seen to be the main, or even a significant, barrier to access to justice in 1988.

Small Claims limits for the Provincial Court were raised to \$10,000 as a result of the report. The Economical Litigation recommendation resulted in a committee which worked for some time before disbanding, without coming up with a model for economical litigation in the Supreme Court.

The Provincial Court adopted simplified Rules of Court for the first time in 1991 to coincide with the proclamation of the raised jurisdiction and has been using simplified process since that time. I will describe that process later in the paper.

Between 1997 and 2002, the average length of civil trials in the Supreme Court in Vancouver Law Courts doubled (12.9 hours to 25.7 hours), while during the same period the number of trials reduced by one-half (800 to 393). It appears that the public was abandoning trials to resolve disputes, probably for financial reasons, while at the same time the courts were doubling the cost of a trial.

By 2005 up to a third of the cases in Provincial Court were cases where the claimant abandoned the amount of their claim which exceeded \$10,000 in order to have the claim heard in Provincial Court. Lawyers were turning away clients because they could not economically represent them in a civil lawsuit. It was an often spoken wisdom that claims under \$50,000 to \$100,000 were simply uneconomical to litigate and should be abandoned. There was comment about the significant financial barrier to access to justice, but no real impetus for change coming from any sector. It seemed to be an interesting, but not particularly startling state of affairs when it was discussed in legal circles.

The question remains: How can things get so bad in the courts before the interest of judges and lawyers is captured?

After 15 years working court reform in civil, family and criminal courts I will make a comment on that question for discussion purposes. Is it because judges and lawyers

and court staff think of themselves as the users of the court system? Have you ever been to a court user's committee where a divorcing spouse, a mother who has had her child removed, or a secretary who was harassed and then dismissed, present? Are we asking what they need from the justice system? Are they really looking for the kind of process that we have developed rendering "perfect" justice, with tidy trials for the judges and with lawyers leaving no stone unturned in the pursuit?

Whatever it was, something rendered the profession mute in the face of increasing disquiet about the increasing inability to access the courts.

Finally in the Spring of 2005, 17 years after the Access to Justice Report, the Attorney General made three announcements. First he was appointing a Justice Reform Working Group to look at the delivery of civil justice in the Supreme Court. Second, he was raising the jurisdiction of the Provincial Court in civil matters to \$50,000, proclaiming \$25,000 September 1, 2005. Finally he was commencing a pilot project in three courthouses to implement simplified procedures for cases under \$100,000 in Supreme Court. Another paper will describe those pilots.

The Working group will render its recommendations in June 2006. Master McCallum will describe the Supreme Court pilots. I will briefly describe how cases proceed through the Provincial Court.

The Court currently handles about 20,000 cases per year. The raise in jurisdiction from \$10,000 to \$25,000 produced no increase in volume of cases, since claimants were already filing the higher monetary cases in Provincial Court, but were abandoning their entitlement to the amount actually owed to them.

In 1990 I was asked by the Chief Judge to formulate a civil process for the Provincial Court, which up to that time employed no rules except by reference to the Supreme Court Rules, if the need arose. I took over from a committee which had become hung up on producing Supreme Court Rules light for the Provincial Court, a vision that did not appeal to the Chief Judge of the day.

The new committee simply asked the question "What does the public need from us?" The public had started the trickle, and later stampede, towards Alternate Dispute Resolution. We wondered about that, and noticed that if you take the word "Alternate", for sake of argument, out of ADR you are left with "Dispute Resolution". Maybe, we thought, what they are looking for in courts is not fine lawsuits, but simply dispute resolution. Quite simply put, they want this hassle out of their lives. They don't want to be "litigants", as we have characterized them, at all. The courts however, treated their dispute like a treasure, mulling it over, immersing the litigants in it for years, and seemingly relishing each new discovery that could give new life to the dispute.

The Provincial Court has a very defined and limited process, governed, after filing, by the court, not the litigants. There is little chance of being sandbagged or blindsided by

the other side. There are no discoveries or motions. There are really only two appearances any parties should make.

The first is the settlement conference and the second is a trial. If the case settles at settlement conference you are done, your client goes back to his/her life. This is the place where you can get results for your client that are acceptable to your client, and represents the speedy, inexpensive and simple side of the equation.

Let's look at the settlement conference for a moment. After a Reply is filed the court takes control of the pace of the litigation. You will get a notice to attend a settlement conference usually within two months of the Reply being filed.

The settlement conference notice will have a time for you to attend at a settlement conference room in a courthouse. Your case is the only case set for that time slot and the judge will give you undivided attention for the time period set for your settlement conference. Generally if your case is worth less than \$10,000 you will have a one-half hour time slot. If it is for more than \$10,000 you will have up to 1 ½ hours with the judge.

The settlement conference has a number of functions and may attempt to accomplish one or all of them depending on the initial assessment of the judge coming into the room, and the needs expressed by the parties or their lawyers.

What a Judge may do:

- Mediate a settlement
- Dismiss claims for want of jurisdiction, or that are frivolous or vexatious
- Add or delete parties
- Dismiss or give judgment in cases not attended by one of the parties
- Make orders for production of documents
- Prepare a case for trial
- Estimate the time required for a trial

Every courthouse with a few exceptions for small circuit courts has a mediation center within it where a judge will hold the settlement conference around a round table. Parties must attend and may be accompanied by their lawyers. Almost without exception judges will initially try mediation with the parties. All judges have been trained in interest based mediation and the court is currently conducting a two day mediation refresher for all the judges.

The process is designed to give the parties a chance to settle the case on terms that make sense to them and are in keeping with their interests. Only 42% of cases move on to a trial after the settlement conference.

If a trial is required, it is still possible to achieve a just speedy inexpensive and simple resolution. The average trial in the Provincial Court is 109 minutes. That figure is skewed upward by the specialized civil court in Vancouver where trials generally set for

a full day. It is an interesting phenomenon that is also present in the family and criminal specialized courts in Vancouver. While it is counter-intuitive specialization of courthouses, and possibly judges, with the possible exception of commercial courts may be a negative factor in designing a process for economical litigation

Keeping trials relatively short is assisted by the following rule:

Rule 10(1) reads as follows:

- (1) A judge may conduct a trial without complying with the formal rules of procedure and evidence, and in doing so may
 - (a) ask the parties to explain their cases, to respond to each other and call witnesses, or
 - (b) receive evidence in any other way the judge thinks is appropriate.

A trial in the Provincial Court may not always look like the trial you will get in the Supreme Court, especially if there is an unrepresented litigant on the other side. Making self represented litigants fit well into the trial process is not unlike trying to jam square pegs into round holes. Bearing in mind that the object of the exercise is not to supervise a continuation of the street fight that brought these litigants before the court, but to obtain the facts from each side and give a decision, many judges will opt to have each side give their side of the facts under oath and allow each side to reply under oath to what the other party said, rather than allowing them to engage in cross examination.

If a lawyer is involved on one side the judge will likely allow cross-examination with an expectation that the cross examination be focused and effective. If it is used as a fishing expedition with no discernible goal then the judge is likely to get nervous about Section 2 which mandates a just, speedy, inexpensive and simple resolution of disputes.

Summary

The Provincial Court of British Columbia has a mandate to provide civil justice in an expeditious manner. It has a unique process designed to attempt settlement by mediation at a very early stage of the process and then a trial which gives no advantage procedurally to a represented or an unrepresented party. The system is designed to allow lawyers to represent their clients without having to charge a fee disproportionate to the amount at stake.

Since 1991 the court has been a forum for the resolution of smaller lawsuits in what must be well in excess of 150,000 cases. There has not been a single discovery and very few interlocutory applications. Most cases settle after a settlement conference on terms agreed to by the parties. Few, if any, settle due to financial exhaustion.