Superior Court of Justice (Ontario)

NEW CIVIL CASE MANAGEMENT PILOT FOR TORONTO REGION: RULE 78 CASES

By Regional Senior Justice Warren K. Winkler

A) Summary:

By the summer of 2004, the Toronto civil justice system based upon a universal application case management system was in crisis. Trial dates for cases of 10 days or more were being set in 2008. Cases of less than 10 days in length were being scheduled for trial in 2006. The "one size fits all" approach to the case management system led to unacceptably long waiting times for interlocutory motions over timetabling issues. Our Masters became mired down in a sea of procedural motions. That interlocutory congestion spilled over to our judges' motion lists which resulted in extensive delays. Parties' costs were escalating as a result of the increased number of formal steps and appearances which had to be undertaken.

After extensive consultation with the bench and bar, a three-year pilot project was implemented on December 31, 2004 to address these concerns. Some of the key elements are highlighted in this summary:

1. As opposed to the universal application of case management to every file, a more specific form of case management is substituted in its place, on the principle of case management as necessary, not necessarily case management. Cases that meet the stringent criteria (described below at heading B "Effective, Flexibility and Targeted Case Management") will receive case management which suits the specific needs of each file. The "one size fits all" concept resulted in too many cases receiving unnecessary or ineffective case management. The new enhanced form of case management has lowered the costs for litigants, and has allowed for the more timely and economical completion of litigation. It has specifically resulted in a great deal of time being freed up for the Masters to hear substantive motions, and to conduct pre-trials in Simplified Procedure cases (R. 76).

2. Mandatory Mediation was expanded to encompass Simplified Procedure actions (claims for $50,000.00 or less). In addition, the former time lines for mediation (described more fully at heading D "Mandatory Mediation") are significantly expanded to allow parties to conduct the mediations at the earliest stage in the proceeding at which it is likely to be effective. Too often, mediations were taking place too early in the proceedings when the parties did not know enough about their own cases to constructively talk about settlement. The expansion of mediation to Simplified Procedure cases, and

the extended mediation timeframes have resulted in many more cases settling before trial.

3. Trial dates are now being set when counsel are ready to receive them. Now, counsel have two years from the filing of the statement of defence to set the actions down for trial. This expanded time frame has met with very positive feedback from the Bar. Counsel now have sufficient time to exchange documents, to conduct their discoveries, and their mediations. Under the former regime, counsel had to race through the procedural deadlines or receive a case management extension from a Master. In addition, once they had rushed through all of the procedural steps to get the matter ready for trial, they were met with the reality that their trial date was set far off in the future. This "hurry up and wait" approach of the case management system was counterproductive and impractical.

4. Long trials are now being scheduled in 2008 – a significant improvement from the summer of 2004. In addition, counsel who want an earlier trial date can be accommodated. Because of the significant reduction in case management motions, the improved success rate at mediations, and the extended timelines which allow counsel to effectively manage their files, the backlog has dramatically diminished.

5. One of the key problems was that because of the long waiting times between the set dates and trial dates, parties were obtaining trial dates for cases that were not ready for trial. This situation clogged the lists and led to unnecessary and excessive adjournment requests.

6. Parties' costs have been significantly reduced by eliminating the mandatory timetabling interlocutory motions. Access to justice has been enhanced by curtailing the trial backlog, shortening the wait for trials, and eliminating costs associated with unnecessary appearances.

B) Introduction:

Rule 78 of the Ontario Rules of Civil Procedure came into effect in May 2005 and replaced the Rule 77 Case Management System for the City of Toronto. It applies to most actions (with some exceptions such as Estates or Commercial matters) commenced in the City of Toronto on or after December 31, 2004. It incorporates the key elements of a Practice Direction which was issued on November 22, 2004 to take effect December 31, 2004.

The historical context of the case management rule will now be briefly outlined. Beginning in 1991, a portion of the civil cases in Ottawa and Toronto began to be selected for case management. By 1997, 25% of all cases commenced in Toronto were being case managed. By July 31, 2001, all cases commenced from that point onwards

fell under the case management regime. It was anticipated that all of Ontario would move into the case management regime at some future point. At present, the rule only applies to Essex County (Windsor) and Ottawa.

The central tenet of the Rule 77 case management regime was that the narrow time limits prescribed by the rules could only be extended by court order. If a party failed to comply with a particular time requirement, the proceeding or pleadings could be dismissed. This principle resulted in a multitude of motions and case conferences in Toronto to extend the tight timeframes.

Under Rule 77, cases were placed on either a standard or fast track. On the fast track, settlement conferences had to be scheduled within 150 days after the first defence was filed. On the standard track, counsel were given 240 days to schedule the settlement conference after the first defence was filed. Most case conferences were conducted by Masters and largely concerned timelines and procedural directions.

The Toronto case management system did not keep pace with the burgeoning population in the Greater Toronto area since 1990 and the significant increase in the number of cases. The number of judges and courtrooms remained the same during this 16-year period notwithstanding the substantial increase in cases and the demand for judicial resources. As a result, there were substantial and untenable delays in the trial date system.

C) Purpose of Rule 78:

The purpose of Rule 78 is to tackle this backlog and to attempt to deal with some of the inefficiencies that are inherent in the case management system given the lack of judicial resources. Our courts in the Toronto region remain committed to effective case management but because of the large volume of cases, the universal application of case management could not continue. During the three-year pilot project, a more case specific form of case management is substituted in its place, on the principle of case management as necessary, not necessarily case management. A targeted form of case management will lower litigation costs and allow for the more timely and economical completion of litigation.

Our courts will only provide partial or full case management where the need for the court's intervention is demonstrated. In addition, the mandatory time frames which existed in the prior case management regime have been significantly extended in order to provide counsel with sufficient time to conduct their discoveries, exchange their documents, and move the file forward without unnecessary judicial intervention.

The following headings (D-I) will touch on the key discrete elements of Rule 78. The paper finishes with an assessment of the early success of the Rule under the heading "Results to Date".

D) Effective, Flexible, and Targeted Case Management:

Under Rule 78, case management may be provided in actions which meet one or more of the following criteria:

(a) There are complex factual or legal issues;
(b) Litigation is a matter of public interest;
(c) There are numerous parties or numerous related proceedings;
(d) There is a chronic and substantial obstruction to the timely disposition of the action by one or more parties.

Where all of the parties agree that an action meets one or more of the aforementioned criteria and that case management is required, they may make a written request to the Administrative Master. If it appears to the Administrative Master that a form of case management is warranted, the action will be assigned to a Master who may convene a case conference if necessary (R. 78.12(1)). If there is not a joint request, a party can move by motion to seek case management. If that motion is successful, a Master may conduct a case conference and could order that Rule 77 would apply to the proceeding (R. 78.12(2)).

It is important to appreciate that the convening of a case conference does not necessarily mean that there will be ongoing case management for that particular file. The Master may well determine in a particular case that all of the case management requirements are fully met with a single case conference; however, in the most complex of cases, it may be that more than one case conference will need to be conducted.

The case law to date supports the proposition that it is a relatively high threshold to cross in order for a case to be placed back into the Rule 77 jurisdiction.[1]

E) Time Frames Have Been Extended:

Under the former 77.08, the Registrar would dismiss an action if there were neither a defence filed nor judgment obtained within six months of the statement of claim being issued. This rule resulted in numerous requests for time extensions and in motions to set aside the Registrar's dismissal orders. This approach to dealing with undefended actions still exists in Rule 78 but the time frame has been extended to two years from the commencement of the action (R. 78.06). After two years (rather than six months), if the action has not been defended it will be dismissed administratively on 45 days notice.

Under Rule 77, unless there was an order extending the time, a defended action was required to be finished production, mediation, discovery and any discovery motions within 240 days (standard track) or 150 days for fast track cases from the date of the action being defended. The time frame now is two years from the date the action is

[1] *Tibbits v. York Central Hospital*, [2005] O.J. No. 393 (Master); *Shand Estate v. Loblaws*, [2005] O.J. No. 1420 (Master); *Echaufaudage v. Elio*, [2005] O.J. No. 5104 (Master).

defended. The governing rule is now the status notice and hearing (Rule 48) which will be discussed under heading G.

The key extension of the time frames under Rule 78 will free up significant time not only for counsel but also for our judiciary in Toronto. Too many counsel complained about the rigid time frames under Rule 77. Those strict time frames forced counsel to attend before a judicial officer to acquire extensions and directions. As a result, numerous case conferences and motions were conducted by Masters concerning timetabling issues. In addition, because of the nature of the time frames, counsel would often arrive at trial scheduling court (the court that sets trial dates) and would not be in a position to set a trial date because either the discoveries were not concluded or they were still waiting for further productions. In those circumstances, the set date would be adjourned to a further trial scheduling court. The numerous adjournments resulted in further appearances not only for counsel but also increased judicial resources having to be allocated to trial scheduling court. By the time trial scheduling court was terminated in June 2005 (The Practice Direction provided for a six month phase out of the court), that court was hearing more than 14,000 set date appearances on an annual basis. More than one half of those set dates were second or third appearances on the same file.

In Toronto, the case management system resulted in numerous interlocutory steps being taken involving unnecessary attendances by counsel to extend time frames with resulting huge costs to the parties. The pilot project by extending the time frames and by providing targeted case management to the files that require it has attempted to realign judicial and support resources to enable the Toronto Superior Court to better manage its caseload.

F) Mandatory Mediation:

Mandatory mediation is an integral component of the Ontario Case Management regime. Under Rule 78, it is important to realize that mediation will still continue to be mandatory for all cases but the timeframes for conducting them have been significantly extended. Parties are expected to conduct their mediations at the earliest stage in the proceeding at which it is likely to be effective and in any event, no later than 90 days after the action is set down for trial by any party (Rule 24.1.09.1). In simplified procedure cases (Rule 76) and in wrongful dismissal cases, it is contemplated that the mediation would occur within 150 days after the close of the pleadings.

Experience has shown that the mandatory mediation process in the Province of Ontario has been quite effective in accomplishing the timely resolution of many civil cases. Thus, mediation is maintained in the Practice Direction regime but the time frames are significantly extended to allow counsel to conduct the mediations when they are most likely to be effective. In the case management regime, pursuant to Rule 24.1.09, the mediation session is required to take place within 90 days after the first defence has been filed. As a consequence, some mandatory mediations were not successful because they took place at an early time in the life of a civil file when neither counsel

nor the parties were ready to negotiate. Discoveries had often not taken place and neither side knew enough about the other side's case to compromise at the mediation. The new timeframes should go a long way to correcting that problem.

An important consideration, quite apart from the effectiveness of mediations, is that outside mediators are the court's only expandable resource.

G) Status Hearings:

Pursuant to Rule 48.14, if an action has not been set down for trial within two years after the statement of defence is filed, the Registrar will serve a status notice on all of the parties. Ninety days after the status notice is served, the Registrar will dismiss the action for delay unless (a) either a party has set the action down for trial, or (b) the action is dismissed on consent, or (c) at a judicial status hearing, a court has extended the time frame for the parties to set the action down for trial.

At the status hearing, a court will target cases that are not moving forward at an appropriate pace and may impose a range of orders including the imposition of deadlines, timetabling, costs, or setting a trial date (R. 78.08).

It is contemplated that the extended two-year time frame will allow many counsel a reasonably sufficient opportunity to perfect the case without judicial intervention. It is also contemplated that a status hearing for any particular case will take place only once. It is not envisioned that cases will be adjourned from one status hearing to the next; otherwise, the status hearing court could end up resembling the former trial scheduling court with all of its inefficiencies.

H) Trial Dates:

Trial dates will be scheduled only after one of the parties has set the action down for trial by filing a trial record pursuant to Rule 48.02. One of the issues with the former trial scheduling court under the case management regime was the reality that the trial record did not have to be filed before a party was compelled to attend a trial scheduling court. Pursuant to Rule 48.04, once a party sets an action down for trial, he or she cannot initiate or continue any form of discovery or interlocutory motion without leave of the court. Leave will only be granted in the rarest of circumstances. The requirement that an action can only be set down for trial by filing a trial record will alleviate some of the major inefficiencies which surrounded the former trial scheduling court practice. Counsel appeared at the former trial scheduling court without first filing the trial record. As a consequence, as previously stated, most cases were not ready for the fixing of a trial date. The result was that many set dates were adjourned a number of times to successive trial scheduling courts.

Now, once the trial record has been filed, the court administrative office will send a certification form to all counsel. That certification form which is to be filled out by all counsel will set out counsel's prognostication concerning the proposed length of trial

and will outline the number of witnesses to be called by both sides. A tentative trial date is then provided to counsel through the court office. That trial date can be confirmed or vacated at the subsequent judicial pre-trial. The purpose of this is to enable the parties and the court to better estimate the length of trial and to facilitate the shortening of the trial through better trial preparation.

I) Pre-Trial Conference:

At the pre-trial, the trial date is only confirmed if a judge is satisfied that the trial estimate by counsel is accurate and that the parties are ready to proceed. The pre-trial will not take place if mediation has not yet occurred. The completion of a mediation is a mandatory precondition to the availability of a pre-trial. A detailed pre-trial memorandum has to be completed by all of the parties including the provision of a witness list. The pre-trial conference has two central principles: (1) to explore settlement options; and (2) to ensure that the trial will proceed efficiently and on time (R. 78.10).

J) Results to Date:

The Practice Direction has now been in existence for approximately 16 months. Already, a significant improvement has been seen in the allocation of judicial resources. Masters are now able to hear many more substantive motions as opposed to having their time consumed with case management timetable motions. In addition, Masters have been able to utilize their additional time by significantly increasing the number of Simplified Procedure pre-trials (Rule 76) that they are able to conduct. The backlog and waiting period for Masters' motions dates has been significantly reduced.

Trial date waiting times have significantly improved. Six to ten day trials can now be reached within a 12-month timeframe. Longer trials can now be reached by 2008. There is also an improved access to early trial dates for longer cases if they are truly ready for trial. With the cancellation of trial scheduling court, 1½ days of additional judicial time per week are now available for trials and motions.

Although Rule 78 has improved the Toronto trial and motions backlog, one must not lose sight of the reality that the Pilot Project is nonetheless only an interim solution to a much larger problem. Unless judicial resources keep pace with the growing population and caseload, innovative approaches to case management will only be partially successful.

If the Pilot Project continues to be successful, a great deal of the credit rests with counsel and their clients for reassuming greater responsibility for the organization of their cases and for moving them towards a timely form of resolution.

The Pilot Project is proving to be effective in combating the backlog and the delays in trial waiting time. Parties' costs have been significantly reduced by eliminating many unnecessary interlocutory timetabling steps. Expanded mediation to encompass the

simplified procedure cases, and the broader timelines to conduct the mediations have increased the settlement rate of our cases. Most importantly, these factors have significantly improved access to justice for all litigants.