FEDERAL COURT AND FEDERAL COURT OF APPEAL PRACTICE 2012

CASE MANAGEMENT

THE MARITIME LAW PERSPECTIVE

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THE CURRENT RULES

The rules relating to case management can be found in Part 9 of the Federal Courts Rules entitled Case Management and Dispute resolution Services. These rules are divided into three parts, namely, Status Review, Specially Managed Proceedings and Dispute Resolution Services. Each of these parts is considered in turn.

Status Review

Federal Court

There are two methods by which a proceeding can be put into case management. First, a party can apply for the proceeding to be case managed and the court can order case management under rule 384. More frequently, however, a proceeding is put into case management through the mechanism of the status review. Pursuant to rules 380 to 382 proceedings which do not

meet prescribed steps within a specified period of time are subject to a status review and are generally automatically put into case management.

Rule 380 is the rule that provides for the status reviews of both actions and applications. Rule 380(1) applies to actions and 380(2) applies to applications. There are two status reviews for actions but only one status review for applications. Actions are subject to the first status review at 180 days after the commencement of the action and to the second at 360 days after the commencement of the action. Applications are only subject to status review at 180 days from the commencement of the application.

In respect of actions, it is the second status review at 360 days which is most commonly encountered and which results in proceedings being put into case management. Rule 380(2) provides that where 360 days have elapsed since the commencement of the action and no requisition for a pre-trial conference has been filed the court shall order that the action continue as a specially managed proceeding. This is a completely automatic process requiring no filings on the part of counsel.

Some actions will, however, be subject to an earlier status review at 180 days from the commencement of proceedings. Pursuant to Rule 380(1)(a), a Notice of Status Review in Form 380 is automatically issued by the registry if 180 days have elapsed since the commencement of the action and either no statement of defence is filed or there is no pending motion for default judgement. This is a more serious event as it does not automatically result in the proceeding being put into case management but has the risk of dismissal of the claim.

Form 380 and rule 382 set out how the Plaintiff must respond to the Notice of Status Review. Specifically, the Plaintiff is required to file written representations within 15 days of date of the Notice of Status Review stating the reasons why the proceedings should not be dismissed for delay. Those representations must also contain a justification for the delay and a proposed timetable for the completion of the steps in the proceeding. Form 380 and rule 382 also permit, but do not require, a Defendant to file representations within 7 days of receiving the Plaintiff's representations.

For applications, rule 380(2) is similar but not identical to rule 380(1)(a). Rule 380(2) provides that if no requisition for a hearing date has been filed within 180 days of the commencement of the application then the court may either issue a Notice of Status Review or may simply order that the application automatically continue as a specially managed proceeding. Of course, if the court issues a Notice of Status Review then the requirements of Form 380 and Rule 382 will apply.

Rule 382.1 provides that a judge or prothonotary shall conduct the status review and that the review is to be conducted solely on the basis of the written representations filed pursuant to rule 382. There is no hearing. The powers of the judge or prothonotary are set out in rule 382.1(2). He or she may dismiss the proceeding or order that it continue as a specially managed proceeding. The case law has established that the Plaintiff in receipt of a Notice of Status Review must provide justification for the delay and propose a plan for moving the action forward. *(Liu v. Matrikon Inc*., 2010 FCA 329) Provided the Plaintiff does so there is little risk of the action or application being dismissed.

Federal Court of Appeal

The status review procedure in the Federal Court of Appeal is set out in rules 382.2 to 382.4 and is not dissimilar from the procedure in the Federal Court. If a requisition for a hearing date has not been filed within 180 days of the issuance of the notice of application or appeal then a notice of status review may be issued.(382.2) The party in default must file written representations within 30 days justifying the delay and proposing a timetable.(382.3 (1) and (2)) The other party may file representations.(382.3(3)) The review is conducted by a judge and, as in the Federal Court, is entirely in writing.(382.4(1)) The judge conducting the review may dismiss the proceeding, grant judgment, give directions or set a timetable.(382.4(2))

The Maritime Perspective on Status Reviews

The status review rules as they existed during the period from 1998 to 2006 were a source of difficulty for the maritime bar. Unlike the present rules, the pre-2007 rules required status reviews after 360 days in virtually every case. This proved to be a burden on counsel and increased the costs of litigation since written representations had to be filed in virtually every

case. Ironically, it also delayed the proceedings since nothing could happen while a case was under status review. The usual result and order of the pre-2007 status review was that the case was directed to be put into case management and the parties were directed to file a joint timetable. The difficulties and inefficiencies of the pre-2007 rules were widely recognized. At least in meetings between the maritime bar and the Federal Court officials there seemed to be general agreement on the problems. The solution was to amend the pre-2007 rules to the current rules which automatically put cases into case management after 360 days without the need for status reviews or written representations and the associated delays.

The present rules have done away with the problems and complaints the maritime bar initially had concerning status reviews. The status review process is now, for the most part, a non-issue for the maritime bar.

Specially Managed Proceedings

The case management rules or the rules governing "Specially Managed Proceedings" are contained in rules 383 through 385. Rule 383 empowers the Chief Justice of the Federal Court to appoint a judge or prothonotary to act as a case management judge or to appoint a prothonotary to assist in the management of a proceeding. It is noteworthy that a prothonotary may be either a case management judge or may simply be appointed to assist the case management judge. Rule 383.1 similarly empowers the Chief Justice of the Federal Court of Appeal to appoint a judge as a case management judge in a proceeding.

Rule 384 provides that the court may at any time order that a proceeding continue as a specially managed proceeding. The rule provides no indicia of the circumstances in which the court should so order or the factors that the court ought to take into account in making such an order. The case law also provides little guidance on this issue.

In *Huang v Canada*, 2003 FCT 196, at paragraph 2, the late prothonotary Hargrave referred to the earlier decision in *Information Commissioner (Can.) v. Canada (Minister of Environment,)* (1999) 179 FTR 25, and held that a case management order "should not be made routinely and there must be a substantial reason justifying the proceeding being removed from the timetable set out in Part 5". This suggests that it could be difficult to obtain a case management order.

However, in practice, case management orders are routinely granted with little difficulty. A May 1, 2009 Practice Direction entitled Streamlining Complex Litigation seems to invite counsel to seek out case management.

> Parties and their counsel are reminded that case management is always available to them, preferably at the outset of a proceeding. This flexible framework allows the parties, with the case management judge, to tailor the procedure to ensure the most expeditious least expensive determination of the matter. Requests for case management are made by motion which may be submitted by letter.

The powers of a case management judge are set out in rule 385. The judge "shall" deal with all matters that arise prior to the trial and may:

> (*a*) give any directions that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits;
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> (*b*) notwithstanding any period provided for in these Rules, fix the period for completion of subsequent steps in the proceeding;
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> (*c*) fix and conduct any dispute resolution or pre-trial conferences that he or she considers necessary; and
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> (*d*) subject to subsection 50(1), hear and determine all motions arising prior to the assignment of a hearing date.

An interesting point that has arisen is whether all motions or applications in a case managed proceeding must be brought before the case management judge. This is certainly one possible reading of rule 385(1) which says the case management judge "shall deal with all matters…". However, in *Trevor Nicholas Const. Co. v Canada*, 2004 FC 238, aff'd. 2004 FCA 356, it was held by Justice Gibson that procedural motions can be referred to other judges or prothonotaries. At paragraph 13 of his reasons he said:

> [13] All judges of this Court are required to reside in or close to the National Capital Region. The Court currently has prothonotaries resident only in Ottawa, Montreal, Toronto and Vancouver. The Court sits throughout Canada. Case management is intended to facilitate the work of the Court rather than to place it in a straight-jacket. Thus, it is important that all judges and prothonotaries of the Court have the jurisdiction and the flexibility to ensure that the work of the Court is carried forward in the most efficient and effective manner that is practicable. I simply cannot conceive that Rule 385 was intended to limit the flexibility of the Court. Further, I find it hard to believe that the

> Rules which confer jurisdiction on prothonotaries on the one hand, would purport to take away some of such jurisdiction in case management situations. Further again, I find it even less likely that, by the Rules, the jurisdiction of judges who are not designated to case manage a particular matter where another judge has been so designated, would have their jurisdiction which is conferred by Act of Parliament restricted by the Rules. The latter possibility would make no sense, and further, would likely be beyond the jurisdiction of those who purport to make the Rules of the Court.

The powers given to a case management judge are very broad. For example, it was held in *Trevor Nicholas Const. Co. v Canada*, 2005 FC 1301, at paragraph 19, that a prothonotary acting as case management judge can grant relief other than that specifically requested by the parties. However, although the powers given to a case management judge are broad, they are not unlimited. In *Apotex Inc. v. Merck & Co*., 2003 FCA 438, the issue concerned the scope of discovery, in particular, whether a party had to answer a large number of refused questions. At first instance, the prothonotary refused to order that the questions be answered and rationalized this decision, in part, on the basis that the philosophy of case management was to move the case forward. An appeal from the prothonotary's decision was initially dismissed but on further appeal to the Federal Court of Appeal the appeal was allowed. Justice Strayer of the Federal Court of Appeal held that it was an error in principle for the prothonotary to deny a party a right granted by the rules and that "justice is not to be subordinated to expedition".

> [13] In my view, however, in the present case there has been an error of principle which has fettered the exercise of discretion by the prothonotary, and his decision has been confirmed by the motions judge. I do not understand Rule 385 to authorize a case management judge or prothonotary, in giving directions that are necessary for the "just, most expeditious and least expensive determination of the proceeding on its merits" to enable them to deny a party the legal right to have questions answered on examination for discovery which are relevant to the issues in the pleadings. That right is not merely "theoretical" (as the prothonotary put it) but is clearly spelled out in Rule 240 and I do not take the general words of Rule 385(1)(a) or of Rule 3 to be sufficient to override that specific right. I would also observe that the word "just" which appears in both these rules relied on by the respondents and the decision-makers below confirms that justice is not to be subordinated to expedition. A person who is a party to a civil action is entitled to ask any question on discovery that is relevant

> to the issue: that is a matter of justice to him, subject of course to the discretionary power of the prothonotary or a judge to disallow the question where it is abusive for one of the reasons mentioned above. No such findings have been made in this case.
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> …
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> [15] In the present case I am not satisfied that the learned prothonotary directed his mind to specific questions of relevance. The relevance issues were not raised clearly before him in paragraph 19 of the respondents' submissions, on which he relied and which he adopted as his rationale. Further, his reasons suggest that his ultimate conclusion was based on what he understood to be the imperatives of case management and not on any test of relevance. In particular, he did not specifically conclude that the questions should not be answered because, although relevant, they would for example be abusive because calling for an opinion or because of their scope.

The final point to note about the powers given to a case management judge is that appeals from orders of case management judges will be given more than the usual deference. In *Sawbridge v Canada*, 2001 FCA 338, at paragraph 11 the Federal Court of Appeal made it clear that orders of case management judges would only be interfered with in the clearest cases of misuse of judicial discretion.

> [11]We would take this opportunity to state the position of this Court on appeals from orders of case management judges. Case management judges must be given latitude to manage cases. This Court will interfere only in the clearest case of a misuse of judicial discretion. This approach was well stated by the Alberta Court of Appeal in *Korte v. Deloitte, Haskins and Sells* 1995 ABCA 469 (CanLII), (1995), 36 Alta. L.R. (3d) 56, paragraph 3, and is applicable in these appeals. We adopt these words as our own.
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> > This is a very complicated lawsuit. It is subject to case management and has been since 1993. The orders made here are discretionary. We have said before, and we repeat, that case management judges in these complex matters must be given some "elbow room" to resolve endless interlocutory matters and move these cases on to trial. In some cases, the case management judge will have to be innovative to avoid having the case bog down in a morass of technical matters. Only in the clearest cases of mis-use of judicial discretion will we interfere. …

To the same effect is *Apotex Inc. v. Merck & Co*., 2003 FCA 438, at paragraph 12.

The Maritime Perspective on Case Management

When the Federal Courts first initiated case management there was not a lot of support for the concept from the maritime bar. In fact, the bar was mostly very much against case management. The predominant concern was that the courts would micro-manage cases to such an extent that the parties and their counsel would lose control. Related to this concern over micro-management was a further concern that all cases would be treated the same by the courts in the sense that a routine timetable and set of procedures would be imposed on all cases whether appropriate to that particular case or not. Behind most, if not all, concerns the maritime bar had was the idea that the parties and their counsel know what is best for them and their case and they should be left alone to do it.

Happily, the concerns of the maritime bar with case management were unfounded and case management is now not only well received but often sought out. This is because, in practice, case management has not moved the primary responsibility for managing a case from counsel to the courts. Rather, the courts have really taken a supervisory role and have left the routine management of cases to counsel. Most cases in case management require little more from counsel than providing a timetable to the court for the completion of the next steps in the proceeding and periodically updating the courts on the progress. When that progress is satisfactory, the court has generally taken a hands-off approach.

The most useful aspect of case management has proven to be its flexibility. Case management allows for modifications of the timetables and procedures to suit the particular case. It has long been recognized that large or complex cases require special timetables and procedures and case management is ideally suited for such cases. Although, regrettably, there are fewer large and complex cases admiralty cases today than in the past, there are still some and moving such cases into case management judge at the very outset provides a means of developing a specialized procedure.

Case management is not just for large and complex cases. The flexibility that case management allows can be useful for a wide variety of cases. The usefulness of case management may only

be limited by the imagination, or lack thereof, of counsel. For example, where delay is highly prejudicial to a party, early case management is a tool that can be used to get the case expedited.

One of the current buzzwords today is proportionality, the notion that the costs and expenses or practice and procedure should be proportional to the amount at issue or the importance of the issue. Case management provides an ideal means by which to achieve proportionality within the current structure of the rules. In fact, in practice in admiralty cases, proportionality through case management has been practiced by the courts and counsel for years.

One final aspect of case management that has proven beneficial in admiralty cases is the willingness of the courts to accept requests from parties for the appointment of a particular case management judge that has expertise in the subject matter of the case. This is not something that is done in every case, and it is not suggested that it should be, but in larger complex admiralty cases the appointment of judges or prothonotaries with an admiralty background has made the case management process particularly useful.

Dispute Resolution Services

Rules 386 to 391 relate to dispute resolution. Rule 386 provides that the court may order the proceeding or an issue in the proceeding be referred to a dispute resolution conference. Rule 386(2) provides that such a conference shall be completed within 30 days. In practice, it frequently takes much longer than 30 days to arrange and conduct the conference.

The court can order a dispute resolution conference or mediation on its own without being so requested by the parties. This is what happened in *Recalma v. Qualicum Band of Indians*, 1998 CanLII 7718, a case that was not under case management. In *Recalma* Justice Rouleau took it upon himself to order the parties to mediation where the costs would be out of proportion to the amounts involved.

> [7] It became apparent to me that the amount of money involved and the time that it would take to conduct discovery, as well as the cost; taking into account the limited finances of such a very small Band, I felt it my duty to attempt to force mediation and I am so ordering.

If a party fails to attend a dispute resolution conference or fails to attend with proper authority to settle they can be penalized in costs or the court may even consider the failure to appear to be contempt. (*L.S. Entertainment Group Inc. v. Formosa Video (Canada) Ltd*., 2005 FC 1347)

Rule 387 provides that the dispute resolution conference shall be conducted by the case management judge or prothonotary. The form of the dispute resolution conference is in the discretion of the case management judge. It can be conducted either as mediation, an early neutral evaluation or a mini-trial. If the dispute resolution conference is conducted as an early neutral evaluation or mini-trial then the presiding judge or prothonotary will render a non-binding opinion as to the probable outcome.

As with all mediations or settlement negotiations, discussions in a dispute resolution conference and documents prepared for such conferences are confidential pursuant to Rule 388. Also, and not surprisingly, pursuant to rule 391, the judge or prothonotary that presides over the dispute resolution conference is not permitted to preside at the hearing of the matter.

It is noteworthy that the parties who wish to pursue settlement are not restricted to a dispute resolution conference under rule 387. Rule 390 specifically provides that where the parties wish to pursue other forms of dispute resolution they may apply to the court for a stay of proceedings for a period of up to six months.

The Maritime Perspective on Dispute Resolution

As with case management generally, the maritime bar was initially wary of the dispute resolution rules. There was a general belief that admiralty counsel were able to settle their own cases and did not need the assistance of the courts. Further, there was a concern that court imposed dispute resolution would, at best, be a waste of time and, at worst, might put undue pressure on parties to settle.

Again, happily, the fears and concerns of the maritime bar proved to be unfounded. Most of the lawyers in the maritime bar have had very good experiences with dispute resolution under the rules. In fact, many would welcome an amendment to the rules that imposed mandatory dispute resolution.

One of the most important reasons dispute resolution has been successful for the maritime bar is because many of the judges and prothonotaries who preside at dispute resolution conferences (and it is usually prothonotaries who do so) work extremely hard at identifying cases which can be resolved and then at actually resolving them. There are many stories of prothonotaries who were well informed of the details of the case before them and who worked well past the usual office hours to assist the parties in achieving settlement. Regrettably, there are also some stories of dispute resolution conferences being a waste of time because the presiding judge/prothonotary was either not well informed on the details of the case or did not aggressively embrace the role of mediator. There are many more good stories than bad, but, the bad stories do show how critical the choice of judge or prothonotary can be to a successful dispute resolution. Luckily, the courts have generally been amenable to requests from counsel for a particular judge or prothonotary to preside at a dispute resolution conference.