

## Effective Cost Management in Litigation

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"I was bankrupt twice in my life. Once when I lost a lawsuit and once when I won one." – Voltaire supposedly said something like this in the 18th century. Are we in the same situation in 2010?

The answer is a resounding, "We don't have to be".

Changes made to the *Rules of Civil Procedure* in Ontario in January of this year have given judges a new power to determine key issues in a lawsuit, before a full-blown trial.

This can mean the entire case can collapse much sooner, with significant costs savings.

The important thing is to find lawyers who are prepared to adapt their thinking to make use of this change. As Justice Colin Campbell wrote recently, the change in the rules will achieve success "only if at the same time there is an accompanying change in the prevailing legal culture".

### **Who can benefit from the changes?**

A party with a good case, whether a plaintiff or defendant, can benefit.

Generally, it is in the interest of a party that will likely lose in a lawsuit to delay the date of paying out money for as long as possible. Before the recent rule changes, all that was needed to keep a case scheduled for a full-blown trial was to raise a factual dispute between witnesses on an important issue. Today judges have the power to decide those issues at a "mini-trial".

Take an example. A purchaser of property bought for development discovers after closing that it is affected by substantial permanent easements preventing the planned development. He sues his lawyer who failed to discover and advise him about the easements, although aware of the development plans. The lawyer defends saying he told the client about the easements and their potential impact, but the client chose to drop his development plans and purchase anyway. The client swears there was no such conversation. Under the old rules, the client would have to wait, probably several years, for a trial. He could not bring a motion for judgment because the judge

would not be willing to decide which witness to believe on the basis of written statements. He would want to watch both parties give their evidence and be cross-examined.

Under the new rules, the judge could hold a "mini-trial". The witnesses would come to court to give their evidence on that issue alone. If the lawyer was disbelieved, his entire defence would probably be decimated. The only remaining question would be the amount of damages.

### **Access to justice is inversely proportional to the time it takes to get to trial**

The old maxim applies to litigation as to everything else: work tends to expand to fill the time allotted to complete it. If a litigant cannot get his or her case heard reasonably quickly, even the most sophisticated judicial system in the world is of limited use. Of all the human suffering Shakespeare could have listed in Hamlet's famous soliloquy, he chose to include the law's delay. The longer a matter takes to get to trial, the more it costs, emotionally and financially. The more it costs, the more likely it will fail the rational cost-benefit test, even if it is a deserving case. By delaying a trial, a party with a weak case can drive opponents to the point where settlement is the only option. If the party with the weaker case also has greater financial strength – one obvious example is insurance companies – the combination is deadly.

### **Conclusion**

There is, of course, much to be said for resolving civil disputes through rational communication, cooperation and compromise. However, in our effort to embrace these laudable, loftier standards, we must take care not to throw the baby out with the bath water. Individuals have rights. Classes of people have rights. Corporations have rights. Sometimes it is not appropriate to "saw off" rights. For those situations, we have an adversarial legal system that has been tried and tested for centuries. We must preserve it as a viable option for the protection of rights. The amendments to the *Rules of Civil Procedure* in Ontario in 2010 help do that. Now we need the legal profession to make use of them.