

# STRATEGIC PRACTICE DECISIONS – EMPLOYMENT LAW LITIGATION

## I. Introduction

This paper will discuss the topic of Strategic Practice Decisions with reference to the Courts and the *Employment Standards Act* of British Columbia.

## II. Supreme Court of British Columbia

- Claims of damages in excess of \$25,000 are brought in British Columbia Supreme Court.

### Rule 68

- If your claim is estimated to be less than \$100,000 you must file the claim under Rule 68 of the *Rules of Court*.
- Things to know about Rule 68 include:
  - Document disclosure requirements are more focused (in theory at least) under this Rule.
  - There is a mandatory Case Management Conference (CMC) where a judge discusses issues (both procedural and substantive) with the parties and usually sets the length, and sometimes the date, of discoveries as well as the trial or 18A date. It is possible to canvass available trial dates or even book a trial date with Trial Scheduling before the CMC. Allowing the court clerk at the CMC to book the trial date with Trial Scheduling (during the CMC) can often result in a trial date much further into the future than employee's counsel would normally like.
  - You are expected to bring your client to the CMC. You can seek permission through Trial Scheduling to have your client appear at the CMC by phone but you need a valid reason for making such a request. Costs for preparation and attendance can be awarded against a party who fails to have an instructing representative at the CMC.
  - While a CMC judge can order that no discoveries be held, the usual practice is for each party to be provided with a discovery of 2 hours with leave to apply for more time if needed. The smaller the monetary claim, the less likely it is that discoveries will be ordered at all.

- If there is a disagreement between counsel as to the length of the trial, the CMC judge will often (but not always) take a “directive” approach with the parties and attempt to book trial dates that are proportional to the claim in question.
- Claims where the relief sought includes a declaration (such as for a finding that a non-compete clause is unenforceable) cannot be brought under Rule 68.
- Rule 68 also requires a Trial Management Conference (TMC) to be held between 30 and 15 days before trial and requires a Trial Brief to be filed. In addition to confirming that the matter is set for trial, the TMC is another opportunity for the parties to have settlement discussions with the assistance of a judge.
- See below for use of a Judicial Settlement Conference under Rule 68.

### Rule 66

- Counsel may proceed via this Rule if he or she estimates that the trial of their matter is two days or less.
- How Rule 66 interacts with Rule 68 has never been clear. On a claim for less than \$100,000 where the trial is estimated to be two days or less, counsel may write on the Writ “Subject to Rule 68 and Rule 66”. As discussed above, Rule 68 is mandatory where the claim is for less than \$100,000.
- There are no interrogatories under Rule 66 (or Rule 68).
- Rule 66 limits discoveries to two hours in length for each party.
- Rule 66(29) sets out the cost consequences for trials decided under this Rule. Legal costs, exclusive of tax and disbursements, are set at \$5,000 for a one day trial and \$6,600 for two days. Note that the Court has discretion under this Rule to order a higher costs award where there are “special circumstances”, including an offer to settle. Tactically, one reason counsel may choose Rule 66 is to avoid a Costs hearing post-judgment.
- Tactically, one might consider proceeding under Rule 66 because Rule 66(20) states that Trial Scheduling must provide a trial date to the requesting party within four months of the application for the trial date. The reality however is that Rule 66 usually does not provide you with a date that is any earlier than you would receive under Rule 68 or by proceeding in a non-expedited manner for that matter.
- On the issue of booking trial dates, it is possible to book a trial date with Trial Scheduling even when it appears at first glance that there are no dates available. In Vancouver, this is done by writing to Sue Smolen (Manager, Supreme Court Scheduling, Civil) and requesting

either an early trial date generally or a specific date. If you can demonstrate to Ms. Smolen that there is an “urgency” in your matter then she has historically attempted to assist (where resources permit) the parties in finding an earlier trial date. “Urgency” may include an employee suffering financial difficulties as a result of being dismissed with inadequate or no severance.

- Another way to book a trial date when the docket is full for the day(s) you are requesting is to simply ask Trial Scheduling to put you on the overflow list for that day. Opposing counsel may take issue with this action stating that being on overflow means that the parties may get bounced if there are not enough judges. However, that same issue is true for parties on the regular list. Getting bumped in Vancouver is an infrequent occurrence these days and so being on the overflow list may not be much of an impediment to getting a judge.

### Rule 18A

- The 18A process may be as expensive as a one or two day trial and so counsel should be careful not to embark on this process if there is some concern that a judge may find the matter unsuitable for disposition via this avenue.
- The usual concern re: suitability is that there are issues of credibility that cannot be reconciled by a judge without viva voce evidence. If counsel can demonstrate to a judge that he or she can render a just decision without the need to determine credibility, the Court will often go that route.
- An employer claiming cause for an employee’s dismissal often takes the position that the case is unsuitable for disposition via the 18A process because credibility issues, that are central to the case, cannot be resolved through affidavit evidence alone. This has the effect (often desired) of slowing down the employee’s wrongful dismissal claim until a “regular” trial date can be set. If employee counsel feels the cause allegations are dubious, then he or she may want to consider proceeding with the 18A process in any event to compel the employer to put its evidence on the table through a response affidavit. It sometimes happens that the employer’s cause allegation starts to fall apart when the facts are sworn and or tested in cross examination of that affidavit.
- Of course, if the employer’s cause allegation stands up to affidavit testing and there are valid credibility issues, then the employee client will have incurred extra and perhaps unnecessary costs should it be decided that an 18A hearing is not suitable.
- Trial Scheduling usually has an adequate supply of one and two day trial dates that often equal the availability of one or two day 18A dates.
- Conflicting time estimates can be problematic in the 18A process. There are times when one counsel estimates the 18A matter will be two hours or less in duration while opposing counsel estimates the matter to be one or two days in length. In Rule 68 matters this conflict

should be resolved at the CMC. In non-Rule 68 matters, counsel can request a Pre-Trial Conference under Rule 35 (as discussed later in this paper) to discuss the matter as long as a trial date has been set or opposing counsel consents to such a conference.

- Note: Rule 68 does not specifically say that an 18A hearing for final disposition cannot proceed until a CMC is held.

### Wallace Damages

- It is suggested that counsel should only claim Wallace (or aggravated) damages when there is very strong evidence to support such a claim. Read the Supreme Court of Canada decision in *Keays v. Honda* for the latest “last word” on Wallace damages.
- A non-statistical review of recent Wallace claims suggests that the success of such claims is becoming less and less frequent.
- When Wallace damages are pleaded but not awarded, the employer often seeks costs (or a cost reduction) for that part of the claim that was not successful. Such cost awards are by no means automatic at this point.
- Claiming Wallace damages can have the effect of slowing down the proceedings. This is because Wallace damages can often only be proven using viva voce evidence. Defending against Wallace damages is often the basis for employer counsel estimating a higher number of trial days. And a longer trial means a trial date further into the future and a higher expense.

### Judicial Settlement Conferences

- A Judicial Settlement Conference is, as its name suggests, a conference where the parties are attempting to settle their dispute with the help of a Justice of the Supreme Court of British Columbia.
- In any proceeding the parties may consent to participate in a Judicial Settlement Conference however, one party cannot compel another party to attend.
- Judicial Settlement Conferences can be very effective in resolving matters without having to proceed to trial. Clients seem more willing to move on their settlement positions when a Justice of the Supreme Court expresses his or her opinion on the merits of the claim.
- Counsel may request a specific judge for a Judicial Settlement Conference. This can be done in two ways:
  - First, the parties can agree to simply call Trial Scheduling and ask that a note be made on the file that if any one of, say a list of three judges, is available on the day of the

Judicial Settlement Conference, that the parties would prefer one of those judges (or Master if desired).

- Second, if counsel (again by consent) are interested in having a particular judge sit for the settlement conference, then a request for that particular judge should be made via the “Request to Appear Before a Specific Judge/Master/ Registrar” on-line form on the BC Courts website. In this circumstance, the judge in question will usually send the parties (through Trial Scheduling) a list of his or her available dates.
- Judges have different personal and professional backgrounds which can be useful in settling specific types of cases. For example, Chief Justice Brenner has a background in aviation law and so his participation in the settlement conference of a “for cause” dismissal case of a chief mechanic in the aviation industry assisted in the parties settling the dispute.
- In cases under Rule 68 where a resolution to the dispute looks possible, counsel may want to consider setting a 30 minute CMC back to back with a Judicial Settlement Conference. If the settlement conference is not successful then the court can convert the proceeding to the CMC. Such bookings are not common place at Trial Scheduling but are possible.

### Pre-Trials

- Outside of Rule 68, the semi-equivalent of the CMC is the Pre-Trial Conference found under Rule 35.
- The Pre-Trial Conference is normally used by counsel to resolve any last minute trial preparation issues between the parties and to generally make sure that the case is ready to proceed. However, there is nothing stopping counsel from booking a Pre-Trial by consent at any time after the pleadings are filed, or compelling a Pre-Trial Conference once a notice of trial is delivered or received.
- An early Pre-Trial Conference (or an early CMC under Rule 68 as discussed above) can often be the catalyst for early settlement. A judge who sets tight deadlines for discoveries and an early trial date often forces the parties to quickly assess their litigation risk and come to the settlement table before the legal costs start to mount.

### **III. Provincial Court – Small Claims**

- Claims under \$25,000 are brought in Small Claims Court.
- Claimants can abandon claims above the \$25,000 threshold to stay in Small Claims.
- Claims in Supreme Court can be transferred to Small Claims and vice versa either by consent or by Court order.

- At the Vancouver Small Claims Registry there is mandatory mediation, then a pre-trial conference and then the trial.
- Claims of \$5,000 or less are dealt with in certain registries by a Justice of the Peace in hearings of one hour in length.
- Since the cost implications of Small Claims are greatly reduced compared to BC Supreme Court, this is the forum where employee counsel may want to consider bringing wrongful dismissal cases with “challenging” cause allegations.

#### **IV. Employment Standards Branch**

##### The Process

- The Employment Standards Branch (ESB) administers the *Employment Standards Act and Regulation (ESA)*, which set minimum standards of wages and working conditions in most workplaces in British Columbia.
- An employee would choose to use the ESB / *ESA* process because it is thought to be generally a faster and cheaper alternative to Court. However, there are limitations to the ESB / *ESA* process.
- An employee must make a complaint to the ESB within six months of the wrongdoing or within six months of their employment being terminated.
- The *ESA* sets a six-month limit on the time period the ESB can go back to see whether an employer owes money to an employee.
- Note: an employer cannot bring a complaint against an employee through the *ESA*.
- The first step an employee takes to resolve a dispute over the payment of wages or other issues is to contact the employer directly by using a Self-Help Kit provided by the ESB.
- In certain circumstances, an employee will not be required to use the Self-Help Kit. For example:
  - The employer's business is closed;
  - The matter involves a person under the age of 19;

- The complaint is related to a leave provision of the Act (pregnancy leave, parental leave, bereavement leave, compassionate care leave, family responsibility leave or jury duty);
  - The employee is a farm worker, garment or textile worker, or domestic;
  - The employee has significant language or comprehension difficulties;
  - The only issue is that the employer has withheld the employee's last pay cheque; or
  - The employee has already sent a letter to the employer attempting to resolve the issue.
- If there is no resolution through the Self-Help Kit then the employee must make a complaint to the ESB.
  - If a matter is referred to investigation by the ESB, the investigating officer will gather information and evidence from both parties. The officer will put each party's position and evidence to the other party for a response. The officer will try to resolve the complaint informally, but if that is not possible, the officer will hold an adjudication (hearing) and make a decision and issue a Determination.
  - The hearing of more complex *ESA* cases can take several days.
  - There is no monetary limit on *ESA* Determinations.
  - The ESB hearing generally tracks the presentation order found in a trial court however procedural rules are generally more relaxed at an ESB hearing.
  - Counsel can bring their own court reporter to an ESB hearing as one is not supplied by the ESB.
  - An *ESA* Determination can be appealed to the Employment Standards Tribunal and then can be judicially reviewed. These appeal mechanisms have the unfortunate effect of removing the purported benefits of filing a complaint under the *ESA* – that being “cheaper” and “faster” than court.

### Specific Claims

- If an employee's only claim is for wages, then the ESB is most likely the best venue to pursue such a claim.

- Generally speaking a claim for unpaid wages is not limited to six months because the wages need only be payable in the previous six month period and unpaid wages are an accruing liability.
- Where it gets more complicated is when the employee has a valid wage claim but also a wrongful dismissal case. In such a case, it may make more sense financially for counsel to bring both claims in court. However, if the wage claim is straight-forward and the client is in need of money within a time frame not normally available through the courts, then counsel might consider bringing the wage claim under the *ESA* (or even having the client do that themselves) and bringing the wrongful dismissal in court.
- There are a number of claims that can only be brought under the *ESA*. The British Columbia Court of Appeal in *Macareg* has decided that *ESA*-type claims such as overtime (where the employment contract is silent on the issue) can only be brought through a complaint under the *ESA*. Vacation pay would appear to fall under that category as well.
- Under section 63 of the *ESA*, employees dismissed without cause are entitled to compensation for length of service to a maximum of 8 weeks wages. These post-dismissal monies are different from common law severance in that they are compensation for past service and are not money paid in lieu of the requirement to provide reasonable notice (the basis for damages in the common law).
- Take note that section 63 monies are not subject to mitigation.
- Some counsel fear that bringing a claim under section 63 of the *ESA* may preclude them (through a *res judicata* argument by the opposition) from pursuing a larger award in a claim for wrongful dismissal. However, it would seem that both the Employment Standards Tribunal (see the case of *Sitter*) and our Court of Appeal have distinguished section 63 monies and wrongful dismissal monies as distinct from one another and that the awarding of one should not preclude the awarding of the other. Although it has been held that section 63 monies provided to an employee should be deducted from a common law severance award.

### Settlement

- If requested, the ESB will supply a mediator who will mediate either in person or on the phone. The benefit of this mediation is that it is free and you can often have the mediator assist the parties to resolve all issues including those outside of the *ESA*.

### Enforcement

- Settlement Agreements signed through the ESB can be filed in Supreme Court by the ESB and enforced as a judgment of the Court. This may include turning the matter over to a Court Bailiff for collection.

- Remember however, that the complaining employee does not “own” the Determination rendered in their complaint and so it is only the ESB that can enforce a Determination.
- Where an employer is thought to have no money to pay a potential court judgment, counsel may consider filing a claim under the *ESA* because it has provisions where liability for items such as unpaid wages can attach to directors of the Company in question. However, there are limitations on what can be attached and to how much.

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