

RULES OF COURT—2009  
PAPER 6.1

## Cost Effective Litigation

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## **COST EFFECTIVE LITIGATION**

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### **I. Introduction: Costs, Justice and Economics**

The statue of Justice in the Vancouver law courts has a set of scales, a blindfold and a sword. Notably however, she doesn't have a money belt around her waist or a handbag to carry a chequebook. This might give the impression that she doesn't concern herself with such things. But she must, because cost is a barrier to access to justice. Perhaps she uses plastic.

For those of us who take cases where contingency fees are generally inappropriate, the access to justice issue is not a remote and histrionic cry of the Civil Justice Reform committee. Unless you have a rarefied practice, it is a reality. How often have you thought "I couldn't afford to hire myself if I got into a dispute"? What does that tell you about the affordability of the civil litigation process? How many cases have you turned away or your client decided not to pursue because they would cost too

much? And how many of those have been meritorious suits of some substance? How many cases have run out of steam as costs have mounted and funds run dry? How many cases have settled on less advantageous terms because plaintiff or defendant could not afford the costs?

Access to justice is one aspect of the problem. Economics is another. If possessed of all relevant information, a business or an individual will obviously not pursue litigation, or defend it to trial, if the costs exceed the gains to be obtained from doing so.

The higher the cost, the higher the hurdle that litigants must leap to gain access to the system. If we can reduce costs by intelligent planning and practice we can increase access to justice, improve the economics of civil litigation for clients, increase the volume of cases for the profession, particularly younger lawyers and help restore faith in the system of justice in BC.

This paper proceeds on the basis that there is much that can be done by counsel working within and around the rules which currently exist, and any rules likely to replace or amend them, to contain costs and make those costs at least somewhat responsive to the case in question. Trying to make the costs proportionate to the case seems like an unexceptionable idea, but it has attracted a lot of suspicion in the debate over reforms to the Rules, generally because of concerns that the quality of justice will be unacceptably downgraded in cases involving less money. Cost cannot be the only factor in a decision as to how to run a case, but in most cases where the litigant is funding it, it must surely be an important factor.

The rules do not require that every case be driven to the courthouse in a Rolls Royce. Nor do our professional standards, nor should our personal approach. For ordinary cases a Chevy will do nicely and, in BC, surely we recognise that some parts of the journey may be suitable for a bicycle? On reflection, since the theme of this course is more litigation as warfare rather than litigation as journey, perhaps the better metaphor would be that not every campaign or every battle in the campaign requires a squadron of tanks. Sometimes a foot patrol will do.

The reformers say that making justice more affordable requires a “cultural shift.” Perhaps. This paper attempts to sketch out some approaches to litigation that can achieve reductions in costs. It is primarily directed to civil litigation with some element of complexity, but it is not made of whole cloth, parts can be adapted where suitable to the case in question.

## **II. What Drives Litigation Costs?**

One of the primary drivers of increased cost is factual complexity. Factual complexity manifests itself in a number of cost-increasing ways: multiplicity of documents; exhaustive factual inquiries of client and witnesses; the necessity for advice from an expert or experts; the need for detailed searching discovery and perhaps more than one representative for discovery; and, ultimately, lengthy trials.

Another primary driver of increased litigation costs is too much process: pleadings applications due to poor pleading or overly aggressive attacks on pleadings; unnecessary document applications resulting from a lack of attention to the requirements by the respondent or over broad requests by the applicant; unprepared, unfocused, meandering, examinations for discovery; ill-considered applications for summary disposition, or the failure to bring such applications in suitable cases; adjournments, especially of major procedures such as discoveries, summary trials and trials; overly long trials due to unnecessary (often duplicative) witnesses and overly long examinations or cross-examinations.

Another cause of unnecessary cost is the failure to consider and discuss possible early resolution of the case. All too often, the failure to press this possibility early results in cases becoming more difficult to settle because of sunk costs.

### III. How Can Costs be Reduced?

#### A. Start with a Strategy that Fits the Case Factually, Legally, Tactically and is within the Available Budget

At the time that we take instructions, the legal territory over which the potential lawsuit may travel is often broad and relatively unrestricted.

The facts may not present themselves in a clear light; there is usually a range of possible objectives for the client; the legal possibilities for causes of action or defences may be various and their merits require some analysis; there may be more than one available legal process and, the selected process likely offers a considerable degree of flexibility in the steps to be undertaken.

Taken in combination, this means that there is often a broad range of possible approaches to the dispute, which may have significantly different cost consequences.

Failing to come to grips with these variables at the outset and factor in the available resources of the client may get the action commenced more quickly and at less initial cost to the client but will likely result in much greater cost down the road. Every lawsuit needs an initial strategic plan which takes into account cost considerations.

It is generally not cost-effective in the long run to proceed on the basis of an undeveloped idea of the facts and legal issues, file a claim or defence and then simply follow the Rules as the default procedure, reacting to steps in the process as deadlines approach. But this is a common approach.

I suggest that the considerations which follow are intrinsic aspects of most plans for cost-effective litigation. The complexity of the case determines the complexity of the plan and the level of detail and amount of time spent on each aspect. Don't make this planning exercise more involved than it need be. In a simple case the back of an envelope may do. In a complex case it may be a substantial undertaking, but in either case it is more cost-effective than simply launching into a claim or defence, unless you get lucky, but clients surely expect us to do better than trust to luck.

#### 1. Clarify the Facts as Best You Can

The plan for the lawsuit must be built upon a reasonably firm factual foundation. This does not require a vast factual investigation but it often means looking at the key documents, speaking to the key witnesses and engaging in some shrewd cross-questioning of your client.

#### 2. Identify the Clients' Objectives

Don't chase the moon if the client would be reasonably happy with a piece of cheese. Don't defend every allegation if the client should reasonably make concessions, particularly if this can be done without damaging the essential framework of the defence. (And if it can't, advise an immediate settlement attempt.)

#### 3. Do the Necessary Legal Analysis

This may be a full-blooded opinion in a complex case, but when you are on familiar territory it may entail no more than a walk down the hall or a telephone call to someone to get a quick second view on your analysis. If you are depending on legal research undertaken shortly before arguing an 18A or full trial to tell you whether your legal theory holds water, you have taken an unjustified risk with your client's money.

#### **4. Consider How Many Causes of Action/Defences/Issues to Raise**

If you think you can win by advancing legal theory A, discuss with the client whether the added protection of theories B, C and D merit the cost. If legal theory A will likely succeed on the basis of uncontested facts 1, 2 and 3, be brave enough to consider running the case on that basis rather than fighting tooth and nail over supplementary facts 4, 5 and 6. Do you really need to look under every pebble on the beach? And does your client want to pay for the minimal marginal improvement in his or her chances?

Some lawyers, generally the perfectionists among us, think that we cannot get into trouble, cannot make a mistake, cannot lose a case when we should win it, if we plead everything, investigate everything and adduce everything into evidence. This is wrong. First, if the client can't afford it, you risk sinking the entire case under a weight of costs it cannot bear. Second, it rarely works tactically: KISS is generally a better plan. Third, .... (I don't need a third).

#### **5. Consider the Right Legal Proceeding and the Right Process within that Proceeding**

Is this a case that is likely to be resolved by petition or will you spend more of your client's money trying to hammer a round peg into a square whole than bowing to the inevitable and commencing an action? This is an important question because a petition will generally cost a lot less money. The same question arises when considering whether to use the fast-track procedure.

Similar issues arise over applications such as pre-trial injunctions or whether to plan for an application to strike, summary judgment or 18A trial. I do not say that such motions should automatically be discounted on considerations of cost. Rather a careful and realistic view must be taken of them to determine whether their strategic value and likelihood merit the cost in a constrained budget. A pre-trial injunction may be the key to getting the matter resolved in one case and an expensive folly in the next. An 18A may be the answer or may be a waste of money. Our ability to realistically assess these strategic calls is essential to cost-effective litigation.

Planning should not carry with it any bias in favour of doing everything early in the process. You should consider what tasks need to be done early and whether other tasks can be deferred if there is a reasonable expectation that the case can be resolved without incurring the expense.

These are key decisions, which will doubtless need to be revisited as the matter progresses, but should be addressed at the outset so that the client is armed with the necessary information to make the important choices early and so that the case starts out on the right track.

#### **6. Build in Cost Considerations**

Give your client rough estimates of how much the various alternatives will cost. (You can give the appropriate disclaimers.) In all but the simplest case a budget will help. Build in expert costs, disbursements and taxes.

Without financial information how does a client acting under cost constraints make decisions such as: Do they want to commence proceedings? Do they want to defend to the bitter end or try and settle before costs are sunk? Do they want to take a risk a run and plead a very narrow case or are they prepared to make a federal case out of it? Can they afford to hire an expert?

#### **7. Plan Your Settlement Strategy**

Clients like to settle. They like to settle earlier rather than later, with less rather than more legal cost. Big surprise! But many lawyers do not plan for this. They deal with settlement serendipitously, as they move along the litigation path. This is not the right approach. The settlement plan is an essential element of litigation planning.

## **B. Staff the File Appropriately**

Staffing is a high impact factor in cost-effective litigation.

If cost is an issue don't take the case unless you already have the necessary expertise and experience or unless you plan to do the extra work required to learn on the job for free. The additional costs are high. It is not just a question of getting some extra thorough legal research done. Every aspect of a case is much more expensive if you (or your co-counsel if the case requires more than one lawyer) aren't familiar with the area.

Consider carefully whether the case requires more than one lawyer. Costs can increase dramatically if more than one lawyer is involved unless the division of labour can be effectively managed to avoid duplication, which can be hard to do.

If the case is one which requires senior counsel it may be necessary from a costs perspective to have junior counsel to do the day-to-day work on the file, consulting with senior counsel where necessary. In such a case the senior counsel may have to limit their involvement in the file to where it is truly necessary.

Whenever there is to be more than one lawyer, make sure that the team and the allocated tasks fit together well so as to avoid duplication of effort. Dividing issues among counsel can work. (For instance one takes liability and one damages; or one takes one factual aspect of the case and the other a different one.)

Make sure that work is delegated to the appropriate person on the team. Use a paralegal where appropriate but not where the work needs to be done by a lawyer, otherwise it will result in unnecessary duplication.

Make sure that you make best use of your client's in-house resources. This does not mean downloading work that should be done by your office, which again can lead to duplication.

These matters are often best assessed by preparing a detailed budget. The cost consequences of changing the way in which the file is staffed can then be quantified. Admittedly budgeting the cost of a legal proceeding is more art than science but it does provide very useful information for managing costs.

As the file progresses monitor and supervise effectively.

## **C. Plead Tactically, Legally and Succinctly**

Whether you have prepared a strategic plan or not, it is still necessary to consider the matters enumerated in A(1) to (6) above in order to plead properly. A factually vague, legally unanalyzed, prolix claim or defence is asking for unnecessary cost down the road. It may come in the form of an application to strike, but more likely by way of unfocused document discovery, examinations for discovery, trial preparation and conduct.

It also makes no sense to incur substantial costs in pursuit of legal claims or defences that are not necessary to achieve the client's objectives.

Pleadings determine to a significant extent the factual complexity of the action. As noted earlier, factual complexity is one of the primary drivers of cost. So the manner in which the case is pleaded can determine which end of the cost scale the case will occupy.

If the client is severely constrained by cost, the right strategy may well be a narrow surgical strike, whether by way of claim or defence.

#### **D. Get an Early Trial or Hearing Date and Keep It**

Generally speaking costs are greatly increased in cases that drag on. There are a number of reasons for this. It can be much more difficult and therefore costly to ascertain the facts as it gets longer since the events in question. For example witnesses are harder to find, have a harder time recalling or reconstructing what happened, and more document prompting is required. Second, costs go up where the details of a case are dimmed by the passage of time between the various stages of the case. So, if the time between pleading, document review and examination for discovery is relatively short the details of a case are more likely to remain relatively fresh in the mind of counsel and client which significantly reduces the time required for preparation for each step. Third, adjournments are very expensive because they create significant duplicated preparation.

The antidote to this is getting an early trial or hearing date and holding on to it. Reserve enough time or you are building in an adjournment.

In my view severance of issues and litigation in slices is generally a bad idea. It results in significant additional procedural complexity and cost. But this not an absolute rule. There are cases where it has been spectacularly successful in bringing litigation to an early resolution. The severed issue needs to be dispositive of the case or of many issues in the case, or be a very important issue, such that it will eliminate or radically reduce future costs or significantly improve chances of settlement. The issue needs to be discrete from other issues that will otherwise need to be resolved. Consideration must be given the problem of serial appeals.

Securing and maintaining an early date is a major tool in reducing unnecessary cost. It also promotes early settlement.

There are exceptions. Some cases are patently lacking in merit and are not pursued. It may be that a defendant will get away with doing nothing in such cases and will never be called upon to expend costs in defending the case. But it is a gamble that may not pay off. Sleeping dogs sometimes awake and the costs of defence can then be substantially greater.

#### **E. Discuss the Management of the Case and Settlement Potential with Opposing Counsel at Intervals Throughout the Process**

When you have your strategy in hand, you may be able to achieve some aspects of your plan by reaching agreement with opposing counsel. You may agree that certain factual matters are not really in dispute and define the areas that require factual resolution. Better yet, you may agree that the case turns on some issue of law and agree to a summary determination, avoiding the costs of a trial.

If agreement can be reached on such issues, the earlier it can be reached, the more costs you can avoid.

Don't wait until the courthouse steps, or even the discovery room to discuss settlement. As noted above, early settlements are good. The notice to mediate can be an effective tool to put settlement on the agenda. But we should not become overly reliant on mediation. It is more expensive than a negotiation between counsel and should only be required where some impasse has been reached.

#### **F. Manage Document Production**

Even in the age of *Peruvian Guano*, there are things that can be done to manage the significant costs involved in document production in document intensive cases.

- (1) If the potential scope of document production is financially burdensome consider discussing the matter with opposing counsel to see if agreement can be reached to limit production (particularly where the problem is mutual) either absolutely or on a staged basis—where certain categories of document are produced first in the hope that proves unnecessary to move on to other categories of evidence; or to take cost-saving measures such as bulk production and listing of less relevant files.

- (2) If you can't reach agreement, consider whether an application can be brought under Rule 26(1.2) on the basis that full production would be financially burdensome and limiting production would have no or minimal impact on the ability of the other party to litigate the case. An application can also be brought under Rule 26(15) but this requires the severance and determination of an issue prior to discovery and, as noted above, view severance often increases rather than reduces costs.
- (3) Consider whether admissions can be made to limit the scope of document production.
- (4) Reach agreement with opposing counsel on appropriate search terms for electronic documents and other aspects of the protocol for e discovery.
- (5) Make sure that you select a document management system that is appropriate to the case and the personnel working on it. Do not pay for a costly electronic management system and costly inputting if you are not going to use it in the course of the case. On the other hand money will definitely be saved in a case with a substantial number of documents (from hundreds upwards) if the appropriate document database software is used. Make sure that this is put in place at the outset and that documents are gathered and processed in the most efficient manner for that system.
- (6) Manage the document review process so that the amount of times that the whole body of documents is reviewed is as limited as possible, preferably to one time. On the first review try to determine relevance and privilege for listing purposes; note the document's relevance to specific issues in the case; note key documents; and note documents for future use in discoveries and witnesses.

## **G. Prepare a Chronology of Facts**

Before embarking on examinations for discovery or detailed witness interviews, prepare a chronology of the material facts (not every fact), with references to the relevant documents. This is the most efficient tool to use for preparation for these tasks and can also be updated and used for trial preparation and opening and closing arguments. It is also a very efficient way of sharing information if there is more than one counsel working on the case.

In the simplest case counsel may be able to keep the chronology in his or her head. Usually it is best to commit it to writing. In a more complex case it may be necessary to break the chronology into pieces by subject area. It need only be as detailed as the nature of the case requires. Overkill defeats cost saving. In a case that is told by the documents, a chronological list of the key documents from each side's discovery, with some short description of the content of the document may be a cost-effective substitute, particularly if created by the document database software.

Use of a chronology permits efficient preparation, and avoids duplication of work by keeping the information in an easily accessible and updatable form. It facilitates efficient proof of facts and acts as an effective tool for organising final and interim submissions.

## **H. Make Oral Examination for Discovery Efficient**

Discovery can be a very expensive part of the process if protracted.

In order to prepare for and conduct a discovery efficiently and cost-effectively, the chronology of important facts must be understood; the relevant documents organised; the legal position must be sufficiently developed; the facts requiring proof or disproof identified; and the issues necessary to be explored determined. The ways of accomplishing these tasks have already been described above. If accomplished the scene has been set for focused, effective discoveries. If not, inefficiency, duplication and unnecessary cost will result unless the case is very simple or counsel has a memory like an elephant.

In most cases examining counsel should try to get the bulk of the discovery done without the need for lengthy adjournments and the associated duplicative preparation. There is often some follow up to be done at a later date and perhaps some discrete issues can be left until that session, but by and large it is not cost-effective to do discoveries in stages. (As always there are exceptions. For example in complex fraud cases, it may be necessary to first discover the story, then consider the relevant evidence and then resume the discovery with a view to breaking it down.)

There is no need for extensive introductory or background questioning. A discovery that gets right to the point is often more successful as well as cheaper.

Organize and mark documents (or agree to some other system) with an eye to their use at trial.

Hand-holding counsel should not make unnecessary objections since they result in lengthy and thus expensive chambers motions. Counsel should also attempt to avoid serial discovery and the need for duplicative preparation. In a case where serial discovery is abusive it is appropriate, with fair advance warning of your position to opposing counsel, to impose a cut off and force examining counsel to go to chambers for further discovery. Counsel can only do this if a proper job is done of preparing the witness and disclosing the relevant documents and if objections are proper.

The appropriate question is often not how much discovery would you like, but how much is essential given what your client can afford?

## **I. Avoid Unnecessary Procedural Motions and be Effective in Those You Cannot Avoid**

Figure out how much it costs your client for you to go chambers on a short or long chambers motion. Bear that information in mind when you are making decisions or giving advice that will result in motions.

Some steps can be taken to avoid motions: Communicate with opposing counsel to maximise co-operation and keep fights to the minimum; don't take unreasonable positions (it results in you defending unnecessary motions and destroys money saving co-operation); give where it doesn't matter (you save money that is better used for other purposes and may get something in return, now or later); use your powers of persuasion on opposing counsel; negotiate deals.

Experienced counsel learn that it is not a sign of weakness to give up on a demand which, upon mature consideration is wrong-headed or not worth the fight; or to accede to a demand that may be unsustainable but doesn't matter. Be tactical where you engage and always consider the cost ramifications.

Getting to a final hearing or settlement discussion in good shape without procedural motions is a success that we should aspire to in every case. The frequency with which you can manage it is, in my view, one of the hallmarks of effective counsel.

If you are drawn into procedural motions be effective and proportionate. An application for the documents crucial to proving your case demands more care and attention than defending a relatively innocuous application for answers in a discovery.

Keep affidavits succinct and to the point. Identify the issues and necessary facts prior to sitting down with your client or witness or starting to draft. Do not spend time and money introducing or replying to irrelevancies or matters of marginal relevance.

Keep Outlines succinct. Prepare a first draft when preparing your material in order to take advantage of your familiarity with the facts. Avoid a long Outline and longer written argument. One will do.

## **J. Consider Whether You Really Need an Expert or Experts and If You Do, Plan Ahead**

Don't hire experts merely out of a fear that you will be second guessed if you don't. Be aware of the proper role for experts and analyze whether your case will really benefit from one.

If a key issue in the case depends upon expert advice get a preliminary view early. Your client needs it to make the appropriate strategic decisions.

Find an expert who has the expertise and experience to do the job without unnecessary expense. Contact more than one expert and compare prices. Seek estimates of the work. Monitor costs.

Retain an expert in good time. Waiting to the last minute can result in being unable to properly manage costs.

Confer with the expert and find out what facts must be established before undertaking the discovery or witness interview in which those facts are best elicited. This avoids duplication.

If tactically appropriate, you may be able to defer some of the expense to a later point in the proceeding so that it can be avoided if the case can be settled.

## **K. Preparing and Conducting the Trial or Final Hearing**

A whole paper could be written on this topic alone. I will content myself with a few points.

- (1) Organization and planning is now at an even greater premium because the dollars at issue are generally by far and away the largest in the entire process. It is easy for costs to get away from you here and blow the budget. Organization reduces duplication and saves money.
- (2) Start with your chronology, key documents and legal analysis. These will guide your preparation.
- (3) Review and make a brief note of key admissions or facts from the discovery transcripts; make a note of read in or transcript references to be used for cross-examination; update the chronology and key documents.
- (4) Make a list of the points that have to be proved and how you are going to prove them (admissions in pleadings, discovery or documents are most cost-effective, witnesses less so). You may be able to use your chronology for this. Prove what you need - not irrelevancies. This is key to containing costs. Do not plan to enter masses of irrelevant or marginally relevant documents.
- (5) Having decided what documents you wish to adduce into evidence, agree to a document agreement with opposing counsel. This saves a lot of money. Failing which consider a notice to admit for those you have not proved in discovery. Otherwise consider how to best to get them into evidence. It is cheaper to plan this in advance than to make it up as you go along at trial.
- (6) Prepare notes of what you need from each witness. Plan to call only the witnesses that you need. If one witness can give the evidence, don't call two without good reason. This is key to containing costs. Prepare binders of the relevant documents for key witnesses. Meet with them or interview them on the phone and prepare your notes or, in a more complex case, minutes of evidence.
- (7) Prepare notes for cross-examination: keep them to the point. This is key to cost containment (as well as effective advocacy).
- (8) Prepare a concise opening
- (9) Carry through with the program at trial. Don't examine or cross-examine where you don't need to. Don't respond to irrelevancies (unless the judge clearly disagrees with your assessment).

- (10) Keep good notes of the evidence and documents. Keep them organised by date. If you do it on the computer they can be searched which saves money in long cases. Avoid daily transcripts except where there is a specified need. Update your chronology.
- (11) Use your notes and updated chronology to prepare argument. Don't use transcripts. They are expensive to order and time spent reviewing them is even more so.

#### **IV. Conclusion**

Once we recognise that we cannot resolve disputes by gazing in a crystal ball and we reject the palm tree approach, it is inevitable that the process will be expensive. The process is also open-ended and can be difficult to navigate, demanding judgment, experience, skill and planning. Furthermore it is hard to quantify the cost of litigation in advance and it is difficult for the client to assess what needs to be done and which costs are incurred wisely and which are not.

All of this can understandably lead to a hands off approach to cost containment. It is easy to find yourself following a program and timetable which falls out of the Supreme Court Rules, without consciously asking yourself whether it is the right program for the case; how it should be customized; what short circuits are available; what are the client's main objectives and how can they best be achieved; what the various possible approaches will cost and what the client can afford?

If litigation is to be as cost effective as possible and if clients are to get the biggest bang for their buck, we need to constantly consider these issues.