Abrams v. Abrams et al.

[Indexed as: Abrams v. Abrams]

102 O.R. (3d) 645

2010 ONSC 2703

Ontario Superior Court of Justice,
D.M. Brown J.
May 10, 2010

Civil procedure -- Case management -- Rule 77.02(2) of Rules of Civil Procedure not stripping judges hearing matters on Estates or Commercial Lists of inherent powers to manage litigation before them -- Judges sitting on Toronto Region Estates List having inherent power to case manage proceedings -- Judge managing litigation other than under Rule 77 possessing inherent power to require that motions be brought in writing, to require that evidence-in-chief be given by way of affidavit and to impose time limits on length of trial -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 77.

The applicant in a capacity and guardianship proceeding agreed to have a judge act as the case management judge for the proceeding. The judge issued a case management endorsement which contained extensive directions about the remaining pre-hearing steps in the matter. The applicant did not appeal the endorsement, but challenged the jurisdiction of a judge hearing applications and motions on the Estates List to case manage litigation on the List, as rule 77.92(2) of the Rules of Civil Procedure provides that Rule 77 (the case management rule) does not apply to proceedings on the Toronto Region Commercial List and Estates List.

Held, the challenge should be overruled.

The court's inherent jurisdiction or power to regulate, manage and control the proceedings before it co-exists with the specific rules of practice in respect of various proceedings. Rule 77 does not exhaust the court's power to manage litigation before it; it simply provides a further tool, in addition to the court's inherent powers and [page646] other powers mentioned in the Rules, to manage a case in an effective way. Nothing in the language of rule 77.02(2) purports to strip judges hearing matters on the Estates or Commercial Lists of the inherent power to case manage litigation. That case management power includes the power to require that interlocutory motions be brought in writing, to stipulate that the evidence-in-chief of witnesses at the trial be given by way of affidavit and to set the length of the trial.

Cases referred to

Marcotte v. Longueuil (City), [2009] 3 S.C.R. 65, [2009] S.C.J. No. 43, 2009 SCC 43, 62 M.P.L.R. (4th) 1, 311 D.L.R. (4th) 1, EYB 2009-164625, J.E. 2009-1852, 394 N.R. 1, consd

Other cases referred to

Abrams v. Abrams, [2008] O.J. No. 5205 (S.C.J.); Abrams v. Abrams, [2010] O.J. No. 787, 2010 ONSC 1254, 54 E.T.R. (3d) 283; Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, [1975] S.C.J. No. 84, 57 D.L.R. (3d) 1, 5 N.R. 515, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240; Beach v. Toronto Real Estate Board, unreported, May 31, 2009, Toronto, Doc. No. CV-08-366597 (S.C.J.); Business Depot Ltd. v. Genesis Media Inc. (2000), 48 O.R. (3d) 402, [2000] O.J. No. 1593, [2000] O.T.C. 298, 47 C.P.C. (4th) 270, 96 A.C.W.S. (3d) 936 (S.C.J.); Connelly v. Director of Public Prosecutions, [1964] A.C. 1254, [1964] 2 All E.R. 401, [1964] 2 W.L.R. 1145, 48 Cr. App. Rep. 183 (H.L.); Control & Metering Ltd. v. Karpowicz (1994), 17 O.R. (3d) 431, [1994] O.J. No. 345, 23 C.P.C. (3d) 275, 45 A.C.W.S. (3d) 1218 (Gen. Div.); Equiprop Management Ltd. v. Harris (2000), 51 O.R. (3d) 496, [2000] O.J. No. 4552, 195 D.L.R. (4th) 680, 140 O.A.C. 1, 9

C.P.C. (5th) 323, 101 A.C.W.S. (3d) 413 (Div. Ct.); Hallman Estate v. Cameron, [2009] O.J. No. 4001, 52 E.T.R. (3d) 29, 2009 CanLII 51192, 80 C.P.C. (6th) 139 (S.C.J.); J.B. Trust (Trustees of) v. J.B. (Litigation guardian of) (2009), 97 O.R. (3d) 544, [2009] O.J. No. 2693, 50 E.T.R. (3d) 50, 81 C.P.C. (6th) 107 (S.C.J.); Mother of God Church v. Bakolis, [2005] O.J. No. 1638, [2005] O.T.C. 295, 138 A.C.W.S. (3d) 848 (S.C.J.); Park v. Lee (2009), 98 O.R. (3d) 520, [2009] O.J. No. 3746, 2009 ONCA 651, 254 O.A.C. 52; R. v. Felderhof (2003), 68 O.R. (3d) 481, [2003] O.J. No. 4819, 235 D.L.R. (4th) 131, 180 O.A.C. 288, 180 C.C.C. (3d) 498, 17 C.R. (6th) 20, 61 W.C.B. (2d) 489 (C.A.); R. v. Keating, [1973] O.J. No. 224, 11 C.C.C. (2d) 133, 21 C.R.N.S. 217 (C.A.); R. v. Oliver, [2005] O.J. No. 596, 194 O.A.C. 284, 194 C.C.C. (3d) 92, 28 C.R. (6th) 298, 127 C.R.R. (2d) 215, 63 W.C.B. (2d) 511 (C.A.); R. v. Papadopoulos, [2005] O.J. No. 1121, 196 O.A.C. 335, 201 C.C.C. (3d) 363 (C.A.); R. v. Rose (1998), 40 O.R. (3d) 576, [1998] 3 S.C.R. 262, [1998] S.C.J. No. 81, 166 D.L.R. (4th) 385, 232 N.R. 83, 115 O.A.C. 201, 129 C.C.C. (3d) 449, 20 C.R. (5th) 246, 57 C.R.R. (2d) 219, 40 W.C.B. (2d) 192; R. v. Snow (2004), 73 O.R. (3d) 40, [2004] O.J. No. 4309, 191 O.A.C. 212, 190 C.C.C. (3d) 317, 66 W.C.B. (2d) 357 (C.A.); R. v. Steel, [1995] A.J. No. 992, 34 Alta. L.R. (3d) 440, 174 A.R. 254, 29 W.C.B. (2d) 60 (C.A.) [Leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 533]; Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, 2001 SCC 46, 201 D.L.R. (4th) 385, 272 N.R. 135, [2002] 1 W.W.R. 1, J.E. 2001-1430, 94 Alta. L.R. (3d) 1, 286 A.R. 201, 8 C.P.C. (5th) 1, 106 A.C.W.S. (3d) 397

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 11, 146

Code of Civil Procedure, R.S.Q., c. C-25, art. 4.2

Substitute Decisions Act, 1992, S.O. 1992, c. 30 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.04(1), (1.1), 20.05(2), 30.1, 37.15(1), (1.2), 38.10(1), 50.07(1)(c), 53.01, 77, 77.02(2), 78 [page647]

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Dockray, M.S., "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997), 113 Law Q. Rev. 120
Ferguson, D.S., ed., Ontario Courtroom Procedure (Markham: LexisNexis Canada, 2008)
Hill, Casey, "The Duty to Manage a Criminal Trial" (Paper presented to the National Justice Institute, April 2009)
Jacob, I.H., "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23
Lesage, C.M., and Michael Code, Report of the Review of Large and Complex Criminal Cases Procedures (Toronto: Queen's Printer for Ontario, 2008)
Osborne, Coulter A., Civil Justice Reform Project: Summary of Findings & Recommendations (Ontario Ministry of the Attorney General, 2007)

RULING on the power of judges hearing motions and applications on the Toronto Region Estates List to case manage proceedings.

M. Teitel, for applicant S. Abrams.

R. Swan, for J. Abrams.

E. Hoffstein and D. Lobl, for P. Abrams.

B. Schnurr, for Ida Abrams.

D.M. BROWN J.: --

I. The Issue: The Inherent Power of Judges to Manage Civil Litigation

[1] Do judges who hear applications and motions on the Toronto Region Estates List possess the jurisdiction or power to manage litigation on the List?

[2] The applicant, Stephen Abrams, says "no."

[3] Although Mr. Abrams did not appeal my case management

endorsement of March 1, 2010 (the "March Endorsement"), [See Note 1 below] which contained extensive directions about the remaining pre-hearing steps in this matter, as well as directions about the conduct of the ordered trial of issues, at a subsequent case-management conference on April 8, he challenged my jurisdiction to make that endorsement and made it quite clear that he would not co-operate in moving his application to a trial of issues in accordance with the directions contained in that endorsement.

[4] Stephen Abrams' position is simple: either I allow him to litigate this proceeding under the Substitute Decisions Act, 1992, [See Note 2 below] [page648] in the way that he wants, or he will appeal my case management directions. As I informed his counsel at the hearing, judges do not negotiate their jurisdiction or powers with litigants.

[5] So, in this endorsement, I will explain why judges possess the jurisdiction and power to manage litigation on the Toronto Region Estates List, including making specific directions of the type that I did in the March Endorsement, and I will defer issuing further directions in this proceeding until either Mr. Abrams appeals my decision and the appeal is disposed of, or the time for bringing an appeal has expired.

II. Procedural Background

[6] I set out the history of this high-conflict capacity and guardianship proceeding in the March Endorsement. In terms of the history of the case management of this proceeding, on the return of a motion before me on November 9, 2009, I agreed, at the request of the parties, including Stephen Abrams, to act as the case management judge for this proceeding. I directed the parties to develop a schedule for all remaining examinations.

[7] I held a case management conference on November 25, 2009, at which time I set a timetable for the remaining examinations. I also directed that inquiries be made about allegations that Stephen Abrams had breached rule 30.1 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] by sending certain information about his sister to the College of Physicians and Surgeons, and that a conference call on that issue be held on

December 10, 2009. Stephen Abrams did not object to my jurisdiction at that time.

[8] The conference call was held on December 10, 2009. Stephen Abrams did not object to my jurisdiction at that time.

[9] The next case-management conference was held on February 8, 2010. The parties reported that they had complied with my directions and completed the remaining examinations in accordance with the timetable I had imposed. The issues of outstanding motions and the length of trial were also discussed. Stephen Abrams did not object to my jurisdiction at that time.

[10] A conference call was then held on February 24, 2010. My resulting March Endorsement summarized that call and directed counsel to co-operate and prepare a plan to adjudicate the ordered trial of issues in this application in accordance with certain parameters, which included

(i) completing the trial of issues within three days on September 27, 28 and 29, 2010; [page649]

(ii) conducting a hybrid trial, primarily relying on filed affidavits for a witness' evidence-in-chief, with latitude to conduct up to 30 minutes additional examination-in-chief of each party witness and the cross-examinations of each party witness limited to three hours in length;

(iii) filing comprehensive document briefs, factums and briefs of authorities in advance of the hearing;

(iv) bringing any remaining refusals motions before me by way of motions in writing; and

(v) preparing lists of any portions of pleadings or affidavits of the opposite parties to which a party objected so that I could consider whether any merit existed in dealing with such complaints prior to the trial, or whether the presiding judge should simply be given a list in advance of those portions of affidavits to which the parties took exception.

[11] In that endorsement, I indicated that following the hearing on April 8, 2010, I would finalize a plan dealing with all remaining pre-trial matters and I would fix the trial date

which would be peremptory to all parties.

[12] Stephen Abrams did not appeal the March Endorsement.

[13] At the conference on April 8, the respondents submitted a joint trial plan which conformed to the parameters I had set. Mr. Abrams submitted two plans. The first his counsel described as conforming to my endorsement. It did not. That plan proposed that Mr. Abrams' case would occupy 2.5 days of the hearing, leaving 0.5 days for the respondents' case. I do not know why Mr. Abrams even bothered filing that document given its obvious unfairness.

[14] What Mr. Abrams really wanted was set out in the second plan contained in his written submissions -- a ten-day trial using only viva voce evidence, including a full day to deal with pleadings-related issues, four days for Mr. Abrams' case, three days for the respondents' case, a day of reply evidence for Mr. Abrams and a day for final submissions. Again, Mr. Abrams tilted the allocation of time in his favour.

[15] The parties also filed briefs of refusals in respect of which they wished to bring motions. Mr. Stephen Abrams seeks to move on

(i) about 50 refusals made by his sister, Judith Abrams, on her examination, with the lion's share relating to issues involving Ms. Abrams' employment and personal matters, five concerning [page650] "draft wills", eight dealing with Ida Abrams' capacity and treatment, and one relating to their father, Philip's, capacity; and

(ii) four refusals taken on the examination of Philip Abrams.

The respondents seek to move on the following refusals:

(iii) five refusals made on the examination of Stephen Abrams;

(iv) 21 refusals taken on the examination of Elizabeth Abrams, many dealing with issues relating to the estate planning undertaken by Ida and Philip Abrams;

(v) one refusal made by Rosette Rutman, the wife of Stephen Abrams; and

(vi) ten refusals given by Mark Wainberg, Elizabeth Abrams' husband, many dealing with issues relating to the estate planning undertaken by Ida and Philip Abrams.

In sum, approximately 95 refusals must be determined. Using a very conservative estimate of five minutes of oral motion time per refusal, two full motions days would be required to deal with that number of refusals in the ordinary course.

[16] Finally, Stephen Abrams submitted a list of those portions of the respondents' affidavits and pleadings that he wished to strike out:

[QL:GRAPHIC NAME="102OR3d645-1.jpg"/]
Stephen Abrams has already examined Judith and Philip Abrams on their affidavits. [page651]

III. Positions of the Parties

A. Stephen Abrams

[17] In a 26-page written submission filed at the hearing, Mr. Stephen Abrams took the following positions:

(i) the March Endorsement contained factual inaccuracies and media reports of that endorsement contained errors;

(ii) these reasons for decision dealing with matters raised at the April 8 hearing should be sealed;

(iii) judges sitting on the Toronto Region Estates List possess no Rules-based or inherent jurisdiction to impose case management, including case management in this particular proceeding;

(iv) even if a judge sitting on the Toronto Region Estates List could impose case management in a proceeding, the judge lacked jurisdiction

(a) to require affidavit evidence to be used at a trial of issues, and

(b) to give directions regarding the length of the trial and time limits for witnesses.

B. Ida Abrams

[18] Section 3 counsel for Ida Abrams submitted that his client does not support her son's request for a sealing order and endorses the respondents' joint litigation plan prepared in response to [the] March Endorsement that would see the timely adjudication of the issues in this proceeding.

C. Philip Abrams

[19] Counsel for Philip Abrams also opposed Stephen's request for a sealing order, observed that the parties actually had requested, back on November 9, 2009, that I act as the case management judge in this proceeding and submitted that judges sitting on the Estates List possess the jurisdiction to impose the type of case management contained in the March Endorsement.

D. Judith Abrams

[20] Counsel for Judith Abrams submitted that his client took no formal position on the argument made by Stephen Abrams, but (i) wanted this proceeding heard as quickly and as expeditiously as possible, (ii) supported the respondents' joint litigation [page652] plan and (iii) saw no justification for a sealing order in this proceeding. Counsel submitted that his client was pleased with the "firm hand" type of case management imposed to date in this proceeding.

IV. Inaccuracies in Media Commentary on the March 1, 2010 Endorsement

[21] Stephen Abrams submitted that the March Endorsement contained factual errors and that I had misapprehended certain matters. His written submissions contained seven pages describing those errors. If Stephen Abrams thought that I had erred in any findings or conclusions in my March Endorsement, he was free to appeal my decision. He did not.

[22] Stephen Abrams also expressed concern about media coverage of the March Endorsement, including what he contended were inaccuracies in the reports on my decision. The court has no control over how the media reports decisions that it releases. If Stephen Abrams feels aggrieved by any media coverage, he enjoys remedies at law.

V. Mr. Abrams' Request for a Sealing Order

[23] Stephen Abrams requested an order barring the media from the April 8, 2010 hearing (none were present) and from any other scheduling appointments and case conferences. Since no media have shown the slightest interest in attending any case conference or motion in this proceeding, I see no need to deal with this request.

[24] Stephen Abrams also requested that all future case conference memoranda be sealed, "except to the extent that they correct alleged factual errors that this Honourable Court may conclude were made in March 1, 2010". The other parties opposed this request. No sealing order was requested when this application commenced, and the public file for this proceeding currently contains three boxes of filed materials. In J.B. Trust (Trustees of) v. J.B. (Litigation guardian of), [See Note 3 below] I summarized the principles governing requests to seal court files. No grounds exist in the present case to order that future decisions of this court should be sealed. I dismiss the request.

[25] Similarly, there is no basis to grant Stephen Abrams' alternative request for an order "requiring the use of parties' initials in lieu of their names in any media reports of this case". [page653] This proceeding has been litigated under a full-names style of cause for two years; I see no reason to change that situation.

VI. Jurisdiction of Judges to Manage Proceedings on the Toronto Region Estates List

A. The problem

[26] Mr. Abrams' primary argument challenges the jurisdiction, or power, of judges sitting on the Toronto Region Estates List to impose case or litigation management in a proceeding. He submits that such judges possess neither the inherent jurisdiction nor any authority conferred by the Rules of Civil Procedure to do so. His argument is a straightforward one. Both before and after January 1, 2010, the Rules provided that Rule 77 case management in the Toronto Region did not apply to most matters heard on the Toronto Region Estates List, including applications for guardianship of property or persons under the Substitute Decisions Act, 1992. In light of that situation, Mr. Abrams argued, no judge hearing a matter on the Toronto Region Estates List possesses the jurisdiction or power to manage a matter on the List.

[27] To some extent, Mr. Abrams' argument does not surprise me. The "gap" in Rule 77 became apparent as soon as the Rules Committee approved the "new" Rules in December 2008. As I wrote

last fall in Hallman Estate v. Cameron [at para. 47]: [See Note 4 below]

> As to case management, Ms. Hallman is correct that a form of case management is available for proceedings on the Toronto Estates List. I say a "form" of case management because, strictly speaking, the type of case management described in Rule 77 is not available for the majority of disputes heard on the Estates List: Rule 77.01(2)(d) through to (d.0.3).

[28] That Rule 77 case management may not be available for a proceeding does not mean that case management, more broadly understood as litigation management, cannot apply. Again, I addressed this issue in Hallman [at para. 48]:

> Yet the lack of availability of Rule 77-style case management has not impeded the ability of judges sitting on the Estates List from implementing more informal ways of managing cases that appear on the List, either at the request of counsel or at the initiative of the judges. This makes sense. On-going judicial intervention is necessary in some cases to ensure that justice is done. Some parties seek such intervention, and the courts should be ready to respond to reasonable requests to ensure proper access to justice. So, too, intractable cases often require judicial management to prevent abuses of the system of justice and fairness to both parties. [page654]

[29] Mr. Abrams' submissions, however, call into question that analysis, so I propose to examine in more detail the inherent and Rules-based power of judges sitting on the Estates List to engage in the management of litigation on the List.

B. The inherent jurisdiction or powers of a superior court of record

B.1 The source of inherent powers

[30] What is the source of the inherent jurisdiction or powers of a superior court of record? In a seminal article, [See Note 5 below] Sir I.H. Jacob viewed the inherent jurisdiction of a court as an aspect of its general jurisdiction, consisting of a

set, or bundle, of powers which "derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called 'inherent'":

> For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. [See Note 6 below]

This led Jacob to conclude that the source of these powers was "the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". [See Note 7 below] Jacob offered the following definition of a court's inherent jurisdiction:

> [T]he reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. [See Note 8 below]

[31] Although Jacob's definition has been accepted by the Supreme Court of Canada and the Ontario Court of Appeal, [See Note 9 below] his [page655] approach has been criticized by some as too metaphysical in nature, and an alternative way of describing the source of a court's inherent jurisdiction has been to regard as inherent those powers which are necessary if the court is to manage the work which has been assigned to it in an appropriate fashion, [See Note 10 below] a sort of jurisdiction by necessary implication kind of argument. As put by Lord Morris of Borth-y-Gest in Connelly v. Director of Public Prosecutions:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively without such jurisdiction. I

would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process. [See Note 11 below]

[32] Whichever view one takes of how to articulate the source of a court's inherent powers, the commentators unite in recognizing that courts, at least superior courts of record, enjoy inherent powers to regulate and control their own process and proceedings other than those which are conferred on them by legislation, including delegated legislation such as rules of practice. [See Note 12 below] Indeed, less than two years ago, former Chief Justice Lesage, and now Justice Code of this court, in their Report of the Review of Large and Complex Criminal Cases Procedures wrote:

[A]t common law "the trial judge" has significant case management powers, both when hearing motions at the pre-trial stage and when hearing evidence at trial. All trial courts, whether statutory courts or superior courts, have the implied power to control their own process and ensure a fair trial. It is from this broad power that the common law developed an expansive list of remedial tools designed to ensure the fairness and effectiveness of trial processes. [See Note 13 below]

[33] Justice Casey Hill, in a recent article, [See Note 14 below] exhaustively reviewed the origins and the scope of a judge's inherent powers to manage a criminal trial. His opening comments apply with equal force to civil proceedings [at paras. 1-3]:

Originally cast in terms of inherent authority to control the processes of the court and prevention of abuse of the process, it is today recognized that [page656] a trial judge has a duty to manage the trial process balancing fairness to the parties as well as efficient and orderly discharge of court process. Judicial management of litigation recognizes that "there is more at stake than just the interests of the accused". Management involves control, direction and administration in the conduct of a trial. This power, settled

within a broad discretion, relates to the entirety of the trial proceeding extending beyond the scope of pre-trial case management rules designed for "effective and efficient case management". . .

While the criminal trial remains an adversarial process with a division of roles between the trial judge and counsel, the court bears responsibility for control of the trial process, achievement of a just result, and maintenance of respect for the administration of criminal justice. Avoidance of delay, efficient management of limited court time and resources, assistance to jurors to reach a verdict, compliance with rules of court and judicial directions designed to promote trial fairness, minimizing inconvenience, establishing a professional and civil forum for trying a case without distraction or personal disputes, and encouragement of public respect for the process, all legitimize a trial judge's authority to effectively manage a criminal trial.

With the court's compass steadily pointed toward trial fairness, a trial judge's obligation to the administration of justice includes prevention of unnecessary delay or abuse of the court's process as well as attention to conservation of cost and resources. This is entirely consistent with guidelines relating to judicial conduct:

> . . . judges are obliged to ensure that proceedings are conducted in an orderly and efficient manner and that the court's process is not abused. An appropriate measure of firmness is necessary to achieve this end. A fine balance is to be drawn by judges who are expected both to conduct the process effectively and avoid creating in the mind of a reasonable, fair minded and informed person any impression of a lack of impartiality.
>
> . . . . .

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court.

. . . . .

> In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs.

[34] These inherent powers are broad. It is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process because those limits cannot impair the need of the court to fulfill its judicial functions in the administration of justice. [See Note 15 below] That said, the exercise of inherent powers must not undermine principles of procedural [page657] natural justice or fairness. As the Court of Appeal recently pointed out, while a trial court has the inherent jurisdiction to control its own process, that jurisdiction does not extend to dismissing cases without hearing the available evidence and submissions. [See Note 16 below]

B.2 A court's inherent powers to regulate its own process apply to both the trial and pre-trial stages of proceedings

[35] Inherent powers to control the court's process are not confined to judges who preside at trials. Certainly on the civil side of the court, judges possess such inherent powers at all stages of a civil proceeding. [See Note 17 below] The scope of a court's contemporary inherent powers to control its own proceedings and to prevent abuse of its process necessarily reflects the trend that has emerged in the past few decades towards greater judicial oversight of civil proceedings. As noted in Justice Ferguson's Ontario Courtroom Procedure:

> There has been a huge change in philosophy in civil trial procedure since the current rules came into force in 1985.
>
> Up to that time the Rules of Practice, case law and tradition were based on the philosophy of a classic professional adversary system. The underlying assumption was that all parties would be represented by informed, skilled counsel whose professional skills and ethics would produce a fair

> trial subject to rulings by the trial judge when the parties asked for them. Our current rules reflect a recognition that such an approach too often produced delay, unnecessary cost and unfairness. [See Note 18 below]

[36] As a result of that recognition, the role of the judge in directing a civil proceeding has changed. The Court of Appeal has observed that the contemporary trial judge should not be regarded "as little more than a referee who must sit passively while counsel call the case in any fashion they please". [See Note 19 below] Instead, a trial judge may intervene at an appropriate time, pursuant to the court's inherent power to control its own process, to "make directions necessary to ensure that the trial proceeds in an [page658] orderly manner". [See Note 20 below] A "trial judge is entitled to manage the trial and control the procedure to ensure that the trial is effective, efficient and fair to both sides". [See Note 21 below]

[37] So, too, judges have become more active in the pre-hearing phases of civil litigation. As put recently by Deschamps J. in her minority decision in Marcotte v. Longueuil (City), "[w]hat is clear from these different sources is that the purpose of [proportionality] is to reinforce the authority of the judge as case manager. The judge is asked to abandon the role of passive arbiter." [See Note 22 below] Justice Ferguson has noted that today:

> . . . the current philosophy in civil and family trials -- and the evolving philosophy in criminal trials -- is that the judge is not simply an independent observer who decides procedural issues as they are raised by counsel. The judge is now expected to manage litigation to ensure that it is efficiently and fairly dealt with. [See Note 23 below]

Even in the context of criminal proceedings, the Court of Appeal has recognized the power of judges to set schedules for the hearing of pre-trial motions as part of their responsibility of ensuring the orderly administration of justice: "Counsel are expected to comply with the schedules set by the court. This is no less true in criminal matters than in civil matters." [See Note 24 below]

[38] The Alberta Court of Appeal articulated the contemporary duties and powers of judges in the following way:

> In our view, it is the unpleasant duty of the courts to see to it that justice is not unduly delayed. Even when every party to a proceeding seems to be content to see litigation drag on, it is in the public interest to prevent that unhappy result. The modern concept of case management requires a judge not merely to see to it that every party has a fair hearing, but also to see to it that the parties do not abuse that right. For example, parties -- and their counsel -- should prepare for a step in a proceeding when preparation is required in order to move the proceedings along, and not just when it suits their calendars or their other interests. Courts today must decide, and give directions on, matters that unreasonably delay proceedings. Unreasonable delay can come from prolixity, but also hairsplitting and other techniques. Increasingly judges in the future will be required to ration time and effort for motions and objections in terms of the quality of the application. [See Note 25 below] [page659]

[39] The purpose underlying this recognition of the enhanced role of judges to manage proceedings was succinctly put in the Lesage-Code Report:

> The common law powers are very effective tools of judicial case management because they encourage efficient, focused and well-prepared lawyering. [See Note 26 below]

[40] This same point finds expression, in slightly different terms, in the Ontario Rules of Civil Procedure. Judges exercise their inherent powers to manage litigation both before and during trial in order to achieve the two fundamental principles identified for civil litigation in Ontario. One fundamental principle is an end; the other, a means to that end. The end, or objective, of the judicial management of the civil process is to "secure the just, most expeditious and least expensive determination of every civil proceeding on its merits": rule 1.04(1). The means to that end involves courts ensuring that their orders and directions "are proportionate to the importance and complexity of the issues, and to the amount

involved, in the proceeding": rule 1.04(1.1). These two fundamental principles inform the contemporary inherent powers of the Superior Court of Justice to control and manage its civil process to achieve the due administration of justice in each and every case.

[41] In sum, in the world of contemporary civil litigation, judges of the Ontario Superior Court of Justice necessarily possess the inherent power to give directions to the parties, in appropriate cases, about the conduct and completion of both pre-hearing and hearing steps in the proceeding, so that the case receives a just, expeditious and least expensive determination on its merits and that the pre-hearing and hearing steps unfold in a proportionate manner. Such inherent powers are necessary to enable the court to act effectively within its jurisdiction. [See Note 27 below]

B.3 The relationship between a court's inherent powers and rules of practice

[42] The Superior Court of Justice of Ontario is a superior court of record possessing "all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario". [See Note 28 below] As such, the Superior Court of Justice enjoys the inherent, or necessary, powers to regulate and control its own proceedings and to prevent the abuse of its process. This inherent [page660] power is recognized, in part, by s. 146 of the Courts of Justice Act, which provides that the "jurisdiction conferred on a court . . . shall, in the absence of express provision for procedures for its exercise in any Act, regulation or rule, be exercised in any manner consistent with the due administration of justice".

[43] A court may exercise its inherent jurisdiction or power even in respect of matters that are regulated by statute or by rules of court so long as it can do so without contravening any statutory provision. [See Note 29 below] As put by Jacob:

> The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not

mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

In Equiprop Management Ltd. v. Harris, Lang J. (as she then was) echoed Jacob's point when she observed that the Rules generally are considered to be in addition to, rather than in substitution for, inherent jurisdiction. [See Note 30 below] In his article, Dockray ventured that a court's inherent jurisdiction may supplement, but cannot be used to lay down procedure which is contrary to or inconsistent with, a valid rule of practice. [See Note 31 below]

[44] The inherent powers of superior courts to prevent abuse of their process and ensure fairness in the trial process can only be removed by clear and precise statutory language. [See Note 32 below] However, the inherent jurisdiction of a superior court is not such as to empower a judge of that court "to make an order negating the unambiguous expression of the legislative will". [See Note 33 below]

[45] In sum, the court's inherent jurisdiction, or power, to regulate, manage and control the proceedings before it co-exists with the specific rules of practice in respect of various proceedings. A court's power to control its own process is the sum of both sets of powers. Both sets of powers may operate together, with a court's inherent powers ceding only in the face of clear, unambiguous [page661] statutory, or regulatory, language that the court cannot manage its process in a specified manner.

VII. The nature and content of litigation or case management

[46] Before dealing specifically with the issue of the powers of judges sitting on the Estates List to manage proceedings, it is important to stress that the concept of "case management" for civil cases is a broad one, and the term "case management" refers to a broad range of powers exercised by judges in the course of managing a civil proceeding.

[47] A judge may intervene to manage a civil proceeding in a variety of circumstances. First, judges frequently issue directions for the further conduct or trial of a proceeding when disposing of a motion or application. For example, a judge

hearing a motion, such as a motion to set aside a default judgment, may, as part of the disposition of the motion, give directions for further steps in the proceeding -- e.g., timetabling the delivery of pleadings, affidavits of documents and the conduct of discoveries. This sort of case management occurs daily.

[48] The Rules specifically encourage judges hearing certain motions, such as summary judgment motions, to give extensive case-management directions in the event they conclude the proceeding should proceed to trial: see the extensive "check list" of directions contained in rule 20.05(2). It is significant that rule 20.05(2) provides that a judge should consider when disposing of a summary judgment motion directions regarding how the trial should be conducted -- e.g., placing time limits on the oral examination of a witness at trial; requiring that the evidence of a witness be given in whole or in part by affidavit; requiring expert witnesses to meet prior to trial and to file a joint statement setting out areas of agreement and disagreement; and delivering concise summaries of their opening statements prior to the commencement of trial: rules 20.05(2)(i), (j), (k) and (l).

[49] In the case of an application, a judge possesses the broad power to "give such directions as are just" where the judge directs a trial of the application or any issue: rule 38.10(1). Such directions could include how the trial of the issue should be conducted.

[50] Second, judges conducting civil pre-trial conferences are now asked to consider issuing case-management directions for the remaining steps in the proceeding and for the conduct of the trial: rule 50.07(1)(c).

[51] Third, it is a well-established practice in the Toronto Region that counsel on certain types of cases may approach directly judges known for their expertise in a subject-matter area for assistance and directions in managing a case. [page662]

[52] Fourth, parties may approach certain judges well known

for their mediation skills in an effort to effect a settlement of the case.

[53] Fifth, periodically a judge will have a case cross his or her radar screen, usually during a motion, where the judge concludes that the case falls into the category of those that have "fallen off the rails" and requires some litigation management in order to fulfill the fundamental objectives of the Rules. Judges will take on such cases in order to bring some semblance of order and proportionality back to the proceeding.

[54] Sixth, parties to a proceeding may request formally the appointment of a judge to hear all motions in a proceeding, usually one of some complexity where numerous motions are contemplated: rule 37.15(1).

[55] Seventh, parties may make a formal request for Rule 77 case management.

[56] All seven types of judicial intervention are forms of "case management" or "litigation management", in the sense that a judge intervenes in the proceeding prior to trial in order to give directions for the preparation of the case for trial, for the actual conduct of the trial, or to attempt to resolve the proceeding. As can be seen, case or litigation management may arise in a variety of circumstances and will require the application of a range of management tools in order to secure the just, most expeditious, least expensive and proportionate determination of the proceeding on its merits. As is also evident, Rule 77 case management represents only one of several different ways by which a judge can manage a proceeding. Put differently, Rule 77 case management does not exhaust the court's power to manage litigation before it; it simply provides a further tool, in addition to the court's inherent powers and other powers mentioned in the Rules, to manage a case in an effective way.

VIII. The Powers of Judges on the Estates List to Manage Proceedings

A. The Toronto Region Estates List

[57] For administrative convenience, the non-family civil work undertaken by the Superior Court of Justice in the Toronto Region has been broken down into different scheduling groups or teams: the Commercial List; Long Trials; and Civil Motions/ Short Trials. The Estates List constitutes part of the Civil Motions/Short Trials team. Judges rotate through these areas periodically, and the cases in each group are managed under the same scheduling umbrella. The Estates List is not a separate court, but simply a shorthand designation for the judge who is assigned each week to hear motions and applications involving estate, trust and capacity law. [page663]

B. The availability of "case management" on the Toronto Region Estates List

[58] Rule 77 establishes a mechanism by which parties can request the appointment of a case management judge or master in Toronto, Ottawa and Essex County. Rule 77.02(2) specifies that "this Rule does not apply to" a variety of matters, including proceedings on the Toronto Region Commercial List and Estates List. Pointing to that section, Stephen Abrams submitted that because Rule 77 case management does not apply to matters on the Estates List, judges who hear matters on the Estates List cannot intervene to manage cases. I see no merit in Mr. Abrams' submission for several reasons.

[59] First, I see nothing in the language of rule 77.02(2) that purports to strip judges hearing matters on the Estates or Commercial Lists of the inherent powers to manage litigation before them. Rule 77.02(2) simply states that Rule 77 case management does not apply to the Commercial List or Estates List. As I described above, Rule 77 case management constitutes only one of several different means by which a court can manage a proceeding. I see no conflict between rule 77.02(2) and the inherent powers of judges sitting on the Estates List, or Commercial List, to manage litigation in those fora.

[60] Second, Rule 77 has a long, and somewhat tortured, history. Its early days were reviewed by MacDonald J. in Control & Metering Ltd. v. Karpowicz [See Note 34 below] and Business Depot Ltd. v. Genesis Media Inc. [See Note 35 below] Suffice it to say that an initial effort to bring all civil proceedings in

Toronto under a highly structured and formalized case-flow-management system collapsed under its own weight. The lack of resources needed to support such an initiative resulted in greater delays in cases, exactly the opposite of the intended result. In the Toronto Region, Rule 77 was replaced in 2005 by the "light touch" case-management pilot project set out in Rule 78, and the "case management if necessary, but not necessarily case management" philosophy was carried over into the amended Rule 77 that came into effect on January 1, 2010.

[61] Historically, cases on the Commercial List and Estates List were not rolled into the various Rules 77 and 78 case-flow-management initiatives in the Toronto Region, I suspect largely because both Lists had developed their own distinctive approaches to managing their proceedings. That approach has [page664] continued under the new Rule 77, leaving it to the Estates List and Commercial List to craft the litigation management practices best suited to the needs of the proceedings on those lists.

[62] Third, Rule 77 applies only to proceedings in Toronto, Ottawa and Essex County. The exclusion of the other judicial regions in Ontario does not mean that judges in those regions lack the inherent powers to manage proceedings in their jurisdictions in accordance with local practices and resources. In fact, in the Hallman case, I specifically noted the evidence in the record that a defined process for securing case management exists in Kitchener-Waterloo. [See Note 36 below] I have no doubt that similar litigation management practices operate in other judicial regions in Ontario, notwithstanding the language of Rule 77.

[63] I conclude that judges sitting on the Toronto Region Estates List, like all other judges of the Ontario Superior Court of Justice, possess and enjoy inherent powers to manage litigation on their lists or, to use the more popular expression, to "case manage" their proceedings.

IX. Application of These Principles to the Present Case

A. Stephen Abrams' alternative complaints

[64] As an alternative argument, Stephen Abrams submitted

that even if judges on the Estates List possessed the power to manage litigation in some general way, three features of the directions contained in the March Endorsement went beyond the proper litigation management powers of a judge: (i) requiring interlocutory motions to be brought in writing; (ii) stipulating that the evidence-in-chief of witnesses at the trial be given by way of affidavit; and (iii) setting the length of the trial.

B. The inevitability of "judicial squeezing" in case management

[65] It is apparent that Mr. Abrams has challenged my jurisdiction to make such directions because they do not accord with the way he wishes to litigate this proceeding. Judicial management of high-conflict cases, such as this one, involves, at times, a certain amount of "judicial squeezing" in order to advance the case to a hearing in a timely and proportionate manner. Not all parties take kindly to such squeezing. But, it is worth recalling the comments made by Master Haberman in her decision in Mother of God Church v. Bakolis, where one party sought the recusal of a case management master with whose directions it did not agree: [page665]

> It is understood that, in a case managed environment, there will be times when the master forms an impression about how one party or the other has been conducting itself as a result of this repeated exposure. If the view is unfavourable, that, in and of itself, does not give rise to a basis for recusal. One must still meet the test that has been articulated by the Supreme Court of Canada. Similarly, if the master's repeated dealings with the parties and the issues gives rise to a sense that there is more merit to one side than the other, that, too, will not suffice to prevent further handling of the case. That is precisely what case management was intended to do -- create an expeditious and cost effective way to resolve all aspects of the disputes that come before the courts, by allowing judges/masters to become familiar with the case through repeated exposure. [See Note 37 below]

In other words, some amount of judicial squeezing accompanies litigation management. If some pinching occurs, that does not signal a lack of jurisdiction or bias, but simply a necessary

degree of judicial hammering to bang a case back into proper procedural shape. The recent adoption of the principle of proportionality signals that the sound of the judicial hammer will only get louder.

C. The principle of proportionality

C.1 Its origins as an express principle in rules of court practice

[66] Although the principle of proportionality as a guide to the exercise of judicial discretion in controlling the process of the court is not a new concept, it was only earlier this year that the principle found express statement in rule 1.04(1.1) as a foundational principle of the Rules of Civil Procedure: "In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding." In Marcotte v. Longueuil (City), Deschamps J., in her minority reasons, outlined the genesis of the movement to include an express principle of proportionality in local rules of practice [at paras. 69-71]:

> The acceptance of this principle and the increased significance attached to it originated in Lord Woolf's report on reform of the civil justice system of England and Wales: Access to Justice -- Final Report (1996). One of the recommendations in that report was that greater proportionality be ensured between the nature of the case and the procedure used.
>
> According to Lord Woolf, one thing that can be done to achieve justice is to deal with each case in a way that is proportionate to its importance, to the amount of money involved, to the complexity of the issues and to the parties' [page666] financial positions (Final Report, at p. 275). The English courts have stated that the main objective of the new rules of procedure is to control costs, which must, where possible, be proportionate to the amount of money at stake. To this end, the parties must adopt an appropriate strategy. . . .
>
> Proportionality has been advanced as a guiding principle

not only in Quebec, but also in other Canadian province and territories. For example, the British Columbia Supreme Court amended its rules of procedure in 2005 to formally incorporate this principle: Rule 68 -- Expedited Litigation Project Rule . . . In British Columbia, the principle of proportionality plays a significant role in case management: Totol Vision Enterprises Inc. v. 689720 B.C. Ltd., 2006 BCSC 639[.] [See Note 38 below]

(Citations omitted)

[67] The inclusion of an express principle of proportionality in the Ontario Rules of Civil Procedure resulted from the recommendations made by the Honourable Coulter A. Osborne, Q.C., in his 2007 report on the Civil Justice Reform Project. In that report, he stated that "proportionality, in the context of civil litigation, simply reflects that the time and expense devoted to a proceeding ought to be proportionate to what is at stake". [See Note 39 below]

C.2 The operational scope of the principle of proportionality

[68] In Marcotte v. Longueuil (City), the majority and minority of the Supreme Court of Canada agreed that the principle of proportionality found in art. 4.2 of the Quebec Code of Civil Procedure, R.S.Q., c. C-25 ("CCP") [See Note 40 below] offered a tool for judges to use in managing civil cases. As put by DesChamps J. in her minority reasons: "What is clear from these different sources is that the purpose of art. 4.2 CCP is to reinforce the authority of the judge as case manager. The judge is asked to abandon the role of passive arbiter." [See Note 41 below] However, the majority and minority differed about the operational force of the principle of proportionality. The majority rejected the suggestion that proportionality was simply "a principle of interpretation that confers no real power on the courts in respect of the conduct of civil proceedings in [page667] Quebec". [See Note 42 below] Although technically obiter, LeBel J. offered an expansive view of the powers to manage a case which a judge could d raw from the principle of proportionality [at para. 43]:

The principle of proportionality set out in art. 4.2 C.C.P.

is not entirely new. To be considered proper, a proceeding must be consistent with it (see Y.M. Morissette, "Gestion d'instance, proportionnalit et preuve civile: tat provisoire des questions" (2009), 50 C. de D. 381). Moreover, the requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which, while frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system. There are of course special rules for the most diverse aspects of civil procedure. The application of these rules will often make it possible to avoid having recourse to the principle of proportionality. However, care must be taken no t to deny this principle, from the outset, any value as a source of the courts' power to intervene in case management. From this perspective, the effect of the principle of proportionality is to cast serious doubts on the appropriateness of bringing class actions to achieve the purposes being pursued in the appellants' proceedings. [See Note 43 below]

[69] DesChamps J., for the minority, advanced a more modest role for the principle of proportionality. Emphasizing that proportionality is a principle, not an independent standard, DesChamps J. argued that proportionality operated as "a rule of assessment that does not alter the conditions set out in the CCP", so that a judge was to apply the principle in exercising discretion when reviewing any conditions set out in the Quebec Code of Civil Procedure. [See Note 44 below] In sum, "this case management function does not mean that it would be open to a judge to prevent a party from exercising a right. However, the judge must uphold the principle of proportionality when considering the conditions for exercising a right." [See Note 45 below]

[70] The debate in the Marcotte case about the operative function of proportionality in civil litigation took place in the realm of obiter. However, I have strong concerns that the narrower view set out in the minority reasons could see the work

of the principle of proportionality frustrated before it even had a chance to start. I think that Justice Colin Campbell of this court accurately captured the dynamic and reach of the introduction of [page668] an express principle of proportionality into the Rules of Civil Procedure by describing it as a step which signals a shift in the practice and culture of civil litigation. [See Note 46 below] While the Rules of Civil Procedure are not often compared to the Little Red Book of Chairman Mao popularized during China's Great Proletarian Cultural Revolution, I do not think it an exaggeration to characterize the recognition of proportionality in our own Little Blue (or White) Book as a "cultural revolution" in the realm of civil litigation. Proportionality signal s that the old ways of litigating must give way to new ways which better achieve the general principle of securing the "just, most expeditious and least expensive determination of every proceeding on its merits". These new ways need be followed by the bar which litigates and by the bench, both in its adjudication of contested matters and in its management of litigation up to the point of adjudication.

[71] Before dealing with each specific objection raised by Mr. Abrams, let me repeat that he did not appeal the March Endorsement. More importantly, as I pointed out in the March Endorsement, the December 19, 2008 directions order of Strathy J. [[2008] O.J. No. 5205 (S.C.J.)] made it obvious that he expected the trial of this proceeding to be held in 2009. It was not due to the fault of the parties. Having ignored the "light touch" directions of Strathy J., the parties should not be surprised that the next judicial intervention would possess a proportionally greater bite than the first. Or, to put it more colloquially, if parties turn their backs on a first set of judicial management directions, they can expect the court to turn up the heat on the second set. Such is one manifestation of the principle of proportionality in operation. Against this background, let me turn to the specific objections raised by Stephen Adams to the directions that I gave in the March Endorsement.

D. Motions in writing

[72] As at February 24, the parties had indicated that they

wished to bring refusals motions, and Mr. Stephen Abrams advised that he also wanted to bring motions to strike portions of the pleadings or affidavits of opposite parties and to vary the order of Strathy J. regarding the scope of the disclosure of his mother's financial and medical records. At the April 8 hearing, Stephen Abrams indicated that he wanted to bring several [page669] additional motions -- the appointment of an independent guardian or attorney of property for Ida Abrams during litigation; an examination de bene esse of Philip Abrams; and a determination of whether letters of Drs. McIntyre and Nusinowitz qualify as expert reports. Each case management conference seems to spawn a list of new motions which Stephen Abrams wishes to bring.

[73] In para. 36(c)(v) of the March Endorsement, I directed that I would hear the refusals motions by way of writing. Stephen Abrams submitted that I lacked the jurisdiction to require the parties to argue their motions in writing. As he put it, on a motion a party has the "absolute right to present oral argument". He wants to set aside two days for oral argument of the refusals motions.

[74] I must confess that I am puzzled by Mr. Abrams' opposition to the use of the efficient and proportionate device of hearing a refusals motion by way of writing in a managed proceeding. I used that method last year to hear refusals motions in a managed proceeding without any objection from the parties; they recognized that it operates as an effective way to deal with motions when the parties desire to proceed expeditiously to a final hearing. [See Note 47 below]

[75] More to the point, when the parties were before me on a motion on November 9, 2009, I agreed to act as the case management judge for this proceeding. Indeed, my notes for that hearing record that it was counsel for Stephen Abrams who specifically asked that the proceeding be subject to case management. Over the course of three subsequent case management conferences, I gained an understanding of the issues for adjudication in this proceeding, as well as the outstanding steps requiring completion prior to a hearing. It was in that context that I formed the view that the most efficient and

proportionate manner in which to deal with the refusals motions was by way of motions in writing, and I issued directions accordingly in my March Endorsement.

[76] Rule 37.15(1.2), which came into force on January 1, 2010, makes it clear that where a judge manages litigation pursuant to an appointment under rule 37.15(1) to hear all motions, the judge "may, in respect of the motions, give such directions and make such procedural orders as are necessary to promote the most expeditious and least expensive determination of the proceeding". Such directions can include requiring the parties to bring motions by way of writing. In my view, a judge who is [page670] managing litigation other than under Rule 77 also possesses the inherent power to require written motions in appropriate circumstances. Case management, or litigation management, does not form part of a judge's regular work schedule, at least not in the Toronto Region; it is largely done "before hours" or "after hours", so to speak. Accordingly, a judge managing a proceeding reasonably can require parties to submit motions in writing so that the judge can more readily accommodate those motions in h is or her schedule. To insist that a judge managing a proceeding must hear all motions in open court could result in significant unnecessary delays in managing litigation since a judge sitting on the civil team in the Toronto Region only hears motions periodically during a term. Written motions do not prejudice parties; a written factum can function just as effectively and fairly as oral submissions. Refusals motions especially lend themselves to a written hearing. Of course, the complexity of some motions might merit an oral hearing, but the mode of hearing for a particular motion falls within the discretion of the judge managing the proceeding, always keeping in mind the principle of proportionality.

[77] Consequently, I see no merit in Stephen Abrams' argument that as the judge whom he requested manage his application I cannot issue directions requiring that certain motions be brought in writing.

E. Imposing directions regarding the trial: requiring evidence-in-chief to be given by way of affidavit and imposing time limits on the length of trial

[78] In para. 36(c)(iii) of the March Endorsement, I gave the following directions regarding the trial of the issues ordered by Strathy J.:

> The trial will be a hybrid one, primarily relying on filed affidavits for a witness' evidence-in-chief, with latitude to conduct up to 30 minutes additional examination-in-chief of each party witness. Cross-examinations of each party witness shall not exceed 3 hours in length, a more than adequate amount of time given the extensive cross-examinations already conducted.

[79] Stephen Abrams submitted that requiring the use of affidavit evidence at trial ignored "the general principle that evidence should be submitted orally in court", which "has been a cornerstone of our legal system for more than 200 years". With respect, that submission ignores how civil trials have evolved in this province in recent years.

[80] For over a decade, many trials on the Commercial List have used "sworn witness statements to replace examination in chief, in whole or in part, in appropriate circumstances": [page671] Commercial List Practice Direction, para. 50. The April 2009 Practice Direction Concerning the Estates List of the Superior Court of Justice in Toronto adopted the practice of the Commercial List. [See Note 48 below] Trials using a hybrid record of written evidence-in-chief and viva voce cross-examination routinely occur in civil and family proceedings in the Toronto Region.

[81] On January 2, 2010, the Rules of Civil Procedure finally caught up with this long-standing practice. The Rules now specifically provide that a judge who directs a trial on an unsuccessful summary judgment motion, and any judge conducting a civil pre-trial conference, may issue directions for the conduct of the trial, including that (i) the evidence of a witness at trial be given in whole or part by affidavit, (ii) any oral examination of a witness at trial be subject to a time limit and (iii) each party deliver a concise summary of its opening statement: rules 20.05(2)(i), (j) and (l) and 50.07(1)

(c). By limiting the time for oral examination of witnesses at trial, a court can set the length of the trial.

[82] Rule 53.01 states that the general rule of using viva voce evidence at a trial applies "unless these rules provide otherwise". The Rules now "provide otherwise" in order to reflect the reality that if proportionality is to have any meaning as a guiding principle, pre-hearing judges must be able to exercise some control over the length and process for the trial of the proceeding. Of course, any pre-trial directions given regarding the conduct of a trial ultimately are subject to the discretion of the judge presiding at the trial.

[83] A judge engaged in case -- or litigation -- management also possesses the inherent powers to give directions regarding the mode of giving evidence-in-chief and the length of the oral examination of any witness at trial. Such powers are a necessary incident to the judge's ability to manage the case in a proportionate manner. That rules 20.05(2) and 50.07(1)(c) do not specifically refer to judges involved in managing litigation is neither here nor there. A judge managing a case could easily direct the holding of a formal pre-trial conference and thereby engage the powers granted by rule 50.07(1)(c). To require such formality is unnecessary; a case management judge can issue such directions, as an incident of his or her inherent powers, at an appropriate stage of the case or litigation management process.

[84] For these reasons, I conclude that I possessed the jurisdiction to issue the directions contained in para. 36(c)(iii) of the March Endorsement. [page672]

X. Conclusion

[85] By way of summary, on November 9, 2009, the applicant, Stephen Abrams, requested that this proceeding be subject to case management. When he did not like the case management directions that I issued on March 1, 2010, he subsequently argued that I lacked the jurisdiction to case manage the proceeding and issue those directions. I have explained above why I do not accept his arguments.

[86] At the conclusion of the case management hearing on April 8, 2010, counsel for Stephen Abrams raised, as he put it, the "A-Word". In a not-so-subtle fashion, counsel suggested that should I not accede to Mr. Abrams' request to reverse my March Endorsement, his client would appeal my order. As I stated at the start of these reasons, courts do not negotiate their jurisdiction.

[87] Stephen Abrams used the hearing on April 8, which was designed to finalize a plan for the remaining steps in this proceeding, to re-argue matters that I had already decided in my March Endorsement. I cannot manage this proceeding effectively while one of the parties -- the applicant who initiated the proceeding -- contests my jurisdiction to give directions when he is dissatisfied with an order I make. Accordingly, it makes no sense to me to issue final directions for the remaining steps in this proceeding until Stephen Abrams either appeals this decision or decides that he will comply with the parameters that I set for the trial of issues in my March Endorsement.

[88] As a result, I defer setting a final plan for this proceeding until the time for an appeal has expired. I direct the parties to appear before me, in open court, for a further case management conference on Wednesday, June 16, 2010 at 9:00 a.m. If an appeal of my March Endorsement or this order remains outstanding at that time, counsel should so notify my office no later than June 14, 2010, and the June 16 hearing will be postponed until any appeal has been dealt with. If an appeal is not taken from my March Endorsement or this order, then I expect counsel to appear before me on June 16 with an agreed upon "plan to adjudicate the ordered trial of issues" in accordance with the parameters I set down in para. 36(c) of the March Endorsement. Until such time, of course, no further step may be taken in this proceeding without my leave, or the leave of an appellate court.

Order accordingly.

Notes

Note 1: Abrams v. Abrams, [2010] O.J. No. 787, 2010 ONSC 1254.

Note 2: S.O. 1992, c. 30.

Note 3: (2009), 97 O.R. (3d) 544, [2009] O.J. No. 2693 (S.C.J.), at paras. 7-11.

Note 4: [2009] O.J. No. 4001, 2009 CanLII 51192 (S.C.J.).

Note 5: I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23 ("Jacob").

Note 6: Ibid., at 27.

Note 7: Ibid., at 27-28.

Note 8: Ibid., at 51.

Note 9: R. v. Rose (1998), 40 O.R. (3d) 576, [1998] 3 S.C.R. 262, [1998] S.C.J. No. 81, at para. 131; R. v. Papadopoulos, [2005] O.J. No. 1121, 196 O.A.C. 335 (C.A.).

Note 10: M.S. Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997), 113 Law Q. Rev. 120 at 126.

Note 11: [1964] A.C. 1254, [1964] 2 All E.R. 401 (H.L.), at p. 1301 A.C.

Note 12: Jacob, supra, at 32; Dockray, supra, at 122.

Note 13: (Toronto: Queen s Printer for Ontario, 2008) at 70 ("Lesage-Code Report").

Note 14: "The Duty to Manage a Criminal Trial" (Paper presented to the National Justice Institute, April 2009). Citations omitted.

Note 15: Jacob, supra, at 33.

Note 16: Park v. Lee (2009), 98 O.R. (3d) 520, [2009] O.J. No. 3746 (C.A.), at p. 521 O.R.

Note 17: As observed by the Supreme Court of Canada in Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, at para. 34: "Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them."

Note 18: D.S. Ferguson ed., Ontario Courtroom Procedure (Markham: LexisNexis Canada, 2008) at 21 ("Ontario Courtroom Procedure").

Note 19: R. v. Felderhof (2003), 68 O.R. (3d) 481, [2003] O.J. No. 4819 (C.A.), at para. 40.

Note 20: Ibid.

Note 21: R. v. Snow (2004), 73 O.R. (3d) 40, [2004] O.J. No. 4309 (C.A.), at para. 24.

Note 22: [2009] 3 S.C.R. 65, [2009] S.C.J. No. 43, 2009 SCC 43, at para. 67.

Note 23: Ontario Courtroom Procedure, at 31-32.

Note 24: R. v. Oliver, [2005] O.J. No. 596, 194 O.A.C. 284 (C.A.), at para. 29.

Note 25: R. v. Steel, [1995] A.J. No. 992, 174 A.R. 254 (C.A.), at para. 26, leave to appeal refused [1995] S.C.C.A. No. 533 (emphasis added).

Note 26: Lesage-Code Report, supra, at 71.

Note 27: Connelly v. D.P.P., supra.

Note 28: Courts of Justice Act, R.S.O. 1990, c. C.43, s. 11.

Note 29: Jacob, supra, at 24.

Note 30: (2000), 51 O.R. (3d) 496, [2000] O.J. No. 4552, 195 D.L.R. (4th) 680 (Div. Ct.), at pp. 700-701 D.L.R.

Note 31: Dockray, supra, at 128.

Note 32: R. v. Rose, supra, at para. 133; R. v. Keating, [1973] O.J. No. 224, 11 C.C.C. (2d) 133 (C.A.), at pp. 135-36 C.C.C.

Note 33: Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, [1975] S.C.J. No. 84, at p. 480 S.C.R.

Note 34: (1994), 17 O.R. (3d) 431, [1994] O.J. No. 345 (Gen. Div.), at paras. 13-18.

Note 35: (2000), 48 O.R. (3d) 402, [2000] O.J. No. 1593 (S.C.J.), at paras. 25-27.

Note 36: Hallman Estate, supra, at para. 49.

Note 37: Mother of God Church v. Bakolis, [2005] O.J. No. 1638, [2005] O.T.C. 295 (S.C.J.), at para. 30 (emphasis added).

Note 38: Marcotte v. Longueuil (City), supra, at paras. 69-71.

Note 39: Civil Justice Reform Project: Summary of Findings & Recommendations (Ontario Ministry of the Attorney General, 2007) at 134.

Note 40: 4.2 CCP states: "In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge."

Note 41: Marcotte, supra, at para. 67.

Note 42: Ibid., at para. 42.

Note 43: Ibid., at para. 43 (emphasis added).

Note 44: Ibid., at paras. 72 and 74.

Note 45: Ibid., at para. 67.

Note 46: "Proportionality" in Civil Justice Reform in Action: The New Rule Amendments, CLE program held October 14, 2009 (Toronto: Law Society of Upper Canada, 2009) at 3.

Note 47: Beach v. Toronto Real Estate Board (May 31, 2009) Toronto, Doc. No. CV-08-366597 (Ont. S.C.J.).

Note 48: See para. 65.
