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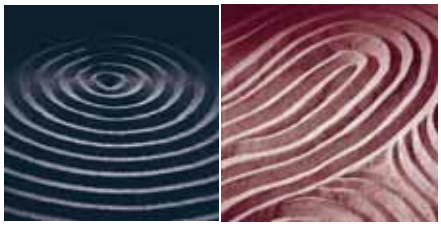

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Pre-Negotiation Strategy in Multiparty Litigation

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LET'S TALK CONSTRUCTION LAW
PRE-NEGOTIATION STRATEGY IN MULTIPARTY LITIGATION*

I. Introduction

This paper focuses on multi-party litigation in the construction context. The issue to be discussed is strategy to be used in preparation for a successfully negotiated settlement. Most commonly this resolution is obtained through mediation, but the strategies are virtually the same if a resolution is to be obtained through a more informal negotiation.

Most clients not only want a successful resolution, they want a resolution where they feel their money has been well spent. Many clients prefer to keep costs in check prior to a mediation, to the greatest extent possible. Only where the mediation was unsuccessful do they want you to pull out all the stops and begin doing the kind of full preparation which is needed for trial.

However, it is very difficult to obtain a satisfactory resolution if you are in the dark on key issues. You will serve your client well if you can identify, as well as you can, a number of key issues before mediation, if you use the discovery process in a targeted and strategic way, and if you use experts in a targeted and strategic way.

II. What do you need in your pre-negotiation tool box?

Well informed is well armed in a negotiation. The information which is important to have in your tool box extends beyond the four corners of the pleadings. This is the time to think creatively about what information you need to understand the positions of the other parties. Similarly, this is the time to consider your client's own risks, and to make sure your client is well aware of such risks. In order for the negotiation to be successful, you need to make sure that your client is pragmatic and realistic. It is great to be bullish on your case at the courthouse steps, but you will not achieve a successful negotiation if your client thinks he or she has nothing to lose.

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* This paper was prepared by Wendy A. Baker, of Miller Thomson LLP, Vancouver, BC, with special thanks to Brian Ross also of Miller Thomson LLP.

A. Know where the money is (plaintiff's case)

You need to know who has the money. And you need to know who doesn't have any money. If all of your arguments are focussed on a judgment proof defendant, you are not going to walk out of the negotiation or mediation with a happy client.

There are a couple of things that can be done. Most defendants in construction litigation have insurance. They may not have coverage under their policies for the issues raised in the litigation, however. But, you can now explore their insurance position early in the litigation. Rule 26 was amended effective July 1,

2007 to deal with disclosure of certain limited insurance documents:

> 26(1.4) A party must ensure that there is listed in the list of documents prepared under subrule (1) any insurance policy under which an insurer may be liable
> (a) to satisfy the whole or any part of a judgment obtained in the action, or
> (b) to indemnify or reimburse any party for any money paid by that party in satisfaction of the whole or any part of such a judgment.
>
> (1.5) Despite subrule (1.4), information concerning the insurance policy must not be disclosed to the court at trial unless it is relevant to an issue in the action.
>
> (1.6) For the purposes of subrules (1.4) and (1.5), "insurance policy" does not include an application for insurance.

This new provision will give you a glimpse into the insurance position of the defendants. It is only a glimpse, however. A recent decision of the BC Supreme Court has interpreted the Rule to include only contracts where there is an obligation to indemnify. Documents which provide for discretionary assistance only are not subject to disclosure: *Holland (Guardian ad litem of) v. Marshall*, [2008] B.C.J. No. 331 (S.C.).

Most importantly, disclosure of policies under this Rule will reveal whether there is an exclusion for certain types of damage. Of particular interest in recent years has been the inclusion of a water entry exclusion, which has resulted in the denial of coverage for many design professionals.

Another significant insurance coverage issue in recent years has been the line of cases denying coverage for general contractors under their CGL policies: *Swagger Construction Ltd. v. ING Insurance Company of Canada*, 2005 BCSC 1269 (CanLII), 2005 BCSC 1269; *Progressive Homes Ltd. v. Lombard General Insurance Company of Canada*, 2007 BCSC 439. The summary of the *Swagger* conclusion, which was upheld in *Progressive Homes*, was set out by Garson, J. in *GCAN Insurance Company v. Concord Pacific Group Inc.*, 2007 BCSC 241 (CanLII), 2007 BCSC 241:

> [42] I would interpret **Swagger** as authority for the proposition that a liability insurance policy covering physical injury to tangible property does not contemplate the artificial division of the work of the party responsible for that work into component parts for the purpose of establishing Resultant Damage, unless that is the clear intention of the entirety of the policy. Smith J. decided that the policies at issue in **Swagger** could not be interpreted as covering what I called above Own Work Resultant Property Damage, and therefore the University's claim against **Swagger** was not covered by its wrap-up liability policy. **Swagger** is also authority for the proposition that in the context of an insurance

policy covering physical injury to tangible property, defective construction is not an "accident" unless there is damage to the property of a third person.

It should be noted that the appeal of the *Progressive* case has been heard, with judgment reserved. BC is presently charting a different course on the coverage position of general contractors than is being developed in Ontario. As such, this is an area of the law which must be closely watched.

Confirmation of the insurance position can be explored further on examination for discovery pursuant to the companion amendment to Rule 27, also enacted in 2007:

> 27(22.1) Without limiting subrule (22), unless the court otherwise orders, a person being examined for discovery must answer any question within his or her knowledge or means of knowledge that is related to
>
> (a) the existence and contents of any insurance policy under which an insurer may be liable
>
> (i) to satisfy the whole or any part of a judgment obtained in the action, or
>
> (ii) to indemnify or reimburse a party for any money paid by that party in satisfaction of the whole or any part of such a judgment, and
>
> (b) the amount of money available under the policy, and any communication from an insurer denying or limiting liability under the policy.

The scope of questioning is very limited, but it will allow you to determine the extent of policy limits available, and confirm whether there has been a denial of coverage. In Ontario, where a similar Rule is in force, the Court has found that witnesses must not only disclose whether coverage has been denied, but also the basis for the denial: *Seaway Trust Co. v. Markle*, [1992] O.J. No. 1602 (S.C.J.).

For uninsured defendants, investigations can be conducted to determine whether there are assets in the corporation's or person's name. This information will be useful to you in determining what negotiating pressure you can bring to bear on a particular defendant.

B. Know where the money is (defendant's case)

Similar to the plaintiff, you need to know which parties have the ability to pay a settlement. The same investigations available to the plaintiff are available to the defendants. In addition, you should know what your client's limits or asset base is, as this will be important in determining how to position your client in the negotiations.

You should also learn how the different policies on the project work together. Is there a wrap-up policy? Has it been triggered by all the relevant parties? Have all the parties triggered their insurance? This must be confirmed prior to the negotiations. It is important to be satisfied that all coverage issues been determined prior to the mediation. If not, pressure should be brought to bear on the parties to resolve the coverage issues as soon as possible. The mediator may be of assistance in resolving the coverage issues for the purposes of the mediation.

Another important piece when acting for a defendant is to get a sense of how much money the plaintiff has available to spend on the litigation. Is the plaintiff a large strata corporation, with the ability to assess 100+ owners to cover legal fees? Is the plaintiff a single person, with no other assets, who just

completed a very costly repair and is facing a long trial with many defendants? Is the plaintiff a school funded by the provincial government? It is important to spend some time understanding the economics which may be driving the plaintiff's desire to settle.

Strata Council minutes produced in the litigation may be a useful place to find information relating to the plaintiff's approach to the litigation, and may include hints as to the repair and litigation cost expectations of the plaintiff.

C. Are there any significant "absolute" defences?

All defendants to the litigation will have defences and the strengths of those defences must be assessed. However, it is very important to identify whether there are any defences that give a defendant an absolute defence to the Action – the kind of defence which does not require a full trial. An example of this kind of defence would be a clear and strong limitation defence based on an agreement (such as found in *Board of School Trustees et al. v. Killick Metz Bowen Rose Architects and Planners et al.,* 2007 BCSC 28, or *College of New Caledonia v. Kraft Construction Company Ltd.*, 2007 BCSC 1408). If one of the main target defendants has a very strong defence, in particular one which could be resolved on a Rule 18A application, this needs to be taken into account in preparing for the mediation.

D. What are the pressures external to the litigation?

In any negotiation it is very important to understand the dynamics underlying the positions the parties may take.

Some of the pressures which may be brought to bear on the plaintiff are discussed above, i.e. dwindling resources to support the litigation. In addition, if the plaintiff is a strata corporation, it may be useful to find out how great the support is for the litigation. Is this a strata corporation which has internal conflicts about the course of the repairs and the litigation? Often the developer will have access to this information if it remains an owner of suites in the building. Has there been litigation internal to the strata corporation regarding the conduct of the repair (i.e. see *Enefer v. The Owners, Strata Plan LMS 1564*, 2005 BCSC 1866, and *Ranftl v. The Owners, Strata Plan VR 672 and Wennerstrom*, 2007 BCSC 482, amongst others)?

If the plaintiff is involved in more than one piece of litigation, i.e. it is a Society with several projects, or a school district, and one or more defendants are involved in two or more of the different actions, this provides opportunities for those defendants to negotiate multi-action settlements. By the same token, other parties should be aware if such dynamics are in play between the plaintiff and one or more defendants, as the settling out of one or more defendants early in the process will create additional pressure on the parties remaining in the room.

Defendants may have many external pressures, including financing pressures, development opportunities which may be lost, difficulties getting bonding in the face of ongoing litigation, etc. These may not exist for all defendants, as those that are insured or are defunct companies may not have significant external pressures that will influence their decision making in the negotiation.

Another consideration may be the reputation of the defendant. While all defendants are concerned about being parties to litigation, some defendants will place a very high value on their reputation and this will drive their negotiating position. For example, if a defendant is a manufacturer of a particular product, it may not be willing to contribute much in the way of funds, but it may be willing to resupply the product.

If the product is of a significant value, and the repair work has not started, this may be an avenue to explore. If this seems like a possibility, it should be explored early to allow for a meaningful discussion at the negotiation. Similarly, a defendant may be willing to pay more than you expect to ensure that the litigation is completed quickly, particularly where it has ongoing projects and is concerned about protecting its corporate reputation in relation to those projects.

The relationships between the parties need to be considered. Are there ongoing relationships between any of the parties? Are there projects in the wings where some of the parties may be working together again? In other words, are there business relationships which can be exploited to obtain a good result? To get this kind of information, you must talk to your client and get them to think carefully about what is happening in the industry. Who can they contact to find out information? The industry is relatively small, and clients are often very connected.

The flip side of the close business relationship, is the long standing dispute between parties to the litigation. If within the group of the defendants there are serious conflicts, whether arising out of the project at issue or otherwise, it is very important to understand that at the outset. You must find out if there are serious personality or other conflicts between any defendants, and consider what such conflicts will do to the dynamics of the negotiation. It may be that you need to have a frank discussion with the other counsel about how to handle the situation, including considering whether a different representative should attend the mediation, whether the mediator should be advised to immediately break out the parties into separate rooms, etc. Properly managing a disruptive personality is very important to achieving a successful settlement.

E. Prepare a risk assessment

A risk assessment is important in advising any party prior to the negotiation. It is particularly important where you are advising an insured party. Without a proper risk assessment, the insurer will not be in a position to properly instruct you for the negotiation. You may find yourself in the negotiation without sufficient authority to make the settlement contribution you believe is needed from your client.

In assessing the risks for a negotiation, you must have a clear idea of your client's likely exposure at trial. This means not only assessing the pure legal position of your client based on your analysis of the facts and the law, but also assessing the kinds of factors discussed in this paper.

For example, if you know that you represent the only defendant that has any ability to pay, and you know that you will have a difficult time proving any kind of contributory negligence on the part of the plaintiff, your client's risk increases dramatically. This needs to be communicated to your client to ensure you are in the best position you can be in for the mediation. You need to know your client's bottom line so that you can manage the process effectively.

Similarly, if you represent the plaintiff and you know that a further assessment for legal fees will be extremely difficult to obtain, and you know that the key defendants have been denied coverage and have no other available assets, the risk of the plaintiff getting no recovery at all is heightened. The plaintiff needs to understand this so that reasonable positions can be taken early in the process.

III. Where should you spend your money on discovery?

Discoveries in preparation for trial on a major construction case are expensive. They often take many days, with many parties in attendance. If you are involved in a case which you expect to go to mediation, as virtually all do in recent years, you need to think carefully about where to spend your money on discovery.

One obvious strategy is to plan to conduct your discovery in two stages. The first stage focuses on issues you think are priorities for the mediation, to be followed by a second discovery only if the mediation fails. Most often counsel will consent to this process as it lessens the expense for their client as well. To ensure that the proposition is a savings for both parties, the examined party should insist that the topics areas to be covered on discovery be identified in advance, to allow for proper preparation of the witness. The quid pro quo is that the examining party must complete the discovery on those issues in the first stage, and not attempt to come at them afresh if the mediation fails and further discovery must be completed.

If you plan to use a two stage discovery, do not waste your time pre-negotiation on technical formal admissions that you would want for trial, but which do not expose significant risk, as discussed below.

A. Discovery by the plaintiff

As discussed above, the plaintiff is now able to ask questions about the defendant's insurance position on discovery. The questions permitted are fairly limited, but will reveal the essential points relevant to assessing the ability of the defendant to pay a judgment or settlement through insurance.

The plaintiff in a building failure case, or other complex construction case, must have an expert report before mediation. There is no point in trying to convince a defendant that it should put up money to settle a case unless there is a compelling expert report from the plaintiff. This expert report should be the foundation of the plaintiff's discovery.

Bearing in mind that an expert report can cover many issues, it is important to work closely with your expert to identify the key vulnerabilities in the building design or construction. What failure can your expert identify that created a significant and identifiable loss? Who does your expert identify as responsible for that failure? What are the central admissions that you will need to link the defendant, the failure, and the loss together?

This exercise should be completed for each of the defendants to determine their key vulnerabilities. After this has been done, you need to assess some of the other information you have as to likely recovery against the different defendants. Your priority in discovery pre-negotiation needs to be on the defendants where you can (a) most likely link the loss to a specific failure, and (b) most likely obtain recovery.

Your focus pre-negotiation should be on critical admissions against those defendants who are most likely to be in a position to contribute to a settlement. This is not to say that your discovery needs to be limited to the target defendants only, but rather that your focus on discovery needs to be to expose the weakness in the target defendant's position. For example, it may be that the subtrades have very useful evidence as to site instructions given by the architect which will impact the architect's defence. Or the general contractor may have very useful evidence as to the conduct of the City inspector.

Exposure of these facts through discovery is important for the plaintiff pre-negotiation, as if the plaintiff can come away from the discovery process having developed a clean admission trail linking specific

defendants, to specific failures, which are explained in the plaintiff's expert report, the defendants will have to explain these risks to their clients and more likely to get realistic authority to settle. The plaintiff doesn't have to prove the whole case in pre-negotiation discovery, but if a strong case can be put together on a key element against each critical defendant, the plaintiff will be in a much better position at the negotiation.

B. Discovery by the defendant

Many defendants do not conduct discoveries prior to mediation. Whether it makes sense to conduct a discovery depends primarily on your preliminary assessment of potential exposure. It may also depend on the insurance policy under which the defence is being conducted. If the policy is one of diminishing limits, you may not want to spend large portions of the available settlement money on discoveries.

If your client is being aggressively targeted by the plaintiff, and you are concerned about a significant risk to your client, you must seriously consider conducting discovery in advance of the mediation.

There are a number of potential areas to focus on. Like plaintiff's counsel, you will want to focus on the questions that will expose the greatest risk to the plaintiff or the other defendants.

When considering examining the plaintiff, a fertile area for defendants is evidence of the plaintiff which goes to the plaintiff's own contribution to the losses. Where you are involved in multi-party litigation, you can gain a significant advantage for all defendants if you can establish that the plaintiff is at real risk of a court determining contributory negligence. If that risk can be exposed through discovery, one of the biggest threats the plaintiff has in a negotiation is in jeopardy. No longer can the plaintiff look with certainty to the one defendant in the room who might be in a position to pay. The plaintiff will be forced to look seriously at the likelihood of recovering against each defendant individually. If contributory negligence cannot be determined, the evidence obtained may still be of assistance in an argument that the plaintiff failed to properly mitigate its damages.

If the facts of the case create a realistic prospect for a limitation defence, the plaintiff's knowledge of damage should be explored on discovery. If the facts are unlikely to expose a weakness in the timing of the commencement of the action, this is not an area to spend time on. If there is ambiguity on the facts, leave it for trial – it will not assist in the mediation. But if the facts do support a strong argument on limitations, admissions should be gained on discovery to expose this risk as it will have a significant impact.

Another area that can be usefully explored pre-mediation is whether the repairs have bettered the plaintiffs. Did the repair choice convert their Chevy building into a Cadillac? This kind of a report is particularly useful where a new design solution has been employed in the repair, one that reflects the knowledge of the industry today as opposed to the state of the industry when the building was constructed.

If your client is facing significant exposure on the apparent facts presented in the expert report, and you know your client will be a significant target, you may need to discover in relation to the facts of the failure and the repair. Consider examining the plaintiff's expert, if that expert also performed the one site investigation and repair: *Strata Plan LMS923 v. Appia Developments Limited*, 2004 BCSC 233, 23 B.C.L.R. (4th) 394; *Strata Plan LMS 2262 v. Stoneman Developments Ltd.,*2005 BCSC 1313, 44 B.C.L.R. (4th) 194.

Where there is a critical dispute between your client and one of the other defendants, it may be important to deal with that issue on discovery prior to the mediation. This is particularly so where the other defendant is deflecting its exposure entirely onto your client. The discovery should be limited to that one issue only, particularly if you are aligned with the other defendant on other issues.

IV. Experts – getting the biggest bang for your buck pre-mediation

The first consideration is whether you need a report at all for the mediation. Oftentimes you do not.

If you represent the plaintiff, however, it is essential that a report be prepared early in the process. The defendants will base their own risk assessment, primarily, on the pressure they feel brought to bear on them by virtue of the expert report.

Many expert reports recite a chronology of what was done during the remediation, and describe in endless detail what was found when the building was taken apart. At the back of the report will be attached a Scott Schedule with no real detail as to why the costs are allocated in the way indicated. In my view these reports are not as effective as a report that clearly identifies what failed in the building, why the failure occurred, and how that failure resulted in specific damage or loss. It is not helpful to know that one anchor bolt was not galvanized in accordance with the specifications, if the report fails to link the bolt to a failure which resulted in damage.

It may be that at trial your expert will need to go into great detail on all aspects of the building. But for the purposes of negotiation, your money is better spent in getting the expert to isolate critical failures or deficiencies, and link those both to specific defendants and to specific damage or loss in the building. There is nothing wrong with working with your expert early in the piece to help you understand the key failures and how they relate to each defendant. These discussions will inform your discovery, and will help you to instruct your expert in preparing a more targeted report for mediation.

To make a damages report most useful on mediation, it is critical to relate the damages claimed to the liability issues. It is not enough to simply set out the total spent. At mediation the defendants will be trying to allocate their share of responsibility amongst themselves. The more information you can give them in your report as to how the allocation is to be made, the better your chance of success. Throwing a large, unsupported number into a room of defendants, with the expectation that they will figure out a way to equitably share the cost, is not realistic. When preparing your damages report, think about ways to assist the dynamic in the other room. Arm the defendants with some tools they can use against each other to bring recalcitrant defendants to the table and pay their proportionate share.

Finally, use your expert to assist you in showing the reasonableness of the damages you are claiming. Did the expert cost out the repair? Did they tender it? Did they get several quotes? The defendants will challenge the reasonableness of the repair, so use your expert to counter the defendant position.

When acting for defendants, it is common to obtain for the mediation a report which is quite different from a trial report. If the building is not repaired before the litigation commences, it is a good idea to retain an expert and have them attend on site and document the state of the building prior to the repair, and during the repair. However, you often do not need to have that work reduced to a written report for the mediation. Preparing a building failure report is expensive, and as long as the expert has assembled the evidence needed to prepare the report, he or she can hold off writing the report until after the mediation.

For the mediation report, the expert can focus on the deficiencies of the plaintiff's liability report. Attacks can be made on the assumptions used by the plaintiff's expert, the methodology employed, and the underlying facts.

Attacks can usefully be made on the reasonableness of the plaintiff's damages report, particularly where the plaintiff has not taken the time to address reasonableness up front in their own report. If the project is of a significant size, consideration can be given to obtaining a betterment report, i.e. where the repair has resulted in a building of much higher quality than the one originally purchased. As many of the defendants will have a common interest in proving betterment, the cost of such a report may be shared between several defendants.

Where your client has been targeted by another defendant, in an attempt to deflect their own exposure onto your client, you may need to obtain a liability report for the mediation. This report should be targeted to the specific issue raised by the other defendant, and focussed on attacking the opinion obtained by the other defendant.

You will not often obtain a report at the mediation stage which attacks a co-defendant. The reasons to obtain such a report must be strategic. You may want to target a co-defendant where there is a strong argument against the plaintiff which would sever liability, and the facts are fairly clear as against the co-defendant. If your expert cannot convincingly point to a negligent act or omission of a co-defendant which clearly contributed to the damages claimed by the plaintiff, don't bother getting a report. Such reports are costly and if they only serve to muddy the water, they will not be useful in the mediation.

V. Conclusion

Negotiations and mediations can be very useful in resolving disputes. In the construction field, full scale litigation is extremely costly, and so more and more cases are resolved through mediation. This does not mean that careful preparation can be abandoned. The preparation for a negotiation or mediation must be careful and fulsome. But you have to remember that the mediation is not a trial. You are not going to convince anyone you are legally right. Your strategy must be to clearly expose risks to the other side. This means carefully thinking about what your strongest points are, and pursuing those points diligently before the mediation begins. It means thinking outside the litigation box to better understand what is driving the parties. It means being prepared, and creative.