THE CHILD FAMILY AND COMMUNITY SERVICE ACT

RULE 2: THE MANDATORY CASE CONFERENCE

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THE ACT

On January 29, 1996 the *Child, Family and Community Service Act* ("the CFCSA" or "the Act") and Regulations were proclaimed in force. This Act replaces the Family and Child Service Act which had been in force since 1980. In January most of the Provincial Court (*Child, Family and Community Service Act*) Rules ("the Rules") also came into force.

The CFCSA is intended to restructure the province's approach to child welfare. A review of the Act and the Rules readily discloses some significant developments in both law and procedures, which developments are in turn founded upon certain policy values expressly articulated in the Act. The Act describes a broader spectrum of responses to child abuse and neglect than did its predecessor. Responses to abuse or neglect are described on a continuum, with preference expressed for the least disruptive intervention that will be effective to protect the child.

THE CONTEXT

While the Gove Inquiry was underway, and following the release of the Gove Report,the Ministry of Attorney General was drafting new legislation which, inter alia, would provide the framework for the courts to respond more effectively to the concerns of the public in child protection cases. Interested members of the community and members of the Bar and Bench were consulted to determine how best to deal with the issues being raised by the various participants involved in protection cases at the court level.

The adversarial nature of child protection cases and the delay involved in resolving these cases were two areas of prime concern. While the courts have a significant and unique role in child protection cases, it was thought that an approach capable of being tailored to the specific needs of the parties may reduce the anxiety of the parents, and reduce the delays which arise from a one track litigation process.

It was determined that one key ingredient of any new process should include the court supervising the progress of the litigation. The Chief Judge of the Provincial Court of British Columbia, Robert Metzger, advised that he was prepared to provide a commitment from the judiciary that the Provincial Court would respond, as best it could, to provide the resources required for a new process. That process is now contained in the Rules.

The Rules define procedures whereby a mandatory Case Conference is directed early in the litigation process in an to attempt to stream cases into the most appropriate forum for their resolution. The Case Conference allows the judge to mediate any issue, except the issue of whether the child is in need of protection. The judge also has authority to refer the matter to outside mediation, order a mini-hearing, make orders for disclosure, make orders to prepare the case for hearing, or decide issues which do not require the taking of evidence. In addition the judge, who will not generally be the hearing judge, may give a non-binding opinion on the probable outcome of a hearing.

A number of judges have now been specifically assigned to the Case Conference process and have received training in mediation. These judges will also be involved in all the pre-hearing procedures of the case such as the Presentation hearing, the Protection Hearing Commencement and the motions required to move the case towards resolution. Where possible the same judge will track a case through to conclusion.

Similar processes have been successfully introduced in the child welfare context in other jurisdictions. The objectives articulated in other jurisdictions are often very similar and quite appropriate to the British Columbia context. A project in the State of Connecticut for example described as "case status conferences for child protection cases" articulates its the goal as helping the parties to reach a settlement that:

- is informed, timely and dignified;
- is consistent with public policy and judicially acceptable;
- ensures the safety and well being of the child while maximizing the families' integrity and functioning; and
- protects all parties legal rights and obligations.

With a committed judiciary providing leadership and supervision of cases it is hoped that these goals can be met, and that the "guiding principles" described in s. 2 of the CFCSA will provide the fabric for the resolution of cases coming before the Provincial Court.

RULE 2

Commencing June 3, 1996 a Case Conferences is mandatorily directed at the commencement of every protection hearing under s. 40 unless a consent order is made or the matter is otherwise resolved that day.

The court has a general discretion to refer a matter to a Case Conference at any time.
Note that as of June 3rd Rule 8(3) was repealed and Rule 8(4) came into force, providing that a hearing shall be adjourned only with the permission of a judge.

WHY?

Section 2(g) of the Act says that decisions relating to children should be made and implemented in a timely manner. Court backlogs are resulting in lengthy delays in many areas of the Province. To the extent that Case Conferences can facilitate early resolution they will reduce delay. The Gove Report emphasized the importance of early determination of decisions relating to children. Administrative judges have been asked by the Chief Judge to give the scheduling of CFCSA cases and Case Conferences an enhanced priority.

The creation of a structured settlement opportunity will not only resolve some cases earlier, it will undoubtedly resolve other cases that would have gone to trial. A settlement accomplished through the Case Conference will avoid some of the delay, cost and bitterness that sometimes attends the trial process.

HOW WILL IT WORK?

Significant blocks of time have now been scheduled into judicial rotas for Case Conferences. If a consent order is not made at the commencement of the protection hearing a Case Conference will be booked for approximately 30 days from that date. Scheduling will take counsel's calendars into consideration. It is the director's responsibility to notify any parties not present or not represented at the s. 40 commencement of the date, time and place of the conference (Rule 2(4)). At the time of scheduling the Case Conference the judge will review the extent of disclosure made or anticipated under s. 64 (Rule 2(3)). On the appointed day the Case Conference will proceed as follows:

- Parties and their lawyers and any other person the judge orders to attend (the child in some cases) must attend.
- The Case Conference will be under the control and direction of the judge.
- Judges who do Case Conferences will be assigned a block of time in a "Case Conference day" without other matters being booked in that block of time.
- Initially, where a day or half day is booked for Case Conferences there will be two Case Conferences set for each half day. A Case Conference will be scheduled for approximately 1.5 hours. If counsel know that a given case will need more time to adequately conference, counsel should request a longer booking from the judge setting the Case Conference at the commencement of the s. 40 hearing or from the trial coordinator. In smaller centres the administrative judges will attempt to set aside blocks of time strictly for CFCSA matters.
- Case Conferences will, where possible, be held in Settlement Conference rooms.
- A clerk will be present.
- Judges will wear their judicial attire, but not their gowns.
- All parties and their counsel will, space allowing, be seated at a conference table with the judge.
- Everyone present will, under the judge's management, participate in the discussion. Everyone present will, under the judge's management, participate in the discussion. Most judges will actively involve social workers and parents and other parties directly in the discussion. At the same time, the judge will retain the freedom to meet separately with the lawyers at some point during the conference or to leave the parties to caucus on their own.
- Although it will not always be possible, there will be an effort made to have the same judge do the s. 35 presentation, the s. 40 hearing and the Case Conference. Similarly, the judge who adjourns the Case Conference or has done a Case Conference previously on the case will conduct subsequent conferences or mini-hearings on the file. The judge who does the Case Conference will not, as a general rule, hear the trial except with the consent of the parties, or in the unlikely event that the Case Conference was administrative only and did not deal with substantive issues.
- Telephone hearings (by judge's order or on direction of the Chief Judge pursuant to Rule 2(9)) will be used only on a limited basis and will not be encouraged.

WHAT WILL HAPPEN?

- Possible outcomes of a Case Conference include:

  a final settlement of all issues;

  - a settlement of some issues, with a trial directed on others;
  - no settlement, but orders made respecting disclosure of information, production of documents, receipt of evidence or procedure at a trial; and
  - an agreement to attend a mini hearing.

- The judge has extensive powers at a Case Conference. See Rule 2(5).
- The goal of the Case Conference is to communicate and problem-solve. Full mutual disclosure of all relevant information should precede each conference. Once the Case Conference is underway the judge will want to hear frank and straight-forward statements of each party's real goals and concerns. Parties will be encouraged to discuss their interests, not just their positions. Options for resolution will be identified and objectively evaluated by all participants. The Case Conference will be solution-oriented, with an emphasis on timeliness.
- A record will be kept in the court file of all orders, directions, agreements and undertakings given at the settlement conference. Parties will also have the option of going into open court to record the basis of a settlement and to make an order.
- Where a settlement is made it can be formalized by way of s. 60 consent order. Note that s. 60 as now drafted may require the consent of persons who, by reason of failing to appear at the protection hearing, are not parties. That is, a parent could fail to appear at a protection hearing and thus fail to secure party status and therefore be unaware of the date for the Case Conference. However, that same parent's written consent is required by s. 60(2). In its present form, there are limitations at s. 60(3) on the court's ability to dispense with the required consents.
- Rule 7(2) provides that counsel for the director will draft any order made, unless the judge orders otherwise.

OTHER POINTS

- Section 2(d) of the Act states that "the child's view should be taken into account when decisions relating to the child are made" and s. 4(f) confirms that the child's views are a relevant fact to be considered in determining the child's best interests. How can this happen in a Case Conference? In some circumstances a child attending a Case Conference could be exposed to information on to personal interactions which would be traumatic or personally destructive for that child. On the other hand, we know that older children very often want to be privy to discussions determining their fate, and that the child will often have views or information essential to a wise solution. Initially, the decision as to whether or not a child attends a Case Conference should be considered by the child, or at least by the mature child, and by those who know the child. Presumably this will be the social worker, often in consultation with the parents. Ultimately the decision could be made by the judge. A balance will need to be struck between the need to shield children from being exposed to potentially harmful dynamics at the Case

Conference and the importance of having the child participate in and contribute to a profoundly important issue in his or her life.

- A judge may decide that a witness (expert or otherwise) should attend where his or her evidence is critical to the dispute.
- Information settles cases, and disclosure is one of the cornerstones of a meaningful Case Conference. The Act gives judges the latitude to vigorously assert the need for adequate disclosure where a s. 64 request for same has been made.
- A judge may mediate under Rule 2(5)(b), or the judge may refer the matter out to be mediated by another professional under Rule 2(5)(c) and s. 22 of the Act. The judicial Case Conference will not displace the use of the family conference or mediation initiated by the director under ss. 20 or 22 of the Act.
- Note that in most centers the Case Conference will be the gateway to setting trial dates; that is, no hearing date will be booked until the Case Conference.
- If a case settles after commencement but before the Case Conference, counsel should either let the Registry know of the cancellation as soon as possible, or alternatively, schedule another case to replace the one settled.
- There will be cases that do not fully resolve at the Case Conference.. It is widely recognized that the facts and circumstances around child protection cases are fluid, and that things can change significantly between the Case Conference and the hearing. If a change in circumstances may result in a settlement being possible, counsel are encouraged to ask for another conference and, resources allowing, it will be booked.
- Where a case under the CFCSA has been joined with a custody case under the Family Relations Act in the Provincial Court, the combined cases will proceed to a Case Conference.
- It is hoped that counsel for the parties will take some responsibility to ensure that all stakeholders are either present in the Case Conference room or available at the court house as this will help in some circumstances to avoid an adjournment of the conference.

MINI-HEARINGS

This is an innovation flowing from Rule 2 which allows a judge to make the decision required in a case by agreement on abbreviated evidence. Mini-hearings are requested and planned at the Case Conference and normally will be placed by the Case Conference judge on his or her own list. Note that there are material differences between the mini-hearing conveyed under the Provincial Court Rules and the Supreme Court mini-trial. It is expected that mini-hearings will be given priority in scheduling. Mini-hearings will be appropriate only when evidence is, or can be, limited (for example by admissions), or where the issue is otherwise capable of being dealt with in one or two hours..

CONCLUSION

The Case Conference under Rule 2 has the potential to be responsive in a timely and creative way to the rights and needs of children and parties under the CFCSA. Judicial expectations in terms of counsel's preparedness, familiarity with the file and readiness to discuss the merits will be high. Judges will be in a position to devote considerable attention to each Case Conference. This assumes that all counsel and other parties will be in a position to discuss final resolutions at a much earlier stage in the litigation process than was typically possible under the former Act.