CANADIAN DEFENCE LAWYERS

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Canadian Defence Lawyers (CDL) is grateful for the opportunity to make submissions to the Bifurcation Subcommittee of the Civil Rules Committee.

Founded in 1996, CDL is a national bar association with members from coast to coast. We are the voice of the Canadian civil defence bar, drawing from the experience of trial and appellate counsel appearing on behalf of insurers, insured defendants, corporations, and institutional litigants.

**More Easily Accessible Bifurcation Increases Access to Justice**

In 2014, the Supreme Court of Canada released its seminal decision in *Hryniak v Mauldin*.[1] The Court recognized a systemic problem with the legal system across our country – the significant difficulties that ordinary Canadians have accessing civil justice. "Ensuring access to justice is the greatest challenge to the rule of law in Canada today. … Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication in civil cases, the development of the common law is stunted."

The Supreme Court directed that a "shift in culture" was required to address this problem. The Supreme Court cautioned that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. More easily accessible bifurcation of trials in Ontario is a further step in the direction of this cultural shift and enhances access to justice.

Yet, the current Rules and jurisprudence work against this culture shift by requiring that all parties agree to a bifurcated trial.

One of our members has advised of a recent experience in Ottawa highlighting the current Rule's problem. The case involves a relatively simple liability dispute and a complex claim for damages. The plaintiff and two of three defendants agreed to a bifurcated trial, but the final defendant refused. All parties now face the very problems of which the Supreme Court warned – unnecessary delay and significant expense.

[1] 2014 SCC 7.

A liability trial in that action would require 5 days. It is possible (and even likely) that some or all of the defendants would have been successful and the action would be dismissed as against those parties. A judgment on liability would also remove one of the largest obstacles to a negotiated settlement. Instead, at a time when judicial resources throughout our province are already at a premium, a 20 day trial is scheduled for the latter part of 2025.

Moreover, all parties must now incur the costs of securing expert reports on damages. Given the complexity of the plaintiff's alleged injuries and medical history, multiple experts are required for the trier of fact to assess damages, which comes with significant additional risk to the plaintiff. If any of the defendants succeed, the plaintiff is exposed to a much greater costs award. The plaintiff may even rethink whether to advance this action to trial. This is the antithesis of access to justice.

**The Current System Is Inconsistent with Other Trial Procedures**

Trials are the culmination of a legal proceeding. Counsel are expected to cooperate with one another to present a case to the court in an organized and efficient manner. If procedural disputes arise, the court can intervene and direct a process that will secure the most just, expeditious and least expensive determination of the proceeding on its merits. So, why does one party have the unilateral power to have all parts of an action tried together?

Comparing the court's powers with respect to directing the mode of trial, even where a jury notice has been delivered, to the court's powers with respect to bifurcation demonstrates an inconsistency in how the principles set out by the Supreme Court are applied in Ontario.

A party's right to have a trial by jury is a long-recognized substantive right; however, it is not absolute. The Court of Appeal for Ontario observed that: "the object of a civil trial is to provide justice between the parties, nothing more. It makes sense that neither party should have an unfettered right to determine the mode of trial. Rather, the court, which plays the role of impartial arbiter, should, when a disagreement arises, have the power to determine whether justice to the parties will be better served by trying a case with or without a jury."[2]

Whereas the current rule on bifurcation precludes the court from bifurcating a trial and directing how a case is to be tried absent consent of all parties; which runs contrary to the Supreme Court's encouragement: "This culture shift requires judges to actively manage the legal process in line with the principle of proportionality."[3]

**Bifurcation in Other Provinces**

No other province requires the consent of all parties to order bifurcation, thereby making separate trials for liability and damages more readily available elsewhere in Canada than in Ontario. For example, in British Columbia, Rule 12-5(67) allows the court to "order that one or more questions of fact or law arising in an action be tried and determined before the others." Rule 41(18) of the Rules of Court for the Supreme Court of Yukon and Rule 7.1(1)(a) of the Alberta Rules of Court contain similar language.

In New Brunswick, Rule 47.03 of the Rules of Court provides: "Either before or after an action is set down for trial, the court may order that different issues be tried at different times and may give

[2] *Cowles v Balac* (2006), 83 OR (3d) 660 (CA), para 38.
[3] *Hryniuk v Mauldin*, para 32.

directions with respect to the conduct of such trials." Several criteria are to be considered by the court in granting such discretionary relief.[4]

In Québec, Article 211 of the Code of Civil Procedure permits the court, even on its own initiative, to split a proceeding if it thinks it advisable in order to protect the parties' rights. Similarly, Article 158(1) provides the court with authority to split a proceeding when to do so would "simplify or expedite the proceeding and shorten the trial." Such an order may be made at any stage of the proceeding.

Prince Edward Island – which has adopted Rules of Civil Procedure which closely mirror those in Ontario – enacted a rule which expressly permits any party, or the court on its own initiative, to seek an order for separate hearings.[5]

Not every province has enacted a specific procedural rule dealing with severance of trial proceedings. The Court of Kings' Bench Rules in Manitoba do not contain a rule. However, the court nonetheless retains jurisdiction to make such an order without the consent of all parties.[6] Similarly, courts in Saskatchewan rely on inherent jurisdiction and only grant bifurcation "in the most exceptional cases … where the issues to be tried separately are simple and where it appears at least probable that the trial of the separate issues will put an end to the action."[7]

**Responses to the Questions Posed**

1. *Should jury and non-jury trials be treated differently under the Rule.*

No. Our members in Ontario routinely try cases before juries where the issue of either liability or damages has been settled – essentially a bifurcated trial – without complication. Civil juries are one of two cornerstones of our parliamentary democracy.[8] A party who seeks to have some or all of a case tried by a jury should, subject to the court's discretion on a motion to strike a jury notice, be entitled to that right.

The Supreme Court of Prince Edward Island permits separate hearings on liability and damages in jury cases.[9] Meanwhile, the courts in British Columbia have noted that "severance is most appropriate when the trial is by judge alone" but that it remains within the court's discretion to bifurcate a jury trial.[10]

2. *Should a judge be able to bifurcate an action on their own initiative? Should this be limited to the pre-trial judge? Is it too late to bifurcate at trial?*

No. CDL is of the view that the court should not have the authority to bifurcate an action on its own initiative. Judges, with the exception of those presiding over a pre-trial, have limited insight into the dynamics of an action. The parties to a proceeding and their counsel are in the best position to assess the most appropriate method of resolving a case. An order unilaterally imposing a bifurcated trial on parties would be akin to a mandatory Rule 20 or 21 motion.

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[4] See *Jeux Maritimes Inc. v. Commission des loteries du Nouveau-Brunswick* (1994), 150 NBR (2d) 46.
[5] Rules of Civil Procedure, r 6.03
[6] See *O'Brien v. Tyrone Enterprises Ltd*., 2012 MBCA 3.
[7] *Central Canada Potash Co. v. Saskatchewan (Attorney General)*, 1974 CanLII 976 (SK CA), para 15.
[8] The other being the right to vote.
[9] See for example *Ghiz-Fay v RBC*, 2021 PESC 37; *Jreij v Intact Insurance Company*, 2016 PESC 31.
[10] *Nguyen v Bains*, 2001 BCSC 1130, para 11.

However, the pre-trial judge should canvas the prospect of bifurcation as part of the matters that should be considered at a pre-trial conference.[11] CDL recommends that Rule 50.06 be amended to add: "The possibility of separate hearings on the issues of liability and damages."

3. *At what point in the litigation ought the motion be brought?*
4. *Should the timing be an issue for determination by a judge on a case-by-case basis?*

CDL recommends that the Rules should not prescribe the timing of such a motion. Civil litigation, particularly personal injury actions, are fluid. The dynamics of a case change continually as new information is discovered and as counsel engage in settlement discussions. Counsel are in the best position to determine when a motion to bifurcate a trial should be brought.

As a best practice, once a party is of the view that separate trials could result in a more expedited resolution, that party ought to bring the motion seeking bifurcation. This is likely to occur at or shortly after the action is set down for trial but may be earlier. New Brunswick Rule 47.03 expressly provides that such a motion may be brought "before or after an action is set down for trial."

Consideration could be given to modifying the certificate signed by the lawyer setting the action down to include a declaration of whether that party intends to seek a bifurcated trial.

However, the timing of the motion ought to be a factor in the court's decision. Separate trials on liability and damages allow the parties to obtain a result on the merits in a cost-effective manner. There will be a time in every litigation when bifurcation will no longer provide a cheaper or faster route for the parties. In Nova Scotia, one of the factors considered on such a motion includes whether substantial cost had already been incurred on both issues of liability and damages.

5. *If bifurcation occurs at the pre-trial stage, should the pre-trial judge have the jurisdiction to award costs of damages disbursements where they will have to be updated should that part of the action proceed to trial?*

No. Costs should generally only be awarded by a pre-trial judge to compensate a party for costs "thrown away". Costs incurred obtaining documents relevant to damages are not "thrown away".[12] There are two types of "damages disbursements" regularly encountered in actions defended by our members: (1) the cost of obtaining a plaintiff's medical records and other relevant documents; and (2) expert opinions.

Parties are obliged under the *Rules* to obtain and produce all relevant documents in their power, possession or control and to update their productions throughout the litigation. If a plaintiff succeeds at a preliminary liability trial, then the costs of complying with these continuing discovery obligations are properly included as an assessable disbursement following the ultimate decision. If the plaintiff is unsuccessful, then no additional disbursements will be incurred.

With respect to expert opinions, the point in an action at which a party obtains a medical opinion is a strategic decision. A premature expert opinion can set artificially inflate a party's expectations. Whereas

[11] Rules 50.06(2) [simplification of the issues], (4) [the question of liability] and (11) [any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding].
[12] If medical practitioners charge fees that are disproportionate to the costs to produce documentation, then this ought to be addressed through a different forum.

a properly timed expert opinion can facilitate settlement discussions, even if an update is required for trial.

Ultimately, the need to update damage expert reports is one that can be addressed through early discussions between counsel about the benefits of bifurcation in a particular case. As Justice Karakatsanis held in *Hryniak*: "counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice."[13]

6. *Would new wording in Rule 6 that adopts that contained in Rule 21.01(1) to permit bifurcation where it may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs, be acceptable?*

Yes. CDL supports language which adopts that set out in Rule 21.01(1). As Lord Denning once held: "The normal practice should still be that liability and damages should be tried together, but the court should be ready to order separate trials whenever it is just and convenient to do so."[14]

CDL is committed to its ongoing role as a key stakeholder in these initiatives and thanks the the Civil Rules Committee for the opportunity to provide its input on behalf of its membership.

If you require any further information or clarification on the information contained within this response, please do not hesitate to contact us.

Yours very truly,

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[13] Para 32.
[14] *Coenen v Payne*, [1974] 2 All ER 1109, p 1112.