CANADIAN DEFENCE LAWYERS

March 11, 2019

The Honourable George R. Strathy
Chief Justice of Ontario
Osgoode Hall, 130 Queen Street West
Toronto ON M5H 2N5

Dear Chief Justice Strathy,

**PREAMBLE:**

Canadian Defence Lawyers (CDL) is grateful for the opportunity to contribute to a dialogue for the reform of the justice system in Ontario. 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. In order to allow us to provide a more fulsome response, our members from across the country have participated in these submissions. Further, through our affiliation with the Defense Research Institute (DRI), CDL draws upon a North-American network of defence lawyers. We have also consulted with DRI to include their experiences in Justice Reform.

CDL prides itself on its members' independence from their clients. As counsel whose primary obligation is to the Court, our organization places the independence and efficiency of the justice system above the interests of our membership's institutional clients. In this regard, CDL is deeply concerned about access to justice. The submissions below seek to address the questions about changes to the Ontario Justice system with different funding levels. For example, changes that might be made with little to no cost and changes that do have cost.

**SUBMISSIONS:**

***Civil Juries***

In recent years, CDL has kept an eye on calls from interested parties to curtail or abolish jury trials. Advocates of abolition have labelled the civil jury as the cause of long trials and backlogs. The experience of our members is that this argument amounts to the perpetrators of delay blaming the process they are abusing. The real agenda is a belief that Canadian juries award lower damages than judges. (This, in principle and in practice, is no more valid than the belief that American juries award higher damages than judges.) Jury trials have an essential grounding effect on justice because its procedure is one every member of the public can understand: each side has their say, and six of their peers (or twelve, in criminal matters) are left to deliberate on the most just result. The fact that most automobile litigation used to be heard efficiently in jury trials lasting several days meant there is nothing intrinsically inefficient about jury trials – quite the contrary.

We know from our interaction with our colleagues in DRI that the U.S. justice system is much more efficient than ours in terms of the timeline between the filing of a complaint to the delivery of a verdict. Most cases are heard in about a year after commencement, and it is not uncommon for large, multi-party cases to be heard within two or three years. In Ontario, the trial lists alone are usually that long. A well-managed jury trial can be shorter than a bench trial because both sides' lawyers recognize the curtailed attention span of ordinary citizens in processing evidence material to a case or defence. Knowledge of one's audience has fostered a culture of disciplined and short trials. Of course, the fact that judges are freed of the burden of writing judgments has a secondary, often-overlooked, effect of making a fixed complement of judges more available to hear cases.

Attempts at justice reform in Ontario since the 1980's has followed the best intentions of government, the judiciary and the bar to reduce backlogs; to make litigation more affordable and accessible; and to lessen the adverse impact of the process of criminal, family and civil litigation on the parties who must navigate the legal system. Nevertheless, each attempt at reform has created its own problems because of the over-reliance on rule-tweaking and form-proliferation. As we conclude the fourth decade since the introduction of the "new" *Courts of Justice Act* and rules of civil litigation in 1984, we must be mindful of the elegant simplicity of those rules in mapping out three simple steps: pleading, discovery and trial.

If there is one contribution that CDL can offer in improvement of the justice system in Ontario, it has to be a reminder that legal process must be driven by justice, not the other way around. Jury trials may not be ideal in all cases, but their availability has the effect of forcing parties and their lawyers, as well as presiding trial judges, to exercise more self-discipline in the conduct of actions and trials.

Some simple changes that may be made with lower costs are outlined below.

***Case Management by Properly Trained Court Staff***

Through the Case Management System (CM) run by appropriately trained Court Staff, the Court can track exactly what is happening on each file as well as the timeline for next steps. That will encourage/require parties (and their lawyers) to move matters along. Case Management need not be limited to certain stages, but instead continues from the moment pleadings close through to completion/closure of the Court file. Generally, this can happen through a scheduled 15-minute call between the CM Court Staff assigned this role and counsel for all parties. During the Case Management conference call, status of the litigation and next steps are discussed along with timelines and, at the end of that call, the next Case Management conference call would be scheduled in order to keep things moving appropriately.

If the Case Management system was run by Court Staff in order to free up Judge time, it could still allow for the involvement of a Judge on a periodic basis if requested by the parties or the CM Court Staff if they felt a Judge was required for specific issues. The CM Court Staff would remain responsible for managing the case but without requiring a Judge to fully take on case management. A Judge would only be required in certain, exceptional, circumstances.

For example, if the lawyers or the parties cannot agree on a procedural matter the next Case Management conference call might involve a Judge who could provide input. Although the Judge's input would not be binding on the parties and would not be based on an evidentiary record or considered legal briefs, it can nonetheless sometimes assist the parties and the system by avoiding procedural motions.

Another example is where a particular lawyer or party might not be moving the matter along expeditiously. A Judge's encouragement can sometimes solve that problem with Orders made on a Case Conference call.

If counsel is unable to move a matter along, the Court might also want to involve the parties themselves for case management. Having the clients on the phone (or in-person in court) can be effective.

***Issue Determination Prior to a Full Trial and the Use of the Rules***

As mandated by the SCC in *Hryniak*, finding ways to deal with litigation short of a full trial is a goal worthy of pursuit. The changed summary judgment rule (not-so-new now) is a move toward that goal, but other options could also be considered. For example:

- Bifurcation: The P.E.I. Rules have different wording that provides more discretion for bifurcation, which has been embraced by the P.E.I. trial division. The rule permits the Court to order this on its own initiative as well as on a motion by any party:

  > 6.03: On the motion of any party or on its own initiative, the Court may order a separate hearing on one or more issues in a proceeding including separate hearings on the issues of liability and damages.

- The Rule on determination of an issue before trial might be looked at to consider whether it could be broadened. This could be another area, like summary judgment, where it might be time to permit broadening of the Court's ability to make a determination of an issue especially if that determination might then dispose of the main issue in dispute between the parties.

There are issues in some jurisdictions with delay in scheduling motions. This could certainly be addressed without having more Court resources (judges and courtrooms) to hear the motions. Even with the suggestions above (none of which should involve a significant spend on resources), it will likely take a while before cases are moving better/more quickly through the system.

***The American Perspective:***

As noted above, Canadian Defence Lawyers is comprised of members from all across Canada and is pleased to offer comment on behalf of its multi-provincial members. Also, Canadian Defence Lawyers is associated with DRI – The Voice of the Defense Bar. DRI is a 22,000 member international lawyers association headquartered in Chicago. CDL benefits from this close connection by accessing input from its leaders on issues of civil procedure reform.

DRI's Center for Law and Public Policy has authored several white papers on the civil justice system which are publicly available. Canadian Defence Lawyers' Public Policy Secretariat stands willing and able to respond to the Court's request for any further information on our suggested topics and would be honoured to participate in any further government consultation on civil justice reform. Some of the ideas from our DRI friends are noted below.

***Bench & Bar Communication***

Lawyers and the Court must strive, especially in this day and age, to promote and ensure a fair, efficient trustworthy judicial system. Fairness includes access to the Courts and timely resolution of cases. The

scheduling backlog across Ontario results in a failure of access to justice. Each Ontario Region strives to adopt a system for appearance scheduling which best suits its case load and local bar. Bench and Bar Committees should exist in all Regions to permit consultation with the local bar associations. In this way, input from the local bar benefits procedural policy-making, and the Court can ask the association representatives to communicate with their members through list-serves and education programs. Bar associations are credited with helping lawyers become better lawyers and continuing legal education offered by lawyers for lawyers is the hallmark of the ongoing improvement of the delivery of legal services in Ontario.[1]

***Cost Control for the Litigants***

The cost of litigation is often not commensurate with the value of the case. Inability to litigate to judgment a case of modest value because of cost constraints results in a denial of access to justice to any litigant with a modest value case, regardless of their personal or corporate status. Access to motions, trials and appeals should be afforded to everyone regardless of means. Although they are discretionary, costs follow the event in Ontario. A successful party can expect to receive some portion of his or her legal bill paid by the losing party. But, with the drastically increased cost of litigation, we see now that the cost of litigating in our jurisdiction is just as much of a factor in the dispute resolution process as the merits of the case itself. Cost of litigation should not, in and of itself, play a dominant role in enforcing ones' legal rights. A review of the Ontario costs regime is long overdue as costs are a driving factor in all our current Rule reforms. Disbursements quantum has increased exponentially over the last decade and has been the subject of judicial comment. Complex cases involving the deductibility of collateral benefits can result in major differences in the result owing to our costs rules and the rules pertaining to offers to settle. The explosion of Adverse Costs or After the Event Insurance providers and third party litigation funders has changed the landscape of Ontario civil litigation and gives rise to question such as: who is the decision-maker? Transparency is of critical importance – the Court and parties have a right to know who is the directing mind of the litigation and to have that person present in the room when decisions about potential settlement and trial management are being made. Rules amendments requiring the disclosure of litigation funding are important and are starting to be created in the United States.[2]

With cost as the motivating factor, rules of discovery have been studied and amended with the advent of proportionality as a guiding principle. Discovery plans and early focus on the scope of discovery have helped to reduce discovery-related disputes but delay in production of relevant documents continues to contribute to the slow pace of civil litigation in Ontario. Litigators have been accused of falling into a culture of complacency in terms of moving their cases along, but in large part this is attributable to the failure of parties to produce relevant documents. Access to judicial officers on a basis that does not require the formality of booking a motion date, ordering transcripts, swearing affidavits and cross-examinations thereon is the key to moving cases faster. In Toronto Region parties can access Chambers Appointments

[1] *Best Practices for Civil Trials*, The Advocates Society https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/The_Advocates_Society-Best_Practices_for_Civil_Trials-June_2015.pdf *Paperless Trials Manual* The Advocates Society https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/The_Advocates_Society_Paperless_Trials_Manual_May29.pdf

[2] DRI Center for Law and Public Policy http://www.dri.org/docs/default-source/dri-white-papers-and-reports/third_party_litigation_10-17-18-(1).pdf?sfvrsn=2; Lawyers for Civil Justice http://www.lfcj.com/tplf-resources.html and http://www.lfcj.com/disclose-third-party-litigation-funders.html

with the ease of an email and this process should be popularized as an easy and inexpensive means to resolve delays and disputes in scheduling. That process could be adopted province-wide at minimal cost.

***Opening up Discovery, Experts***

A more detailed review of discovery rights in Ontario is overdue. Broad documentary discovery, limited by the proportionality rule, governs civil cases. But other jurisdictions seem to have speedier access to trial dates while accommodating increased discovery rights. Once retained, experts are under-utilized in Ontario civil litigation. In most US states, discovery of experts is permitted. In Ontario, we are limited to know only what an expert includes in a report served prior to trial, but the involvement of experts in the litigation if the case reaches trial cannot be underestimated. In many personal injury cases, experts are retained, reports exchanged, but not tested as nearly 99% of these cases settle. There is no realistic restriction on the use of experts by parties as the limit of three is often obviated, especially in personal injury cases, thanks to increased specialization and judicial pronouncements circumscribing expert testimony. The result is that costly expert reports, considered by the Courts to be mandatory prior to the conduct of a pre-trial conference, are forced by the operation of the timelines in cases where they are not required for discussion about resolution. Or, they are served and collect dust until the case settles, effectively creating a significant disbursement which has to be paid by the litigation's loser. The ability of the parties to further test the merits of the competing expert opinions through the discovery process/depositions should be explored as a possible opportunity to focus the parties' attention on the real merits of the case prior to trial. The Rules permit the Court to order direct communication by experts, but consideration to expanding the pre-trial involvement of experts may alleviate what has evolved to be a practice of retaining experts but making little use of them until trial. Earlier use ought to promote earlier resolution and therefore less costs to the parties and the Court system as a whole. After all, the experts belong to the Court to guide it in its decision making process and not the parties.

***Court Facilities***

Canadian Defence Lawyers feels it is not alone when it advocates for a fair, efficient, trustworthy Court system which is adequately funded and staffed with talented judges. Adequate Court funding is the heart of the system. It is well-established that when Courts are adequately funded, with an adequate judicial complement, appropriate staff and sufficient courthouse premises to accommodate the jurisdiction's litigants, access to justice is achieved. Even more, business in such jurisdictions thrives. In the United States, the reality that jurisdictions with well-funded Courts attract industry and commerce.[3]

***Juries***

The right to a trial by a Civil Jury is encapsulated in the *Seventh Amendment* of the *U.S. Constitution*. There is no such similar right in Canada. Recent complaints against Ontario's civil jury system have been loudly voiced by a minority of groups. Canadian Defence Lawyers forcefully set out its position[4] – that the importance of the civil jury to Ontario's justice system cannot be underestimated as noted at the outset of these submissions. Participation in the civil justice system as a juror is an important part of being a

[3] *The Economics of Justice,* DRI Center for Law and Public Policy 2014 http://www.dri.org/docs/default-source/dri-white-papers-and-reports/2014-economics-of-justice.pdf?sfvrsn=10

[4] *Civil Juries Under Ontario Rule 76 Simplified Procedure* 2016 Canadian Defence Lawyers https://www.cdlawyers.org/files/CDL%20Letter%20on%20Civil%20Jury%20Trials%20Rule%2076%20Ontario.pdf

citizen. Jurors who participate in a trial believe in the jury system and think it is fair. Moreover, when a person is judged by a group of one's peers, as opposed to an individual, fairness resounds. Jury trials allow the public to participate in the system and ensure that society's current norms are applied. All Court users, including the Bar and the government, should be fully invested in preserving the civil jury trial system by strengthening it. This is accomplished by streamlining the processes and improving the quality of the trial process.[5]

**CONCLUSIONS**

Unlimited funding of the Ontario Judicial system would solve most issues but reality dictates that this is easier said than done. While funding is important to the administration of Justice in Ontario, we need to look at creative solutions that involve little to no cost. We hope we have been able to illustrate some of those potential solutions to improve access, efficiency and the delivery of Justice for all Ontarians.

Thank you for allowing the Canadian Defence Lawyers to participate in such an important process. If you have any further questions, please do not hesitate to contact us.

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Sincerely,

Laura Emmett
President 2018-2019
Canadian Defence Lawyers

[5] *It's Jury Service, Not Duty* DRI Center for Law and Public Policy 2009 http://www.dri.org/docs/default-source/dri-white-papers-and-reports/it's-jury-service-not-duty-(2009).pdf?sfvrsn=8