CANADIAN DEFENCE LAWYERS

June 11, 2021

The Honourable Justice Peter D. Lauwers
Court of Appeal for Ontario
Email: caitlin.leach@ontario.ca

Dear Justice Lauwers:

Thank you for your work on behalf of the Rules Committee, and for inviting Canadian Defence Lawyers to comment on the issue of late expert reports. It is indeed a matter of concern to our members. We will first respond to the questions in your letter of May 19, 2021, in order, and then add some additional comments.

1. We would describe the late service of expert reports as a moderate problem, but one that is part of a larger problem as we will discuss below. There is still widespread, general compliance with the timelines although we have to acknowledge what is apparently the experience of the bench in this regard. The nature of the expert report however, determines how prejudicial its absence is and many late reports really should not impede a valid assessment of the case by counsel or the pre-trial judge (or the trier of fact for that matter). Furthermore, when trial is a long way off, potentially years, it may not be practical to have all expert reports in hand 90 or 60 days before a pre-trial conference.
2. Despite what we said above, if reports are not in hand well in advance of any settlement discussion, be it mediation or pre-trial conference, it is often difficult for insurance claims handlers, if not their counsel, to feel confident in an assessment of the case and therefore to obtain or provide appropriate settlement authority. It is trite that having such authority is a prerequisite to fruitful negotiation. This is equally true of expert reports from either side. It is also the case that, since the plaintiff has the burden of proof in most cases, the defence only responds to the case presented by the plaintiff. The later the plaintiff's reports, the later the defence reports.
3. Generally, no, in the sense that we do not believe counsel mischievously delay obtaining or serving expert reports for the purpose of delaying the case. We believe the real reasons to be as discussed in the response to the next question.
4. Counsel, and we can be forgiven for observing that it is most often plaintiffs' counsel, serve reports late largely due to poor litigation file management. Poor oversight of clerks and support staff, poor diary systems, poor training of less experienced lawyers and just poor professional rigour generally. There are other reasons too. Many lawyers procrastinate in litigation because they are afraid or reluctant to conduct a trial if settlement doesn't come easily. This is also a product of poor training and inexperience. A change of counsel, on either side, can lead to late reports. The defence can be late with reports if the plaintiff is late with theirs. And more recently, delay can be due to an external factor such as complications arising from pandemic-related restrictions.
5. The solution has to start with discipline. Rules already in place have to be applied and respected. Nothing will change behaviour faster or more definitively than making an example in a few cases and disallowing the adjournment, and the report, in the face of an imminent trial. (If this has

already been done, and no one has noticed, it shows us the expendability of some of these reports.) In the case of a pre-trial conference however, this is less compelling. If the pre-trial is taking place a long time before trial then there is less mischief to a late report and possibly a good reason for it as mentioned above. The problem is the timing of the pre-trial conference, not the timing of the expert report. We recognize that the Court would like to try to resolve cases early, but we all know that hard decisions are not made without a sense of urgency over our heads. A further solution, at your suggestion, is discussed at #9.

6. Consent, yes - adjournment, no. Consenting to a late report is up to the party as they can assess the impact on their case. The timing of pre-trial conferences and, more importantly, trials, is a matter of public concern for a number of reasons and should not be left up to parties, both of whose counsel were raised in the same system referred to above. That may sound glib but in fact our members, and our clients, will benefit from any measure that brings more certainty, predictability and timeliness to litigation. We believe that is true for all litigants. So any consent to a late report should not be allowed to result in an adjournment, although as we have said throughout, this is less of a concern with a pre-trial conference that is a long way out from trial. If a report is served late, and it would be unfair to the other side to allow the report without their opportunity to respond such that an adjournment of a trial would be necessitated, then the new report ought not be allowed. The same cannot be said of a pre-trial. In the above situation the pre-trial ought to be re-scheduled insofar as such rescheduling does not result in the adjournment of the trial.
7. We strongly suggest that the factors for permitting a late report should be different for pre-trial conferences and trials. An enormous amount of work and expense and stress goes into preparing for trial. Furthermore, the planning actually starts, or should start, long before. This includes scheduling for parties, counsel and witnesses, not to mention the Court. The circumstances under which a trial should be adjourned should be severely limited and they should not include late service of an expert report. Consent could be a factor at the pre-trial stage, but not trial. A truly new and dramatic change in circumstances could be a factor, but this should be rare. So-called rebuttal reports should be made entirely unnecessary. More leeway should be granted to experts to expand the four corners of their report in testimony. It should be assumed, for example, that opposing experts will disagree with each other and testify accordingly. It should not be necessary for experts who have already stated their opinion and their reasons for it, to engage in a back and forth debate with each other resulting in multiple reports often right up to the eve of trial. One report from each should be sufficient and perhaps all that is allowed, as long as the expert can testify about anything in the opposing expert's report or testimony.
8. Our position is that pre-trial judges should not be allowed to order costs beyond the authority already granted in the Rules. The problem is that it is somewhat subjective as to whether time was wasted, and who wasted it. Just because settlement discussions are perfunctory, or even non-existent, does not necessarily mean a pre-trial has been wasted. This would also be open to too much variation across the judicial regions and even among judges within a region. In our experience, there is a spectrum of views among the hundreds of judges in Ontario as to their role at a pre-trial conference and their expectations of counsel at one. Costs such as this are best dealt with in the cause.
9. We endorse the suggestion that Rule 53.08 be amended to provide that leave (to serve an expert report late) "may" be granted rather than "shall". Use of the mandatory "shall" sends the wrong message. It's almost permission to ignore the timelines because proving prejudice, no matter how real, is always difficult. And as we have said above, it is important to send the right message to counsel that late reports will no longer be tolerated. Another option would be to

amend the rule to provide that leave to serve an expert report shall not be granted unless the serving party can show an unexpected change in circumstances and the exercise of due diligence, and a lack of prejudice to the other side. At the same time we suggest that pre-trial and trial dates be set at the same time, at a scheduling appearance, and that the pre-trial date be targeted not more than 3 months prior to trial such that all parties attention is properly focused and that expert reports remain relevant without substantial revision at the time of trial. For example in British Columbia, trial management conferences must occur at least 28 days and no more than 120 days before the trial. Briefs must be exchanged 28 days prior to the trial management conference for the plaintiff and 21 days for the defence. Their rules require the service of reports and responding reports 84 and 42 days before trial respectively.

General Comments

The number one problem in civil litigation is the delay between commencement of a lawsuit and trial. Everything else, including not only the late delivery of expert reports, but increased cost to litigants, inefficient use of judicial and court resources and the denial of timely justice itself, cascades down from that one failing.

If it could be mandated that trial must occur within a certain period – say 2 or 3 years (in some U.S. jurisdictions it's as short as 18 months) – from commencement of the action, and that trials will proceed on a scheduled date, then there would be more efficiency, less foot-dragging and all the urgency needed to ensure that settlements will occur in a timely way. It's worth observing that the Commercial Court seems to have made this work for its docket when justice delayed became justice denied.

Speaking of the U.S., a suggestion that has been discussed in the context of your inquiry is the availability of cross-examination of experts in advance of trial. Some think that this will promote the sharing of information in good time before trial. There is no doubt that trials in the States happen more quickly and are generally shorter, and this is due in part to the extensive discovery they engage in, including deposing experts. It is also due to their advantageous use of dispositive motions. The ability to cross-examine experts as part of discovery is a worthwhile consideration as it can be expected to lead to earlier, more informed choices about settlement and failing that, the evidence to be led and the questioning at trial, and shorter trials generally.

Apart from that however, there must be discipline in the system so that parties and counsel understand that Rules are not meant to be observed in the breach. Fewer exceptions should be allowed when it comes to timelines.

Thank you again for the opportunity to participate in these discussions. Please let us know if we can assist further in any way.

Sincerely,

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