Issues with Motions to Remove Solicitors of Record

Submitted to: Ministry of the Attorney General, Office of the Chief Justice of the Superior Court of Justice, and the Civil Rules Review Committee

Submitted by: Ontario Bar Association

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ONTARIO BAR ASSOCIATION
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L'ASSOCIATION DU BARREAU DE L'ONTARIO
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Introduction

We write to you with concern about the current situation regarding the timeliness of motion dates for motions for removal as lawyer of record ("**removal motions**"). Despite regional variances, there is a general lack of available dates for this type of motion, and in certain regions without dedicated motion days like Toronto, the earliest dates currently available are almost a year away. The situation is unsustainable and requires immediate attention.

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Civil Litigation and Family Law sections. Members of these sections include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario.

Comments & Recommendations

General

The unavailability of removal motions negatively impacts not only lawyers, but also the clients they serve, potential clients, and the administration of justice. Lawyers are at an increased risk of insurance claims and professional discipline proceedings if, for example, a matter is administratively dismissed while a removal motion is pending. As you know,

lawyers remain obligated to represent their clients, despite a potential conflict, non-payment of fees, or a breakdown of the lawyer-client relationship, for as long as they remain on record. The delays in removal motions being scheduled and heard means that lawyers may be required to continue with significant undertakings like discoveries or trials, despite grounds to terminate the lawyer-client relationship.

The unavailability of timely removal motion dates can also mean that when the motion is finally heard, there may be prejudice that was not present at the time the motion was filed, further complicating the situation. In some circumstances, there might be a breakdown in the solicitor-client relationship that is so severe that counsel would not be able to obtain instructions, which could cause significant delay in a proceeding until the removal motion is decided.

Members of the public are faced with a bar that is increasingly agreeing to only limited-scope retainers to protect themselves, and to provide certainty in the event the lawyer needs to withdraw services. Legal fees are increasing and will continue to increase because of this issue. Lawyers will need to seek larger up-front retainers before agreeing to represent a client to avoid being in a non-payment situation with the inability to have a removal motion heard, resulting in more individuals self-representing. The lack of responsive dates for removal motions creates more self-represented litigants, thereby slowing down the court process and requiring more judicial time and resources, which ultimately negatively impacts the administration of justice.

While we strongly urge additional resources to the judicial complement and court staff needed to address this issue, we recognize and understand the constraints the courts are facing. We have several alternative recommendations as a starting point that could improve the *status quo*.

Recommendation 1: Expand Regional Best Practices and Unify the Procedure

The impact of the unavailability of dates for removal motions is not felt equally across all regions of the province. In many regions, dates are completely unavailable. In some regions, dates are available but are cancelled closer to the hearing date, often after a lawyer has filed a motion record and put significant work into seeking removal. We think that the process should be standardized across the province, pulling from the best practices currently in place in various regions. This could be affected through court administration changes and changes to the Consolidated Practice Direction.

For example, the consent court pilot project in Kitchener, which dedicates a weekly or monthly date to hearing these motions, could be expanded across the province. In Toronto, administrative matters, including motions for removal can be heard in scheduling court at 9:30AM. This could be adopted province-wide and begin earlier in the day to address more matters, including in those regions where there are dedicated motion days. Toronto judges will also sit early for case conferences and hear administrative matters in chambers, a practice that can be expanded province wide. Another regional solution is the virtual express motion court in Ottawa, which runs most Fridays. Here, consent and unopposed motions within an Associate Judge's jurisdiction are handled with significantly faster turnaround times compared to other regions and courts.

A practice that is notably absent from the Toronto region is having dedicated motion days. Currently in Toronto, there is a two-tier motion list – one for 9:30AM to obtain motion dates in scheduling court, and the actual motion date which can be more than a year into the future. While consent or unopposed motions can sometimes be heard at scheduling court, the lack of consistent procedure and certainty is an issue for lawyers.

There is also confusion between jurisdictions and even within the same court as to whether a removal motion is an over-the-counter motion or a regular (in court) motion. For example, in Brampton, lawyers have been given conflicting directions. One lawyer was told that their

unopposed removal motion was brought in the wrong format, and that it must be brought as a regular motion on a motion's day. When the lawyer followed those instructions, the judge sitting that day refused to sign the order, saying that it should have been brought as an over-the-counter motion.

Having consistent procedures across the province would take into account the reality experienced by lawyers practicing in numerous regions across Ontario due to technological advances in the delivery of justice. Having consistent procedures would reduce the barriers for lawyers wanting to practice outside of their home region, increasing the options available to the public to seek representation.

Recommendation 2: Pan-Provincial Court

Courts users have become accustomed to virtual courts over the last three years, and, for many matters, they have worked well. Courts have yet to take full advantage of the remote nature of virtual hearings. Judges and court staff do not have to be in the community where a matter is being heard. This allows the system to transfer resources not being used in one community to a community in need, in relatively real-time. Resources across Ontario could be used to serve people across Ontario. With all relevant parties working together, this could be operationalized in two ways:

1. Enabling judges and court staff from one courthouse to assist virtually in another courthouse on an *ad hoc* basis as schedules allow.
    - Assistance could extend province-wide or be limited to specific regions to account for the effective leadership of regional senior justices. It could also be targeted to specific issues, like removal motions.
2. A standing fully remote court to assist any party in the province with urgent matters.

- Could employ *per diem* judges to avoid reallocating judicial resources from other courthouses and have an additional complement of judges permanently assigned to the virtual standing court.

These two options can be implemented through court assignment and internal administrative changes. Subsection 15(4) of the *Courts of Justice Act* ("***CJA***") already permits the temporary assignment of a judge to any location in Ontario, though a permanent solution may require an amendment to the *CJA*. Additionally, judges who have elected to become supernumerary pursuant to sections 12(3) of the *CJA* and 29 of the *Judges Act* could be utilized for standing a fully remote court.

Recommendation 3: Priority List When Motion Dates Collapse

As mentioned above, even when dates are available to book, it is not uncommon for the motion date to collapse close to the hearing. This puts the lawyer back at square one, with additional time being lost, and increases the chances of denial due to prejudice to the client. When motion dates collapse, the matters should be put on a priority list. If unopposed or consent removal motions are being heard in writing and are subsequently denied, they should also be placed back on a priority list depending on the reasons for denial (e.g., insufficient information or outstanding questions, rather than a substantive denial). This change can be implemented through internal administrative changes within the court.

Recommendation 4: Triaging Motions and Relying on Associate Judges

Removal motions should be flagged in the court's system and triaged. For jurisdictions where associate judges have a lower case load compared to judges, removal motions should be referred to associate judges. This will reduce the workload on judges and ensure that removal motions are given proper priority.

Recommendation 5: Motion Judge Should Remained Seized

Where a removal motion, heard in writing or orally, is not granted because of procedural or evidentiary issues (i.e., not dismissed on its merits), the motion judge should provide directions and remain seized of the matter. This will ensure that the motion is still given priority and can be brought back before the same judge, who is familiar with the matter, once the directions have been complied with.

Recommendation 6: Permit Service by E-Mail

Service is often a live issue in removal motions due to the breakdown of lawyer-client relations and the inability to contact a client. This causes additional adjournments and delays in the process. Service by e-mail should be permitted in these cases to avoid further delays, and to support the continued court modernization initiatives.

While many rules have been liberalized to allow service by e-mail, the specific service rules for removal motions in section 15.04(2) do not permit this. We think this should be proposed to the Civil Rules Committee for potential amendment and adoption.

Conclusion

Our list of recommendations is not exhaustive. We provide them as a starting point for considering structural changes that can improve the unsustainable situation with removal motions. While we strongly advocate for additional resources to the judiciary and court staff, these solutions can be implemented concurrently to have a major impact on the sustainability of the justice system.

We would be pleased to work with you on developing and implementing these solutions and any other solutions that would improve the status quo.