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L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

The Honourable John Gerretsen,
Attorney General
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON
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June 1, 2012

Dear Minister:

Re: Status Notice and Hearings

Thank you again for taking the time to meet with me on March 27th. I found our discussion to be enjoyable and productive. As promised, I am writing to provide more detail on one of the issues of growing concern, namely, the "status notice" and "status hearing" procedures outlined in Rule 48.14 of the *Rules of Civil Procedure*.

Rule 48.14 provides

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>
> (1) Unless the court orders otherwise, if an action in which a defence has been filed has not been placed on a trial list or terminated by any means within two years after the first defence is filed, the registrar shall serve on the parties a status notice in Form 48C.1 that the action will be dismissed for delay unless, within 90 days after service of the notice, the action is set down for trial or terminated, or documents are filed in accordance with subrule (10). O. Reg. 438/08, s. 46; O. Reg. 394/09, s. 20 (2, 3); O. Reg. 186/10, s. 3.
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> . . .
>
> (8) Where a status notice has been served, any party may request that the registrar arrange a status hearing, in which case the registrar shall mail to the parties a notice of the status hearing, and the hearing shall be held before a judge or case management master. O. Reg. 438/08, s. 46.
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> ***Notice to Client***
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> (9) A lawyer who receives a notice of status hearing shall forthwith give a copy of the notice to his or her client. O. Reg. 438/08, s. 46.
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> ***When Hearing in Writing***
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> (10) Unless the presiding judge or case management master orders otherwise, the status hearing shall be held in writing and without the attendance of the parties if a party files the following documents at least seven days before the date of the status hearing:
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> 1. A timetable, signed by all the parties, containing the information set out in subrule (11).
> 2. A draft order establishing the timetable. O. Reg. 438/08, s. 46.
>
> ***Timetable***
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> (11) The timetable shall,

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(a) identify the steps to be completed before the action may be set down for trial or restored to a trial list;

(b) show the date or dates by which the steps will be completed; and

(c) show a date, which shall be no more than 12 months after the date of the status hearing, before which the action shall be set down for trial or restored to a trial list. O. Reg. 438/08, s. 46.

Status Hearing in Person

(12) In the case of a status hearing that is not to be held in writing, the lawyers of record shall attend, and the parties may attend, the status hearing. O. Reg. 438/08, s. 46.

… .

While this rule has existed for some time, it has, in that last few years, become the subject of an enforcement process that results in an avoidable waste of administrative and judicial resources. In addition to the direct cost of administering the service of status notices and the scheduling of status hearings,

1. court time is taken up reversing dismissals that resulted from status notices not being sent to the lawyers current address or lawyers not being notified that their timetable was not accepted;

2. Masters and judges spend additional court time reviewing counsel's conduct of the case from its inception rather than simply setting aside a dismissal that resulted from inadvertence;

3. Even where the dismissal is improper, defense counsel do not always get instructions to consent to it being set aside or to consent to a timetable. Therefore, court time is required in order to resolve the situation; and

4. Where a dismissal resulting from inadvertence is not set aside, longer, more complex, more resource intensive professional negligence suits simply replace the original suit. This simply adds to the court burden as it requires litigating many of the issues in the original suit in addition to the professional negligence issues. From a societal standpoint, the original tortfeasor is relieved of the obligation to pay for the damage caused.

There is little policy justification for the status hearings to weigh against the fact that they are wasting court resources. An administrative remedy is neither appropriate nor required to monitor the speed of a civil case, in that:

1. Defendants who feel they are prejudiced by delay have remedies in the Rules of Civil Procedure ;

2. There are no constitutional considerations that dictate the speed with which a civil case must proceed;
3. Clients will put pressure on lawyers to have the case proceed at an appropriate speed;
4. There are legitimate reasons for cases to take longer to prepare than 2 years, including waiting for recovery to be complete or prognosis to be more certain; and
5. While we understand that the government may be accountable to the public for the speed of the system, in civil cases, where the government is not itself a party, a more appropriate public measure may be the time between the action having been set down and the trial date. This would avoid the government being accountable for the speed with which private parties chose to pursue their disputes.

We would be pleased to work with your Ministry and the Civil Rules Committee to craft a rule that accomplishes the public policy goal of improving the efficiency of the justice system, without wasting resources. Given the announcement in the 2012 budget that the justice sector must reduce its spending by $116 million over the next three years, it is increasingly crucial that inefficient and unnecessary procedures are eliminated to ensure critical justice services can survive.

Thank you again for your time and interest in this issue. We look forward to hearing from you.

Yours very truly,

Paul R. Sweeny,
President

CC: The Honourable Dennis R. O'Connor, ACJO, Chair Civil Rules Committee