ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

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

December 3, 2013

The Honourable Mr. Justice Geoffrey B. Morawetz
Superior Court of Justice
Court House
361 University Avenue
Toronto, ON M5G 1T3

Dear Justice Morawetz:

RE: Civil Motions and Long Trials Review

The Ontario Bar Association ("**OBA**") is pleased that the Ontario Superior Court of Justice has recognized the need to address the significant delays in the scheduling of long motions and long trials in Toronto and the surrounding regions. These delays are a concern to the OBA's members as reflected in a Resolution passed unanimously by its governing Council in September, 2013 which calls for "urgent corrective action" to address these problems.

The OBA is encouraged by the Chief Justice's appointment of Your Honour to head a working group ("**Judges' Working Group**") to identify and implement steps to shorten these delays. We are also pleased to have been invited to participate actively in this process. Dialogue between the bench and the bar is vital to the efficient administration of justice.

In order to ensure that our recommendations reflect a broad consensus, the OBA convened a working group ("**OBA Working Group**") consisting of plaintiff and defendant-side lawyers practising in the following areas: civil litigation, class actions, insurance law (including personal injury), estates, commercial litigation and Federal Court practice. Representatives from the family and criminal law sections also participated to provide broader comparative input.

In addition, the Ontario Trial Lawyers' Association, an association of plaintiff lawyers practising primarily in the area of personal injury, and Canadian Defence Lawyers, a national association of civil insurance defence lawyers, support the position in this letter.

The OBA Working Group focused on simple and effective changes that could reduce the wait times for long motions and trials. We did not consider changes that would require new net expenditures of public resources, the appointment of additional judges (although the OBA remains committed to ensuring that the number of judges in all regions of Ontario is commensurate with demand), or changes to governing legislation.

We support the recent initiative undertaken to require prompt filing of motion materials after scheduling of motions. This will avoid the practice of "placeholder" bookings and put all parties on a level playing field when it comes to scheduling motions. It should also force moving parties to prepare their materials earlier and thus reduce the number of last-minute scrambles resulting in unexpected adjournments of motions.

The notice recently issued by the Regional Senior Judge for the Toronto Region requires notices of motion to be filed and payment of the filing fee to be made within 10 days of booking a date. This is practicable but may not, on its own, eliminate placeholder bookings unless there is a further requirement that a **motion record** be filed within 30 days of booking the date. Otherwise, parties may file a perfunctory notice of motion as a placeholder and not prepare a motion record until much later.

The motions court office should notify counsel if the motion date has been vacated as a result of the failure to file within the required time. Moving parties should then be permitted to obtain a new motion date and a new filing deadline.

ADDITIONAL SUGGESTIONS FOR CONSIDERATION

1. On-Demand, Light-Touch Case Management

The ability to consult with a judge in an informal setting, without paperwork or long scheduling delays, is one of the most widely admired features of the Commercial List. These brief "9:30 attendances" improve the flow of cases and reduce the number of unnecessary and costly contested motions.

Currently, the only mechanism for obtaining judicial input on pending or contemplated motions for non-Commercial List matters is the Motion Scheduling Court ("**MSC**"). The perception of the MSC is that it does not allow for an efficient use of counsel time and that it is an inadequate forum in which to address issues that arise in difficult or complex cases. It is perceived as a necessary step to obtain a "long" motion date, i.e. a motion of two hours or more, or to adjust a timetable.

Unlike 9:30 appointments which take place in chambers, MSC takes place in open court, and attendance at the MSC can take an hour or more even though the actual time before the presiding judge can be as short as a couple of minutes. Although the MSC may have originally been conceived as a way to provide light-touch case management for regular civil list matters, it is rarely used for any purpose other than mandatory scheduling.

We propose that the MSC be replaced by on-demand, light-touch case management where parties in need of scheduling assistance or soft case management can attend on reasonably short notice to obtain assistance from an experienced judge in an informal, in chambers setting.

Similar to the 9:30 appointments, light touch case management could be used to: (i) schedule long motions; (ii) set and adjust timelines for motions and other pre-trial steps; (iii) shorten the time needed for a motion by ensuring that parties focus on the important matters at issue; (iv) obtain minor orders and directions, and (v) address trial scheduling matters. Ideally, it would also offer parties a preliminary view on the likely outcome of a motion from an experienced judge and encourage a consensual approach to purely procedural matters.

The experience of the Commercial List users is that 9:30 appointments reduce the number of actual contested motions heard by the court. The less formal nature of the process is more satisfying for lawyers and judges alike compared to traditional motions, and far less expensive for clients. They also serve to reinforce the "no adjournment" policy of the Commercial List, thus reducing inefficiencies and frustration caused by last-minute adjournment requests.

While the volume of cases on the Commercial List is much lower than on the general civil list, we believe that on-demand, light-touch case management could work in the general setting as well. With the elimination of the MSC and the anticipated reduction in the number of contested motions (and consequently the number of motions for leave to appeal or appeals) resulting from the availability of light-touch case management, it should not require any new judges to be appointed.

To be clear, we are not suggesting a return to the mandatory case management system of the past or to single-judge, "cradle to grave" case management. Indeed, most cases should progress through the courts without any need to take advantage of light-touch case management. The availability of this resource, however, could provide a moderating influence in cases where counsel might otherwise be tempted to act unreasonably or to engage in stalling tactics.

In terms of facility requirements, small court rooms or break-out rooms could serve as chambers. Appointments should ideally be 10 to 15 minutes in duration and conducted in-person except where necessary to accommodate counsel outside of Toronto in which case telephone attendance should be permitted. Attendances scheduled before 10 AM sittings, or other times, such as mid-day or after 4:30 PM, would result in more efficient use of existing judicial and court resources.

Scheduling the short attendances would require a system that is both more nimble and timely than the motion scheduling process. There are online scheduling tools that could serve this purpose for little or no cost.

The appointments should be presided over by judges who are interested and skilled in light-touch case management. Some informal training by current and past judges on the Commercial List is recommended.

The bar associations would have an important role to play in ensuring the success of this feature. This would begin with educating members on the benefits and proper use of light touch case management. There would need to be a mechanism to deal with counsel who abuse the process and self represented litigants who may not be receptive to or appropriate for such intervention.

RECOMMENDATION: We recommend that on-demand, light touch case management be introduced at first on a pilot project basis. A Practice Direction similar to that which created the 9:30 appointments on the Commercial List should be sufficient to establish it. If the pilot project is successful, it can be deployed more generally.

2. Motions in writing

We support expanding the availability of motions in writing. Under the current rules, the practical effect of Rule 37.12(5)(d) of the Rules of Civil Procedure is that any responding party can force an oral hearing when an opposed motion is brought in writing. Our experience is that responding counsel rarely agree to an opposed hearing in writing. As a result, motions in writing are not widely used even on relatively simple contested motions.

Provided that the court adheres to its current turnaround time for such motions (approximately 2-3 weeks from the date of filing to the release of the decision), motions in writing offer the possibility to shorten delays and reduce costs involved in scheduling and arguing routine and uncomplicated motions. They also allow for better utilization of judges' non-sitting time.

We offer the following comments, and would be pleased to discuss this initiative further to facilitate implementation:

- Rule 37.12(5)(d) of the Rules of Civil Procedure should be amended to remove the ability of a single responding party to force an oral hearing in respect of certain, non-controversial motions. Such motions might include:
  - motions in simplified proceedings
  - motions to remove lawyers of record
  - productions motions and motions for undertakings
  - motions for particulars
  - motions for default judgment
  - production from non-parties

- motions in personal injury cases for surveillance evidence and persons who "might reasonably be expected to have knowledge" (Rule 31.06 (2))

- Oral hearings should remain the norm in more complex or substantive motions such as:
  - injunctions
  - summary judgment

- Certain motions fall within a gray category where an oral hearing may or may not be beneficial depending on the nature of the motion. These include:
  - motions to strike pleadings
  - jurisdiction motions
  - motions for security for costs

  A Practice Direction providing guidelines to the profession on which motions should presumptively be made in writing would be useful. We would be pleased to have the opportunity to comment on such Practice Direction at the appropriate time.

- The court should retain discretion to require a full oral hearing or, alternatively a brief in-person or telephone hearing to resolve issues identified in the course of reviewing the written material whenever necessary in the interest of justice.

Ideally, motions in writing in which all materials are filed electronically could be decided by any judge in the province so as to reduce the load on Toronto and the surrounding regions. We understand that this is not currently possible given the administrative limitations. However, this should be open for consideration at a future time or currently if all parties consent to electronic filing of motion materials.

RECOMMENDATION: We support expanding the availability of motions in writing according to the current turnaround time. It would be helpful to introduce a Practice Direction

providing guidelines on which motions should presumptively be made in writing. We would be pleased to have the opportunity to provide further input on any such Practice Direction.

3. Time limits on oral argument

The OBA Working Group favours time limits for civil motions. Time limits should be appropriate in light of the proportionality principle and strictly enforced by the bench.

Imposition of time limits requires a slight culture change in motions court. In this era of lengthy facta for many contested hearings, judges should be encouraged to be more interventionist and to direct counsel to areas where they should focus their submissions. As stated by Deschamps J. in her minority decision in *Marcotte v. Longueuil (City)*, "... the purpose of [proportionality] is to reinforce the authority of the judge as case manager. The judge is asked to abandon the role of passive arbiter."[1] A similar view was expressed by Lord Woolf in his Report, *Access to Justice*: "Ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the court."[2]

Time limits exist and are strictly enforced in the Divisional Court, the Ontario Court of Appeal, and the Supreme Court of Canada with no appreciable decline in the quality of advocacy.

RECOMMENDATION: Appropriate and proportionate time limits should be imposed and strictly enforced by the bench. This policy can be introduced by Practice Direction. We would be pleased to have the opportunity to provide input on such Practice Direction at the appropriate time.

4. Encourage judges to release endorsements from the bench for the majority of motions not involving novel or important legal issues

[1] *Marcotte v. Longueuil (City)*, 2009 SCC 43, at para. 67.
[2] Right Honourable Lord Woolf, *Access to Justice: Final Report* (July 1996) at Chapter 1: Case Management. Online: National Archives <webarchives.nationalarchives.gov.uk.>.

Most motions are not jurisprudentially important and most do not require full written reasons. All too often cases are put on hold waiting for the release of a decision. Encouraging more endorsements from the bench and fewer reserve decisions will reduce wait times following contested motions.

RECOMMENDATION: Encourage more endorsements from the bench. No formal rules or amendments required.

5. Flexibility in setting down case for trial

One of the biggest impediments to obtaining a timely trial date is Rule 48.04 which requires that all motions and discoveries be completed before a party can set an action down and begin the process of applying for a trial date. The practical result is that parties spend years on discoveries and motions and only once they have completely finished these can they begin the process of obtaining a trial date. For long trials, that means a further wait of two years or more after the case is set down for trial. The resulting "dead time" is one of the greatest causes of delay in getting to trial. While it is possible to request an expedited trial date, because this involves jumping the queue, it is difficult to obtain unless, for example, a plaintiff is catastrophically injured.

Allowing for flexibility in obtaining trial dates would dramatically reduce the total time taken from the issuance of the claim to the commencement of trial. Other than for a brief transition period, this reduction in overall delays would not significantly disrupt existing procedures. The transition period could be addressed through trial list purges which might result in some short-term inconvenience for long-term gain.

While it is possible that relaxing Rule 48.04 could result in some cases being called for trial before they are completely ready, this problem can be addressed through other means such as light-touch case management. Rule 48.04 currently is not strictly enforced on the Commercial List. Parties can request a trial date before they have completed all discoveries and motions.

This does not appear to have caused a greater number of cases not being ready for trial on the scheduled commencement date than on the regular list where Rule 48.04 is strictly enforced.

RECOMMENDATION: We suggest that the Judges' Working Group recommend to the Civil Rules Committee that it consider revising rule 48.04 to allow for greater flexibility in when cases can be set down for trial. We would also encourage the judiciary in the meantime to take a more flexible approach to granting leave under rule 48.04, particularly if light-touch case management is available.

6. Designate a single judge to hear more Divisional Court appeals

Section 21(2)(c) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 ("**CJA**") allows the Chief Justice of the Superior Court of Justice or her designate to empower a single judge to hear and determine a proceeding in the Divisional Court where appropriate considering (i) the nature of the issues involved and (ii) the need for expedition.

This provision could be used more widely by the court to free up judicial resources. Currently, most appeals, other than appeals from Masters orders and from Small Claims Court (which are specifically dealt with in sections 21(2)(a) and (b) respectively), are heard by a panel of three judges.

The broader use of section 21(2)(c) would free up two judges at any given time during the sittings of the Divisional Court to hear motions or trials, or, alternatively, to hear other Divisional Court appeals.

We believe that the first branch of the test, i.e. "the nature of issues involved," could be satisfied in many cases given that most appeals heard by the Divisional Court involve interlocutory and procedural matters, as opposed to final, substantive matters. We also believe the "necessity for

expedition" branch could easily be satisfied as most procedural appeals delay the progress of the litigation, and thus any shortening of those delays could be considered necessary.[3]

RECOMMENDATION: Consider allowing more Divisional Court appeals to be heard by a single judge, thereby freeing up two judges at any given time during the sittings of the Divisional Court to hear other matters.

7. Separate pre-trial conferences into distinct "trial management" and "settlement" conferences

The OBA Taskforce Report on Judicial Mediation[4] recently recommended that the pre-trial conference be separated into two distinct attendances: a trial management conference to manage the trial and narrow issues on the one hand; and a separate, optional settlement conference focused entirely on resolution on the other hand.

Given the tremendous resources that trials consume, it is preferable that a trial management conference focus exclusively on managing the trial. If parties wish to engage in a judicial mediation, this should take place separately from the trial management conference. Blending these two functions into one pre-trial conference means that counsel often do not know which direction the pre-trial conference will take. As a result, neither they nor the judge are often sufficiently prepared to address either in a meaningful way. This results in wasted opportunities to resolve cases that could be settled or to better manage cases that are bound for trial.

[3] It could also be argued that the words "the need for expedition" in section 21(2)(c) of the CJA are broad enough to include the need to expedite matter s in the Superior Court of Justice generally and not merely the need to expedite a particular case.
[4] *A Different 'Day in Court: The Role of the Judiciary in Facilitating Settlements*: http://www.oba.org/getattachment/News-Media/News/2013/July-2013/A-Different-'Day-in-Court-The-Role-of-the-Judiciar/ADifferentDayInCourt7122013.pdf

RECOMMENDATION: Separate pre-trial conferences into discrete "trial management" and "settlement" conferences. This should ultimately be addressed through a rule change but, in the meantime, could be implemented through a Practice Direction or other less formal means.

8. Reconsideration of automatic administrative dismissals

A surprising amount of counsel time is devoted to keeping track of status notices threatening the automatic dismissal of an action according to rigid timelines. Such notices are sometimes not received by the addressee or go unnoticed resulting in the summary dismissal of active litigation. The results are numerous motions before Masters to set aside administrative dismissals or, worse, solicitors' negligence actions by clients whose actions have been dismissed and not reinstated.

The justifications for administrative dismissals are that they purge the system of dormant files and provide some finality to litigants. However, dormant files do not on their own cause delays or costs to the courts or users of the court system. The counsel and court time involved in dealing with notices and motions to reinstate actions appears out of proportion to the benefits.

RECOMMENDATION: We recommend that the Judges Working Group recommend to the Civil Rules Committee a review of status notices and administrative dismissals and consider other means of disposing of dormant cases which reduce the burden on counsel and the courts.

9. Tracking and publishing "wait times" for each of the following:

- Wait times for short motions;
- Wait times for long motions;
- Wait times for short trials;
- Wait times for long trials;

- Average wait times between hearing and release of reasons on motions and trials.

Publishing wait times will ensure transparency and ultimately enhance the reputation of the court. Wait times have crept up to their current unacceptable levels in part because both counsel and the court itself do not seem to have access to reliable information. This increases frustration among litigants and is one of the factors hastening the demise of publicly-funded courts and fueling the growth of private, for-profit arbitration where hearing dates are transparent and accessible.

Publication of wait times will ensure that such information is timely and accurate. This will allow counsel to better prepare their clients for what lies ahead when they choose to commence an action or bring a motion.

We note that the Ontario Court of Justice recently announced that the Court's criminal court statistics would be published on its website. The statistics, which are to be posted quarterly, include disposition rate statistics (i.e., length of time/number of appearances for cases where all charges on the case have been dealt with) on the provincial and regional levels as well as data for individual court locations.

Given the level of transparency of the provincial court, we believe that similar data should be made publicly available by the Ontario Superior Court of Justice.

RECOMMENDATION: Track and publish "wait times" for each of the events noted above.

10. Post locations of motions and pre-trial conferences online

A Toronto motion can be heard in any one of four different buildings. Yet it is surprising to note that the court office does not post motion lists online. Counsel and parties must proceed to court early enough on the day of the motion to search lists posted in different buildings or call the motions office on the day before, thereby taking up court staff and law firm administrative time.

The only other way to find out in advance where a motion is going to be heard is to go to the website of the Toronto Lawyers' Association to view a scanned copy of the paper list released by the court the preceding day. This service is not widely known to the profession or to the public.

RECOMMENDATION: Post locations of motions and pre-trial conferences online by 4 PM on the day before the motion. This should be within the capabilities of court staff and existing technology.

CONCLUSION

The OBA would be pleased to offer any further assistance to the Judges' Working Group and to provide assistance in disseminating to the profession any measures that are implemented.

We look forward to continuing our collaboration with the Judges' Working Group and thank you for this opportunity to contribute to this important initiative.

Members of OBA Working Group on Civil Motions and Long Trials Review

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