



Consultation on MAG Proposal on a Single-Judge Model for Civil Proceedings

Submitted to: Ministry of the Attorney General

Submitted by: Ontario Bar Association



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



Table of Contents

Introduction.....	2
The Ontario Bar Association.....	2
Overview.....	3
Recommendations.....	5
Conclusion.....	8



Introduction

The Ontario Bar Association (“OBA”) is pleased to provide this submission in response to the Attorney General’s invitation to comment on a proposal for legislative reform to implement a Single-Judge Model in civil proceedings in Ontario.

The Ontario Bar Association

The OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. Each year, via the work of our 40 practice sections, the OBA provides submissions to governments for the profession and the public interest and delivers over 325 in-person and online professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

The OBA has long advocated for modernizing Ontario’s Civil Justice System, and the experience during the suspension of regular Court operations as a result of COVID-19 provides an opportunity to combine innovation and technology with an in-depth understanding of law and the justice system to create a sustainable future that works better for the Courts, lawyers and the public we serve. At the same time, we understand the need to balance any reforms not only in their potential for streamlining litigation, but for their effectiveness in ensuring they facilitate the justice system's fundamental objective of yielding the fairest result in every case.

This submission has been prepared by a working group of lawyers from the Civil Litigation and Insurance Law sections, who have considerable experience with judicial case management both on the Commercial List in Toronto and on the regular civil list with matters in which the parties have consented to case management. We have also canvassed



the experiences of lawyers who have participated in the One Judge Pilot Program in the Superior Court of Justice that was launched in early 2019.

Overview

The OBA agrees that the objectives identified by the Attorney General are important objectives that, if properly executed, may be advanced by the implementation of a Single-Judge Model in Ontario:

- Promoting consistent rulings within a case and enabling a Judge to oversee compliance with their Court orders;
- Better enabling parties and counsel to predict what the Judge may or may not do at the next stage of a case;
- Allowing the Judge to become very familiar with the parties, counsel, and the various legal issues, thereby saving judicial time spent on learning new case files; and
- Promoting prompt and full disclosure and making it more difficult for a party to delay in making proper disclosure, when that party must face the same Judge every time.

The OBA also believes that the following additional benefits and objectives can be achieved through a Single-Judge Model in Ontario:

- Reducing the judiciary's time spent on routine interlocutory matters such as productions motions, motions for expert reports, timetable motions.
- The Single-Judge model is also attractive since it is already being used at Superior Courts all across the Province at the pre-trial stage where pre-trial Judges will request to see counsel and litigants 2-3 times for pre-trial conferences prior to the actual trial itself.
- The Single-Judge Model will potentially reduce the need for Trial Scheduling Court and Assignment Court lists across the Province as the single judge will be responsible



for advising the Trial Coordinators if a particular case is ready for trial or not, freeing up more courtroom space and time for true contested matters and trials.

- Judges are sometimes reluctant to grant relief out of a concern that it might fetter the discretion of the Trial Judge. Single-Judge Proceedings may reduce that problem.
- More generally, Single-Judge Proceedings may encourage parties to avoid tactical motions and be thoughtful about pre-trial steps in litigation.

Overall, the feedback of our members has been positive with respect to their experiences with judicial case management on the Commercial List in Toronto and on the regular civil list with matters in which the parties have consented to case management. Single-Judge Proceedings could achieve much of the same impact as case management, with the distinction that with Single-Judge Proceedings, the case management Judge is also the Trial Judge.

We note that some members have raised concerns that in certain cases, having the same judge involved throughout a proceeding may give rise to a party's perception that they are not receiving the neutral assessment at trial that they deserve. In this submission, we have outlined some of the ways in which this concern may be mitigated by incorporating appropriate protections in any proposal for Single-Judge Proceedings. Our members have noted that these issues may be guided by any evaluation that is available in respect of the One Judge Pilot Program in the Superior Court of Justice that was launched in early 2019.

We have two further comments of general application:

First, any implementation of a Single-Judge Model must respect the independence of the judiciary and its exclusive authority in respect of assigning and scheduling matters.

Second, in order for any Single-Judge Model to be accessible and effective, the Court must have the judicial and associated resources necessary to meet the demand in assigning and scheduling matters. In this regard, we are mindful of the resource concerns expressed by the



Court prior to the pandemic, and the compounding challenges that the pandemic has wrought.

Recommendations

1. *Should a Single-Judge Model be applied to all civil proceedings in Ontario? If not, what exceptions to the Single-Judge Model would you propose and why?*

We do not expect that the proposal is intended to capture family law proceedings, Commercial List matters or matters under the *Class Proceedings Act*. The benefits of Single-Judge Proceedings as outlined in the prior section have applicability to a broad range of civil proceedings in Ontario, and in the normal course, there should be no exceptions to the model.

In our view, the model should include cases involving self-represented litigants. In line with the *Statement of Principles on Self-Represented Litigants* and as endorsed by the Supreme Court in *Pintea v. Johns*, 2017 SCC 23, [2017] 1 S.C.R. 470, the Single-Judge Model will assist self-represented parties in being more informed of the legal process, availability of legal aid and other sources of information and assistance. They will also have better access to justice because a Single-Judge will be able to deal with a self-represented party more expeditiously. It would also protect self-represented parties at the trial stage and avoid such issues as were seen in *Girao v. Cunningham*, 2020 ONCA 260. Any self-represented party who has issues with the Single-Judge has the option of a bias motion and the appeals process.

However, as outlined above, exceptions should be contemplated where judicial resources require them. At a minimum, the OBA would like the One Judge Pilot Program to continue and be expanded, so that more lawyers and parties can gain experience with the benefits of Single-Judge Proceedings.

2. *Should parties' consent be required prior to a proceeding becoming a single-judge proceeding?*

No. A consent requirement would hinder the model.



An alternative to a *mandatory* Single-Judge Model is an opt-in model akin to the option to serve a jury notice whereby any party may, at their option, require a Single-Judge Proceeding.

Regardless, giving parties an option to choose will create yet another issue to be argued before the Court, which will require more judicial resources than if the system was mandatory. It is more effective to make the system mandatory.

3. In what, if any, circumstances, should a Single-Judge proceeding be able to be reassigned to another Judge?

In the Single-Judge Model, the right of a party to request that the proceeding be assigned to another Judge should be limited to protect the benefits and integrity of the model.

First, our members have raised a concern that there are some motions that, if argued before the Trial Judge, could cause prejudice to a party. For instance, a production motion that requires the Judge hearing the motion to review and consider documents which may or may not be producible (e.g. documents over which privilege is claimed). In a Single-Judge Proceeding, there ought to be a mechanism for a party to: (a) make a request to the Single-Judge for a particular motion to be heard by a different Judge where prejudice could arise from the Trial Judge hearing the motion; and/or (b) make a request to the Single-Judge for the trial to be heard by a different Judge, where prejudice could arise from the Single-Judge serving as Trial Judge.

Second, our members note that for certain motions of true urgency, the scheduling limitations of the previously assigned Single-Judge may necessitate the use of a different Judge, to facilitate a timely hearing.

Third, trial management issues would naturally be reserved to the Trial Judge. However, it is suggested that in all matters, judicial pre-trials be conducted by a different Judge for the purpose of judicial mediation and encouraging pre-trial settlement discussions. While the pre-trial should be conducted by a separate judge, trial conduct and management matters



should be reserved to the single-judge on a case conference. Pre-Trial judges should not speak to the Single-Judge regarding the case and should have no knowledge of the matter prior to entering the pre-trial. The purpose of this restriction is to protect the integrity of the system and ensure that pre-trial settlement discussions are fruitful. Any pre-trial judge who has any specific knowledge of the pre-tried case, the identities of litigants or counsel, or has any specific knowledge or opinions of the Single-Judge that might affect or influence the pre-trial Judge's opinions or otherwise regarding the pre-trial should recuse themselves of conducting the pre-trial.

Fourth, our members recognize that any process, including any Single-Judge Model, must maintain the existing protection afforded to parties with respect to the reasonable apprehension of bias. Accordingly, all parties should be continued to be allowed to bring motions for reasonable apprehension of bias. The motion would be heard by another Judge of the Superior Court. However, the bringing of this motion should *not* prevent the Single-Judge from continuing on with ensuring all other procedural matters (discoveries, mediations, production, timetables, etc.) continue on as scheduled. This is to ensure that the litigant bringing the bias motion shall still be given his/her day in Court, but that these motions do not get used as a tactic to cause delay.

Fifth, under any proposed model all parties should be able to appeal any order of the Single-Judge pursuant to the appeal mechanisms under the *Rules* and the *Courts of Justice Act*. Even if a decision of the Single-Judge is under review, in most circumstances the Single-Judge should be able to continue ensuring that a case is moved forward and that procedural matters are in order. If litigants appeal multiple orders successively in an attempt to frustrate the Single-Judge Model (and have another Judge assigned) then this will become apparent and will be subject to scrutiny as an abuse of process.

Lastly, there should potentially also be an additional mechanism contained within the Single-Judge Model, whereby any party may raise any issue that relates to any potential instance where judicial impartiality was compromised (including but not limited to, conduct of the



Single-Judge and their interplay with the parties and/or any such other grounds as the party complainant sees fit) to the attention of the Regional Senior Justice, who could re-assign the case to another Judge if warranted. This could also work to reduce the number of bias motions brought, and provide another avenue if the particular Single-Judge Model is not working well for the particular parties involved.

Conclusion

Again, the OBA appreciates the opportunity to provide input on the policy proposal for a Single-Judge Model in Ontario as we work towards the shared goal of improving efficiency, access to justice and innovation in the Civil Justice System in Ontario. We look forward to the opportunity to work with the Ministry and the Courts to develop this initiative further, including any legislative amendments that are contemplated.