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

June 14, 2021

The Honourable Justice Peter D. Lauwers
Court of Appeal for Ontario
130 Queen St W,
Toronto, ON M5H 2N5

Dear Justice Lauwers,

Re: Problems with the late delivery of expert reports

Thank you for your letter of May 19, 2021 inviting the Ontario Bar Association (OBA) to provide input and advice as the Court seeks to address problems arising from the late delivery of expert reports. We have set out our answers following each question below.

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, through the work of our 40 practice sections, the OBA provides dozens of submissions to government for the profession and the public interest and delivers over 325 in-person and on-line professional development programs to an audience of over 12,000 lawyers, judges, students and professors. This letter has been prepared with input from the OBA Civil Litigation and Insurance Law Sections whose members represent all parties at every level of Court and at every stage of the trial and appeal process.

1. **Is late service of expert reports a problematic practice in the experience of your members?**

   Our members' experience is that most counsel serve expert reports on time and in accordance with the *Rules*. When expert reports are served late, they are often still served with sufficient notice prior to trial that the responding party can address them and the trial can proceed. Some of our members have, however, received late expert reports very close to the start of trial, with no prior notice or ability to adequately respond. In those instances, the receiving party can either seek an adjournment or, if they are not willing or able to wait for a rescheduled trial, proceed to trial without a fair opportunity to respond to the new expert report. Obviously neither of these are acceptable outcomes and addressing this situation would be a welcomed initiative by the Bar.

2. **If so, what problems have they experienced?**

   Generally speaking, when an expert report (and particularly an expert report that raises novel considerations) is served close to the start of trial, it leaves the responding party scrambling to

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determine the best course forward for their client. Counsel has to determine whether they can obtain a rush responding report in the circumstances recognizing that experts are not always available. If a report is not obtainable in the time period, counsel will have to make a judgment call on whether to seek an adjournment or proceed without an adequate response. It should be noted that an adjournment of a trial may be prejudicial to the responding party's client. For example, with respect to auto personal injury cases, the plaintiff is compensated with 100% of future income loss and 70% of past gross income loss. An adjournment of one year results in a loss of the difference in recoverable income. Also, with respect to auto personal injury cases, the statutory deductible increases every year with inflation and, accordingly an adjournment of one year results in a greater deductible.

Given the foregoing, there is the possibility that the late service of a report could be used as a tactical tool to pressure a plaintiff in an auto personal injury case to settle. Our members suggest that this is the area that may be most prone to abuse, though this too is rare.

Problems also arise in relation to pre-trials; these tend to involve inefficient use of time and resources, as opposed to trial adjournments. One specific example provided by a member was that an expert report was served one week before the pre-trial conference. The report raised a theory of the event that was new and did not give responding counsel enough time to send the report to their expert for a response. The result was that the pre-trial conference occurred with two completely different theories on how the event happened and with little ability of the Judge to provide a full opinion of the merits. This resulted in an ineffective pre-trial conference with settlement pressures not borne out of a full understanding of the case.

3. Is the conscious delay in the delivery of expert reports until after pre-trial conference something your members have seen or done?

We have no evidence of conscious delay in the *delivery* of expert reports by counsel; however, counsel do sometimes attend pre-trials without expert reports, resulting in wasted pre-trials. As outlined below, one of the main circumstances in which this occurs is when a party wants to resolve disputes and chooses to use the pre-trial conference as a venue to negotiate. In those instances, counsel will sometimes not prepare an expert report until after the pre-trial conference so as to limit their client's costs.

4. Why would parties serve expert reports on the eve of trial and then seek an adjournment?

It should be noted that typically a party does not serve an expert report and then seek an adjournment. Rather, a party serves an expert report late and the receiving party is forced to seek an adjournment so as to be able to adequately respond to the report.

There are circumstances that could result in last-minute expert reports as a matter of necessity including:

- Delay by the expert in providing the report to counsel;
- Changed circumstances (e.g., changed valuation or medical conditions) in the lead-up to the trial that require an expert opinion;
- A determination by counsel that previously unanticipated expert evidence is needed during trial preparation; and
- A requirement to change your expert witness (potentially because of lack of availability).

There are likely other circumstances; however, it should be noted that in each of the scenarios above counsel should take all reasonable steps to keep opposing counsel and the Court advised of these circumstances as soon as they are apparent.

5. What suggestions would you have to remedy the problem of last-minute pre-trial conference and trial adjournment requests arising from the late service of expert reports?

The problem of last-minute expert reports prior to pre-trial conferences is viewed by the OBA as different from the problem of last-minute expert reports prior to trial. The solutions discussed in the answers that follow address the problem in regards to trial.

With respect to pre-trials, OBA members view the problem as being less about "last-minute" expert reports and more about pre-trial proceeding in the absence of expert reports. One of the main reasons for this is that pre-trials are being scheduled for cases that are not ready for trial. In regions without mandatory mediation, pre-trials are sometimes used as a mediation. In these circumstances, where parties may wish to settle the case, delivering expert reports may not be viewed as an efficient use of resources. However, if the case does not settle, there may be further pre-trials or a lack of predictability or control over the delivery of expert reports in advance of trial. Similarly, in some instances, pre-trials are scheduled so far in advance of trial and prior to a trial date being set, that the incentive to have all expert reports delivered is absent. Again, this may result in multiple pre-trials and/or expert reports being delivered after the pre-trial.

The OBA suggests the following measures to reduce the impact on pre-trials:

i. Expansion of mandatory mediation to more jurisdictions to reduce the use of pre-trials as de facto mediations. To this end, please see the OBA's submission on the expansion of mandatory mediation[1];

ii. Requiring pre-trials to be set closer to the trial date, as opposed to a pre-requisite to obtaining a trial date; and

iii. Imposing cost consequences on parties who cause wasted pre-trials by failing to deliver expert reports in a timely way.

The measures above should also mitigate the risk of late service of expert reports in advance of trial. If parties are focused on delivering reports in advance of the pre-trial, the issue should come up less frequently on the eve of trial.

The OBA would like to see a culture shift that ends the practice of late service of expert reports. To achieve this, there should be a presumptive inadmissibility of expert reports delivered at the last minute before trial, absent a cogent explanation for the late service. This presumptive inadmissibility would need to be balanced against ensuring trial fairness. In making this determination, the Court should consider the relevance and the necessity of the expert report in assisting the trier of fact as set out in *R. v. Mohan*.[2] If an expert report is delivered late, but with sufficient time for the responding party to deliver a responding report and proceed with a fair trial, then that should be the remedy, with costs forthwith ordered against the late-serving party. Adjournments should be avoided where possible, with adverse costs awarded immediately, in the discretion of the court, where an adjournment cannot be avoided due to late service of an expert report.

6. Should late service of expert reports be permitted on consent of the parties if that results in a wasted pre-trial conference or the adjournment of a fixed trial date?

The court should not permit the late service of expert reports to result in a consent adjournment of a fixed trial date. Consenting parties should still be required to satisfy the court that the matter has been diligently prosecuted to date. Adjournment of fixed trial dates impacts the judicial system as a whole. For every adjournment there are parties waiting for a trial date. OBA members support the Court's effort to control its processes, and enforce the *Rules* to ensure fixed trial dates proceed and are not wasted. Please see the answer to the next question for additional considerations in this regard.

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[1] Available at https://www.oba.org/CMSPages/GetFile.aspx?guid=4f756ca7-2962-417b-aec6-18e1ae760d12

[2] *R. v. Mohan*, [1994] 2 S.C.R. 9

7. **What factors should judges consider in deciding whether to allow late service of expert reports for pre-trial conferences and trials, and should the factors be different for each?**

   The OBA proposes that the following factors be considered when deciding whether to allow a late-served expert report before a trial:

   - Whether there is sufficient time for the responding party to respond to the report and proceed with a fair trial;
   - Whether the late-served expert report is necessary in assisting the trier of fact to achieve a fair result;
   - Whether the party seeking to serve the expert report has a reasonable explanation for its delay in doing so;
     - Additional criteria should apply when considering whether the explanation is reasonable. For example, can the party giving the explanation demonstrate that it has been diligent in advancing the matter? Can the party explain why it took so long to serve the expert report despite that diligence?
   - Whether the parties' consent to the late delivery of the expert report and, again, provide an explanation that can be assessed for its reasonableness by way of the suggested criteria;
   - Whether the admission of the late-served expert report will cause non-compensable prejudice, such as the loss of key evidence as a consequence of the resulting delay;
   - Related to the previous factor, whether the admission of the late-served expert report will impact the fairness of the process as a whole;
   - Whether the imposition of costs could address the problems caused by delay and having to deal with late evidence; and
   - What the impact of allowing or disallowing the report would be on the public's view and confidence in the justice system and its administration.

8. **Should pre-trial judges be empowered to impose immediately payable costs sanctions for a wasted pre-trial conference, and should a judge hearing a leave motion to late-file expert evidence be able to do the same?**

   Yes. Pre-trial judges and judges hearing leave motions in this regard should have the discretionary power to grant costs (including costs payable forthwith) in appropriate circumstances.

9. **Should the wording in Rule 53.08(1) giving trial judges the authority to admit late expert reports be changed from "leave shall be granted" to "leave may be granted"? Would this assist in addressing the problem?**

   OBA members believe this would be a positive change. Trial judges should be given the discretion to rule that expert evidence disclosed in last-minute expert reports is inadmissible, if the admission of that evidence would otherwise result in trial unfairness. That said, it is questionable whether this would have any major practical effect. The importance of ensuring that trials result in fair outcomes will always be of paramount importance.

10. **Do you have any other views on the particular practices around experts and pre-trial conferences that the above questions do not elicit?**

    As mentioned above, the experience and impact of last-minute expert reports are different in the different jurisdictions. Some standardization in the processes for obtaining pre-trial and trial dates and ensuring that pre-trials are conducted closer to trial dates, would help improve predictability and reduce wasted pre-trials caused by last-minute or absent expert reports. OBA members are strongly of the view that most cases do not require multiple pre-trials. It is felt that early pre-trials that are a pre-requisite to obtaining trial dates are an inefficiency for parties, lawyers, and the courts.

    In some jurisdictions there are trials sittings with rolling start dates. The *Rules* provide for service of supplementary reports 45 and 15 days prior to trial start date. In jurisdictions with rolling start dates the judiciary should give direction for service (for example, the deadlines are to the start of the trial sittings).

Thank you for your commitment to addressing these issues. We would welcome the opportunity to discuss these matters further with you.

Yours very truly,

Charlene Theodore,
President, Ontario Bar Association