



Sent electronically

May 19, 2021

Katie W. Robinette (Executive Director)
Federation of Ontario Law Associations
731 9th Street West
Owen Sound, Ontario N4K 3P5
katie.robinette@fola.ca

Dear Katie:

Re: Problems with the late delivery of Expert Reports

I write to you in my capacity as Chair of the Expert Evidence Subcommittee of the Civil Rules Committee. I understand that members of your organization are experienced users of Ontario's civil justice system. We seek your assistance and advice.

As you may be aware, in recent years the Superior Court of Justice's ability to assist in settling and in trying civil cases has been under increasing pressure. The reasons are many, but two of the most significant are the Supreme Court of Canada's insistence that criminal cases be tried expeditiously as a matter of utmost priority because they engage the liberty of the subject, and the increasing devotion of system resources to family law cases.

These competing demands for judicial time and attention make it critical for the civil justice system to operate as efficiently as possible. The civil justice system must meet the objective set out in r. 1.04 of the Rules of Civil Procedure: "the just, most expeditious and least expensive determination of every civil proceeding on its merits" in a manner that is "proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding."

Superior Court judges have brought to the attention of the Civil Rules Committee several problems that waste scarce judicial resources and challenge the system's ability to meet its objectives. First, counsel are increasingly arriving at pre-trial conferences without any or all of the expert reports that will be required to try the case. This wastes the pre-trial judge's time and requires the scheduling of another pre-trial conference. Second, the late delivery of experts' reports sometimes leads to the last-minute adjournment of civil trials. When a trial is adjourned it is not always possible to simply schedule another trial immediately and judicial resources are squandered.

The Civil Rules Committee has mandated the Expert Evidence Subcommittee to consider these increasingly problematic practices.

The purpose of this letter is to ask for information from your organization, as interested in the health of the civil justice system, to assist in the formulation of recommendations to the Civil Rules Committee designed to address the practices I have identified.

I would ask you or your organization to prepare a written response to several questions. The response need not be longer than about five pages. Please send these submissions electronically to my Law Clerk, Caitlin Leach, at: caitlin.leach@ontario.ca.

In preparing your response, I would be grateful if you would use this sequence of questions so that the responses from various organizations can be efficiently combined:

- (1) Is late service of expert reports a problematic practice in your experience?
- (2) If so, what problems have you experienced?
- (3) Is the conscious delay in the delivery of expert reports until after pre-trial conference something your members have seen or done?
- (4) Why would parties serve expert reports on the eve of trial and then seek an adjournment?
- (5) What suggestions would your organization have to remedy the problem of last-minute pre-trial conference and trial adjournment requests arising from the late service of expert reports?
- (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?
- (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?
- (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?
- (9) Should the wording in r. 53.08(1) of the *Rules of Civil Procedure*, which sets the trial judge's 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?

We are also interested in any views on the particular practices under our scrutiny you might have that these questions do not elicit.

Yours very truly,

A handwritten signature in blue ink, appearing to read "Peter D. Lauwers". The signature is fluid and cursive, with the first name being the most prominent.

Peter D. Lauwers
PDL: sr