FEDERATION OF ONTARIO LAW ASSOCIATIONS
FÉDÉRATION DES ASSOCIATIONS DU BARREAU DE L'ONTARIO

"The Voice of the Practising Lawyer in Ontario"

FOLA Submissions

Late Service of Expert Reports

Submitted to: Esther Coward
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Court of Appeal of Ontario

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INTRODUCTION

The Federation of Ontario Law Associations (FOLA) appreciates the opportunity for allowing us to consider the proposed changes to the *Rules of Civil Procedure* and to provide the Subcommittee with our views and recommendations.

FOLA is an organization that represents the 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, FOLA represents approximately 12,000 lawyers, most of whom are in private practice in firms across the province.

THE PROPOSED RULE 50.30.1

With respect, we feel it important to reiterate our initial position to late delivery of expert reports. Based on the comments of our members, we do not see this as a widespread problem throughout the province. This is particularly so with our members outside the GTA.

Overall, we find the proposed solution to be disproportionate to the problem that is being addressed. We believe the proposed Rule 50.03.1 will result in a new layer of costs and delay in an already overtaxed civil justice system. As an example, currently in many regions in the province, it can take months for counsel to receive an issued and entered basket order. We understand that this delay is largely due to the strain on judicial resources. If you now add case conference requests, delays, such as receiving basket orders, will only magnify.

We understand that in centres such as Toronto, Newmarket and Brampton, it can take up to four years to secure a trial date from the point an action is set down for trial. We are also advised that even now in these centres, it can take months to secure a case conference date. We fail to understand how such a system could accommodate even more case conference requests coming only 60 days prior to a pre-trial conference.

In most regions in this province, there are no Masters. Any case conference would have to be through a judge. The workload of those judges is already significant and will become more so once the courts start to open up. The proposed Rule 50.03.1 only increases the burden and we believe does so unnecessarily.

The proposed rule changes have not addressed what we believe to be the primary problem with the pre-trial system in the province and that is the long time lag between the pre-trial date and the trial date. We continue to maintain that a trial date should be fixed within a reasonable time after the pre-trial date - perhaps no later than 90 to 120 days after the pre-trial. If the Subcommittee wants to address a problem with late service of expert reports, we believe that it must first address the time lag between the pre-trial and trial. Nothing in the proposed rule amendments addresses what we believe is a fundamental problem.

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If proposed Rule 50.03.1 is enacted, we foresee three potential problems:

(a) Counsel will routinely request case conferences to the point where the system will become overwhelmed.

(b) Case conferences under Rule 50.13 are permissive ("A Judge may…direct that a case conference be held"). If the system is overburdened, requests for case conferences in some regions may be declined due to a lack of resources.

(c) On the flip side of (a), notwithstanding the word "shall" in the proposed Rule 50.03.1(1), counsel may choose not to deliver a certificate of readiness and continue on as before. Between themselves, counsel routinely agree not to follow certain rules. Counsel routinely do not follow the current Rule 53.03(2.2). Counsel routinely do not agree to a discovery plan under Rule 29.1.03.

COMMENTS ON SOME SPECIFIC PROPOSED RULE CHANGES

Rule 33

Given the time delay between when an action is set down for trial and when a trial date is secured, we are concerned with the proposal that a motion under section 105 of the *Courts of Justice Act* must be made within 60 days of the trial record being filed. If plaintiff counsel serves an entirely new report after the 60 days, the defence would be precluded from moving for a defence medical examination to address the new report. This is an unfairness to the defence.

We are also concerned that the proposed Rule 33.06(2) amendment permits service of a report no later than the time under subrules 53.03(1) or (2). This potentially poses an unfairness to the plaintiff. We see no reason to change the current Rule and maintain that the party who obtained the order for the medical examination shall forthwith serve the report on every other party. No counsel should be permitted to sit on a section 105 report.

Rule 53.03(8)

Currently, a party has a right to bring a motion to extend the time to serve an expert's report. The right to bring such a motion should not be interfered with. The proposed rule change allows a party to "request a case conference under Rule 50.13". As earlier mentioned, Rule 50.13 is permissive. The proposed amendments potentially take away a party's right to appear before a judge or master to request an extension. That right should not be interfered with or made on a permissive basis only.

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Rule 50.03.01(5) and (6)

This proposed Rule prohibits counsel from consenting to a timetable amendment. We believe this to be an undue interference in allowing counsel to manage an action. If counsel agree to a timetable amendment, that agreement should be respected, absent special circumstances.

THE DRAFTING OF THE PROPOSED AMENDMENTS

Everyone with whom we have consulted has expressed difficulty in the drafting of the proposed amendments. Respectfully, they are difficult to follow, not straight-forward and cumbersome to work through. Self-represented litigants would be extremely challenged to work through and understand these proposed rule amendments, particularly in the interplay between the proposed Rule 50.03.1 and Rule 53.03.

CONCLUSION

We respectfully ask the Subcommittee to reconsider the direction in which it is going. To the extent that there is a problem with the late delivery of expert reports, we question whether the problem is province wide. To the extent there is a problem, we believe that the best way to address it is to schedule the pre-trial conference within a reasonable time before the trial date. It is of no use to anyone to set a trial date that extends well beyond the date of the pre-trial conference. If that practice continues, any problems with late service of expert reports will not be properly addressed.

Respectfully submitted,

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