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

"The Voice of the Practising Lawyer in Ontario"

FOLA Submissions on Late Delivery of Expert Reports

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Court of Appeal for Ontario

Submitted on: June 14th, 2021

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Thank you for providing this opportunity to Federation of Ontario Law Associations (FOLA) to comment on late delivery of expert reports.

FOLA is an organization that represents the local law associations and members of 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 authors of this submission are William Woodward, the current Chair of FOLA and Michael Winward, the immediate past Chair. Mr. Woodward was called to the bar in 1988 and practices exclusively in insurance defence. Mr. Winward was called to the bar in 1985 and practices in civil litigation with a strong emphasis on plaintiff personal injury matters. Between these two authors, we have conducted hundreds of pre-trials in various locations throughout the province. We have also consulted with our members.

INTRODUCTION

Rules 53.03(1) and (2) came into effect on January 1st, 2010. They were meant to address the problem of filing expert reports too close to the trial date. It was hoped that establishing a 90/60 day delivery rule prior to the pre-trial would help with this problem. Seemingly, the rule has not been as successful as hoped. Unless a pre-trial conference is held no more than 90 days prior to the trial date, we suggest that these rules be revoked. We do not recommend a more stringent set of rules to take the place of the current rules.

There are many reasons why expert reports may not be served either 90 or 60 days before a pre-trial conference. Often, it is because one or both of the parties would prefer to try to resolve the litigation without having to spend, quite literally, tens of thousands of dollars on expert reports. Sometimes late filing is due to counsel's inadvertence or poor time and file management. Rarely, in our experience, is late filing of an expert report due to a conscious attempt to frustrate the process and seek an adjournment.

One important goal in the civil justice system is to resolve as many civil claims as possible without the requirement of a trial. Even if 10% of the cases in the system went to trial, the system would be hopelessly backlogged due to an inadequacy of resources. Whether resolution occurs after examinations for discovery, at a mediation, at or after a pre-trial conference is secondary to the importance of getting the vast majority of actions resolved prior to starting a trial.

It may well be that an action does not settle at pre-trial. However, it should not be assumed that if the action did not settle at pre-trial, the pre-trial was unsuccessful or a waste of time. In our experience, pre-trial conferences are highly successful in assisting in ultimately getting the action resolved. We do appreciate that there are annoyances and frustrations within the system. However, the system is not broken.

1. *IS LATE SERVICE OF EXPERT REPORTS A PROBLEMATIC PRACTICE IN YOUR EXPERIENCE?*

We do not believe there is a "practice" to serve expert reports late for the purpose of deliberately frustrating the pre-trial or trial process. There are multiple reasons why service can be late, which are more fully explored below.

2. *IF SO, WHAT PROBLEMS HAVE YOU EXPERIENCED?*

The process of setting pre-trial and trial dates is not standardized throughout the province. Instead, it is a patchwork of regional and local rules. In some jurisdictions, it can take 12 to 18 months from when the trial record is passed to the pre-trial date. The trial date is then set at the time of the pre-trial. Depending on the locality of the action, the trial date may be 18 to 36 months from the pre-trial date. Therefore, to comply with Rule 53.03, experts' reports would have to be served up to two or three years before the trial. If the action is not resolved at the pre-trial, some expert reports (particularly medical, rehabilitation and economic losses) will be stale-dated for trial and will have to be updated at tremendous cost.

Pre-Covid, it was challenging to find experts who could deliver a report within a reasonable timeline, except for professional forensic experts such as engineers or accountants. Experts whose primary source of income is other than forensic can be challenging to find and may not

commit to a firm turnaround time for their report. This is especially the case with physicians, rehabilitation professionals or those occupations where they would not normally write any type of report and are outside their comfort zone in doing so. With Covid, this problem has been magnified to the point where it can take many months to find an expert who is prepared to write a report and then many more months for that expert to write a report that complies with Rule 53.023(2.1).

3. *IS THE CONSCIOUS DELAY IN DELIVERY OF EXPERT REPORTS UNTIL AFTER THE PRE-TRIAL CONFERENCE SOMETHING YOUR MEMBERS HAVE DONE?*

Yes, however it must be understood that conscious delay for the purposes of frustrating the pre-trial or trial date is not a common occurrence. There may be conscious delay in report serving if it is genuinely felt that resolution of the action is not dependent upon a particular expert report. For example, a loss of income report that may be needed to get evidence before a court at trial is typically not required for settlement purposes where a present value chart and a calculator will do the trick.

Most importantly, looming in the background is the cost issue – can we get this case settled without either party having to spend thousands or tens of thousands of dollars on expert reports? It is not uncommon for even a midsize plaintiff personal injury firm to carry unbilled disbursements well into seven figures. Even a straightforward claim can attract $20,000.00 to $30,000.00 in expert report costs. Forensic experts such as engineers and accountants routinely send along five figure invoices. This can result in an access to justice problem, depending on how the expert is being funded. Parties and their counsel are understandably hesitant to spend tens of thousands of dollars if they do not have to. Further, a file where assessable disbursements have gone through the roof can, quite literally, be the biggest impediment to getting the action resolved. Ultimately, someone has to pay those disbursements.

4. *WHY WOULD PARTIES SERVE EXPERT REPORTS ON THE EVE OF TRIAL AND THEN SEEK AN ADJOURNMENT?*

This is partly answered above. Otherwise, this can be a file and time management issue in this age of constant, immediate communication. Practice in the last few years has changed dramatically, where hundreds or even thousands of pages of documents can be served at the stroke of a key on a keyboard. The pace of practice, coupled with the challenges of Covid, has had a profound effect on the profession. On June 7th, the Law Society of Ontario sent out a national survey undertaken in partnership with the Federation of Law Societies of Canada, the Canadian Bar Association and the University of Sherbrooke entitled "The National Well-Being Study of Legal Professionals". There is a reason this survey was sent out: the legal profession is under unprecedented stress and the mental health of the members is of increasing concern to regulators across the country.

5. *WHAT SUGGESTIONS WOULD YOUR ORGANIZATION HAVE TO REMEDY THE PROBLEM OF LAST-MINUTE PRE-TRIAL CONFERENCE AND TRIAL ADJOURNMENT REQUESTS ARISING FROM LATE SERVICE OF EXPERT REPORTS?*

Unless a pre-trial conference is held no later than 90 days prior to the trial, Rules 53.03(1) and (2) should be revoked. These rules were meant to address a problem of late service of expert reports prior to trial. They have not had the desired affect and there are practical reasons why that is the case, which have been touched upon above. If expert reports are served late, judges have the appropriate discretionary remedies available to them under Rule 53.08.

Pre-trial conferences should not be routinely adjourned based on late service of expert reports. If, at the pre-trial conference, the presiding judge concludes that it is appropriate to continue the pre-trial at a later date, those arrangements can be made. However, things can still be accomplished at the pre-trial conference. Even if late service means that not all issues can be resolved, many can be. Surely the pre-trial judge will have formed impressions of the action based on the pre-trial conference memorandum. Those impressions should be canvassed at the pre-trial conference as they can be very helpful in ultimately getting an action resolved.

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?*

Yes. If counsel consent, the presiding judge should respect that consent absent some clear reason to the contrary. It must be kept in mind that counsel still have their clients to answer to concerning delays in the litigation.

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 judge should consider whether counsel were in agreement to delay the exchanging of reports to try to resolve the file in a cost effective manner. Also, the judge should consider whether counsel demonstrated that reasonable efforts were made to obtain necessary expert reports in a timely fashion. Further, the judge should consider whether there is any actual evidence that the late delivery of the report was for the purpose of adjourning either the pre-trial or the trial.

If a judge does not allow late service of an expert report and if that means that the expert is precluded from testifying at trial, it is the party who is prejudiced. Unless the party was complicit in the late delivery, which is highly unlikely, what is the ultimate outcome of disallowing the report and therefore the testimony? If the client is prejudiced does the lawyer put LawPro on notice? Creating another cause of action against the lawyer is not in anyone's interest.

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?*

We question against whom such cost sanctions should be made. The client? Counsel? There should first be a finding that late service of expert reports was for the purpose of frustrating the pre-trial or trial process before cost sanctions should be imposed and that, in our experience, would be rare.

9. *SHOULD THE WORDING IN RULE 53.08(1) OF THE RULES OF CIVIL PROCECDURE , 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?*

No. The rule gives the judges sufficient room for terms, including costs thrown away. Prejudice to the party, who likely has nothing to do with the delay, should not be overlooked should the expert be precluded from testifying.

FINAL COMMENTS

Late service of expert reports is only a small part of a much broader conversation that needs to take place in the post-Covid world of civil litigation. We need a discussion from all justice players – judges, government and stake-holders – if we want to avoid what Brown JA posed in his 2019 article, *Red Block, Yellow Block, Orange Block, Blue: With So Much Competition, What Do We Do?* No topic should be felt off limits. They might well include:

(a) A permanent or temporary suspension of jury trials in all but a few types of cases such as defamation, to move things faster with judge alone trials.
(b) Mandatory case management across the province to keep files moving and not sitting in limbo.

(c) Where possible, specialty judges should be assigned to pre-trials and trials. This makes the process faster and more productive.

(d) If Rules 50.03(1) and (2) are to remain in effect, the Rules should be amended to provide that a pre-trial conference shall be no more than 90 days before the trial date. This way, parties are not faced with the prospect of having to update stale expert reports for trial. It would also increase the prospects of settlement as the looming trial date will be at the forefront of counsels' minds.

(e) Standardized practice in the province for the setting of trial and pre-trial dates, as well as standardized practice on the length of the memorandum that can be included. As an example, in Hamilton the maximum length of a pre-trial conference memorandum is 10 pages. In Waterloo region, pre-trial memos can be 20 pages yet both jurisdictions are in the central south region. Some regions prohibit the filing of expert reports with the pre-trial conference memorandum, which seems counter to the mandatory wording in Rule 50.11.

(f) By the time an action gets to the pre-trial stage, counsel have likely had a number of settlement discussions and perhaps a mediation. Typically the file has not settled before the pre-trial date due to only a couple of issues. In a tort file, those issues are typically liability and/or pecuniary damages, especially future pecuniary damages. Consideration should be given to a rule amendment that would direct counsel to agree on the 1 to 3 issues they would like addressed at the pre-trial. The pre-trial brief should address only those issues and the judge should be prepared to discuss those issues fully and should actively engage in trying to find a resolution for some or all of those issues.

(g) For pre-trials, judges should try to settle some issues if the action cannot be resolved in its entirely. It should be kept in mind that Rule 50.01 states that "the purpose of the rule is to provide an opportunity for <u>any</u> or all of the issues in a proceeding to be settled without a hearing…".

(h) With increasing case backlog, we must have a better way of dealing with self-represented litigants, particularly plaintiffs. The court counter staff and court time self-reps take up has to be dealt with. In 2020, Justice Lauwers dealt with two cases that highlight how much judicial resources could be chewed up by meritless claims by self-represented individuals.[1] A triage system for self-represented litigants should be considered.

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[1] *Chowdhury v Toronto (City),* 2020, ONCA 538 and Auciello v. CIBC Mortgages Inc., 2020 ONCA 53

(i) We must give consideration to the financial motivation for a party to delay the resolution of an action. Interest rates are at historic lows. For car accident cases, the 5% prejudgment interest rate in Rule 53.10 does not apply due to amendments to the *Insurance Act*. For non-motor vehicle personal injury actions, insurers are interpreting *MacLeod v. Marshall* [2] as though it single-handedly amended Rule 53.10 and cut prejudgment interest rates to that under the *Courts of Justice Act.* When interest rates were in the double digits in the 1980's, plaintiffs were financially motivated to delay. Now the defence is motivated. This needs to be recognized and the prejudgment interest rate needs to be set to a rate such that neither party is advantaged in trying to delay the ultimate resolution of the action.

We thank you for allowing us to respond in this matter. We would be more than happy to discuss anything within this submission more fully.

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Michael Winward

[2] *MacLeod v. Marshall* (2019) ONCA CanLII 842