COURT OF APPEAL FOR ONTARIO

MEETING WITH THE ATTORNEY GENERAL OF ONTARIO AND REPRESENTATIVES OF THE BAR

Proposals for Improvements to Ontario's Justice System

THURSDAY, JANUARY 31, 2019

OSGOODE HALL

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February 14, 2019

The Hon. George R. Strathy
Chief Justice of Ontario
Court of Appeal for Ontario
130 Queen Street West
Toronto, ON M5H 2N5

The Hon. Caroline Mulroney, MPP
Attorney General of Ontario
Ministry of the Attorney General
11th Floor, 720 Bay Street
Toronto, ON M7A 2S9

Dear Chief Justice Strathy and Attorney General Mulroney:

RE: Suggestions to Change the Ontario Justice System: Follow-up to January 31, 2019 Meeting

As you know, in the 55 years since its establishment as a not-for-profit association in 1963, The Advocates' Society has come to have over 6,000 members throughout Canada, more than 5,000 of whom practise and reside in Ontario. The mandate of The Advocates' Society includes, among other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates.

At the outset, I would like to thank you once again for inviting me to the joint meeting that you convened on January 31, 2019 to discuss possible changes to the Ontario justice system.

As I explained then, in preparation for the meeting, The Advocates' Society consulted with its members across Ontario to hear suggestions on what changes they would like to see in the system. At the meeting, I summarized the key suggestions we received. This letter reiterates those suggestions and in the addendum provides a few others, some of which were echoed by the other justice system stakeholders in attendance on January 31.

The suggestions below are organized in response to the three questions posed at the meeting.

1. **If there was one change that you could make to the Ontario justice system that would have no cost, what would it be?**

The Advocates' Society believes that, as a general matter, only electronic, searchable documents should be served. Counsel should be directed, by way of a Practice Direction from the courts and eventually through an amendment to the *Rules of Civil Procedure*, to serve documents in Word, PDF or other searchable formats. Such a requirement would provide counsel, and the courts, with the ability to efficiently target key aspects of their cases within voluminous documents. Efficiency would be enhanced inside the courtroom by allowing counsel to better focus their preparation before hearings and their submission at hearings themselves. This requirement would neither result in increased costs nor have a disproportionate impact on smaller judicial centres.

2. If there was one change that would cost $10 million or less, what would it be?

The Advocates' Society strongly supports investments in wraparound services for those involved in family law proceedings. A multifaceted approach to family law would make the process more efficient. In particular, investments should be made into:

1. Enhanced legal services for domestic violence survivors, which would involve working with community agencies and drawing on their existing networks and resources;
2. Increased on-site mediation services to match family sittings at all court locations. Mediation services exist at most family court locations presently. Increasing these services will divert litigants from costly litigation; and
3. Creation of a triage pilot program for family justice. This would involve case management for high conflict cases and perhaps also social workers and community agencies. It would mean that families who need help do not need to wait for months for a first appearance before a judge and would have a single judge assigned as case manager who could divert cases to extra-judicial services as necessary and appropriate. Along with providing the right assistance for families in difficult and complex situations, a triage program would reduce the overall number of court appearances.

3. If you had an unlimited budget, what change would you make?

The Advocates' Society emphasizes the crucial importance of improved infrastructure and courthouse facilities.

We urge the Government to commit to further investment in order to improve courthouse facilities across Ontario. Specifically, Toronto, Brampton and certain areas of Northern Ontario have courthouse facilities which are inadequate. We suggest in particular that consideration be given to the construction of a full-service courthouse (i.e., one that would serve the Superior Court of Justice, the Ontario Court of Justice and the Unified Family Court) in Toronto, outside the downtown cores. If located in Scarborough or Etobicoke, a justice system infrastructure investment of that kind would capitalize on transit infrastructure investments that are now nearing completion and would create a presence in Ontario's largest city for the Unified Family Court ("UFC"), something that has existed in Ontario for some time (and in the case of Hamilton, for four decades).

We generally urge the Government of Ontario to commit to a plan for UFC in all court infrastructure planning presently and in the future. In particular, we urge the Government of Ontario to ensure that sites across Ontario are ready to receive federally-appointed judges who are allocated to UFCs.

We at The Advocates' Society look forward to continuing the discussion about these and other ideas for the improvement of Ontario's justice system, and to being part of the roundtable and working groups to be created shortly.

Yours truly,

Brian Gover
President

ADDENDUM: Additional Suggestions from Members of The Advocates' Society to Improve the Ontario Justice System

1. **If there was one change that you could make to the Ontario justice system that would have no cost, what would it be?**

- A number of legislative amendments in family law would increase efficiency in the justice system without incurring additional costs. In particular:
  1. An amendment to Rule 4(1) of the *Family Law Rules* to allow articling students to appear at return dates and conferences on procedural matters without leave of the court would reduce costs to family law litigants;
  2. Amendments to the *Children's Law Reform Act* to match upcoming changes to the Federal *Divorce Act* would facilitate harmony and reduce confusion for married and unmarried spouses; and
  3. Amendments to Sections 89 and 112 the *Courts of Justice Act* to provide authority for the ordering of the Voice of the Child Report, currently provided by the Office of the Children's Lawyer, would allow for speedier and more affordable service for family law litigants.

- The Advocates' Society would also support an increase in the monetary jurisdiction under the Simplified Procedure and before Small Claims Court. Efficiencies can be gained through the rationalization of certain proceedings with a comparatively lower monetary value.

- We encourage the Government of Ontario to continue to urge the Federal Government to fill superior court judicial vacancies across Ontario.

- Finally, we draw your attention to The Advocates' Society's *Best Practices for Civil Trials*, released in June 2015, which outline practices through which counsel can reduce the time spent arguing trials. We would be pleased to discuss ways in which the Government and the Courts can continue to emphasize the importance of these principles to counsel across Ontario. A copy of the *Best Practices for Civil Trials* is appended to this letter.

2. **If there was one change that would cost $10 million or less, what would it be?**

- The Advocates' Society encourages the Government to invest in courthouse technology. We believe that relatively modest investments in technology would result in significant efficiencies.
  - Improved WiFi access in all courthouses, for example, would facilitate electronic hearings.
  - In criminal law, the implementation of CourtCall or other similar software would allow for electronic appearances before the Ontario Court of Justice.

3. **If you had an unlimited budget, what change would you make?**

- The Advocates' Society encourages further investments in legal aid for family matters, including to negotiate separation agreements and to attend mediations, and criminal matters. This could include a cost-of-living adjustment for the hourly rate of lawyers who do legal aid work. We have been advised by Legal Aid Ontario that a cost-of-living adjustment over the next three years would amount to $1.2 million for the first year and $2 million for years 2 and 3 cumulatively.

The Advocates' Society

The Advocates' Society, 2700-250 Yonge Street, P.O. Box 55, Toronto, ON M5B 2L7
T: (416) 597-0243 | F: (416)597-1588 | www.advocates.ca

The length and cost of civil trials is a significant problem in Ontario. As Chief Justice Strathy remarked at the Opening of the Courts Ceremony on September 9, 2014, "It strikes me that we have built a legal system that has become increasingly burdened by its own procedures, reaching a point that we have begun to impede the very justice we are striving to protect." The Chief Justice stated the problem succinctly:

> "Our justice system has become so cumbersome and expensive that it is inaccessible to many of our own citizens."

Other senior judges have expressed similar concerns. Associate Chief Justice Marrocco has commented on the migration of civil cases to private arbitration, with the attendant loss to the evolution of jurisprudence and compromises to the open court principle. In time, the bench and bar could lose the ability to try a broad spectrum of civil cases.

Excessively long trials consume scarce judicial resources to the point that timely access to the courts is compromised. Civil litigants' concerns about timely and efficient resolution of their disputes must be seen as relating not only to their own interests, but also to the public interest in ensuring the continuing availability of public resources for dispute resolution.

With the judiciary's encouragement, The Advocates' Society has taken a leadership role in response to the serious threat to access to justice that lengthy civil trials pose in Ontario.

In early 2014, the Society struck a Task Force comprised of civil litigators and judges to examine the issues more closely. For almost a year, the Task Force researched civil trial practices across Canada and from other jurisdictions, including a review of reports from various institutes, bar associations and governments.

On January 28, 2015, the Society hosted the Civil Trials Symposium, a forum where over 100 participants – judges, lawyers drawn from the private bar and government, and leading legal academics – shared their views on how to ensure the fair and timely resolution of civil disputes through our court system. A consensus emerged about ways in which this important goal can be achieved. That consensus is reflected in this document – the *Best Practices for Civil Trials*.

By publishing these *Best Practices for Civil Trials*, the Society strives to promote a culture in which civil disputes are resolved more frequently, whether by trial or otherwise, in a more accessible, proportionate, and cost-effective manner, without compromising fairness. The goal is to equip trial judges to make properly-informed adjudications in an efficient way; to equip counsel to make the most efficient use of client and court resources; and to preserve our civil trial process for future generations.

Establishing best practices for civil trials is an evolving process and the *Best Practices for Civil Trials* are not intended to be exhaustive. This is and will be a living document. The Advocates' Society is committed to supplementing and amending the *Best Practices in Civil Trials* from time to time with additional means of enhancing the efficiency of the civil trial process.

The focus of the Task Force in developing the *Best Practices for Civil Trials* was on civil trials in Ontario. The Society believes that these *Best Practices* could have application across Canada, with necessary modifications to take into account differences in legislation and court practice. The Advocates' Society welcomes feedback on these *Best Practices* from the judiciary, and from the Society's members nationwide. Feedback on the *Best Practices* may be provided via email at policy@advocates.ca.

The *Best Practices for Civil Trials* are grouped into four areas:

A. Case Management

B. Trial Planning and Management

C. Use of Documents and Technology at Trial

D. Expert Evidence at Trial

While grouped into different areas of trial practice for convenience, the Society encourages readers to read the *Best Practices for Civil Trials* holistically, as these four areas are interdependent and interconnected.

The following principles must also be kept in mind when reading the *Best Practices for Civil Trials*:

- The *Best Practices for Civil Trials* are anticipated to be used in both judge alone and jury trials;

- Where applicable, counsel may find it useful to substitute the word "trial" with "hearing", as the *Best Practices for Civil Trials* can apply to the hearing of applications, hybridized forms of civil proceedings and alternative models of adjudication;

- Counsel should seek to cooperate with one another in the interests of keeping the civil process as fair and efficient as possible;

- The *Rules of Civil Procedure* and the *Evidence Act* provide rules of general application which govern various procedural aspects of civil trials, but generally speaking, those rules should be regarded as minimum standards only; these *Best Practices for Civil Trials* are intended to go beyond what is required by statutory and regulatory instruments, and reflect that counsel should adopt practices that ameliorate the demands of the civil trial process on the administration of justice, while at all times respecting the best interests of their clients;

- Not every Best Practice will be appropriate for every case;

- Regional differences may arise in the application of different Best Practices, based on the judicial resources available and existing regional practices; and

- Trial and pre-trial practices, including the implementation of these Best Practices and the cost involved for each step in the civil process, should always remain

proportional to the matters in issue, and in particular, to their importance and complexity.

Best Practice #1: The aim of case management is to increase the efficiency of civil justice without compromising the just determination of cases on the merits. Case management should be flexible to fit the circumstances of each case. As early as possible in the litigation process, counsel should confer about the elements of the proceeding and endeavour to: discuss the likely form and requirements of the final hearing; fix the trial date; establish a timetable for reaching that trial date; and consider and determine whether settlement, in whole or in part, is possible.

Commentary

1.1 Different cases will require different degrees of case management. Case management must be responsive to these differing needs and should not impose uniform and inflexible requirements on all matters. In some cases, once a timetable has been set, the parties will encounter no difficulty moving the case forward and will not require a further case conference until the trial management conference/pre-trial conference. In other cases, multiple interlocutory matters and other issues will arise, and more frequent case conferences will be necessary.

1.2 Case management should be carried out with the following guidance from the Supreme Court in mind:

> There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.[1]

1.3 At the initial case management conference, some consideration should be given to the form that the final adjudication of the case is likely to take. This will guide the determination of what steps are necessary to get to trial (or some other form of hearing), how much time is necessary to complete those steps and how long the hearing is likely to take. In order that these issues can be addressed, it is essential that counsel attend the initial case management conference having informed themselves about the file and , as much as reasonably possible given the circumstances of the case the likely key issues, number of witnesses and

[1] *Hryniak v Mauldin*, 2014 SCC 7 at para. 27.

documents. Counsel should not be strictly held to estimates given at the initial case management conference. As the case progresses, counsel will learn and think more about the case. As counsel's understanding of the case evolves, further case management conferences may become necessary and the form or length of trial may require revisiting. However, as the trial date draws near and greater clarity concerning the issues and requirements is achieved, time limits should be more firmly established, with a view to ensuring the best use of the court's resources.

1.4 The trial date, and the length of the trial, should be fixed as early as possible. Fixing a trial date early in the process is helpful in focusing the parties on what is required to get the case ready for trial. A fixed trial date may eliminate or reduce disproportionate discovery requests, unnecessary motions and other problems that tend to increase costs and delay the progress of cases.[2] Fixing a trial date also provides a degree of certainty and predictability to the parties as to when their dispute will be finally resolved, which is a major concern for litigants. Fixing the length of the trial at an early stage will assist the parties in narrowing the issues and focusing the litigation on the essentials of the dispute.

1.5 A realistic timetable should also be set to ensure the parties are ready for trial and to reduce adjournment requests. Deadlines set at case management conferences must be reasonable and meaningful. If deadlines are missed without adequate justification, there should be consequences (including costs) to provide an incentive to comply with the timetable. Counsel should commit to completing the procedural steps necessary to adhere to the timetable, and the set trial date, in order to avoid adjournments of trial dates.

1.6 Case management should also address such other items as the parties and the case management judge see fit. For example, simple discovery disputes often can be addressed at a case management conference or a trial planning conference without the need for a formal motion. The viability and benefits of a mediation or a settlement conference should also be addressed during case management. Counsel should consider engaging in such dispute resolution options as early as is reasonable in the proceedings (for example, if the facts are not in dispute, prior to documentary production), as even partial settlement of a matter will eventually result in a more efficient trial.

1.7 In cases where the case management judge is also the trial judge, case management conferences should not be used as settlement conferences. Generally, it is preferable to separate case management and settlement conferences in order to ensure that the case management function of the conference does not become overshadowed by settlement discussions, especially those that do not succeed.

[2] The court can grant leave to avoid the consequences of Rule 48.04 when fixing the date.

Best Practice #2: Case management is not mandatory and counsel are encouraged to implement the elements of an efficient proceeding on consent. Where requested by one or more parties, or where ordered by the court, case management should be available.

Commentary

2.1 Some cases do not require case management, the most common example being cases where counsel are able to agree on procedural matters and do not need the court's assistance prior to trial. Assigning such cases to case management would be an unnecessary use of the court's and the parties' resources.

2.2 Where a party seeks to bring a motion, however, the court's resources are being engaged prior to trial. Parties should consider whether case management could be used to resolve interlocutory disputes without the need for a formal motion, thus ensuring the most efficient use of resources. Case management can prevent motions that are frivolous, designed to delay or otherwise provide no real benefit to the proceeding.

2.3 Even where no motion is being brought, judges or masters may identify cases that would benefit from some form of case management, such as cases that are factually or legally complex or involve multiple parties.

2.4 Judges and masters should be able to assign cases to case management of their own accord, including cases involving self-represented parties.

2.5 Counsel should also be able to request case management, and such requests may be made unilaterally. Counsel will often be able to identify problematic or difficult cases at an earlier stage than the court. The fact that case management is available if requested will discourage non-responsive, uncooperative or otherwise unreasonable behaviour by parties and their counsel. In other words, even if case management is not actually engaged, its ready availability can be used to ensure that cases progress in a more reasonable and efficient way.

Best Practice #3: It is preferable to have the same judge case-manage an entire proceeding (including hearing motions and the pre-trial conference), at least until the trial management conference. In some cases, it may be beneficial for that judge also to conduct the trial. In some cases, it also may be beneficial for the case management judge to have expertise in the subject matter at issue.

Commentary

3.1 There are two key benefits to having the same judge case manage a case up to trial, including the pre-trial conference. First, it avoids a judge having to familiarize him or herself with the case each time a conference is held. Second, it provides an incentive for the parties to act reasonably at each step of the proceeding. A party will be disinclined to take a meritless position on a motion and counsel will be disinclined to act uncivilly if they know the next time they want to

bring a motion or informally resolve an interlocutory matter, they will be appearing before the same judge.

3.2 It is also beneficial for the case management judge to have knowledge or experience in the subject area of the case, as it will enable him or her proactively to identify issues and deal with them in less time than a judge who is unfamiliar with that substantive area.

3.3 Consideration should be given to the option of having the case management judge also act as the trial judge. In such a case, the case management judge would not conduct the pre-trial conference or engage in settlement conferences with the parties without the consent of the parties.

3.4 In Toronto Region, case management should be presided over by judges but motions within a master's jurisdiction should be heard by masters, although counsel may request that the case management judge hear all motions as a means of resolving issues and avoiding motions before multiple judicial officers. There should be some co-ordination between case management judges and masters with regard to the scheduling of masters' motions. Case management is most effective when one judicial officer retains ultimate control of the process.

Best Practice #4: In the ordinary course, a case management conference should be available within 30 days of a party requesting one. Case management conferences should be held by telephone or, where permitted by court resources, by videoconference, unless the case management judge orders otherwise. Counsel attending the case management conference must have carriage of the case or possess sufficient knowledge of the case to be able to address any issues that might arise at the case management conference.

Commentary

4.1 Case conferences should be readily available and case management conferences must be meaningful. Otherwise, they can become another procedural delay in moving the case forward.

4.2 Depending on available resources, certain jurisdictions may be able to convene case management conferences more quickly than others. However, creativity and flexibility are encouraged so that case management conferences can be convened without undue delay. Holding the case conference by telephone or videoconference,[3] for example, promotes the efficient use of resources and should be encouraged. Case management judges may also wish to deal with some issues via e-mail. Case management judges should retain the discretion to require personal attendance by counsel or parties where appropriate.

[3] Other technological options for connecting the parties for a teleconference, such as GoToMeeting™, may also be considered.

4.3 Regardless of the form of case conference, participating counsel must be sufficiently briefed and with sufficient instructions to make the conference productive.

Best Practice #5: Judges, masters, court staff and the bar should be educated about case management so that there is a common understanding about its purpose, availability and use. A bench and bar committee in each judicial region should regularly address case management so that problems are identified and addressed quickly.

Commentary

5.1 Like counsel and their clients, different judges have different strengths and interests. Case management will work best with the participation of judges who are skilled at and interested in case management. Tools available to judges in promoting use of these *Best Practices* include the use of time management techniques and costs awards to advance the litigation process. In implementing new case management procedures, it is critically important that court staff are consulted and trained so that administrative hurdles are eliminated or reduced.

5.2 The bar also needs to be educated about case management and new procedures. Although all counsel should be familiar with Superior Court of Justice practice directions and advisories, more publicity and training may be required in order to inform the bar of the options and expectations relating to case and trial management discussed in these *Best Practices* and elsewhere. This should include interaction and consultation within the jurisdictions in which a member practises to ensure clients are not burdened with unexpected cost consequences for failing to observe the *Best Practices* which have been locally adopted.

5.3 No matter how well thought-out any case management system is, there will inevitably be some unanticipated difficulties. In addition, over time, the needs that case management is designed to address may change. A bench and bar committee in each judicial region should be established to focus on case and trial management. This committee should meet at least twice per year.

Best Practice #6: There is no "one-size-fits-all" trial. The trial process should be adapted to meet the requirements of individual cases in the most time- and cost-effective way possible. For example, counsel should consider establishing fixed-time allocations per party within the trial, as well as consider supplementing viva voce evidence and oral submissions with written evidence and submissions.

Commentary

6.1 Effective trial planning involves proactive and organized problem solving. For a trial to be conducted efficiently, counsel must focus on the relevant legal issues

and organize their evidence and submissions accordingly. Reasonable limitations on the trial process can contribute to an efficient trial without impairing the fairness of the process.

6.2 For example, the benefits of a witness giving his or her testimony orally are well-established. However, such benefits should be weighed against the use of the parties' and court's resources at trial. In appropriate circumstances, serious consideration should be given to whether certain parts of the evidence could be introduced in writing, as opposed to *viva voce*. In some circumstances, the evidence of an individual witness can be appropriately offered in part through testimony and in part in writing. The potential for using written evidence should be canvassed in case management, at the pre-trial conference or the trial management conference.

6.3 Oral opening and closing submissions should be time-limited, and counsel should provide written submissions (preferably with page limits) to supplement oral submissions where appropriate or as determined by the trial judge.

6.4 Some trials can be conducted on a "chess clock" basis, where time is equally allocated to the parties and barring exceptional circumstances, counsel are limited to the time allocated. In most cases, counsel should be permitted to allocate that time as desired amongst direct examination, cross-examination and opening statements and closing submissions.

6.5 Subject only to exceptional circumstances, the court should enforce time limits.

Best Practice #7: Counsel should discuss trial planning and strive to reach agreement on procedural issues well in advance of the first day of trial. Where there is disagreement, counsel should take all reasonable steps to ensure that it is resolved prior to trial, whether through case management, at the pre-trial conference or at the trial management conference. Pre-trial and in-trial motions should be minimized.

Commentary

7.1 Parties should strive to agree on the following matters well in advance of the first day of trial:

- Agreed statements of facts;
- Joint document books (whether hard copy or electronic), including identifying the documents comprising the key documents in a case, the use that will be made of them at trial, their authenticity and admissibility and, in appropriate cases, their sufficiency as proof of the truth of their contents
- Method of document delivery and organization for documents not included in the joint document books;

- Number of witnesses and witness coordination, including language and form of testimony and translation;

- Issues relating to expert testimony, including the qualification, admissibility, and scope of expert evidence;[4]

- Preliminary evidentiary issues, including admissibility;

- Time limits on, and allocation between, open and closing submissions and witness examinations, including using a chess clock during the trial itself where the equal division of time is appropriate;

- Compendia, chronologies, casts of characters, *aides memoire* and any other materials that may be handed up or otherwise used at trial;

- Demonstrative evidence to be used at trial; and

- Computers, screens, audio-visual tools and other technology that will be needed or used at trial.[5]

7.2 If parties are unable to agree on these matters, the parties should set out in writing those issues that cannot be resolved and seek to have the matters resolved prior to trial, through a case management, pre-trial or trial management conference.

7.3 The joint book of documents may consist of documents for which authenticity is not in issue, or it may comprise a convenient brief where documents are organized with each being proved in the ordinary manner. Counsel should agree on the authenticity and admissibility of as many documents as possible. Disagreements with regard to these issues should be addressed prior to the trial. The parties should carefully document their agreement regarding the documents and file the agreement with the court along with the documents. Where necessary, formal mechanisms contemplated by the *Rules of Civil Procedure*, such as Requests to Admit, should be used. Counsel should not refuse to admit the authenticity of documents that are not in dispute, as disputes surrounding authenticity often result in the unnecessary utilization of resources.[6]

7.4 The case management judge or pre-trial judge may make orders with regard to procedural trial matters on which the parties are unable to agree. However, issues related to the admissibility of evidence should be resolved by the trial judge, but preferably prior to the first day of trial.

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[4] See also Section D below: Best Practices for Expert Evidence.
[5] See also Section C below: Best Practices for the Use of Documents and Technology.
[6] The Honourable Michelle Fuerst and The Honourable Mary Anne Sanderson, eds., *Ontario Courtroom Procedure, 3rd ed.* (2012: Markham, LexisNexis) p. 1263.

7.5 Time limits should be set having regard to the nature and complexity of the issues. The trial judge should hold counsel and parties to the time limits set, while retaining the discretion to grant modest time extensions where necessary.

7.6 Procedural motions during the trial itself should be rare and, generally speaking, permitted only in the most exceptional and unexpected circumstances. However, the trial judge should retain the discretion to permit and determine in-trial motions as appropriate.

7.7 Counsel should consider agreeing on the quantum of costs awarded to the successful party in a trial to obviate the need for costs submissions following a trial.

Best Practice #8: A trial judge should be assigned to the case at least 60 days in advance of the first day of trial and should conduct a trial management conference as soon as practicable thereafter.

Commentary

8.1 The trial judge should be assigned to the case at least 60 days in advance of the first day of trial. The trial judge should conduct a trial management conference as soon as practicable thereafter, and in any event, well in advance of the first day of trial. More than one trial management conference may be necessary in order to ensure trial readiness.

8.2 As with case management, trial management can effectively make use of telephone conferences, videoconferences and emails, but the trial judge should retain the discretion to require personal attendance by counsel or parties where appropriate.

8.3 Counsel should raise any procedural or admissibility issues with the trial judge in advance of the trial, whether at a trial management conference or otherwise.

Best Practice #9: Parties should use the trial management process to consider alternative ways to resolve a case or different issues within a matter, where appropriate.

Commentary

9.1 Trials and other final determinations can take many different forms. The *Rules of Civil Procedure* are flexible with respect to how cases should move forward.

9.2 Counsel should consider the substantive and procedural aspects of the case as early as possible in the litigation process, including creative alternative ways to resolve a case or certain issues in it. Counsel should discuss these alternatives as early as practicable, whether formally or informally, during case management or pre-trial and trial management conferences. Among other things, partial or full summary disposition should be considered if appropriate in the circumstances of the individual case.

Best Practice #10: Counsel should engage in document management and production after the close of pleadings and work together to prepare a discovery plan. Early organization of documents and agreement on the scope and manner of production will assist the parties in preparing the documents for trial.

Commentary

10.1 By working together to create a discovery plan, counsel will identify and resolve many discovery-related issues in a timely fashion and reduce litigation costs.[7] If the trial is to proceed electronically (and it is noted that electronic trials can take several forms), the discovery plan should set out specifics for electronic production of documents. Early planning of the organization of electronic documents will facilitate and reduce the costs of an electronic trial.[8]

10.2 A number of items should be considered in the discovery plan and discussed by counsel, including (a) whether or not documents will be produced electronically, (b) the electronic searchability of documents (through optical character recognition), (c) the format of production of electronic documents (such as PDF for documents, and JPEG for photographs), (d) the use of a consistent naming convention for documents, (e) unique identification codes for documents and (f) a cost-effective litigation support software for electronic production (if applicable).[9]

10.3 While meeting their clients' production obligations, counsel should strive to minimize the number of documents produced without undermining the achievement of a just and accurate result in the proceedings. Where appropriate, counsel should cooperate in this regard, for example, by agreeing to narrow issues and the identities and/or functions of document custodians. Similarly, counsel may also agree to forego the production of duplicate copies of documents.

10.4 Counsel should also observe the principles in Commentary 10.3 above in order to minimize the number of documents produced at the trial itself.

10.5 In preparing a discovery plan involving electronic documents, the parties should consult "The Sedona Canada Principles Addressing Electronic Discovery"

[7] Honourable Coulter A.Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* (November 2007) at 65; The Sedona Canada Principles Addressing Electronic Discovery, 2d. Ed. Public Comment Version (February 2015) (https://thesedonaconference.org/publication/The%20Sedona%20Canada%20Principles), p. 30.
[8] Ontario E-Discovery Implementation Committee, *Model Document # 11 – E-Trial Checklist* (2010: http://www.oba.org/Advocacy/E-Discovery/Model-Precedents).
[9] *Ibid* at 1. See also The Advocates' Society's *Paperless Trials Manual*.

developed by and available from The Sedona Conference[10] and The Advocates' Society's *Paperless Trials Manual*.

Best Practice #11: Counsel should discuss the court's preferences and capabilities for receiving evidence, including documents electronically or in hard copy format and testimony via videoconference, and make appropriate arrangements well in advance of trial.

Commentary

11.1 Counsel should inform themselves about the court's preferences and technical constraints with respect to documents. For example, counsel should file a second copy of all documents for the trial judge's use, as the original copy will become an exhibit. If documents are being filed electronically, counsel should coordinate with the appropriate court staff to ensure that the trial judge has the required software to view the electronic documents. In some cases, it may be necessary to arrange for the judge to be trained on the software program that is to be used. The pre-trial conference and trial management conference are the appropriate times to discuss with the court the technology that the parties intend to use at trial.

11.2 Electronic versions of written evidence, submissions and authorities are often of assistance to trial judges. For example, counsel should consider providing written closing submissions on a USB key, with hyperlinks to caselaw and other important documents which are also included on the USB key. Details around the provision of such materials, including the proper format, should be discussed between counsel and the trial judge well in advance of the trial.

11.3 Where court resources permit, counsel and the court should also discuss the potential for out-of-town witnesses to testify via videoconference. Counsel should ensure that the court can accommodate the videoconference request and is comfortable with the testimony being heard by videoconference.[11] Video technology has advanced such that courts have found that it is possible to make findings of fact and decisions about credibility based on videoconference evidence.[12]

Best Practice #12: Counsel should recognize that electronic trials can be a means of reducing trial time and cost and increasing access to justice. Over time, electronic trials will be considered the norm and not the exception.

[10] *Ontario Rules*, r. 29.1.03(4); The Sedona Canada Principles Addressing Electronic Discovery, 2d. Ed. Public Comment Version (February 2015) (https://thesedonaconference.org/publication/The%20Sedona%20Canada%20Principles).
[11] *Ontario Rules*, r. 1.08(2) – (4).
[12] *P.* v. *C.*, 2012 ONCJ 88 at para. 27; *Wright* v. *Wasilewski*, 2001 CanLII 28026 (S.C.J.).

Commentary

12.1 In most cases the cost of an electronic trial will be less than the cost of conducting the same trial using a paper record. A net cost savings is achieved due to the reduction in preparation time and trial time associated by using trial-preparation technologies and also through reduced photocopy costs.[13]

12.2 There is no one model for an electronic trial. In some basic electronic trials, technology is used to display and submit only the documents to the court electronically. In more sophisticated electronic trials, all evidence (including testimony, exhibits and read-ins) is received and stored electronically during the trial.[14]

12.3 In Ontario, the parties generally supply the computers, software and other electronic aids required to run an electronic trial as few courtrooms are currently equipped with the necessary technology. (However, the parties may still experience a significant cost saving over a paper trial.) Accordingly, it is important for counsel to inform the court as early as possible that the trial will proceed electronically.

12.4 Counsel considering an electronic trial are encouraged to consult various guidelines available including The Advocates' Society's *Paperless Trials Manual* and the Ontario E-Discovery Implementation Committee's Model Document #11: E-Trial Checklist.

Best Practice #13: Where appropriate, counsel should engage experts at an early stage of the litigation process, and well in advance of the times anticipated or required under the Rules, in order to become properly informed of the issues and merits of prosecuting or defending an action.

Commentary

13.1 There are multiple junctures throughout the pre-trial stage when counsel should consider engaging experts. First, early in the case, experts can (and in some cases, should) be consulted about the merits of prosecuting or defending a case. Timely interaction with experts, and asking the right questions, can help ensure that cases without merit are resolved early, with minimal expense. Second, where there is good reason to pursue or defend a claim, the most efficient and cost-effective way to proceed is often to provide early notice of experts' views to opposing counsel.

[13] Ontario E-Discovery Implementation Committee, "What is an Electronic Trial" (Ontario Bar Association, 2010) p. 5.
[14] See, e.g., Ontario E-Discovery Implementation Committee, "What is an Electronic Trial" (Ontario Bar Association, 2010); The Advocates' Society *Paperless Trials Manual*.

Best Practice #14: Where appropriate, counsel should serve any expert reports on the opposing side earlier than the times required in the Rules to allow the opposing side to consider the proposed expert evidence and the need, if any, to respond.

Commentary

14.1 The early engagement of experts and disclosure of their opinions benefits the parties in both the pre-trial process and trial itself. In some cases, an effective discovery cannot be obtained without having appropriate expert evidence and guidance. Settlement negotiations, mediations and pre-trial conferences are significantly enhanced when all parties have engaged their experts in advance and have received and served final reports. The early exchange of expert reports will, of course, have tactical implications in certain cases. Counsel must balance these implications against the efficiency benefits of early exchange of reports.

Best Practice #15: Most issues concerning expert testimony should be capable of resolution without formal motions.

Commentary

15.1 Frequently, issues as to admissibility and scope of expert testimony are not raised until after the trial commences. This can consume considerable time at trial. But there are broader implications for trial efficiency: in many cases, knowing in advance what evidence will be permitted at trial would allow counsel to determine whether a trial is necessary in the first place.

15.2 Generally, counsel should not wait until trial to raise issues regarding the qualifications of experts or the scope or admissibility of their opinions. In some cases, waiting until trial to raise these issues amounts to the last vestige of trial by ambush. Given the considerable resources demanded by the trial process, these are matters that are best dealt with before the trial commences.

15.3 For example, the admissibility of expert evidence may be challenged based on the number of experts a party intends to call. This is particularly problematic in personal injury trials. Where counsel intends to object to the number of witnesses called, they should do so before the assigned trial judge, in advance of trial.

15.4 Challenges to the admissibility and scope of expert evidence should be made prior to trial. Wherever possible, and particularly where experts reside outside of the jurisdiction, challenges to the admissibility and scope of expert evidence should be made by videoconference. In order to facilitate timely challenges to the admissibility and scope of expert evidence, either when or as soon as possible after serving an expert report, counsel should identify any opinions in the report on which counsel does not intend to rely at trial.

Best Practice #16: In appropriate cases, counsel should mark the entirety of the expert report as evidence unless there are portions that are inadmissible, in which case the excluded portions should be redacted.

Commentary

16.1 There is no provision for the routine filing of expert reports and conventions vary across Ontario, depending on the practice area. The *Evidence Act* allows for the filing of medical reports in limited circumstances. In the personal injury field, it has become routine to provide the trial judge with copies of expert reports as *aides memoire*, but they are not routinely admitted as evidence. In commercial litigation, expert reports are – and should be – routinely admitted as evidence even where their authors testify.

16.2 Where a trial is necessary, it is in the interests of the parties and the administration of justice that the least expensive and most expeditious way of introducing expert evidence be achieved, balanced against the rights of the parties. The admission of expert reports into evidence serves this purpose in two ways: (i) it expedites the examination-in-chief of expert witnesses; and (ii) it provides the trial judge with the means to be informed of the evidence to come. Where an expert report merely constitutes a descriptive account of the factual scenario relating to a legal dispute, the report should not be entered into evidence.

16.3 It is acknowledged that this practice would likely be inappropriate for jury trials.

16.4 The trial judge should retain the discretion to hear and determine any issues with regard to the admissibility of expert reports, including factual inaccuracies and unsupported conclusions, but preferably well in advance of trial. Formal motions should not be required except in exceptional circumstances.

Presentation to Chief Justice and Attorney General on Improvements to Ontario's Justice System

Ideas/changes to improve Ontario's Justice System

No Cost

- Adopt the approach of reviewing government laws/policies from the perspective of the impact they will have on the justice sector:
    - Disability determination and Social Benefits Tribunal (See Auditor General's Report)
    - Criminal Charges, especially treating addictions and mental health as criminal offences
- Consider expanding the use of alternative approaches to litigation in appropriate circumstances:
    - Restorative justice
    - ADR
- Have all of us engage in a coordinated effort to push the federal government to increase its contribution to legal aid to supplement provincial investment
- Set up regular meetings of this group, or a combined bench/bar/government group like this.
- Jointly educate the public on the legal system.
- Recognize that although technology can be a solution to increasing access to justice and containing costs, it is not the answer to everything and for everyone:
    - Many Ontarians (low income, rural/remote, those with limited literacy, those with various physical and emotional disabilities, etc….) still don't have sufficient access to technology.
    - Although some justice system processes can certainly be aided by technology, other legal matters are by their nature human and interpersonal.

Under $10 Million

- Deal with unrepresented people in civil court by placing duty counsel in most courthouses to assist them. (Either from the community clinics or the private bar, or both.)
- Study the economic impact of legal representation on government expenditures (to match the studies done in the United States)
- Study legal needs and how they arise to see if we can engage in early intervention to head them off
- Increase public legal education because an informed public leads to decreased justice sector costs.

- Support/fund the use of trusted intermediaries to play an increased role in helping people become informed and accessing legal help.

Over $10 Million

- Continue the investment in legal aid to raise the Financial Eligibility Guidelines to at least the Low Income Measure. Close the gap between those who can't afford to hire a lawyer and those who qualify for legal aid services. Extend access to some form of legal services to the working poor and middle class.
- Index future increases in legal aid funding to an objective measure like the cost-of-living index. De-politicize it.

January 31, 2019

Re: Meeting with the Attorney General of Ontario and Representatives of the Bar

-Thursday, January 31, 2019

CRIMINAL LAWYERS' ASSOCIATION

Speaker notes

Apple Newton-Smith (Vice-President)

1) **If there was one change that you could make to the system that would have no cost, what would it be?**

TECHNOLOGY

-utilise existing technologies to improve communication and information sharing between justice system players

- Providing disclosure to counsel electronically
- Allowing electronic access to publicly available information
- Allow electronic filing of court documents, motions, applications etc.. in all court houses
- Allow routine appearances for retained counsel to be done electronically
- Remote defence access to institutions
- Allow technology in institutions to be used for intake and assessment for out of custody programming e.g. substance use programs, housing intake, mental health

-much of this technology is already available and installed, for instance in the correctional/remand facilities

-currently it is very difficult to complete the application process for out of custody treatment programs, mental health and housing issues from custody as in person in take is required, this programming is key for bail and sentencing, allowing access to intake for this programming would increase the number of people eligible for structured and assistive release

-any additional start up and maintenance costs would be grossly offset by the savings incurred in other areas, i.e. transport of prisoners, legal aid hours to counsel, savings in paper alone would be significant

2) **If there was one change that would cost $10 million or less, what would it be?**

INMATE APPEAL PROGRAM AT THE ONTARIO COURT OF APPEAL

-provide ongoing guaranteed funding for the administration of the Pro Bono Inmate Appeal Program (PIAP)

-cost of $100 000 per annum for paralegal who manages and administers program for pro bono appellate counsel

-provide funding for a part time counsel to assess and evaluate the Ineffective Assistance of Counsel (IAC) claims made by unrepresented appellants, and to provide advice and guidance to those appellants with respect to whether or not the claims should ultimately be pursued

-be clear that **not** asking for funding for counsel to argue appeals, argument of the appeals should remain the domain of pro bono duty counsel

-asking only for funding for a staff lawyer with the Pro Bono Inmate Appeals Program to evaluate, assess and deal with IAC claims in their beginning stages

-IAC claims are frequently made by unrepresented appellants, they are time consuming and costly to deal with and more often than not made without an appreciation of what such an allegation is and requires, and are without merit

-have found through pilot project that when a dedicated lawyer does an evaluation of the claim at first instance and provides advice to the appellant most of the claims are abandoned, and those with real merit can go back to LAO for reconsideration

-something that can't be done on an ad hoc basis but requires a dedicated and experienced lawyer

3) **If you had an unlimited budget, what change would you make?**

FUND ELECTRONIC MONITORING FOR BAIL

-costs of electronic monitoring put anyone who qualifies for legal aid out of consideration, and frankly ability to pay for monitoring would likely result in disqualification for legal aid

-people who would be releasable on electronic monitoring are sitting in remand at greater expense than the electronic monitoring

-these people are often the marginalised who don't have family/friends to support them in the community, mental health and addictions issues, issues which have often lead to incarceration in first place

LEGAL AID ONTARIO

-provide ongoing sustainable funding for the certificate system

-make legal aid available to the working poor, not just those on social assistance, these are the people who can never afford private counsel, do not currently qualify for legal aid and form the majority of unrepresented litigants in the criminal justice system

Meeting with the Honourable George R. Strathy Chief Justice of Ontario and the Attorney General of Ontario Caroline Mulroney and Representatives of the Bar: A Brief Overview of Remarks

Julia R. Vera
Chair of the Family Lawyers Association

January 31, 2019

About the FLA

The Family Lawyers Association was founded 25 years ago. Our membership consists of Ontario lawyers working primarily for low-income clients a majority of which accept legal aid certificates and/or are on the panel of lawyers who represent children as Agents of the Office of the Children's Lawyer in both custody and access and child protection matters. Accordingly, the focus of the FLA has always been to work towards protecting the rights of our most vulnerable low-income citizens.

Changes to the justice system that would have no cost

We propose several amendments to the *Children's Law Reform Act* to mirror the amendments made to the *Divorce Act,* Bill C-78

Amendments to the *Divorce Act,* Bill C-78, have now passed second reading and there are currently no proposed amendments to the *Children's Laws Reform Act* before the legislature to mirror the proposed *Divorce Act* amendments. Among the proposed amendments, the *Divorce Act* will be replacing terminology related to custody and access with terminology related to parenting. For example, the *Divorce Act* will use the term "Parenting Time" to replace the term "Access"; and "decision making responsibility" will replace the broad interpretation normally assigned to custody. We suggest that in order to avoid confusion as a result of the different language being used under the provincial and federal schemes, the *CLRA* be amended to reflect the *Divorce Act* amendments. Different terminology to describe the same principals will be especially problematic in Unified Family Court jurisdictions.

These proposed amendments to the *CLRA* would be of no cost and result in the treatment of all families in Ontario equally whether they are married or not.

Voice of the Child Report

The Voice of the Child Report is a short report written by the Office of the Children's Lawyer's clinician for the court that summarizes a child's statement about a particular issue in their custody situation. The report is done for children over the age of 7, are a free and efficient way to resolve many parenting issues. Currently, there is no legislative provision in the *CLRA* for the Voice of the Child reports, and we propose that there be an amendment to provide for same.

The proposed amendment would be of no cost and would provide more families in Ontario with greater access to justice with respect to their custody and access issues.

Changes that would cost $10 million or more

Adequate funding of the LAO certificate program

In April 2018, the province increased the Legal Aid certificate eligibility threshold again by six percent by raising the financial threshold for a single applicant without dependents from $13,635 annual income to $14,453. This increase resulted in approximately 153,000 more low-income Ontarians receiving legal services from LAO. Despite this increase, there are still many Ontarians living below the poverty line (earning $20,676 for a single person) who still cannot qualify for even a contributory certificate.

It is imperative to highlight that currently, 40% of self-represented litigants in family court earn less than $30,000.00 a year and another 17% earn between $30,000.00 - $50,000.00 a year. Without adequate funding for LAO the most vulnerable, unrepresented litigants, those earning between $14,453 and $30,000.00 are left without a viable solution to their access to justice issue as they are not in a financial position to retain the services of a lawyer in any capacity. Poverty in families is often a contributory factor to the difficulties with resolving family disputes outside of Court. Resources that are easily available to families with means are rarely a possibility for the working poor.

> "There is evidence however, that low-income Albertans (those making $50,000.00 annually) experience the legal system differently than those making over $50,000.00; and they are more likely to have more than one legal difficulty. There are high needs areas such as family law where the cost of legal services (by both lawyers and non-lawyers) is a barrier for low-income Albertans. The expansion of the scope of practice by independent non-lawyers agents for a fee will not solve the access to legal services problem because the fields where independent non-lawyers agents offer their services are where they are able to make a living. Generally, independent non-lawyers agents are not offering legal service in the high needs areas of law where there is a lack of access to affordable competent legal services. Data collected indicates that low-income Albertans are unable to pay for many legal services whether delivered by lawyers or non-lawyers in areas generally classified as poverty law and family law." (The Law Society of Alberta: Alternate Delivery of Legal Services Final Report, 2012.)"

Adequate funding of the LAO certificate program will have a positive impact on the lives of almost half of the self-represented low-income Ontarians involved in our family justice system if the eligibility threshold is increased to $30,000.00.

In addition to the detrimental effects on the litigants themselves, unrepresented people strain court resources by increasing administrative costs to the court, increase costs for a represented party or for LAO or the Office of the Children's Lawyer, by shifting the work to those who are represented.

We believe our proposed funding increase to LAO for certificate eligibility threshold would make lasting improvements to the way low-income individuals' legal needs are met in this province.

Unified Family Court

Finally, we propose the government continue to support their commitment to Unified Family Court expansion to all parts of the province with a solution that all existing and future courthouse construction include a plan for Unified Family Court expansion.

February 7, 2019

Re: Federation of Ontario Law Association's Proposals for Improvements to Ontario's Justice System

The Federation of Ontario Law Associations ("FOLA") appreciates the opportunity to discuss proposals for improvements to Ontario's justice system.

By way of background, FOLA's membership is comprised of the presidents of the 46 local law associations throughout Ontario, together with our affiliate member, the Toronto Lawyers' Association. These local law associations collectively represent nearly 12,000 practicing lawyers across the province. These lawyers and our member associations are on the frontlines of the justice system. FOLA advocates for a better justice system that recognizes the crucial role played by competent and professional lawyers.

Introduction

FOLA's focus in these submissions is on finding cost effective ways to maximize the use of the limited resources within the Superior Court of Justice and the Court of Appeal. Essentially, FOLA proposes that efficiencies be identified so as to ensure that the resources of the Superior Court are used in as effective a manner as possible. Put simply, FOLA believes that judges of the Superior Court of Justice should be spending their time on matters that are appropriate for that court. Specifically:

- Judges of the Superior Court should not be trying modest value claims of under $50,000
- Actions of moderate value should be tried under a new simplified procedure rule without a jury.
- It is not the function of a Superior Court judge to instruct a self-represented litigant on such matters as the Rules of Civil Procedure. A new civil gatekeeper role should be developed to ensure that self-represented litigants are not in a courtroom before their motions or actions are ready to proceed.
- A self-represented appellant must first obtain leave to appeal before attending upon a three member panel of the Court of Appeal.

Question 1 – If there was one change that you could make to the system that would have no cost, what would it be?

FOLA recommends increasing the limit for simplified procedure cases up to as high as $500,000.00, conditional upon amendments being made to the current Rule 76 (Simplified Procedure Rule). In addition, jury trials should be eliminated in simplified procedure

matters. The goal in this recommendation is to take moderate size civil cases out of the jury system and put them into a simplified non-jury system.

No one could reasonably dispute that jury trials take up significantly more court time than do non-jury trials. Counsel in jury trials are in a heightened state of vigilance and sensitivity over the evidence that jurors may hear throughout the course of trial. Objections are numerous, *voir dires* are common and juries are often asked to leave the courtroom while evidentiary issues are sorted out. Additionally, delays are incurred when jurors get sick or need time off from the trial. Essentially, jury trials take too long and thereby unduly tie up limited judicial resources. It would not be a stretch to suggest that a three week (fifteen day) jury trial could be tried in seven to eight days with a judge alone. The effective "savings" of seven or eight days of trial time with a judge alone would free up that judge for other matters, whether they be criminal, civil, family or administrative duties.

If the monetary limit in simplified procedure cases is to be increased, whether to $500,000.00 or some other amount, it is important that amendments be made to the current Rule 76 so as to ensure proportionality between the size of the claim and the procedures that govern that claim.

By way of example, the current Rule 76.04(2) limits the time for examinations for discovery, regardless of the number of parties to be examined, to two hours. There is no provision within the Rule for a party to seek leave of the court for more discovery time, should the circumstances of the case warrant. In a case that may have a value of up to $500,000.00, a two hour time limit for examinations for discovery is too short and disproportionate to the value of the claim.

FOLA would suggest that the time limit for examinations for discovery be extended to something like four to five hours per person to be examined, with a right for a party to move for additional discovery time if warranted. For example, in medical negligence claims, municipal liability claims, commercial claims with multiple documents, etc. a two hour time limit for examinations for discovery is insufficient.

By way of another example, the current Rule 76.10(4) relating to pre-trial conferences mandates that each party must file a copy of their Affidavit of Documents together with copies of those documents. In an action that has a value of up to $500,000.00, pre-trial judges may well be deluged with documents, if every document in every party's Affidavit of Documents has to be filed for the pre-trial conference.

Additionally, the current rule relative to simplified procedure pre-trial memoranda limits the parties to a mere two page statement setting out the issues and the party's position. Two pages is too short and disproportionate to an action that may be worth up to $500,000.00.

There are other difficulties with the current Rule 76 as it would apply to an action that has a value of up to $500,000.00, such as the summary trial procedures (Rule 76.12). The point is that if the simplified procedure limit is going to be increased, a review of the current Rule 76 is in order.

As with increasing the summary procedure limits, an additional way to better make use of the resources of the Superior Court of Justice would be to increase the monetary limits in the Small Claims Court. FOLA would recommend an increase to at least $50,000.00. The goal here is to take modest size actions out of the Superior Court system and put them into the Small Claims system.

Admittedly, increasing the monetary limits of the Small Claims Court may come at a cost, in that more deputy judges may have to be appointed. However, that cost would be quite modest. We are advised that the per diem rate for a deputy judge is $726.00.

Lastly, as with the simplified procedure rule, if the monetary limit of the Small Claims Court is going to be increased, the rules of the Small Claims Court should be reviewed and consideration be given to how Small Claims Court trials can be shortened, but at the same time justice be served to the parties.

Question 2 – If there is one change that would cost $10M or less, what would it be?

FOLA proposes that some resources be spent to ensure that self-represented litigants do not appear in the Superior Court of Justice without first ensuring that their claims are ready to proceed.

FOLA would like to preface the remarks that follow by stating that they are not meant to be a criticism or a sign of disrespect to self-represented litigants. Rather, we believe that self-represented litigants are here to stay and it needs to be recognized that self-represented litigants, not being legally trained, can take up considerable court resources.

Currently, there is very little systemic guidance within the civil justice system that would be of assistance to self-represented litigants. FOLA's concern is that self-represented litigants, not being legally trained, can find themselves before a judge when their matters are either not properly constituted or are not ready to proceed. It is not the function of a judge of the Superior Court of Ontario to effectively counsel a litigant on the Rules of Civil Procedure, to then adjourn the matter to another day when the litigant hopefully has their house in order. The current practice with self-represented litigants leads to wasted court time, money and resources and great frustration for everyone involved, including the self-represented litigant.

It needs to be appreciated that in every courtroom, in addition to the judge, there are at least three other publicly funded players: the court clerk, the judge's clerk and a court reporter. If a matter comes before a judge that is not ready or cannot proceed, it is wasted time and money for all players within the court system.

It is well known that judges act as a gatekeeper within the courtroom. FOLA proposes that funding be made available for an effective gatekeeper through whom a self-represented litigant must receive guidance and permission to move their action forward.

By way of example, currently a self-represented plaintiff can have a Statement of Claim issued by attending at the court counter and paying the appropriate fee. The clerk behind the

counter does not look at the Statement of Claim to ensure that it pleads a cause of action, nor does the clerk ensure that the pleading complies with Rule 25 (Pleadings in an Action). FOLA would propose that before a self-represented plaintiff can issue a Statement of Claim, or a self-represented defendant file a Statement of Defence, they must first have permission from, for lack of any other name, an effective civil gatekeeper. The role of the gatekeeper would be to ensure that a Statement of Claim pleads a cause of action or that a Statement of Defence appropriately responds to the claim. Essentially, the gatekeeper role would be to ensure at least a modicum compliance with Rule 25 before the claim makes its way into the court system. The gatekeeper would assist the self-represented litigant by giving direction and would assist the court system by preventing any claims from entering the system before being properly plead.

Similarly, self-represented litigants should be required to go through the gatekeeper before filing a motion record. The gatekeeper would ensure basic compliance with Rule 37 (Motions and Applications). For example, a gatekeeper would ensure that the motion is supported by affidavit evidence or that the relief sought falls within a judge's jurisdiction.

Additionally, a self-represented litigant ought not to be allowed to set an action down for trial without first getting the approval from the gatekeeper. By way of example, a self-represented litigant may not appreciate that their claim is one that will require opinion evidence from an expert in order to succeed. If that is the nature of the claim, the gatekeeper would ensure that the self-represented litigant has an expert report that appears compliant with the *Evidence Act* and Rule 53.03 (Expert Witnesses). This is not to say that the gatekeeper makes a determination as to the admissibility of the expert's report, which is obviously in the sole jurisdiction of the trial judge. Rather, the gatekeeper acts as a screen to ensure that the self-represented litigant has an expert's report that may well be admissible.

Once again, the goal behind FOLA's proposal is to maximize the use of court resources, particularly judges' time, by taking steps to ensure that claims and defences filed by self-represented litigants comply with the Rules and the self-represented litigants do not find themselves before a judge without first having their paperwork vetted. Simply put, the gatekeeper function is to ensure that the litigants have their ducks in a row before appearing before a judge.

FOLA suggests that having someone in this gatekeeper role will not only save judicial resources, but will also be of assistance to self-represented litigants, as they will better be able to navigate court procedure and will find the entire experience less frustrating. Someone serving in this gatekeeper role is good for the court system, is good for the self-represented litigant and would no doubt be much appreciated by the frontline counter staff.

With respect to the cost of this gatekeeper function, FOLA would envision members of the private bar acting in the gatekeeper role, paid on a per diem or half day basis. Staffing would be in the court building and would be based on need. For example, in a busy urban court, someone in the gatekeeper function may be available every morning or afternoon from Monday to Friday. In a smaller, less busy centre, someone in the gatekeeper role may be required less frequently, such as every Tuesday and Thursday morning. The self-represented litigant would be given a maximum amount of time with the gatekeeper; say 15 or 20 minutes. The money spent for lawyers to fill this gatekeeper role is more than made for in efficiencies and better use within the Superior Court system.

Finally, Ontario is experiencing a very real issue with self-represented litigants in the Court of Appeal. A review of the judgments from the Court of Appeal over the past years shows a clear rise in self-represented appellants. The overwhelming majority of appeals brought by self-represented appellants are dismissed.

It is hard to imagine a more difficult arena for a self-represented litigant to navigate than an appellate court. Someone not legally trained would reasonably think that an appeal was effectively a second kick at the can, a do-over. It is unreasonable to think that a self-represented appellate would appreciate the concept of standard of review. A member of the public cannot be expected to appreciate concepts like questions of law, questions of fact, mixed questions of law and fact, inferences, etc.

FOLA's recommendation is that unrepresented appellants must always get leave to appeal and the leave application should be in writing, as is currently required under Rule 61.03.1. The written leave to appeal would be read by a single judge, thus saving valuable court time with three sitting judges.

FOLA's recommendation that self-represented appellants obtain leave to appeal would not cost the system money and would save very valuable time in the Court of Appeal.

In FOLA's submission, the combined effect of increasing the limits in simplified procedure and small claims, eliminating juries in simplified procedure and ensuring that self-represented litigants do not find themselves before a judge prematurely, will result in significant judicial time savings and efficiencies. Effectively, judges will be freed up to take on more worthy duties commensurate with their skills and experience. That extra time could be put toward a number of much needed activities, such as more trial time in the criminal, family or civil systems or toward an effective, province wide, case management system. There is seemingly little indication that the complement of Superior Court judges is going to be increased and it is therefore incumbent on the justice system to make maximum use of the resources that are available.

We thank you very much for allowing FOLA this opportunity.

Sincerely,

Michael J. Winward,
Chair

MJW:rg

Corporate Mailing Address:
731 9th Street West, Owen Sound, ON N4K 3P5
Phone: (519) 270-4283

www.fola.ca
@ont_law_assoc

APPENDIX TO FOLA SUBMISSIONS

Ho, Stephanie (JUD)

From: Mike Winward <winward@mackesysmye.com>
Sent: February 27, 2019 2:33 PM
To: Ho, Stephanie (JUD)
Cc: katie robinette (katie.robinette@fola.ca); Hillier, Joseph (MAG)
Subject: Justice Reform

Hello Stephanie,

On behalf of FOLA, I submitted a summary of our recommendations to improve the justice system that we feel would go a long way in making better use of the judicial resources in both the Superior Court of Justice and the Court of Appeal. Two of those recommendations were to have a civil gatekeeper who would ensure that a self-represented litigant's paperwork was in order before a claim was issued and the recommendation that self-represented litigants must get leave to appeal.

Today, the Court of Appeal released this decision involving a self-represented litigant:
http://www.ontariocourts.ca/decisions/2019/2019ONCA0150.htm

I believe this case is highly relevant to the point we were making. The litigant's pleading was "wholly deficient", yet was issued by the court counter staff. The defendants were required to bring a motion to strike the claim, which was successful. The self-represented litigant then appealed, which involved three Court of Appeal justices. The appeal was dismissed with costs.
All told, far too much of the court's limited resources were used up on something that should never have found its way into a courtroom.

I understood that the submissions of the various stakeholders who attended before the Attorney General and Chief Justice Strathy were going to be circulated. Is it possible to include this e-mail and the referenced decision in the submissions that were made earlier?

Thanks

Mike Winward

Mackesy Smye LLP

Barristers & Solicitors

Telephone: 905-525-2341; Fax: 905-525-6300; e-mail: winward@mackesysmye.com
Mailing Address: 2 Haymarket Street, Hamilton, Ontario, L8N 1G7

COURT OF APPEAL FOR ONTARIO

CITATION: Arsenijevich v. Ontario (Provincial Police), 2019 ONCA 150
DATE: 20190227
DOCKET: C64957

Pepall, Trotter and Harvison Young JJ.A.

BETWEEN

Branko Arsenijevich

Plaintiff (Appellant)

and

Adrian Garner (Badge #8155), Ontario Provincial Police, Her Majesty the Queen in Right of Ontario

Defendants (Respondents)

Branko Arsenijevich, acting in person

Colin Bourrier, for the respondents

Heard: February 7, 2019

On appeal from the order of Justice C. Stephen Glithero of the Superior Court of Justice, dated January 15, 2018.

REASONS FOR DECISION

[1] The appellant appeals from an order striking out his statement of claim as disclosing no reasonable cause of action and dismissing his action.

[2] The action was commenced on October 2, 2015. The appellant claimed punitive damages, travel expenses, interest, and costs allegedly arising from the

stopping, and subsequent detainment and impoundment of his vehicle by an OPP officer. He asserted that the respondents had breached his rights as guaranteed by s. 1(a) of the *Canadian Bill of Rights*, S.C. 1960, c. 44.

[3] On its face, the pleading is wholly deficient. On three or four occasions counsel for the respondents advised the appellant of the deficiencies. On December 17, 2015, counsel for the respondents wrote to the appellant encouraging him to seek legal advice and to consider discontinuing his action. The appellant did not respond and did not amend his pleading. Ultimately, the respondents successfully moved to strike out the claim under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[4] On October 18, 2018, the appellant sought and was granted an adjournment to permit him to retain counsel for this appeal. No counsel appeared on his behalf at the hearing before this court and he proceeded as a self-represented litigant.

[5] In striking out the statement of claim and dismissing the action, the motion judge applied the correct test. He recognized that the statement of claim fails to plead any material facts in support of the purported *Canadian Bill of Rights* breach and the theft allegation. There is nothing in the pleading that suggests that the respondents were acting outside the scope of their authority in stopping the appellant and causing the vehicle to be towed.

[6] The motion judge correctly concluded that the OPP is not a legal entity capable of being sued: see *McNabb v. Ontario (Attorney General)* (2000), 50 O.R. (3d) 402 (S.C.), at paras. 25-30. He also correctly concluded that the appellant's claim, on its face, was incapable of success and that the action should be dismissed. We would note that this court upheld the dismissal of a claim mirroring the appellant's on the basis that it lacked legal merit and was frivolous and vexatious: see *Corsi v. Skanes*, 2018 ONCA 661, 33 M.V.R. (7th) 252.

[7] Although not raised at any stage in this action, we do note that the respondents had filed a statement of defence before bringing their motion to strike under r. 21.01(1)(b). Generally, a defendant should move to strike a claim as disclosing no reasonable cause of action prior to delivery of a statement of defence: *Brozmanova v. Tarshis*, 2018 ONCA 523, 81 C.C.L.I. (5th) 1, at para. 26. However, where as in this case, the statement of claim is so facially deficient and largely incomprehensible, this step by the respondents is not fatal. In addition, it is evident from the contents of their pleading that the respondents took issue with the legal sufficiency of the appellant's claim. Moreover, the motion judge's determination was in keeping with the direction in r. 1.04 of the *Rules of Civil Procedure* that the rules "be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits".

[8] The motion judge did not grant the appellant leave to amend. He noted that the appellant had ample opportunity to amend his pleading but had failed to do so. We see no reason to interfere with his disposition.

[9] Lastly, we see no error in the motion judge's conduct of the proceedings before him. He was correct that in the Superior Court of Justice, the appellant may either represent himself or be represented by counsel: *Rules of Civil Procedure*, r. 15.01(3).[1] This is unlike proceedings under the *Provincial Offences Act*, R.S.O. 1990, c. P. 33 in the Ontario Court of Justice where a defendant may act personally or by "representative" (as defined in s. 1(1) of the *Provincial Offences Act*), such as in the case of *R. v. Allahyar*, 2017 ONCA 345, 138 O.R. (3d) 233. The appellant's friend was welcome to attend at the Superior Court of Justice with the appellant but could not be his representative before that court and therefore could not make submissions on his behalf.

[10] For these reasons, the appeal is dismissed with costs to be paid by the appellant to the respondents fixed in the amount of $1,000 inclusive of disbursements and applicable tax.

"S.E. Pepall J.A."
"G.T. Trotter J.A."
"Harvison Young J.A."

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[1] "Any other party to a proceeding may act in person or be represented by a lawyer": r. 15.01(3).

Notes for Meeting with the Attorney General and Representatives of the Bar

Three questions

1. If there was one change that you could make to the system that would have no cost, what would it be?
2. If there was one change that would cost $10 million or less, what would it be?
3. If you had an unlimited budget, what change would you make?

First suggestion (no-cost, or cost-neutral): focus on early intervention and user-testing to make the system more streamlined, effective, affordable and accessible

LAO's first suggestion is to make more effective use of **existing tools and options, and to prioritize early intervention,** to make the justice system more streamlined, effective, affordable and accessible to Ontarians.

Putting a greater focus on early intervention and triage will help the family justice system better respond to the issue of unrepresented litigants. Early intervention in the criminal justice system can help to tackle the problem of delay.

These are a number of ways that the system can deal with matters more effectively and earlier in the process, using existing tools and options:

a) Focusing on effective case management to support earlier resolution, as LAO does through its funding support for second judicial pre-trials. In family law, this approach can include promoting more timely and affordable justice through expanded use of focused hearings and summary judgement motions to avoid a full trial where one is not necessary;

b) In criminal law, doing more to triage administration of justice charges to keep them from clogging up the courts, in cases where public safety is not an issue. This would include proceeding with pilot projects to reduce the number of administration of justice charges received in the Ontario Court of Justice, and utilizing Bill C-75's new (soon to be implemented) streamlined judicial referral hearing process, which aims to support police and prosecutors in using their discretion not to lay administration of justice charges;

c) In bail courts, reducing delay through increased and consistent information-sharing between crowns and duty counsel offices. Currently, information-sharing is locally regulated and in some jurisdictions the synopsis/criminal record is not

shared with duty counsel until early afternoon, contributing to delays and wasted court resources;

d) Using *R v. Tunney* 2018 ONSC 961 (the bifurcated bail hearing process) at all bail courts in Ontario. This would result in targeted, submission-based hearings that would result in more bail hearings being reached each day and eliminate the adjournment of bail hearings that are ready to proceed.

All efforts should be taken with a view to making the system easier to use for the public including unrepresented litigants. A good idea would be user-testing of the justice system, to make sure that reforms are people-focused, or in other words that they **put the public first.** As stated in the 2013 Cromwell Report, A Roadmap for Change (the final report of the Action Committee on Access to Justice in Civil and Family Matters):

> We need to change our primary focus. Too often, we focus inward on how the system operates from the point of view of those who work in it. For example, court processes — language, location, operating times, administrative systems, paper and filing requirements, etc. — typically make sense and work for lawyers, judges and court staff. They often do not make sense or do not work for litigants.
>
> The focus must be on the people who need to use the system. ….
>
> Until we involve those who use the system in the reform process, the system will not really work for those who use it. Those of us working within the system need to remember that it exists to serve the public. That must be the focus of all reform efforts.

There are other ideas for early intervention and triage that would have some cost but which would likely be cost-neutral to the system because of the savings they would produce:

(1) Investing in effective ways of providing support to family litigants early in the process. This would focus on:

a) Within family courts, creating a "navigator" position. The navigator would ideally be a lawyer or someone with legal training, who understands domestic violence, mental health, available community services and referral options, and how to work with high-conflict clients. The navigator's role would be to help with triage and refer and connect clients with the services and supports that they need, including mediation and other early resolution services;

b) Within the community, developing a "hub" for CYFSA and family law matters, housing organizations that support families in the same location, so that families are better able to access resources that they need to resolve their family law issues (for example, mental health resources, community organizations, interpreter services, CAS's, social workers, clinics, transitional housing, etc.). Mediation services could also be available at the location. (This could be a $10 million idea in one location, or an "unlimited budget" idea if implemented system-wide.)

(2) Investing in effective alternative approaches that can help to reduce incarceration and support rehabilitation. This envisions a focus on prevention and early intervention programs, diversion, expanded use of alternative courts and restorative justice programs, connecting people with community services, and opting for community supervision over incarceration. An effective way to relieve pressure on the criminal justice system would be allowing persons to be streamed into a comprehensive diversion program without charges being laid at all, with appropriate social supports to foster engagement with appropriate social programming, such as mental health supports or addiction services, community service, or educational opportunities - and then ensuring that a social worker follows up with the person during the diversion. Having more embedded crowns providing support and advice at police stations (they already exist in two locations) would also assist in ensuring that people don't end up in the system unless they need to be there. Persons who are in custody should be provided with access to rehabilitative and educational programs to help keep them from returning to custody (sometimes again and again) following their release.

Because prevention starts early, increased police outreach in communities would enable trust to be built up between police and vulnerable communities. Access to more social supports and funding for extra-curricular activities would proactively deter criminal behaviour in youth.

Not only would this overall focus help to relieve the significant economic burden that incarceration and recidivism places on taxpayers, it would help to address the over-representation of Indigenous and racialized persons in the correctional system.

(3) Taking steps to tackle the tremendous financial cost to the justice system of unaddressed mental health issues by:

a) Placing mental health workers in family court – to address the high level of intersectionality of mental health with domestic family and child welfare litigation;

b) Placing mental health workers in WASH court (weekend bail court) – to ensure that WASH court dates are meaningful, and limit the number of adjournments related to mental health needs; also it would decrease the pressure on weekday bail courts due to backlogs from the previous weekend. Mental health workers can help to prepare release plans for persons who may otherwise be considered unreleasable due to their condition;

c) (this would cost more than $10 million) Having a trained mental health team and a social worker that accompanies all police emergency calls to help determine if the matter is a criminal one or if it can be de-escalated and the person can be linked to social supports instead of being drawn into the criminal justice system. This would result in massive decreases in arrests of the mentally ill or addicted, and free the system up for dealing more efficiently with criminal offences.

The across-the-board impact of mental health and addictions on productivity and costs cannot be over-emphasized. The Mental Health Commission of Canada estimates that the total cost to Canada's economy incurred by mental health problems and illnesses is currently **well over $50 billion annually, or nearly $1,400 for every person living in Canada** in 2016. Notably, **expenditures in the justice system were not even included** in this calculation.

The Report on Bail and Remand in Ontario (the 2016 Wyant report) noted that WASH courts are often described as simply "remand courts" that take up resources and time but do not significantly advance the administration of justice, and that there seem to be many reasons for this. The report recommended supports in WASH courts to make them more effective, including support services, including for Indigenous accused.

Second suggestion (using technology to make the justice system more efficient and effective – *likely more than $10 million*)

There is a need to make more, and better, use of technology in Ontario's justice system. Some ideas for this are:

a) Implementing an electronic system for scheduling court appearances that takes availability of essential participants into account, to reduce delays and adjournments related to scheduling. One of the themes highlighted in the 2017 Senate committee report on criminal justice system delay, Delaying Justice is Denying Justice, was creating technology solutions to speed up court proceedings. The report pointed out that "computerized systems can make the justice system more efficient and amenable to human needs" and recommended user-friendly computer portals for managing court appearances as well as for helping unrepresented accused in understanding court procedures;

b) Increasing video capabilities for communications between counsel and defendants in custody at all locations, including police divisions or in Northern communities, and increasing capabilities for stakeholders (e.g. bail program, mental health workers) to conduct interviews by video while a person is in custody. Increasing video capabilities would result in more bail hearings being done by video (especially in Northern communities where contested bail hearings are automatically adjourned on the first appearance).

The Honourable George R. Strathy, Chief Justice of Ontario: Meeting with the AG Ontario and Representatives of the Bar (Thursday, January 31, 2019)

Speaking Notes of OBA President Lynne Vicars

The OBA has worked with government and the courts to advance our common justice objectives, including important initiatives such as:

- a strong, cost effective and accountable, publicly funded legal aid system that allows lawyers to ensure that the most vulnerable in society have assistance with serious legal issues;
- the continued commitment to implementing a province-wide Unified Family Court; and
- adopting technology that saves time and money including on-line filing, on-line scheduling, courtroom wi-fi and video conferencing.

These issues are important - but they are also well known.

Today, the Chief Justice has asked us to discuss one change that could be made to improve Ontario's justice system organized according to the following categories of cost: no-cost, $10 million or less, and an unlimited budget.

In responding to this request, our approach has chosen to follow four rules:

1. Find ways to act early, streamline proceedings and reduce time and cost, in order to free up precious resources for matters that need them.
2. Recognize that solutions that count the most are often smaller-scale initiatives – not sweeping reform – but simple solutions borne from the experience of those who practice.

3. Recognize that statistics drive success because if you don't know where you are you can't make improvements. Measuring and publishing key justice metrics supports innovation.

4. Focus on low-cost or no-cost Initiatives. Governments always have spending constraints, so solutions should support, not detract from, spending on critical justice sector priorities.

Three specific ideas that exemplify this approach are:

1. A mandatory early case conference for cases involving a self-represented litigant in civil proceedings in the regular stream of the Superior Court of Justice

People without legal representation are often unfamiliar with a complex court system - its procedures, rules and basic terms – which leaves them confused, frustrated and ill-prepared. This undermines the public's confidence in the justice system but it also often leads to unnecessary procedures and delays that are costly to the system and all justice participants.

In addition to system impacts, challenges arise for individual judges (who need to remain impartial yet feel a duty to assist), opposing counsel (who may try to explain procedural matters to the unrepresented litigant to avoid delay) and the opposing party (who incurs extra costs by proceedings that are unnecessarily prolonged).

While there are initiatives aimed at assisting self-represented litigants with court forms, mediation services, public legal information, and pro bono legal services, there is no requirement for a mandatory early case conference that would assist self-represented litigants in their understanding of the process and help focus the proceedings to move

forward.

The specific scope of issues to be included and the judicial order making authority would need to be developed. However, the essential element of this proposal lies in the inherent value of early judicial intervention for self-represented litigants.

2. Standardization of courthouse procedures

Courthouses across Ontario currently use different procedures for many standard litigation tasks - for example, filing documents, scheduling motions, obtaining adjournments, taking out orders, trial scheduling and trial lists, can all vary depending on where the matter is heard.

Procedural information is not readily available to members of the bar who don't practice in the region or to members of the public. Lawyers spend time obtaining this information from other lawyers, courthouse staff, and process servers. The information is not always accurate and the costs associated with these tasks may be passed on to clients. Further, self-represented litigants have almost no access to any of the above methods for obtaining this information, which can cause delays.

Practice directions make efforts to address these issues, but these are sometimes out of date, or the regional practice direction does not apply to a particular courthouse.

Standardization of courthouse procedures would greatly help alleviate these problems. We recognize that allowing courthouses to set their own procedures is intended to reflect the realities of local practice, and that complete standardization may not be practical, but at minimum, the information regarding each courthouse should be available centrally, and updated as necessary.

3. ***Regularly measure and publish key justice system metrics***

Regularly measure and publish key justice system metrics, such as the time and number of appearances needed to resolve motions and trials in the Superior Court of Justice.

As the Supreme Court of Canada stated in *Hyniak* – a "culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system."

We know from the experience in other sectors, such as hospital wait time strategies, that transparency and accountability are critical to achieving that culture shift - because what gets measured gets done – and this in turn supports the implementation of innovation that is most effective.

We can't improve what we don't measure.

THE NEW SIMPLIFIED PROCEDURE

Restoring Proportionality and Real Access to Justice for Ontarians

Introduction

Litigation has become too expensive for the average Ontarian. No one involved in our system of justice believes otherwise. OTLA applauds efforts to change that unfortunate fact Finding the right balance between the rights of litigants to present their claims effectively in court and the financial cost of the court process is required.

The Solution

The Civil Rules Committee has recommended that the Attorney General amend the Simplified Procedure to rectify this problem. The recommendation includes increasing the jurisdiction of the Simplified Procedure for claims up to $200,000, and imposing a summary trial process on all such cases. The result is that proportionality will be restored to these modest value cases, average Ontarians will once again be able to afford to have their day in court, and this Government will be responsible for providing those people with real access to justice. As an added bonus, the Government will realize substantial savings by reducing the length of trials and creating a more stream-lined litigation process. OTLA therefore supports the recommendations that have been made, subject to the cautions described below.

The Cautions

The proposed summary trial is a big change from the ordinary trial process. While this type of change is necessary, important decisions about the trial procedure must be left to the pre trial judge

1. The summary trial process will not only assist many average Ontarians, it will lead to a huge cost savings for the Province. Most personal injury claims in Ontario are worth less than $300,000. However, most personal injury trials in Ontario take approximately 3 weeks of court time. Each party must routinely spend $150,000 or more (sometimes much more) in legal fees, on these modestly valued claims. Drastically reducing trial time under the proposed summary trial to a maximum of five days, will not only allow Ontarians to litigate those more modest claims on a cost effective basis, but it will allow the Province to save significant money and resources due to the reduction in court time, court staff, judicial resources, etc. This a win/win for the citizens and the Government of Ontario.

2. However, while some increase to the $200,000.00 amount originally proposed, perhaps as much as $300,000.00 is supportable, OTLA does NOT support increasing the monetary limit any further than that, as some have suggested. If this is done, important rights and safeguards for the seriously injured will be lost. Cases awarded damages of over $300,000. are relatively few and those people will need to be able to present testimony from multiple parties in order to properly prove their loss. This is particularly so where additional evidentiary burdens, such as Insurance Act “threshold” legislation in motor vehicle inury cases, sets out evidentiary requirements, which if not proven, will lead to the plaintiff’s case failing. Where liability is in

issue, this raises the potential need for additional expert testimony, including that of a person's ability to function in several domains, earn income and their future care requirements.

This new proposed trial process represents a dramatic departure from current practice, but it's necessary for modestly valued cases. The process not only involves a significant reduction in trial time, and a limit on the costs and disbursements that can be awarded, but also the addition of trial by Affidavit (as opposed to the preferred oral evidence of witnesses) and an elimination of juries. These cost savings measures are a welcome change for more modest cases, but are not required, and in fact could be quite problematic for larger value claims valued at more than $300,000. The concerns about proportionality and access to justice are not nearly as much an issue for higher valued claims. Justice and fairness require that the litigants in in those cases involving more significant amounts retain the protections inherent in the traditional trial process. Fortunately, these larger cases only represent a small percentage of the total number of claims in the system.

3. The trial process, including how the five days are allocated as between the parties, ought to be eft in the discretion of the pre trial judge. Which party carries what burdens of proof? In some circumstances, the pre trial judge may determine that one party requires more time than the other to present their case, and therefore the pre trial judge ought to be empowered to make such determinations.

4. Access to a jury of one's peers is a fundamental and significant part of our system of justice. However, it is an admittedly expensive system, and OTLA accepts that it is a luxury that modest value claims can no longer afford. Just as juries are not available for cases in the Small Claims Court, our system is faced with the reality that juries are no longer affordable for modest value claims. However, this key feature of our justice system ought to be maintained where it is affordable and proportional, which includes those claims worth in excess of $300,000.

<u>If We Had One Wish</u>: <u>Medical Malpractice Enterprise Liability</u>

5. Our medical malpractice system does not serve victims of avoidable error well. It is broken and outdated. The bifurcated model of medical legal liability, with the hospital on one side and the physicians on the other, is at odds with a patient-centered focus. Moving towards an institutional or enterprise model of liability (similar to that of the aeronautics industry) is most consistent with the goal of reducing harm, increasing access to justice, and streamlining healthcare and legal system expenditures.

Respectfully,

Ronald Bohm, OTLA President

RODA
Roundtable of Diversity Associations

Email care of stephanie.Ho2@ontario.ca

February 18, 2019

The Honourable George R. Strathy
Chief Justice of Ontario
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N6
[email: lawsociety@lsuc.on.ca]

Dear Chief Justice Strathy:

On behalf of the Roundtable of Diversity Associations ("RODA"), and further to our meeting with you, the Bar, and Attorney General, Caroline Mulroney on January 31, 2019, we write to summarize RODA's suggestions for improvements to Ontario's justice system.

RODA is an umbrella organization which brings together a diverse group of Canadian legal associations with the goal of fostering dialogue and promoting initiatives relating to the advancement of diversity, equality and inclusion in the legal profession, the judiciary, and within the broader legal community. As part of our mandate, we monitor and provide input on policy developments within the profession and legal system.

We are pleased to follow up to reiterate our submissions made at the January 31 meeting to the following questions:

1. If there was one change that you could make to the system that would have no cost, what would it be?

2. If there was one change that would cost $10 million or less, what would it be?

3. If you had an unlimited budget, what change would you make?

Summary of RODA's Input

Our membership highlighted that there is a cost to nearly every change. With that said, the following suggestions are *"**no to very low cost**"* changes.

First, it is important to keep diverse members of the bar associations engaged in important policy initiatives and discussions such as this one.

The government must continue making diverse and inclusive judicial appointments. In particular, we should ensure that there are family court appointments to fill the UCF seats with a principle of diversity to reflect litigants at those courts.

We should have a policy, province-wide, that mandates that access to justice to take primacy, with a focus on the use of technology as an important tool. For instance, we suggest:

- Allowing counsel to attend judicial pre-trial meetings by telephone
- Allowing persons with disabilities/child care issues to attend court by phone, other electronic means
- Use of emails/other means to serve and file material
- Electronic appearances
- Electronic filing and scheduling across the board in the province.
- Electronic/online set date appearances.

Our membership provided the following suggestions for *"**low to high cost**"* changes.

We continue to emphasize the need for judicial training on issues involving race and marginalized groups. We believe that there is a discomfort on the bench in talking about race and issues facing marginalized groups, and these are pressing and important issues that need to be tackled. In this regard:

- We suggest that the province implement training for judges and particularly Justices of the Peace respecting racial biases, implicit racism, and the effects of justice system on racialized persons.
- We highlight the overrepresentation of Black and Indigenous persons in the justice system (but also those who do not speak English), and the particular importance of this type of training in family protection and criminal proceedings, where they are especially overrepresented.
- Court programming should be instituted beyond judges to train prosecutors, court staff and other counsel on diversity matters.

We also highlight the importance of accessibility for Ontario's immigrant populations by making legal information available in diverse languages. It is important that essential legal resources reflect the many languages spoken by Ontarians so as to ensure that they can access such information without barriers.

The two areas of the justice system highlighted by our members as urgently requiring review and reform to eliminate barriers are criminal and family law. Wider policy changes should be informed by research. Our members suggest that Ontario compile statistics in child protection and criminal cases to have a better understanding of how the justice system affects diverse persons, to remedy indirect or direct barriers and discrimination.

It is suggested that Ontario begin compiling the following statistics in family and criminal cases:

- The race or nationality (including indigenous), gender, primary language (English, French, or other) of the parties
- Socio-economic variables of the parties (e.g. funded by Legal Aid, private or unrepresented)
- The outcomes
- For criminal cases details on: bail, detention orders, convictions, sentencing

Ontario should tackle mental health issues in the justice system, in view of the high number of mental health issues among marginalized populations. In this regard, Ontario should give regard to implementing and funding an appropriate mental health strategy so that the criminal justice system does not also become a mental health system.

Our members also highlighted the importance of increasing funding to the legal clinics and Legal Aid Ontario certificates.

We cannot stress the importance of Ontario's legal clinics enough in our society. The clients that clinics assist are the most vulnerable in society, including low-income racialized people. Further, clinics keep people housed and help connect them to social assistance and other community support programs. Clinics need to be well funded so they can help these people live with dignity and keep them out of high-cost government services such as hospitals, shelters, the justice system, or homelessness. These are services that should be expanded to assist more people from marginalized communities.

With respect to legal aid certificates, without the assistance of lawyers, the marginalized are left to represent themselves unless they are pleading guilty or seeking bail. The problems become heightened when the person's first language isn't English or they are unable to speak English at all. The lack of assistance or limited assistance adds to the resources of the justice system (e.g. delay). Further, it can bring disrepute to the administration of justice.

In closing, RODA commends you on your goal of improving our justice system. RODA is well positioned through our membership to assist in this process, and we are willing and available to meet with you to discuss meaningful ways to improve our justice system as you continue with this process.

We thank you for your consideration and look forward to hearing from you regarding these important matters.

Sincerely,

Dina Awad
Chair, Roundtable of Diversity Associations

Adrian Ishak
Vice Chair, Roundtable of Diversity Associations

C. RODA Member Organizations:

Arab Canadian Lawyers' Association
Association of Chinese Canadian Lawyers of Ontario

Canadian Association of Black Lawyers
Canadian Association of Somali Lawyers
Canadian Association of South Asian Lawyers
Canadian Hispanic Bar Association
Canadian Italian Advocates Organization
Canadian Muslim Lawyers Association
Canadian Muslim Womens' Lawyers Association
Canadian Association of Somali Lawyers
Federation of Asian Canadian Lawyers
Hellenic Canadian Lawyers Association
Indigenous Bar Association
Iranian Canadian Legal Professionals
Korean Canadian Lawyers Association
Macedonian Canadian Lawyers Association
South Asian Bar Association (Toronto)
Women's Law Association of Ontario
OBA Sexual Orientation and Gender Identity Law Section
OBA Equality Committee
Toronto Lawyers Association

TORONTO LAWYERS ASSOCIATION

February 13, 2019

The Toronto Lawyers Association has been asked to suggest three initiatives which would promote Justice in the Ontario Justice System. These are a précis of our remarks in that respect.

Firstly, the Toronto Lawyers Association suggests that a strong Legal Aid system which allows for a significant number of litigants to be represented in their quest for justice is an essential part of a fair justice system. Far too often, self-represented litigants cannot properly have access to real justice.

Proper representation of litigants is crucial to two goals. Firstly a system of justice must perforce be preoccupied with achieving justice. Justice is best reached with persons who are appropriately represented. Secondly, representation saves time and resources within the administration of justice. Unrepresented litigants take substantially more time to process and hear. Persons being represented save significant administrative costs. A number of studies confirm this.

Secondly, the Toronto Lawyers Association urges the use of technology as a way of achieving justice as well as efficiency. With efficiency often comes justice. The cost of justice can be an impediment to the pursuit of justice. It is also a substantial burden on the state. New technology can be electronic filing. This is of substantial assistance to counsel and cuts down on costs to counsel and judicial administration. Technology can also include the use of the telephone to have Judicial Pre Trials. This again can be a substantial savings to counsel and therefore to the litigants. Judicial Pre Trials by phone are common in the Ontario Court of Appeal, uncommon in Superior Court and rare in in Ontario Court. The modern tendency in courts is to insist on an increasing number of confirmation dates and judicial pre trials. This tendency puts a substantial burden on the litigants to fund travel back and forth to courts for brief discussions. Plainly, allowing more judicial oversight to be performed over the telephone promotes efficiency and costs the courts nothing at all. In fact, if it avoids needless appearances, it saves money.

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Finally the Toronto Lawyers Association urges that the federal prosecution of narcotics offense be ended and that such prosecutions are done by criminal prosecutors in the ordinary course of their function. This would have to be accompanied by a transfer of funding to allow such increased prosecutions by the province. The Toronto Lawyers Association points out that there is no constitutional reason why federal prosecutors must do narcotics prosecutions. Having parallel prosecuting bodies in court is inefficient in larger centers and very inefficient in smaller centers. Substantial savings in time and money could be saved if the federal and provincial government could agree to eliminate this unnecessary duplication.

The Toronto Lawyers Association is very grateful to have been asked to contribute to these discussions and is ready to provide any further assistance when called upon.

Yours very truly,

Dirk M. Derstine
President
Toronto Lawyers Association