

**A 5-Point Action Plan to Get the Civil Justice System Moving Back in the Direction of Achieving its Fundamental Goal - The Fair, Timely and Cost-Effective Determinations of Civil Cases on their Merits**

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**I. THE FUNDAMENTAL GOAL OF OUR CIVIL JUSTICE SYSTEM**

[1] The Fundamental Goal of our public civil justice system is the fair, timely, and cost-effective determinations of civil cases on their merits.<sup>2</sup> As it currently operates, our public civil justice system is not achieving that Fundamental Goal. We need to re-orient some of the key working principles of our civil justice system so that it does achieve the Fundamental Goal.

[2] My talk will have two parts. First, I shall briefly describe what I perceive to be some of the main symptoms and key causes of the problem. Second, I will spend some time proposing a 5-point plan to get the civil justice system back working again towards its Fundamental Goal.

**II. CURRENT PROBLEMS AND CAUSES**

[3] This past June I gave a talk to the Ontario Bar Association Litigation and Insurance Sections entitled, “*Some Thoughts on Creating a Sustainable Public Civil Justice System*”. A copy is attached to this paper. In it I discussed in some detail what I viewed as the three main symptoms of the public civil justice system’s failure to meet its stated Fundamental Goal and my thoughts on what was causing those symptoms. Briefly, let me summarize the three main symptoms reflective of the failure of our civil justice system to meet its Fundamental Goal:

- (i) The lack of timeliness of the adjudication of civil disputes on their merits. I have no doubt that in terms of the average civil case commenced in the Superior Court of

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<sup>1</sup> Ontario Superior Court of Justice, Toronto. I wish to express my thanks to several of my colleagues and members of the Bar who kindly commented on earlier drafts of this paper.

<sup>2</sup> That Fundamental Goal flows from Rule 1.04(1) of the *Rules of Civil Procedure*: “These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.”

Justice, the final adjudication of the proceeding does not occur within two years of its commencement. In the life of the ordinary person, two years is a long time;

- (ii) The cost of civil proceedings. Simply put, the cost of lawyer-represented civil litigation in our province in this day and age is beyond the reach of small businesses – which form the mainstay of our economy - and the middle class;
- (iii) Third, and derivative from the first two symptoms, the emerging phenomenon of the “vanishing civil litigator”. A civil justice procedural system designed on the assumption that parties would enjoy legal representation now increasingly sees litigants fleeing from lawyers in large numbers and representing themselves.

[4] Why is this so? I think there are four main causes for these symptoms:

- (i) **First Cause:** Although in their first section the *Rules of Civil Procedure* articulate the Fundamental Goal of securing the just, timely and cost-effective determination of every civil proceeding *on its merits*, they then go on to create a set of rules which, in large part, erect obstacles to achieving that very goal. Our procedural rules focus more on interlocutory matters than on the final adjudication of cases on their merits. More time is spent on the civil side of our court dealing with issues which do not involve final adjudications on the merits, such as discovery motions, than those which do. This flows, in part, from a pernicious assumption which haunts this package of *74 Rules of Civil Procedure* – the assumption that all rules merit equal treatment. To achieve timely and cost-effective justice, all rules cannot merit equal treatment;
- (ii) **Second Cause:** The *Rules of Civil Procedure*, and the companion cost and fee framework surrounding our public civil justice system, do not reward litigation conduct which secures the Fundamental Goal of a fair, cost-effective and timely adjudication of the dispute on the merits, nor do they penalize litigation conduct which thwarts that goal;
- (iii) **Third Cause:** A litigation culture has arisen in this province over the last three decades which extols creating and litigating peripheral procedural disputes, instead of moving towards the timely adjudication of disputes on their merits. That culture now lauds, as the skilled barrister, the motions specialist, not the final hearing expert;
- (iv) **Fourth Cause:** The public civil court system is operating with front and back office administrative systems which are hopelessly out-of-date, based on a disappearing medium of communication – paper – and which are unable to provide court staff, the judiciary and users of the court with needed, usable information about the inventory of civil cases in our public court system.

[5] What can we do to remedy those ills, so-caused? Much good work is being done at the local administrative levels in our Court to fix some specific aspects of the problems. Nothing I say in this paper intends to suggest that such efforts should not continue. But, I would like to step back a bit and advocate a radical re-thinking of certain of the higher level principles upon which our civil litigation system operates. Now, “radical” means different things to different people. I am not advocating getting rid of our adversarial system. However, some of the key

principles of the adversarial system - at least as they have come to be practised in the Ontario courts - merit re-thinking and, I will argue, radical change.

[6] To that end, I offer up for your consideration a 5-Point Action Plan to get our civil justice system moving back in the direction of achieving its Fundamental Goal.<sup>3</sup> The five points are:

1. Developing a new measure of success for the civil justice system based on the amount of time it takes for a proceeding to go from its start to its finish in our civil courts and adopting a “front-end-assignment-of-trial-dates” system;
2. Re-focusing judicial time to deal only with three matters: (i) interlocutory remedies to preserve the *status quo* pending the final hearing; (ii) actively case-managing proceedings so that they reach their final determination within a set period of time; and (iii) holding the final hearings on the merits;
3. Radically re-thinking the production and discovery process to reduce its cost and eliminate the bottle-neck it creates in most civil proceedings;
4. Re-defining the format of interlocutory and final hearings on the merits so that (a) less time is spent in interlocutory matters on oral argument and (b) the parties enjoy greater choice in how a final hearing will be conducted, with the conventional trial regarded as the exception, not the norm; and,
5. Re-defining the medium of communication used by our Court so that we serve our litigants by managing our case information digitally and exchanging case-related information electronically – in other words, discarding our existing paper culture.

### **III. POINT NO. 1: ADOPT A “FRONT-END-ASSIGNMENT-OF-TRIAL-DATES” SYSTEM**

[7] How does our Court measure whether it is providing timely and cost-effective service to the Ontario public? The Superior Court of Justice has not developed formal metrics to measure publically its success in achieving timely justice.<sup>4</sup> One sometimes sees the timeliness of our service talked about in terms of “time-outs” or “wait times”. In the civil context the concept of “time-out” is used in two ways: to measure the lapse of time between the date an interlocutory

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<sup>3</sup> This paper was largely drafted before the Supreme Court of Canada released its decision in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59. The implications of that decision for the effective reform of the civil justice system remain unknown, especially in light of the Court’s imposition of constitutional limits on the reform process, at least in one of its key aspects – the pricing of adjudicative time. I will proceed on the basis that my Proposals 1 through 4 would fall within the ambit of the powers of s. 96 judges, but the *Trial Lawyers* decision most unfortunately casts some uncertainty on that assumption.

<sup>4</sup> For example, the Court’s most recent *Bi-Annual Report for 2010 - 2012* reported on the number of new proceedings commenced by Region and subject-matter, but it did not contain any statistics about the amount of time it took proceedings to work their way through our Court.

motion is booked and the date the motion is heard, and to measure the lapse of time between setting an action down for trial and the commencement of the trial. Both measures focus only on portions of the life of a civil action; neither measures the entire life-cycle of the action.

[8] For most civil litigants what matters most is not the length of time they have to wait to bring a motion or how long they have to wait for trial once all the pre-trial steps have been completed, but how long they have to remain in the court system. Time is money. The longer a case remains alive in the court system and the greater the number of steps which are taken in the case, the higher the cost of litigation to the parties involved. In routine cases, a party stuck in our civil system for four years more likely than not will end up paying more in legal fees than one who is in-and-out in two years.

[9] Consequently, I think **the time has come for our Court to shift its strategic focus away from “wait times” for discrete steps in a civil proceeding to the broader issue of how long it takes for civil cases to move through our Court from start to finish.** On the civil side the measure of the timeliness of the service we provide should no longer be viewed in terms of “time-outs” for discrete steps, but the more important metric of how long it takes the Court to process a civil case from its start to its finish with a final determination on the merits – either by way of adjudication or settlement.

[10] The “start to finish time” of a civil case cuts to the heart of our Court’s legitimacy as a productive civil institution. Our court needs to assure the public that if they seek our assistance to deal with a civil dispute, the process will be completed within a reasonable period of time and at a reasonable cost. If we cannot provide such an assurance, we risk losing our legitimacy as an effective part of our democratic governance system. Litigants will turn their backs on our doors and seek-out private dispute resolution systems. Indeed, many already do.

[11] What can our Court do to promote the timely passage of a civil case through our system from start to finish? In a word, **we need to move the assignment of trial dates from the back-end of a civil proceeding to its front-end.** Trial dates are, after all, the end-point for either a final determination on the merits or the settlement of the case. At present, we give out trial dates at the back-end of the proceeding after all pre-trial work has been completed. **We need to flip that around and, instead, develop a case management process – one which is ultimately controlled and directed by the judiciary and not by court administrators - which sees trial dates assigned to cases upon the close or deemed close of pleadings.**

[12] Adopting a “front-end-assignment-of-trial-date” system I hope would cause a fundamental shift in Ontario’s civil litigation culture:

- (i) The open-endedness of the existing party prosecution system would give way to a more hybrid approach in which the Court exercised greater influence over the start-to-finish time for civil proceedings;
- (ii) From the get-go litigants would have to focus on the final determination of the case. An end-date for the proceeding would be known shortly after its commencement, and parties would know that they would have to complete all pre-trial steps or settle within that period of time;

- (iii) The shorter life-cycle of the proceeding would reduce the opportunities for interlocutory procedural motions which at present are killing the civil justice system; and,
- (iv) The judiciary would need to work more closely with the ADR community to ensure that opportunities for mediation exist at appropriate points of time in the shorter life-cycles of civil proceedings.

[13] Before the inevitable howls of protest from the nay-sayers rise to their crescendo, let me point out that while such an approach would constitute a radical re-orientation of the Ontario civil litigation process, the proposal is hardly a novel one. Many parts of the United States Federal District Courts already employ variants of the “front-end-assignment-of-trial-dates” system; in some districts it goes by the moniker of the “rocket docket system”.

[14] **To make a “front-end-assignment-of-trial-date” system work would require two key decisions. First, the judiciary – both at the trial level and at the appellate level – would have to resolve firmly that trial dates, once assigned, would be carved in stone.** That would be a major cultural shift from the present situation. Sadly, at present, most parties and counsel in Ontario regard assigned hearing dates as mere “suggestions”, and the judiciary by and large has acceded to that lax approach to trial dates. If, in a “front-end-assignment-of-trial-date” system, assigned trial dates were not rigorously enforced, the system would collapse under its own weight and delays to justice would sprout anew.

[15] **Second, reasonable start-to-finish time periods would need to be established for various categories of civil cases.** Different types of civil cases possess different litigation characteristics. The ripeness of a matter for trial usually is tied to the ability to ascertain the scope of the damages claimed. For example, in most commercial/breach of contract cases more often than not damages can be assessed with reasonable certainty shortly after the commencement of the action. By contrast, in personal injury or medical malpractice cases involving catastrophic injuries it often takes several years before the true extent of the claimed damages are known.

[16] Such differences in the ability to quantify claimed damages point to the need to design standard start-to-finish times for different categories of civil cases. In most basic commercial or breach of contract cases, for example, I have great difficulty in seeing why trials could not occur within two years following the close of pleadings (with 90 days set as the outside limit for the exchange of pleadings).<sup>5</sup> By contrast, the appropriate number for serious personal injury or medical malpractice cases might be closer to four years. Complex commercial or contract cases

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<sup>5</sup> I appreciate that this proposal runs counter to the changes to Rule 48.14(1) which will come into force on January 1, 2015 (O. Reg. 170/14, s. 10). Those changes will extend the permissible life-span of a civil case from two years to five years before an administrative dismissal occurs. The genesis of that rule change lay in a major case information management infrastructure failure, which only highlights the important and unavoidable link between the need for a modern case information system in our court (Action Plan No. 5) and the ability of the Court to operate so as to secure the timely final determination of cases on the merits. An unfortunate tension now exists between Rule 1.04(1) and the new Rule 48.14(1) – they pull in opposite directions.

might require more than two years. But, even for complex commercial cases our Court must be able to offer start-to-finish processing times which are no longer than those offered to litigants by private arbitration services if – and that is a Big, Questionable “IF” – we remain of the view that the public court system should operate as the default forum for civil dispute adjudication.

[17] The final component of adopting a “front-end-assignment-of-trial-date” system would involve moving away from the current default position of precluding the case management judge from acting as the trial judge to a norm of using the judge who has case managed a proceeding to act as its trial judge. Settlement discussions, however, would take place under the auspices of another judge or a designated member of the ADR community.

[18] How could one begin to implement a “front-end-assignment-of-trial-date” system? By way of a pilot project I would suggest that each Region of our Court create a group of case management judges for long civil trials and require any new civil case which the parties expect will take more than three or four weeks to adjudicate to self-identify at the time the action is commenced. Each case would be assigned to a case management judge who would also act as the trial judge. During or at the close of pleadings, in consultation with the parties, the case management judge would establish the milestone dates for each step of the proceeding and set the trial date. The milestone dates would be firm and the trial date would be carved in stone. The case management judge then would bear the responsibility to manage the case to the fixed trial date, including dealing with any interlocutory matters, and, absent a settlement, adjudicate the dispute. As experience with the system developed, cases requiring shorter trial times would be folded into the process.

[19] One final observation. While it is beyond the scope of this paper to discuss the issues relating to class action proceedings in any detail, I would only observe that a procedural reform designed to facilitate the bringing of mass tort claims has, by unfortunate circumstance, transformed itself into a procedure plagued by delays. These days it is far too easy to forget that the legislators who passed the *Class Proceedings Act, 1992*<sup>6</sup> mandated that a certification motion would be made within 90 days of the close of pleadings. I suspect that the legislators thought that pleadings would be exchanged within a reasonable period of time and a certification motion would be determined judicially within a reasonable period after the close of pleadings. Of course, that is not how history has unfolded. It therefore might make sense to modify the “front-end-assignment-of-trial-date” system for class actions by assigning a fixed certification motion hearing date shortly after the commencement of the proceeding.

#### **IV. POINT NO. 2: FOCUS MORE CLEARLY THE ROLE OF JUDGES IN THE CIVIL LITIGATION PROCESS**

[20] At present, judges try to be all things to all people in the civil litigation process: motion deciders, mediators and settlers, case managers, schedulers, and final decision-makers. The present reality facing our Court in most urban areas is that we lack sufficient numbers of judges

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<sup>6</sup> S.O. 1992, c. 6

to service, in a professional and fair way, the volume of cases passing before us without creating unacceptable delays.

[21] What follows from this state of affairs is that **we need to stop viewing judges as having the time to be all things to all people and, instead, we should re-define a core set of roles which judges should play, within the limits of existing judicial resources, with a view to moving civil cases through our court system to final determinations in reasonable periods of time.**

[22] Before developing this point let me deal with a common objection to such a suggestion: instead of re-defining the judicial role, why not increase the number, or complement, of judges? Let me offer two answers.

[23] First, there is no doubt that a need exists for formal studies to make the business case to the federal government for an increase in judicial complement of the Ontario Superior Court of Justice in areas of recent exceptional demographic growth, such as the Central West (Brampton) and Central East (Newmarket) Regions. Such studies are long overdue. While an increase in the judicial complement must be part of any long-term solution, at the same time **the judiciary must take a hard look at the effectiveness of their current time-allocation practices which, at their heart, rest on decades of convention. Any service provider periodically must re-think and re-set the way it serves its clientele, and the judiciary enjoys no exception from that obligation.**

[24] Second, the last two decades have witnessed the emergence of a broad, sophisticated alternative dispute resolution sector in Ontario populated largely by lawyers and former judges who have developed an expertise in various methods of mediation and dispute resolution. Given the existence of such a large body of trained mediators, the judiciary needs to re-cast its traditional relationship with the ADR sector in favour of developing stronger working relationships with it. The days of a certain "Us vs. Them" view of the relationship between the judiciary and the ADR sector should give way to one in which both groups co-operate in servicing different aspects of the same civil dispute. **The judiciary needs to think creatively about how it can delegate segments of a particular case to the ADR sector thereby allowing the judiciary to concentrate their work on specific tasks.**

[25] What tasks? In my view, **the judiciary should focus its time and resources on three aspects of civil proceedings:**

- (i) **hearing requests for interlocutory remedies to preserve the *status quo* pending the final disposition of the proceeding on its merits;**
- (ii) **actively case-managing proceedings so that they reach their final determination on the merits – whether by adjudication or settlement - within the period of time set for that case; and,**
- (iii) **conducting the final hearings on the merits.**

[26] Where should judges spend less of their time? In two areas. First, the courts should out-source more of the mediation/settlement functions to delegates, such as designated senior

members of the profession or retired judges, or to the rest of the ADR community, or to a combination of both. Second, judges (and masters) need to reduce radically the amount of their time spent dealing with interlocutory procedural motions, particularly those dealing with discovery and production issues.

[27] Delegating such tasks to others must not provide an escape hatch for parties who wish to delay the final determination of the hearing – i.e. “If I can’t delay the case before the judge, I’ll drag it out before his/her delegate”. So, judges must retain overall case-management control of a civil proceeding so that the case reaches its final determination on the merits within the period of time fixed for the matter.

## **V. POINT NO. 3: RADICALLY RE-THINK THE INTERLOCUTORY MOTION PROCESS**

[28] **We must radically re-think the role which interlocutory motions legitimately can play in a civil action.** Interlocutory motions are killing our civil justice system; they stand as one of the major obstacles to securing access to civil justice. Procedural rights accorded by our *Rules of Civil Procedure* with the laudable goal of securing a fair hearing have morphed into a system-killing creature worthy of a painting akin to Francisco Goya’s *Saturn Devouring his Son*, which depicted the Greek myth of the Titan Cronus, or Saturn, who ate his children upon their birth fearing that he would be overthrown by them. So, too, civil motions now risk devouring the civil justice system by causing unacceptable delays for, and increased costs to, litigants. Let me offer some thoughts on possible changes.

### **A. Adopt a “Give-It-Your-Best-Shot-Only” limitation on “Get-Me-Out-of-This-Court-Before-Trial” types of motions**

[29] Some motions can result in the final disposition of a civil proceeding. Litigants resort most frequently to three types of motions to get rid of a case before trial: (i) lack of jurisdiction/forum *non conveniens*; (ii) no reasonable cause of action/abuse of process; and, (iii) summary judgment. A major problem now exists with such motions. One increasingly sees litigants resorting to more than one such motion during the course of a single proceeding, taking the attitude if that one loses a want of jurisdiction motion, one need only flip the page in the Rule Book to bring a lack of reasonable cause of action motion. Deep pocket litigants are the ones which tend to favour such an approach, banking on attrition to bring them victory. The bringing of multiple motions designed to avoid a final hearing on the merits in my view constitutes an abuse of our litigation rules. It favours the rich litigant and injects a Jarndyce-like stench into our Court system.

[30] Of course, a legitimate policy concern underlies each such type of motion. Why should an Ontario court assert jurisdiction over a litigant who has no connection to the province? Why should a defendant have to go to trial to resist a claim that has no basis in law or in fact? All fair policy questions to ask.

[31] But, I think one can legitimately respond: if you think there is some really good reason why the case into which you have been brought should not go to trial, then pick your best reason and make your pitch to the Court, but don’t take advantage of a basically free public civil justice



system to throw pitch after pitch. Give it your best shot – be it want of jurisdiction, no legal claim, or no factual basis for the claim. If you strike out on your best shot, then get ready for trial because our essentially free public justice system cannot afford to give you multiple shots to avoid trial.

[32] **Accordingly, for those motions which seek to dispose of a case before it reaches a final hearing, we should adopt a “give-it-your-best-shot” rule. So, for example, if a defendant challenges the jurisdiction of the Court to hear the dispute and fails, that defendant should be precluded from bringing any other sort of Rule 21 motion or a summary judgment motion.**<sup>7</sup>

[33] A “give-it-your-best-shot” rule would afford a defendant one opportunity to extract itself from a case without going to trial, but would prevent the defendant from playing litigation games by bringing a series of such motions. Each such motion has the potential of delaying a proceeding for up to 1.5 years, once appeal rights are taken into account. As matters presently stand, a determined (and deep-pocketed) defendant could delay a proceeding for up to 4 or 5 years by bringing a series of Rule 20 and 21 motions. By acceding to such litigation conduct, our Court moves closer to embracing a Jarndyce-like approach to civil litigation, with the attendant loss of its legitimacy in the eyes of the public.

## **B. Alter the Approach to Dealing with Production and Discovery Obligations and Disputes**

[34] Most interlocutory motions heard by our Court certainly will not result in a final disposition of the case on the merits because most of the motions before us flow from the production and discovery process. Last year I delivered a paper entitled “*Making Mountains out of Molehills: Or How can we save Civil Litigation from Committing E-Seppuku?*” in which I wrote:

*Seppuku* was a form of Japanese ritual suicide by disembowelment. It formed part of the samurai code of honour...

What does seppuku have to do with e-discovery? I contend that unless a new, much more restrictive approach is taken to the production stage of civil litigation, e-discovery, like seppuku, will turn into an elaborate ritual, performed in front of spectators, in which e-discovery, like the tanto blade, will plunge deep into the civil litigation process, resulting in its ritual suicide. Put more simply, e-discovery risks killing civil litigation by pricing civil suits out of the reach of all but the rich.

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<sup>7</sup> I have received some comments that the Rules should be amended to permit the hearing of want of jurisdiction and no-cause-of-action motions at the same time without the moving party having to attorn to the Ontario court, but that summary judgment is a different kettle of fish and should not be lumped in with the other two kinds of motions. I agree that it would make sense to alter the rules about attornment to permit the bringing of want of jurisdiction and no-reasonable-cause-of-action motions at the same time. But, the larger question remains: just how many opportunities can we give litigants to bring motions to avoid a trial while achieving timely and cost-effective justice? Every opportunity for a motion creates the prospect of more costs and more delay. Consequently, I am advocating a broader approach in order to secure timely and cost-effective justice which provides a fair hearing on the merits.

The metaphor could be extended to apply more broadly to all aspects of the production and discovery process. Indeed, it appears that at least in the Toronto Region many counsel are shifting their clients' claims away from actions in favour of using the more summary application procedure in part to avoid the quagmire of the existing production and discovery system.

[35] Efforts over the past few decades to reform the civil litigation process have involved tweaking, but not re-thinking, our long-standing production and discovery system. Rule changes have left the core features of that system intact. Those features are:

- 1/ the mandatory production of information relevant to an issue;
- 2/ the oral pre-hearing examination of parties;
- 3/ requiring the parties to resort to formal interlocutory motions to solve discovery problems;
- 4/ little up-front judicial scrutiny of the merit of such motions before allocating court time to deal with them;
- 5/ allowing appeals from such interlocutory motions; and,
- 6/ the use of modest cost sanctions in the orders determining such motions, with costs usually limited to a gentle partial indemnity slap on the wrist.

[36] Obviously two reasons necessitate some pre-trial production and discovery: fairness and efficiency. Trial-by-ambush is unfair; pre-trial production/discovery goes a long way towards avoiding trial-by-ambush. As to efficiency, the pre-2010 experience with simplified procedure trials revealed that if the litigants could not conduct some pre-trial discovery, then they would commandeer trial time to conduct a discovery. That is a waste of trial time.

[37] So, where does one look to change our system of production and discovery so that it ceases to create undue delay and litigation expense? Only part of the solution lies in the hands of the judiciary. Most of the time spent and costs incurred on production and discovery result from the voluntary decisions made by the litigants and their counsel, with counsel standing in something of a conflict-of-interest position because a large part of their typical litigation revenue stream consists of production/discovery-related billings.

[38] That said, I think the judiciary should take the lead in advocating changes to certain key production/discovery principles with the objective of radically reducing the amount of judicial time spend on production/discovery disputes. Those changes would be as follows:

- (i) Re-cast the scope and the timing of documentary production; and,
- (ii) Re-think how to deal with production and discovery-related disputes.

[39] The proposals that follow apply primarily to the commercial/breach of contract cases which make up the bulk of the civil work of our Court. Their application to other areas of civil litigation – personal injury/med mal and class actions – would require some modification.

## **B.1 The scope and timing of production**

[40] As to the scope of production, the present concept of “relevance to any matter in issue” originated in the paper-era when the volume of documents created by an average civil dispute was much lower than in today’s digital age when not only document creation, but also communication, takes place electronically. Our current concept of “relevance to any matter in issue” simply casts too broad a net in the digital age, thereby causing unnecessarily high production costs and delays.

[41] **I recommend that we tie the mandatory obligation to produce information more closely to the materiality of the information for trial or other final hearing.** The production obligation should be re-cast to focus more precisely on those documents which the party intends to rely upon at trial or which the other side probably would rely on at trial in support of its claim or defence.

[42] To achieve that re-orientation, **we need to re-jig the timing of mandatory documentary disclosure so that it reflects the link between the materiality of a document to the adjudication of an issue at trial.** To that end:

- (i) The plaintiff/applicant should deliver with its claim or notice of application the documents upon which it intends to rely at the trial or final hearing;
- (ii) The defendant/respondent should deliver with its defence or responding materials (i) the documents upon which it intends to rely at trial together with (ii) those documents which the defendant should reasonably foresee would assist the plaintiff in establishing its case;
- (iii) The plaintiff/applicant would be required to deliver with its reply (or in any event of a reply) those documents which the plaintiff should reasonably foresee would assist the defendant in establishing its defence; and,
- (iv) Each side could then make one or two rounds of post-pleading requests for further documents.<sup>8</sup>

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<sup>8</sup> In 2012 Colorado initiated a pilot project to study the effect of somewhat similar disclosure requirements in “business actions” (which included insurance cases) in several districts. The October 8, 2014 report on the results of the first two years of the pilot project makes very interesting reading. The report, “Momentum for Change: The Impact of the Colorado Civil Access Pilot Project”, can be found at the website of the Institute for the Advancement of the American Legal System:

[http://iaals.du.edu/images/wygwam/documents/publications/Momentum\\_for\\_Change\\_CAPP\\_Final\\_Report.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Momentum_for_Change_CAPP_Final_Report.pdf)

[43] Tying more tightly the production of documents to the proof of issues at trial should reduce the unnecessary volume of productions presently associated with autopsy civil litigation – in which the parties aim to write another *War and Peace* instead of focusing on the material issues in dispute – and should force the parties to think long and hard at the earliest stage of the litigation about the real issues in dispute. Such an approach would require more front-end work and thinking by the parties and their counsel, but it could remedy the rather sloppy, un-discriminatory “vacuum-cleaner” approach to documentary discovery currently in vogue.

[44] To those raised in the traditional adversarial system, requiring a party to produce documents which it should reasonably foresee would assist its opposite party at trial might seem like unusual phrasing. But, the essence of such a production obligation would not differ from the current obligation to produce “relevant” documents, for documents which would assist the other side at trial by definition would be relevant.

[45] How would e-discovery obligations operate under such a regime? I would see e-discovery issues arising in what I have described as the “post-pleading requests for further documents”. But, before addressing that issue, let me step back a bit to stress again the direct link which should exist between the scope of pleadings and the scope of documentary production. Our system offers no financial incentive to, nor imposes any financial penalty on, a party to plead only those issues which go to the core of the dispute. In Ontario, for the nominal price of issuing a statement of claim a party can plead as many claims as it wishes and make extravagant claims for damages. How much different pleadings would look if the level of the initial filing fees were tied to the quantum of damages sought or the number of claims asserted? If parties were forced to focus their pleadings on the core of their disputes, a much-reduced discovery and production process would naturally follow. Or, put differently, if limits were put up-front on the number of issues in respect of which e-discovery could be conducted, then the discovery phase of an action would become more focused on that which was material to the final disposition of the proceeding, and production costs would decrease.

[46] This, in a sense, is the approach towards e-discovery which has been adopted by the United States District Courts in their 2011 *Model Order Regarding E-Discovery In Patent Cases*. The Model Order was designed to “promote economic and judicial efficiency by streamlining ediscovery, particularly email production, and requiring litigants to focus on the proper purpose of discovery - the gathering of material information - rather than permitting unlimited fishing expeditions.” The Model Order departs from the operating premise in our Rules that “every document” relating to “any matter in issue” must be produced up-front. The Model Order states:

Hard-worn experience in patent cases and recent commentary teach that efforts to identify comprehensively the discovery issues or to produce all “relevant” documents at once at the outset of the case can result in the vastly overbroad production of e-discovery. Indeed, the practice of gathering huge amounts of information at the front of a case and running broad key searches as the issues emerge has come under increasing question.

[47] The Model Order takes a different approach to the initial collection, organization and production of documents. Unlike our *Rules of Civil Procedure*, production under the *U.S. Federal Rules of Civil Procedure* is request-based. Under the Model Order the initial round of production requests is limited to core documents about four defined issues: (i) the patents, (ii) the

prior art, (iii) the accused instrumentalities, and (iv) the relevant finances. Only after those core documents have been produced can requests be made for the production of emails, and even then email production requests must be limited to specific issues and to only five custodians per producing party. Interestingly, the Model Order also provides that production requests shall not include meta-data absent a showing of good cause. However, fields showing the date and time that the document was sent and received, as well as the complete distribution list, generally are included in the productions.

**[48] The Model Order offers an interesting approach to controlling e-discovery costs: (i) limit the number of issues on which initial documentary discovery can be made; (ii) delay e-mail documentary discovery until after core documents related to the limited issues have been exchanged; and then (iii) limit the scope of e-mail documentary discovery.**

[49] By requiring the parties to produce the material trial-related documents with their pleadings, arguably one could narrow and focus subsequent rounds of production requests and reduce e-discovery costs. The scope of any subsequent round of documentary discovery would be framed by the scope of the issues disclosed by the production of trial documents. The objective, then, would be a simple one – before blowing the client’s bank account on e-discovery, limit the number of discoverable issues to those which really will count at trial and also restrict the scope of e-mail discovery to those issues, as well as to the handful of custodians who actually had something to do with those issues.

[50] Of course, appropriate sanctions would need to exist where parties ignored their production obligations and sought to pull a bunch of documents out of the proverbial magical hat on the eve of or at trial. Our present Rule 53.08 is far too lenient on those who “forget” to disclose material documents until trial. The Rule should be reversed, so that the presumption is that leave to introduce such surprise documents will not be granted. But, I suspect that the approach of tying the production of documents to the delivery of pleadings would have its own built-in, self-disciplining device because the availability of a summary judgment motion should keep the parties honest in their disclosure – if they skimmed on producing the documents they intended to rely on at trial, they could find themselves at the receiving end of a summary judgment motion which argued that they had failed to disclose adequate evidence to justify moving their claim or defence along to trial.

[51] Would this altered approach to the scope and timing of documentary production work in most civil cases before our Court? I think it would because most such cases involve an adjudication of the legal consequences of a series of events generally known to both parties. A small sub-set of cases exists where significant informational imbalances exist between the parties. Mass tort claims via class actions come to mind as an example. Perhaps a different approach to production and discovery would be required for such cases to ensure a fair process. But we need to adopt a simpler production regime for most civil cases.

## **B.2 The means by which to resolve production/discovery disputes**

**[52] To re-orient the production and discovery process to better achieve the Fundamental Goal, we need to reduce the number of disputes emanating from that stage of a lawsuit so that we can reduce the amount of judicial time devoted to their resolution. At**

**the same time, parties must be held to their obligation to disclose information material to the final determination of the lawsuit on its merits.**

[53] As a product of our traditional litigation system – I was trained in it, practised in it and now adjudicate in it - it is difficult to pretend that I can offer “radical” solutions to the current woes plaguing our production and discovery processes. We really do need to bring in some non-legal outsiders who could apply a fresh, Freakonomics-type of approach to designing a new civil litigation system.<sup>9</sup> Until that day comes, let me offer a few possible solutions, captive as I may be to the mindset of the flawed existing system.

[54] Broadly speaking there are four possible means by which to resolve disputes that arise in the production and discovery process:

- (i) amend the *Rules of Civil Procedure* to reduce the number of production and discovery-related issues over which disputes can arise;
- (ii) out-source the determination of such disputes to the ADR community;
- (iii) employ informal judicial methods to determine the disputes; and,
- (iv) employ formal judicial methods to determine the disputes.

**We need to focus on methods (i), (ii) and (iii), so that the amount of time judges and masters spend on (iv) radically diminishes.**

### **Step 1: Reduce production and discovery options**

[55] **As a first step, we should rethink the *Rules of Civil Procedure* with an eye towards reducing the number of choices open to parties during the production and discovery phase of a lawsuit.** The greater the number of choices, the greater the probability that parties will disagree over those choices; motions then result. For example, as they presently read our Rules allow fights over whether a second representative of a corporation may be examined for discovery, over the location of examinations, and over whether third parties must produce documents or submit to examination. Our Rules contain such flexibility in a quest to devise the fairest production and discovery system possible. But the quest for perfect fairness is illusory, and it comes with a very real price tag – increased litigation costs and delay. Reducing the flexibility of the production and discovery Rules by injecting clearer bright line obligations and rights might reduce the fairness of the system a smidgen – although I doubt there would be a practical reduction in its fairness – but the reduction in abstract fairness would be offset by reduced litigation costs, and the amount of money it takes to secure justice itself is an issue of procedural fairness and access to justice.

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<sup>9</sup> All litigators, judges and court administrators should be required to read, *Think Like a Freak*, by Steven Levitt and Stephen Dubner. Their book collects a whole bunch of common sense thinking under one cover. For a change-resistant institution such as our Court, the perspective advocated by Levitt and Dubner would come as a breath of fresh air.

**Step 2: “Un-bundle” the civil lawsuit to include arbitrators as procedural dispute decision-makers**

[56] Next, **we need to make greater use of the ADR community to resolve and determine production and discovery disputes in court proceedings.** The last few years have seen the emergence of several ADR service offerings focused on production and discovery disputes. In my view, if all parties to a proceeding agree to out-source their production and discovery disputes to a member of the ADR community, the Court and the *Rules of Civil Procedure* should facilitate that kind of “un-bundling” of adjudicative services. The parties could agree to refer to binding arbitration some of the procedural disputes which arise during the course of their court case, with the adjudicative process for the entire case combining judicial and arbitral adjudication – a type of “hybrid” civil adjudication process. Certain basic conditions would need to be met for such un-bundling to work:

- (i) The parties and the Court would have to be bound by and follow the arbitral decisions on production and discovery issues in the remaining portion of the court lawsuit;
- (ii) The un-bundling would have to fit seamlessly into the court case by way of a simple agreement amongst the parties – the existing procedural option of invoking a Rule 54 reference is unnecessarily cumbersome;
- (iii) The ADR decision-maker would be required to decide the production and discovery disputes within the court-imposed time frame for the trial of the action – i.e. the Court would possess ultimate control over the duration of the lawsuit and the arbitrator would have to work within the court-imposed schedule; and,
- (iv) No appeal could be taken from the decision of the ADR decision-maker on production or discovery issues.

Of course, this un-bundling option likely would prove attractive only to parties with significant financial resources because they would have to collectively fund the private fees charged by the ADR decision-maker. Nevertheless, if all parties were to agree to hire that kind of service, I see no objection in principle to the courts facilitating, accommodating and, indeed, encouraging it.

**Step 3: Increase the informal (but binding) case-management determination of discovery disputes**

[57] That still leaves a large number of litigants who lack the financial resources to pay for private adjudication of production and discovery disputes. How do we deal with them? **I think a lot of room exists to use the more informal decision-making processes embedded in active judicial case management to decide production and discovery disputes.** While I was sitting on the Toronto Region Commercial List, I experimented with incorporating in case management

orders Standard Case Management Directions which set out my expectations about how parties should approach production and discovery disputes.<sup>10</sup> The relevant portions were as follows:

### **Discovery issues**

**E-discovery:** Counsel must explore creative ways to ensure that e-discovery costs remain proportionate to the complexity of the issues and the amount of money at stake in the case. Those creative ways can include (i) limiting the number of issues on which initial documentary discovery can be made, (ii) delaying e-mail documentary discovery until after core documents related to the limited issues have been exchanged, and then (iii) limiting the scope of e-mail documentary discovery.

**Undertakings:** Each party must deliver answers to undertakings no more than 60 days following the date of the examination on which the undertaking was given.

**Refusals/Under Advisements:** Parties are strongly encouraged to use Rule 34.12(2) of the *Rules of Civil Procedure*. If they do not, the parties must select one of the following options for refusals:

**Option A:** I am prepared to write an endorsement stating that the parties have agreed to refrain from bringing refusals motions, but on the clear understanding that by so doing they will not be faced at trial with the submission by an opposite party that their failure to move on refusals should work against them. If, at trial, an issue arises about a question refused, then the trial judge can consider the matter. If the trial judge concludes that the refusal was proper, so be it. If the trial judge concludes that the refusal was improper, then an adverse inference would be drawn against the refusing party for failing to disclose material evidence;

**Option B:** I will deal with a motion involving up to eight (8) key refusals (not categories, but actual refusals) at a 30-minute “Friday Morning Discovery Hearing” – see paragraph 10 below. However, parties must understand that if they proceed by way of motion, I shall approach the costs of that motion on an “amount per refusal” basis, specifically \$1,500.00 per refusal, payable within 30 days. That is to say, if a party moves on 8 refusals, but succeeds only on two, it may risk adverse cost consequences of up to \$6,000 (i.e. success on 2 refusals (+\$3,000) less failure on 6 refusals (-\$9,000), or a “net” adverse cost award of \$6,000). In addition, in assessing the costs of the motion I shall take into account the refusal of a moving party to have accepted an offer by the other side to use Rule 34.12(2) on the examinations. By communicating my approach to costs to the parties in advance of bringing a refusals motion, I wish to afford parties an opportunity to take a sober look at exactly how many refusals are material for a fair determination of the issues at trial or final hearing and therefore require

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<sup>10</sup> A full copy of the Standard Directions can be found in *Farrell v. Kavanagh*, 2014 ONSC 905.



adjudication by this Court. If a refusals motion will involve more than eight (8) refusals, it most likely will be referred to a Commercial List Master for hearing.

**Option C:** The parties may identify those refusals in respect of which they wish to use Option A and those in respect of which they wish to proceed with a motion under Option B. I offer this third option recognizing that in some actions important, proper questions may well be wrongfully refused on an examination and that fairness requires an adjudication of those refusals in advance of the trial so that the actual disclosure of specific information occurs before trial, rather than simply relying on the drawing of an adverse inference. The number of such material refusals in any action usually is quite small and the cost consequences outlined in Option B should operate to confine the number of argued refusals only to very material issues.

### **Friday Morning Discovery Hearings**

Each Friday morning, from 8:30 a.m. until 9:30 a.m. (except for my Judgment Writing Weeks), I will hold brief, 30-minute hearings on any discovery-related disputes arising in cases which I am case-managing – e.g. scope of e-discovery; scheduling of examinations; identity of person to be examined; refusals; etc. Counsel shall schedule a Friday Morning Discovery Hearing through the Commercial List Office.

If the hearing will deal with refusals, no more than 8 refusals in aggregate will be dealt with at the hearing. All motion materials must be delivered no later than 5 p.m. on the Tuesday preceding the hearing date.

For all other discovery-related matters, counsel must submit a joint letter, no later than 12 noon on the Thursday preceding the hearing date, describing the issue(s) and the parties' respective positions. The letter shall not exceed five (5) pages in length.

### **Motions generally**

In my view, the ability to prepare a case for a final hearing on the merits without resorting to any process-related interlocutory motion represents the gold standard for hearing preparation.

No date for the hearing of an interlocutory motion will be set in this proceeding without an initial discussion of the procedural problem at a 9:30 attendance. At the 9:30 attendance: (i) the moving party must present a draft of the notice of motion and a draft of the order which will be sought on the motion; and, (ii) the responding party must present, in writing, its proposed resolution to the procedural problem which would obviate the need for the motion.

[58] Certain aspects of the Standard Directions sought to offer parties alternatives to rule-based motions for deciding discovery issues. For example, as an alternative to the far-too-popular refusals motion, the Standard Directions offered a judicial direction regarding adverse inferences from refusals to be drawn at trial. Other parts sought to make the parties think twice about the need to bring formal motions by giving advance notice of the significant cost

consequences of some motions – e.g. \$1,500 for each refusal moved on – as well as scheduling the hearing of discovery and production motions at a somewhat un-attractive time of day – i.e. Friday mornings at 8:30 a.m. Four months’ of experience with these Standard Directions tentatively suggested that litigants began to think twice before embarking upon formal production and discovery motions, and the adverse-inference alternatives offered to formal refusals motions were beginning to see buy-in from the Bar.

[59] I have no doubt that other ways exist in which informal case management techniques could resolve production and discovery issues. The time has come where we must take a hard look at a variety of options for the informal determination of production and discovery disputes, no matter how far “outside the box” the option may seem. As well, **greater resort to informal case conference techniques to determine production and discovery disputes should be supported by Rule changes:**

- (i) **One change will come into force on January 1, 2015. New Rule 50.13 will enable a judge to convene a case conference before the judge or a case management master and, as long as proper notice of the request has been given, the judge or master can make a “procedural order”, while only the judge could make an order for “interlocutory relief”.**<sup>11</sup> It appears that the thinking behind this new rule viewed production/discovery-related orders as “procedural orders”, with requests for “interlocutory relief” confined to requests for such relief as injunctions, *Anton Piller* orders, etc. Looked at in that fashion, the new Rule encourages greater co-operation between judges and masters in the management of a specific proceeding and, if properly used, should reduce the amount of time spent by Masters dealing formally with production and discovery issues by enhancing their powers to resolve such disputes through case management techniques.<sup>12</sup> The new Rule 50.13(6) marks a positive step towards altering, for the better, litigation expectations about who can do what and when in the litigation process and, no doubt, will give greater confidence to many judges to embrace case management;
- (ii) **Appeals from interlocutory decisions concerning production and discovery issues should be eliminated.** Appellate review of production and discovery issues is a luxury our civil litigation system can no longer afford. This is one of those areas where the quest for theoretical fairness must give way to the reality of financially

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<sup>11</sup> Rule 50.13(6).

<sup>12</sup> Building on this development, we also need to involve Masters more in the trial of actions, specifically simplified procedure actions. Masters conduct construction lien trials, so why not allocate the trial of Rule 76 matters to them? Litigants should not have to pay the price of legacy constitutional division of powers issues over what Masters can and cannot do. Indeed, I thought a certain stream of constitutional jurisprudence touts that our Constitution is not frozen as of 1867. If that is the case, then let’s find ways to overcome this irritating – but costly – legacy issue and, instead, give priority to providing the most effective service to the public who really do not care about the arcane intricacies of sections 92 and 96 of the *Constitution Act, 1867* when it comes to what Masters can and cannot do. In some ways the split jurisdiction over the superior court public justice system found in sections 92 and 96 of the *Constitution Act, 1867* operates as a major barrier to improving justice in this country.

affordable civil litigation, otherwise we risk destroying general access to the civil court system.

[60] Let me conclude this section with a caveat. While the case management process possesses many good points, if not properly deployed case management can undermine achieving the Fundamental Goal in two ways:

- (i) case management sometimes can create delays if the adjudicator manages a case by repeatedly putting off deciding issues. Case-management cannot be open-ended. Case-management works best when the case is managed to a fixed final hearing deadline; and,
- (ii) case management can be used by parties as a "back door" to bring more motions, which is the opposite of what case management is intended to achieve. The judiciary must resist efforts to use the case-management process in that way.

#### **Step 4: Discourage and limit formal production and discovery motions**

[61] Let me turn, then, to the issue of formal motions for production and discovery disputes. If the recommendations I have advocated above in Steps 1, 2 and 3 are adopted, formal production and discovery motions should diminish in number. But they will not disappear: until litigants and litigators draw their last breathes, such types of disputes will continue in civil litigation.

[62] If we are serious about removing the production and discovery system as an obstacle to meeting the Fundamental Goal, then we must facilitate the enforcement of production and discovery obligations without the need to resort to formal motions. At the same time a strong signal must be sent that parties cannot use formal production and discovery motions as devices to delay proceedings and wear down the other side. Adopting several practices would send such signals:

- (i) **Stronger sanctions for non-compliance with production and discovery obligations should be imposed on defaulting parties.** If one party fails to comply voluntarily with its obligations and the other has to obtain an order to secure compliance, the default remedy for any subsequent failure to comply with the order should be the striking of the claim or defence. A much laxer approach currently prevails, one much more tolerant of non-compliance. A tighter, "two strikes and you are out" approach should become the norm;
- (ii) **Each proceeding should be allocated a fixed amount of time for interlocutory motions** – such as one or two hours for *all* production and discovery disputes by *all* parties. I have heard stories of judicial officers hearing multi-day motions on refusals; in my view that makes no sense whatsoever; and,
- (iii) **Full indemnity costs against the non-complying party should be the norm for production and discovery issues, with the court possessing the power to award double or treble full indemnity costs for litigation conduct which obstructs, delays or hinders a proceeding from reaching its final hearing on the merits.**

Our present cost regime has no teeth. The modest level of partial indemnity costs ends up condoning litigation gamesmanship. If we are serious about changing litigation behaviour, more onerous cost sanctions should be imposed, with the dismissal of the claim or defence resulting from the failure to pay the cost award.

## **VI. POINT NO. 4: RE-DEFINING HEARINGS**

[63] Ontario's adversarial system still rests heavily on oral advocacy, a system which has its strengths – the presentation of a dispute by counsel well-versed in its details – and its weaknesses – the unproductive repetition of written material already before the court. In my view the weaknesses of our system of oral advocacy presently outweigh its strengths. I do not advocate the elimination of oral advocacy: to do so would be to throw out the baby with the bath water. I do advocate reducing the role of oral advocacy at hearings, so that we can continue to admire the baby, but avoid slogging through the bath water.

### **A. Interlocutory hearings**

[64] Under our *Rules of Civil Procedure* parties must file extensive written materials – both evidence and argument – on interlocutory matters. Most judges try to read and master those materials before the hearing. Where that occurs, meaningful and effective oral advocacy has an important, but quite narrow role – to answer the questions of the judge who has read the materials. Those questions might disclose that the judge lacks a full understanding of the facts or the law; further oral submissions can educate the judge on those points. However, those questions might well disclose that the judge fully understands what is in issue; in those circumstances oral submissions should be short and limited to answering the judge's questions.

**[65] Our approach to allocating judicial time for interlocutory hearings should be changed, so that more time is allocated to enable the judge to review thoroughly the filed written materials *before* the hearing, and much less time allocated for the oral hearing in the presence of the parties and their counsel.**

[66] Two cultural changes would be required to implement such an approach. First, counsel would have to become much more disciplined in preparing for and using oral hearings, cutting to the chase more rigorously than presently occurs. Second, court administrators who schedule judicial time must develop daily hearings lists of reasonable length and schedule sufficient judicial preparation time. While administrators in the Toronto Region do a pretty good job on this score, the practice in many other Regions is quite different, with judges facing daily motions lists of impossible length on a regular basis. Forty-case daily dockets of motions serve no one's interests.

### **B. Hearings on the merits**

[67] The conventional trial in which evidence is lead *viva voce* through witnesses has been regarded as the default method for final hearings on the merits. Extensive experience in applications with hybrid hearings utilizing a mix of oral and written evidence to deal with trials of issues has shown the advantage of the hybrid trial as the norm for a final hearing on the merits, irrespective of the form of the proceeding. Written evidence can fairly place before the

trier of fact large volumes of un-contentious facts, leaving oral evidence and cross-examinations to focus on the material facts in dispute.

**[68] We must re-orient our approach to final hearings on the merits so that the hybrid hearing becomes the norm, and the conventional trial the rare exception to that norm.**

[69] The recent decision of the Court of Appeal in *Harris v. Leikin*<sup>13</sup> lends support for this approach. In that case I had heard lengthy summary judgment motions from four groups of defendants. I granted one motion, and directed hybrid trials for the claims against the remaining defendants, with the trials making extensive use of the voluminous written materials filed on the summary judgment motions. The Court of Appeal rejected the argument that directing a hybrid trial had robbed the plaintiffs of control of the trial narrative, stating:

[49] Second, it is my view that both the letter and the spirit of the judge's directions fell squarely within what the Supreme Court of Canada contemplated in *Hryniak v. Mauldin*, at paras. 76-77:

Rules 20.05(2)(a) through (p) outline a number of specific trial management orders that may be appropriate. The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit.

These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion.

[50] It seems to me that Karakatsanis J. was urging judges to do exactly what the judge did in this case. After considering the voluminous material filed on the summary judgment motions, he concluded the case could fairly and properly be decided on the basis of a trial focussed on the specific issues that required *viva voce* evidence.

[70] Properly designed, hybrid hearings can be fair hearings. The *Rules of Civil Procedure* have longed recognized so: the summary trial described in Rule 76.12 typifies the basic hybrid trial.

[71] Hybrid trials should become the norm for judge-alone civil trials. As well, there is no reason why hybrid trials could not work well where juries are involved. I would challenge the personal injury and medical malpractice Bars to put on their creative thinking hats and develop –

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<sup>13</sup> 2014 ONCA 479

with the assistance of available modern trial presentation technology – new methods for the standard civil jury trial.

## **VII. POINT NO. 5: RE-DEFINING MY COURT’S MEDIUM OF COMMUNICATION AND INFORMATION MANAGEMENT**

[72] The Ontario courts remain mired in a paper-based information management and communication system. **The Superior Court of Justice must change its ways – and change quickly – to serve its litigants by accepting, exchanging and managing case-related information electronically.**

[73] Stripped to its functional basics our Court takes in high volumes of data prepared by litigants or their legal representatives, attempts to present that data in a somewhat organized fashion to specialists – the judges – who consider that data, along with evidence out of the mouths of witnesses, deliberate upon it, measure it, weigh it, and release their own set of data adjudicating the legal rights of the litigants. In a word, our court is like a big Amazon.com warehouse of data, but we are still using 1950s techniques to manage and track the inventory in that warehouse. Until my Court modernizes its inventory control techniques, it will be impossible – and I use that word advisedly – to improve, in any material way, the timeliness and cost-effectiveness of our civil justice system and the level of service which our Court provides to the public.

[74] Is such modernization likely? Let me tell a story and then refer to a recent Financial Post article. First, the story. In the summer of 2006, a month before my appointment to the Bench, I was vacationing in Oxford, England. But, I had a filing deadline to meet in a National Energy Board case. One day I took the train to London, went to our firm’s office, finalized the filing with the client by email, then filed the evidence electronically with the NEB in Calgary, took the train back to Oxford, and had dinner with my wife.

[75] One month later I joined the Superior Court of Justice. At that time a party to a proceeding in our Court could not file documents electronically on-line. Today, over 8 years later, that still remains the case.

[76] I can retire in just over 6.5 years. Scanning our Court’s existing planning and priorities horizon, as matters now stand no public commitment has been made by the Ontario government which would offer any comfort that on the day I can retire a party to a proceeding in the Superior Court of Justice will be able to file a document electronically on-line. Modernization of the Court’s “back-bone” information management systems was not identified as a priority for the next four years by Premier Wynne in her September 25, 2014 Mandate Letter to Attorney General Meilleur. A court-wide filing and document management system similar to the PACER system which has been in place in the U.S. Federal Court system since 2005 – nearly a decade ago - simply is not on the current planning horizons of the Ontario government or my Court.

[77] An article appeared this past September in the Financial Post which reported that the Ontario government had “blown” \$4.5 million on its recent, failed Case Information Management Systems initiative.<sup>14</sup> The article also reported on the uncertainty of the founding chairman of the Ontario Bar Association’s Justice Technology Committee about whether a move by the Court to a paperless system would happen any time soon, and it quoted him as saying: “I think that goes under the heading of when hell freezes over”.

[78] On the one hand, I am disappointed by the sense of defeatism implicit in the remark made by a member of the OBA. The Bar remains the single largest user of our Court. If the Bar does not push for court modernization, the provincial government will not respond and court modernization will not happen.

[79] On the other hand, that icy assessment possessed a certain accuracy. But that should not be. In my view, a two-pronged approach is required to modernize our Court’s processes.

[80] First, both the judiciary and the Bar must find the collective will to embrace, to lobby for and to drive the implementation of modern court-wide information management technology. The technology to modernize our Court’s information management system exists, as do the private sector entities who can deliver the technology to meet the Court’s needs.

[81] Second, the Bar and individual judges increasingly must adopt existing collaborative document management technologies on a case-by-case basis. If the law firms involved in a case can agree to use a common, web-based delivery platform on which to exchange and present court documents to a judge in a particular case, they should do so. Judges have the power to bless such arrangements in cases before them, and many are eager to do so. The more that judges and counsel embrace case-specific collaborative technologies, the less relevant will become the paper-based public court registry and its short-comings.

[82] It is unfortunate that we have reached a point in the life of our Court where administrative progress lies in finding ways to work around the neglect of the Court’s public service infrastructure. However, given that state of affairs, the Bench and the Bar must band together to come up with alternative solutions. The stakes are too high to do otherwise. Our Court’s ability to serve the public in an effective manner in the digital age, as well as our legitimacy in the eyes of the Ontario public, hang in the balance.

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<sup>14</sup> “Ontario admits it blew \$4.5-million on failed court modernization project”, Financial Post, September 19, 2014.

## THE FIVE-POINT ACTION PLAN

### Point No. 1: Adopt a “Front-End-Assignment-of-Trial-Dates” System

- 1.1 Develop a case management process – ultimately controlled and directed by the judiciary and not by court administrators - which sees trial dates assigned to cases upon the close or deemed close of pleadings.
- 1.2 The judiciary – both at the trial level and at the appellate level – should resolve that trial dates, once assigned, would be carved in stone.
- 1.3 Reasonable fixed start-to-finish time periods should be established for various categories of civil cases.

### Point No. 2: Focus More Clearly the Role of Judges in the Civil Litigation Process

- 2.1 The judiciary should focus its time and resources on three aspects of civil proceedings:
  - hearing requests for interlocutory remedies to preserve the *status quo* pending the final disposition of the proceeding on its merits;
  - actively case-managing proceedings so that they reach their final determination on the merits – whether by adjudication or settlement - within the period of time set for that case; and,
  - conducting the final hearing on the merits.

### Point No. 3: Radically Re-Think the Interlocutory Motion Process

- 3.1 Adopt a “Give-It-Your-Best-Shot-Only” limitation on “Get-Me-Out-of-This-Court-Before-Trial” types of motions
- 3.2 Alter the Approach to Dealing with Production and Discovery Obligations and Disputes
  - 3.2.A The scope and timing of production
    - 3.2.A.i/ Tie the mandatory obligation to produce information more closely to the materiality of the information at trial or other final hearing. The production obligation should be re-cast to extend to those documents which the party intends to rely upon at trial or which the other side probably would rely on at trial in support of its claim or defence.



- 3.2.A.ii/ Re-jig the timing of mandatory documentary disclosure so that it reflects the link between the materiality of a document to the adjudication of an issue at trial;
- 3.2.A.iii/ Consider an approach to e-discovery which limits the number of issues on which initial documentary discovery can be made, delays e-mail documentary discovery until after core documents related to the limited issues have been exchanged and then limits the scope of e-mail documentary discovery.
- 3.2.B The means by which to resolve production/discovery disputes
  - 3.2.B.i/ Reduce the number of disputes emanating from the production and discovery stage of a lawsuit so that we can reduce the amount of judicial time devoted to their resolution. At the same time, parties must be held to their obligation to disclose information material to the final determination of the lawsuit on its merits.
  - 3.2.B.ii/ Rethink the *Rules of Civil Procedure* with an eye towards reducing the number of choices open to parties during the production and discovery phase of a lawsuit.
  - 3.2.B.iii/ Make greater use of the ADR community to resolve and determine production and discovery disputes.
  - 3.2.B.iv/ Use the more informal decision-making processes embedded in active judicial case management to decide production and discovery disputes and eliminate appeals from interlocutory decisions concerning production and discovery issues
  - 3.2.B.v/ Discourage and limit formal production and discovery motions
    - Impose on defaulting parties stronger sanctions for non-compliance with production and discovery obligations.
    - Allocate each proceeding a fixed amount of time for interlocutory motions.
    - Establish full indemnity costs against the non-complying party as the norm for production and discovery issues, with the court possessing the power to award double or treble full indemnity costs for litigation conduct which obstructs, delays or hinders a proceeding from reaching its final hearing on the merits.

**Point No. 4: Re-Define Hearings**

- 4.1 Interlocutory hearings
  - Allocate more time to enable the judge to review thoroughly the filed written materials before the hearing and much less time for the oral hearing in the presence of the parties and their counsel.
- 4.2 Final hearings on the merits
  - Establish the hybrid hearing as the norm, and the conventional trial as the rare exception to that norm.

**Point No. 5: Re-Define the Medium of Communication and Information Management of the Superior Court of Justice**

- 5.1 The Superior Court of Justice must quickly change its ways to serve its litigants by accepting, exchanging and managing case-related information electronically.

## **SOME THOUGHTS ON CREATING A SUSTAINABLE PUBLIC CIVIL JUSTICE SYSTEM**

**Mr. Justice David M. Brown**

**Ontario Bar Association Civil Litigation and Insurance Sections End of Term Dinner**

**Wednesday, June 11, 2014**

### **INTRODUCTION TO THE PROBLEM**

This year a number of members of our family spent the Easter season in Florence. In preparation for the visit I decided to brush up on my Florentine history. In the course of reading a biography of Nicollo Machiavelli, I came across this passage from Machiavelli's *The Art of War*, which contained part of a dialogue between Fabrizio Colonna and some young people in the Rucellai garden. According to Machiavelli, Colonna said:

And I repine at nature, who either should have made me such that I could not see this, or should have given me the possibility for putting it into effect. Since I am an old man, I do not imagine today that I can have opportunity of it. Therefore, I have been liberal of it with you who, being young and gifted, can at the right time, if the things I have said please you, aid and advise your princes to their advantage.

Not words which stuck in my mind when I studied Machiavelli at university some 40 years ago, but words which now resonate at this stage of life being, as I am, a little more than halfway between the date of my appointment as a judge and my eligibility for early retirement or supernumerary status. Without stretching the literary reference unduly, over the past several years I have written and talked about things that I have seen in the public civil justice system, and I thought that this evening I might take advantage of being in the presence of you, "who being young and gifted, can at the right time, if the things I have said please you, aid and advise your princes to their advantage". "Princes" obviously is not the right word, but one can substitute for "princes" those who hold positions which can influence making improvements to our public civil justice system.

Rule 1.04(1) of the *Rules of Civil Procedure* sets out the fundamental goal of our public civil justice system:

These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

The Fundamental Goal, then, is: the fair, timely, and cost-effective determinations of civil cases on their merits.

As it currently operates, our public civil justice system is not achieving that Fundamental Goal.

This evening I would like to offer some thoughts on why that is so, and what can be done to remedy that problem. I will break this talk down into three sections: (i) first, I will describe

some of the main symptoms of the problem; (ii) second, I will identify what I consider to be some of the key causes of the problem; and, (iii) finally, I will suggest possible remedies for the problem, although my approach might strike some as unorthodox.

But before I do, let me say a few words about why I intend to say what I am going to say, so that my remarks are not misconstrued.

As old-fashioned as it may seem, I applied to become a judge in order to serve my country. I had benefitted greatly from private practice. I wanted a chance to perform some public service.

To that end, I would like to see the Ontario Superior Court of Justice be recognized as the best trial court in North America. I am not speaking about the quality of the Court's judgments: the overall quality of our judgments is second to none. I am speaking about the overall level of service which our Court offers to the public when dealing with the public's civil disputes.

Our overall level of service needs improvement. We are not yet the best. We have the institutional ability and the skills to get there. We just need to unleash them.

So, that is the spirit in which I will offer some comments on problems in our public civil justice system. I will couple those comments with a possible approach to finding solutions, solutions designed to achieve my dearest goal - to see the Ontario Superior Court of Justice regarded as the best trial court on this continent.

## **PART I: THE SYMPTOMS**

I see three main symptoms of the public civil justice system's failure to meet its stated Fundamental Goal.

First, the lack of timeliness of adjudication of a civil dispute on the merits. While statistics are not published on this point, I have no doubt that in terms of the average civil case commenced in Superior Court of Justice, the final adjudication of the proceeding, irrespective of the form of hearing, does not occur within two years of its commencement. In the life of the ordinary person, two years is a long time.

Second, the cost of civil proceedings. Simply put, the cost of lawyer-represented civil litigation in our province in this day and age is beyond the reach of small businesses – which form the mainstay of our economy - and the middle class. Our system is only truly accessible to the upper classes and mid- to large-size corporations, if we regard the legal representation of a party as a fundamental aspect of access to justice.

Third, while over the past two decades commentators have spilt much ink bemoaning the “vanishing civil trial”, the reality is that over the last decade our civil justice system has seen the “vanishing civil litigator”. A procedural system designed on the assumption that parties will enjoy legal representation now increasingly witnesses litigants fleeing from lawyers in large numbers and representing themselves.

### **PART III: THE CAUSES**

These are the primary symptoms of the problem; what is causing them? That is a more difficult question to answer, but let me offer my own thoughts based upon a career which has consisted of 23 years practising civil litigation and its variants as a barrister, and now close to eight years sitting as a judge of the Superior Court of Justice, primarily hearing civil and commercial matters.

I think there are four main reasons why our public civil justice system is not achieving its Fundamental Goal. I cannot rank one above the other; each plays an important role in causing the problem, and I think they all must be addressed together in order to ameliorate the problem. Here is my list:

**FIRST CAUSE: Although in their first section the *Rules of Civil Procedure* articulate the Fundamental Goal of securing the just, timely and cost-effective determination of every civil proceeding *on its merits*, they then go on to create a set of rules which, in large part, erects obstacles to that very goal.**

There is a certain irony embedded in the composition and structure of the *Rules of Civil Procedure*. While the Fundamental Goal enunciated by Rule 1.04(1) talks about securing the determination of every civil proceeding on its merits, many of the rules - indeed the majority of the rules - do not concern final adjudications on the merits.

There are 77 rules. Putting aside the three that deal with appeals, of the remaining 74 rules arguably only 17 deal with final adjudications on the merits.<sup>15</sup> That leaves 57 out of 74 rules which do not involve procedures or issues dealing with a final determination on the merits.

Today, we are witnessing the result of a set of procedural rules which focus more on interlocutory matters than on the final adjudication on the merits: more time is spent on the civil side of our court dealing with issues which do not involve the final adjudication on the merits, such as discovery motions, than with final adjudications on the merits.

Moreover, a pernicious assumption haunts this package of 74 *Rules of Civil Procedure* – the assumption that all rules merit equal treatment. Put another way, in practice our civil rules operate on the basis that the demand for judicial time to deal with a problem under Rule A is of equal worth, and merits equal attention, as the claim for judicial time to deal with a problem under Rule B. For example, our Rules assume that demanding one hour of judicial time to deal with a "where should the examination of a deponent be held motion" merits equal treatment and access to judicial time as demanding one hour of judicial time to adjudicate a summary judgment motion in a simple case.

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<sup>15</sup> [Rules 19 through 22, the special proceeding rules; Rules, 64, 66 and 76; the eight rules dealing with trials (Rules 46 through 53); and, the two Rules dealing with references – Rules 54 and 55.]

That is wrong. Why? Because the assumption of "equal worth" underlying the various rules itself assumes the availability of unlimited judicial resources. At present we do not have unlimited judicial resources in most urban parts of Ontario. In urban areas, the demand for judicial time outstrips the supply of judicial time. The constant delays to get to hearings in urban areas is the most obvious manifestation of this imbalance of supply and demand.

In conditions of such imbalance, we need to inject an element of "discrimination" into our Rules, or using a medical analogy, an element of "triage" into our Rules to rank and separate the "really important" from the "not so important" when it comes to making claims on judicial time. All rules are not of equal litigation importance. The Fundamental Goal of securing the fair, timely and cost-effective adjudications on the merits should serve as the benchmark by which to discriminate amongst the rules when deciding what types of requests merit access to judicial time.

A more rigorous separation of the litigation wheat from the chaff is also required because the body of our substantive law continues to become more complex, not more simple. The complexity of the law imposes its own constraints on the accessibility of a civil justice system. The more complex the body of substantive law, the more inaccessible becomes the system of justice which administers it, and the greater the need for focusing adjudication resources on the heart of disputes, not on their periphery.

**SECOND CAUSE: The *Rules of Civil Procedure*, and the companion cost and fee framework surrounding our public civil justice system, do not reward litigation conduct which secures the Fundamental Goal of a fair, cost-effective and timely adjudication of the dispute on the merits, nor does it penalize litigation conduct which thwarts that goal.**

American Express has a long-standing ad campaign touting its "Front of the Line" service – use our cards and you can get better access to entertainment events. If two parties are prepared to agree that their case will be ready for trial within six months of its start, where in the Rules of Civil Procedure can they find a "Front of the Line" rule? If two parties agree that they will not bring any motions before trial, where can they find a "Front of the Line" rule? Why shouldn't the Rules reward good litigation conduct which seeks the timely and cost-effective adjudication on the merits? Why shouldn't good litigation conduct have "Front of the Line" access to judicial time? How can we hope to encourage good litigation conduct which fosters the system's Fundamental Goal unless we offer tangible rewards for good litigation conduct?

Let me turn to the flip side of the carrot and stick equation. As presently designed our civil system of justice does not require those who use it to take into account the social costs of their use of the system, only their private costs (which may well end up including some of the costs of the other side). Apart from paying their nominal filing fees, parties do not have to think about how their litigation conduct will affect public resources. Put another way, as long as they pay their \$127 to bring a motion, parties can litigate away without regard for how their conduct is affecting the use of a scarce public resource.

It is ironic that our public decision-makers have not taken this problem seriously, given their constant attention to the costs which private use imposes on another public resource - the environment. If judges could somehow wrap the issue of the enduring health of the civil justice

system in the cloak of "green-ness", then perhaps political decision-makers would pay more attention to the illnesses from which our system presently suffers.

But, in an age which concerns itself only with the material and the tangible - the purity of the air or the health of the human body - it is difficult to persuade people to think seriously about the intangible - such as the need of a democratic polity for accessible civil justice. Even when the intangible may well represent the "greater good", it holds little sway in an age focused on the short-term and on the material.

**THIRD CAUSE: A litigation culture has arisen in this province over the last three decades which extols creating and litigating peripheral procedural disputes, instead of moving towards the timely adjudication of disputes on their merits. That culture now lauds, as the skilled barrister, the motions specialist, not the final hearing expert.**

It is not clear to me why this has happened. But it has, and it is a most unfortunate development. The emergence of a strong "motions culture" signals, in my view, a growing inability of counsel to discern the wheat from the chaff in any particular piece of litigation, with the result that counsel are placing unreasonable demands on judicial time to deal with peripheral issues.

The pervasiveness of this "motions culture" is one of two reasons why I think we must question the viability of continuing with one of the bedrocks of our civil justice system – the party prosecution principle.

Our civil justice system operates on the premise that the parties should be the ones who design the process by which any particular dispute proceeds, including selecting all of the steps which occur prior to the final adjudication of the case on the merits. Under the party-prosecution principle, it is the parties who decide what is important, or what is not, when it comes to seeking access to court time.

There are several problems with the "party prosecution" principle as it presently operates. First, decisions by parties about what steps to take in a proceeding are made against the backdrop of virtually free access to judicial resources. For example, a party can initiate and bring a civil case through to trial in the Superior Court of Justice for a filing fee of slightly over \$500,<sup>16</sup> with no financial obligation to pay more for a long, versus a short, trial. Access to the court to bring an interlocutory step is a mere \$127. For that amount of money one can bring any type of motion authorized by the Rules and pay the same access fee for a 4-day motion as for a 20-minute motion. That decision is left in the hands of the parties, subject to varying degrees of judicial scheduling oversight.

What happens when a scarce resource is priced at almost zero? People abuse it. They waste it. We are seeing that every day in our Court with parties bringing motions which, were they

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<sup>16</sup> \$181 to issue a statement of claim and \$337 to file a trial record.

required to pay a "real" access fee which properly priced the value of the scarce public resource, judicial time, they would never think of bringing.

A second problem with the party prosecution principle is that not all parties are interested in achieving the Fundamental Goal of our system - the fair, timely, and cost-effective adjudication of a dispute on the merits. Some plaintiffs bring lawsuits simply to vex or annoy the other party, with the blatancy of the attempt varying with the sophistication of the party – some plaintiffs are quite adept at dressing-up otherwise meritless claims. And, of course, many defendants would be more than content to drag a case out, relying on attrition as their best defence. Both strategies are countenanced under a party prosecution system, with the lore of common-law advocacy extolling, as master tacticians, those who "play the game well".

Finally, the historical embrace of the party prosecution system rested on a major assumption - lawyers would represent the parties. That, no longer, is a valid assumption. Indeed, in one area of our Court - family law disputes - more parties are unrepresented than represented. As a result, courts can no longer rely on the professional filter of the judgment of barristers to keep the pre-hearing process within the realm of the reasonable and the somewhat necessary. Increasingly, the naked emotions of the unrepresented parties, unschooled by any knowledge of the substantive or procedural law, and indifferent to the overall health of the civil justice system - for they will only touch it while their particular case is alive - are what is driving the design of civil cases and the consequent demands by unrepresented parties on judicial time.

In a speech last November to The Advocates' Society I queried the practicality of moving towards a model of civil justice based primarily on judicial inquiry and judicial control of the process. I thought that selective case management would represent a workable, middle-ground solution to this part of the problem. I remain firmly of the view that in the short-term we must expand the use of case management. But, increasingly I am coming to the conclusion that in the longer term we must radically alter the "party prosecution" principle – perhaps even discard it - and move towards much greater judicial control over the design and the selection of permissible steps in a civil suit.

**FOURTH CAUSE: The public civil court system is operating with front and back office administrative systems which are hopelessly outdated, based on a disappearing medium of communication – paper – and which are unable to provide court staff, the judiciary and users of the court with needed, usable information about the inventory of civil cases in our public court system.**

When looked at in a certain way, stripped to its functional basics our court system intakes high volumes of data prepared by litigants or their legal representatives, attempts to present that data in a somewhat organized fashion to specialists – the judges – who consider that data, along with evidence out of the mouths of witnesses, deliberate upon it, measure it, weigh it, and release their own set of data adjudicating the legal rights of the litigants. In a word, our court is like a big Amazon.com warehouse of data, but we are still using 1950s techniques to manage and track the inventory in that warehouse. Until our court modernizes its inventory control techniques, it will be impossible – and I use that word advisedly – to improve, in any material way, the timeliness and cost-effectiveness of our civil justice system.



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In broad strokes, then, these are what I perceive to be the causes of the failure of our civil justice system to meet its Fundamental Goal. In order to end this after-dinner talk on a more upbeat note, let me offer some thoughts on a possible approach to solving the problem, specifically on how to ask the questions needed to develop a "sustainable" civil justice system which will meet the Fundamental Goal of the fair, timely and cost-effective adjudication of cases on their merits.

### **PART III: THE REMEDIES**

Early in my judicial career I thought that if one simply brought to light the problems in the public court system, remedies would occur. How naïve I was. The resistance to institutional change ingrained in both our public court system and the legal profession which practices in it is profound. Much work will be required to make our civil justice system the best on the continent. I suspect that I will not be around to see most of the results of that effort. Nevertheless, whatever degree of discouragement one faces in advocating the need to change in a reasonably quick fashion, one cannot let despair prevail. Therefore, I offer up some thoughts on possible solutions to the current problem.

#### **Re-building the public civil justice system**

About two years into this job of judging I formed the view that the critical problems in the public civil justice system could not be fixed incrementally or piece-meal. Instead, I thought that the system should be re-built afresh on new first principles. I still hold that view; actually with more force today than I did 6 years ago. Will that happen? Of course not. There are far too many entrenched interests in and around our court system, so the appetite for radical reform is not great or wide-spread. By that I mean that it is difficult for those who have grown up in the system – myself included – to take some big steps back and look, with fresh eyes, at whether the system truly is serving those it was designed to serve – the litigants who need their legal disputes determined.

Nonetheless, I would ask you to bear with me for a few minutes while I conduct a “thought experiment”. What would we have to do to re-build our public civil justice system from scratch in a way which would meet the Fundamental Goal? What questions would we have to ask?

#### **Designing a new civil litigation process**

Well, first, we would have to decide who controls how any particular dispute proceeds through the court - would it be the parties through the old "party prosecution" style of litigating, or would it be the judge, importing the more inquisitorial style of adjudication seen in Continental systems? Or, would we create a hybrid, with parties controlling certain limited procedural decisions and judges the others?

Second, how would we go about answering any of those questions? Would we employ the safe, time-honoured traditions of leaving such design choices in the hands of those legally-trained,

such as lawyers and their older incarnations, judges, as well as the numerous policy-makers resident in the Ministry of the Attorney General, or would we start with the real users of the system - the litigants whose rights are at stake in a civil lawsuit?

Imagine the discussions which might ensue if, for starters, you brought together different groups of litigants whose disputes represent those most often seen in our civil justice system. What if they were asked to design the type of civil litigation process which they, as paying litigants, would like to see, recognizing that in any particular case they could be either claimant or defendant? What if they were asked how much money they would be prepared to spend to see claims of a certain size or kind adjudicated? What if they were asked what sort of rules should be put in place to keep the playing field level, while ensuring a fair result? And, what if they were asked how "fair" the result would have to be in order to meet their sense of justice? Would they trade some part of "absolute abstract fairness" for a faster decision as, for example, in some arbitration systems which offer a choice between awards with reasons attached and awards without any reasons?

I would be fascinated by the answers. Unfortunately, few people are asking these questions, deferring to the expertise of those already entrenched in the system.

Who is to say that the answers to such questions would result in a "one size fits all" type of civil justice system? I suspect if we really listened to those whose rights are in play in our system of justice, we would develop several different civil-process "packages" or "offerings", varying with the amounts at stake, the substantive nature of the dispute, whether the parties would represent their own interests in the case or rely on lawyers, and whether their priority is a quick decision or one which was the product of longer reflection and deliberation.

I have no doubt that what would emerge from such a consultation process would be a set of Rules quite different from those we see today which, at their core, simply represent a tweaking of the pre-1985 rules which, in turn, traced their lineage back to the late 19th Century.

Just to stir the pot a bit more, what if those bodies which debate and make civil rules were to suspend their deliberations for two years and, instead, embark upon a grass-roots consultation process with litigants who have actually used or who are using our civil court system? And make it a real grassroots consultation - like meeting folks up in Timmins in the middle of winter when they have to work their way through the snow to a courthouse. Would electronic filings and hearings conducted by Skype or other technologies suddenly become a more attractive policy option in the winters of the North?

And would the current practice of allowing parties to make extensive oral arguments on detailed written arguments which they have already filed with the court survive such a review? I highly doubt it. I strongly suspect that radically reducing the availability of oral argument would be one outcome of such a review process.

### **Pricing a new civil litigation process**

In addition to re-casting the design and control of the civil process, what other aspects of the civil justice system would have to be re-built? The price a litigant would have to pay in order to gain access to the system would be one.

In times of constrained judicial resources, we must stop pricing judicial time as if it were free. It is not. Judicial time is scarce relative to demand. In my view, existing judicial resources should be focussed only on two aspects of civil cases: (i) the final adjudication of disputes on the merits, and (ii) the interlocutory preservation of rights pending the final adjudication. Most (but not all) other disputes are ones for which we simply lack adequate judicial resources to deal with in a timely way – that is to say, judges and masters should not be spending their time on such peripheral disputes in civil cases.

The pricing of access to judicial time should reflect those priorities. If public policy requires low-cost access to core civil justice activities, then set modest fees for requests which seek the judicial interim preservation of rights or the final adjudications on the merits, but charge much, much higher fees for requests for most other interlocutory process-related relief.

Also, allocate standard time limits for interim preservation of rights motions and final adjudications on the merits based on the amount at stake and the nature of the dispute, and then charge “run-over” fees if the time actually consumed by the case exceeds the standard allocation.

In order to minimize the gamesmanship which invariably accompanies any set of procedural rules, we need to re-jig our approach to the pre-trial disclosure of evidence in civil cases, given that our current set of Rules is the product of the more document-constrained paper age, not the “here comes the deluge” digital age. Three thoughts.

First, documentary disclosure should accompany pleadings, not follow them; and the touchstone of “relevance” should give way to that of “materiality” for the proof of a claim or defence at trial. This happens in many arbitration systems.

Second, we should curtail dramatically rights to oral discovery, fixing unalterable time limits which vary according to the amount at stake and complexity of the case – time limits which the parties could not alter.

Third, if we aim to reduce or eliminate the amount of judicial time allocated to production and discovery disputes, at the same time we must toughen up the consequences to a party of failing to comply with production obligations. For example, at present Rule 53.08(1), in its practical operation, permits the late disclosure of material evidence at trial – the usual consequence for late disclosure is a brief adjournment or modest slap on the costs-wrist. If material documentary disclosure must accompany pleadings and the scope of oral discovery is radically reduced, why not make the default for the late disclosure of material evidence its inadmissibility at the final hearing, with few escape hatches? Why reward bad litigation conduct? If a party won't take its production obligations seriously or is trying to game the system, why shouldn't they have to pay the price, regardless of the merits of the party's case? Isn't this what a "green" approach to the

civil justice system requires - attach a tangible financial penalty to the social costs of harmful private litigation conduct?

### **Administrative support and infrastructure**

Next, we would have to rebuild the system of administrative support for our courts. The simple reality is that without an appropriate administrative support system, no court system can function. Changing the rules of procedure and filing fees only gets you part of the way – the organization, monitoring and management of the inventory of cases are critical to the success of any civil justice system.

So, let me continue with my “thought experiment”. What if some extra-ordinary event occurred, and one day we woke up to find that all our courthouses had crumbled to the ground and we had to replace every courthouse in this province? What would we re-build in their place? Well, not the edifices we now have. Two questions would have to be asked before any spade hit the ground.

First, how would this newly re-built court communicate with its customers? I daresay the answer won't be: "by paper". Re-casting the flow of data into and out of the courthouse from paper to digital would radically alter the need for physical bricks-and-mortar space.

So, too, with the second, question: what would the new courtrooms look like? That, I suspect, would prompt folks to ask whether we even need courtrooms for all hearings - would the default be some sort of on-line hearing, with attendance in a physical courtroom required only for exceptional circumstances?

And what about the “front office” and “back office” functions of the court – how would they change? Would the “front office” of a courtroom change so that courtroom staff who serve as the interface between the litigants and the judge more closely resemble the stable, registrar-centred teams which support judges in the U.S. District Courts, thereby doing away with our current model of “musical chairs” staff which harkens back many decades?

And would one re-build courthouses with “back offices” in which almost as much space is taken up in storing paper records as is available for real, live human beings to work in and serve the public? I think the answer is self-evident.

### **Conclusion**

In conclusion, in order to make Ontario’s public civil justice system the best in North America, we have to re-think the key assumptions upon which our system has been built. Tweaking the *Rules of Civil Procedure* won't get us there. And although it is most certainly necessary to continue to implement incremental improvements to our existing system in the short-term, ultimately a more radical re-construction of the system will be required.

The Bar, including organizations such as the Ontario Bar Association, needs to start thinking about such a radical re-construction and to pose some of the questions I have identified, not only

for the betterment of our public civil justice system, but for the Bar's own self-preservation. The sands upon which our system of justice rests are beginning to experience a tectonic shift, and I suspect they will shift with increasing speed over the next 10 years.

My thanks to the executives of both sections for inviting me to your dinner tonight. Judges always cherish the privilege of being given the opportunity to talk with members of the Bar.