Four proposals for a faster, cheaper (and still good) civil justice system

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There is a saying in project management that, in delivering a product, it is only possible to provide two of the following three qualities: fast, cheap, and good. Unfortunately, our civil justice system is delivering only one of the three: good adjudication. It is falling short on delivering a product that is either fast or cheap (or at least affordable). This article proposes four changes that aim to improve the speed and affordability of justice in Ontario, all with the goal of not sacrificing the quality of adjudication:

1. making deadlines meaningful;
2. placing time limits on hearings;
3. expanding single-judge case management; and
4. increasing prejudgment interest.

In choosing these recommendations, we have ignored the low-hanging fruit of civil justice reform – the blindingly obvious changes everyone agrees are necessary, many of which are being implemented in response to COVID-19. These include videoconferencing, service by email, virtual commissioning, and electronic scheduling. We have also sidestepped more sweeping proposals – such as a complete rewrite of the *Rules of Civil Procedure*, changing the default civil proceeding from an action to an application or a "one-judge" system where a single judge hears both pre-trial motions and the trial – on the reasoning that such a radical rethink is unlikely to be adopted any time soon.

The changes suggested here are incremental and achievable ones that can be accomplished within the general framework of the current Rules. The perspective offered is that of two lawyers practising in the private civil litigation bar, a perspective informed by the reality that the two things clients want (after winning, of course) are speed and economy, and that the value proposition offered by lawyers and the court system must go beyond brilliant oratory and wise decision-making and take care of the more mundane matter of getting disputes resolved in a reasonable amount of time for a reasonable amount of money.

Make deadlines great again

Those who act for plaintiffs often find themselves playing the same role in the same movie, time after time: plaintiff's counsel trying to push a case forward to resolution rapidly; defence counsel throwing up roadblock after roadblock, and sometimes seeming to make a sport of how much his or her client can delay the proceeding. For those who haven't seen this movie, Spoiler Alert: the plaintiff's need for speed loses out to the defendant's desire for delay almost every time.

The ways in which defence counsel can slow down the pace of litigation are truly limitless:

- "My schedule does not permit delivery of a defence within 30 days."
- "I won't produce my affidavit of documents until we agree upon a discovery plan."
- "I'm not available to attend discoveries for seven months."
- "It's premature to schedule the mediation until all undertakings are answered and any refusals motion is decided."

If we really want faster resolution of disputes, we need to arm plaintiffs with rules that allow them to keep the litigation moving. The current rules *do not even set a deadline* for most steps in an action. There is no deadline, for example, for serving an affidavit of documents. Ditto for attending at discovery or mediation. And if the plaintiff wants to bring a motion to force the defendant to do these things, the earliest he or she can even get into court is often

months down the road. Challenging a defendant's delay tactics is thus often futile, as it merely ends up causing even more delay.

So how do we level the playing field between the heel-draggers and the hot-to-trots? Let's start by implementing deadlines for the major steps in a case. Exchange of productions? Sixty days after the close of pleadings. Discoveries? Sixty days after that. Mediation? Within 120 days of discoveries. Such deadlines could be extended, but only if all parties consented or the court so ordered. Otherwise, a deadline should be treated as the dictionary defines it: "a date or time before which something *must* be done."

While we're at it, let's create a mechanism that allows parties to resolve scheduling disputes without the need for a full-blown motion. Why not resolve these disputes by telephone conference? Or by emailed submissions, to be supplemented by telephone conference only if necessary?

Some US states set minimum speed limits for those driving on their freeways and ticket motorists who fail to heed them. We need to think of Ontario's courts in the same way. We need, in our view, a minimum litigation speed limit, and a system of enforcement that makes non-compliance costly.

Your time is up

Court time is a finite and valuable resource that needs to be carefully managed. Right now, this management often does not occur because few limits are placed on the time available for argument. This has two negative effects: it consumes court time that would otherwise be available for the timely hearing of other matters, and it increases legal costs for litigants. Stricter time limits should be put on hearings, and time limits, once established, should be followed.

Court time is generally allocated based on lawyers' estimates of how much time is required, often without any limit on the amount of time granted. Counsel will often be pushed to increase time estimates on the grounds that the time required has been underestimated. Why not simply hold counsel to the estimates provided? Or why not go one step further and push counsel to *decrease* time estimates where appropriate?

The principle of proportionality – that the resources dedicated to a dispute should be commensurate with what is at issue – is now considered a central part of virtually all aspects of civil litigation. Proportionality should be considered a key part of scheduling by taking into account both what is at stake in the proceeding as a whole and, for motions, what is at stake on the motion. Some types of motions consume a totally disproportionate amount of court time relative to their importance. Production-related motions, particularly undertakings motions, are a notorious culprit. It is not uncommon for such motions to take hours of court time and preparation time in return for little payoff.

The imposition of time limits is not a foreign concept. Factums are always subject to page limits and everybody finds a way to stay within them. And we need look no further than the Court of Appeal to see that strict time limits work just fine for oral hearings. A hearing at the Court of Appeal is as important as it gets: in almost all cases, it will be a final determination of the dispute between the parties.

The natural objection to the imposition of time limits is that it unfairly limits a party's ability to present its case. For motions, this objection is unpersuasive given that the judge will have all the motion materials, together with a factum in any case where a party wants to provide one. More importantly, in most cases it is very unlikely that additional time for argument would have an impact on the result.

The issue is more difficult when it comes to trials. What if there were other important evidence that was not heard which might have changed the outcome of the case? This is a valid concern, but it does not justify providing limitless time for trials. Trials are getting longer. Many reasons for this have been identified: the pervasiveness of electronic evidence, the increasing use of experts, the complexity of cases, and a shortage of trials leading to a lack of trial experience among counsel. Whatever the reason, the judicious use of time limits is a solution to this problem. An openness to doing so was recently expressed by Justice Edwards in *Davies v Clarington*, one of the longest personal injury trials the province has ever seen. As His Honour observed:

> One of the tools I suggest that will have to be under consideration in any civil trial is the imposition of time limits. Most litigants cannot afford a trial that lasts two or three weeks, let alone twenty-six weeks. Our judicial system simply cannot afford to allocate the time now taken up by many civil trials, where the amounts at issue (while significant to the litigants) does not correlate to the costs of the trial. … [T]he time has come where trial judges may feel it appropriate to take a firmer control of the precious time available to conduct a civil trial.[1]

Where the cost of litigation exceeds what is at issue, we have a serious problem. Giving less court time to smaller cases does not mean the cases are less important. Perhaps counterintuitively, tailoring allocation of court time to the size of the dispute recognizes the importance of smaller cases by ensuring they can be litigated rather than squeezed out of a system that imposes an unacceptable level of expense. In other words, while the size of a dispute should not determine the quality of justice a litigant receives, we should recognize that the cost of litigation is an important benchmark of the quality of justice.

Too many judges spoil the broth

Accessible and informal case management is key to unclogging case progress. Recent years have seen major strides in this area. Case conferences are now available on demand in Toronto and, like their model, the 9:30 appointment on Toronto's Commercial List, have proven to be highly effective. Case management conferences by video conference or teleconference should be made available on demand on short notice everywhere. We should build on this by providing ongoing single-judge case management where a party requests it.

There are a multitude of procedural disputes that can be dealt with informally but still require some judicial involvement. Right now, many of these issues snowball into avoidable motions. Case conferences promote the smooth progress of litigation because their availability immediately focuses attention on a procedural roadblock that might otherwise linger on the back burner, impeding the progress of a case. If a motion or threatened motion is months away, it is easy to put off thinking about the issue. If it is to be addressed at a case conference in a matter of days, the problem gets dealt with. Unreasonableness or unresponsiveness from counsel is often quickly remedied by the prospect of a meeting with a judge. And let's be honest: a motion, with all its formality, cost, and delay, is a terrible default procedure for resolving many if not most interlocutory procedural disputes.

Case conferences, in contrast, are short and to the point, and they almost always serve some useful function. Even where the party that has requested the conference does not get what it wants, a case conference will often result in a timetable being set for the next steps in the action. In many cases

a 15-minute teleconference can accomplish more for case progress than many hours spent in court on a motion. And even where nothing is accomplished, who cares? It is only 15 minutes and has likely saved much more time from being wasted elsewhere.

Once a case conference is initiated, the same judge should preside over future case conferences, any motions, and, once all contested pre-trial issues have been resolved, the pre-trial. This "single-judge" model will save judicial time because the judge will not have to relearn the file and will have some familiarity with the parties and issues. It will allow for more effective adjudication because this familiarity will give judges the pulse of this litigation, which will facilitate the file being moved forward.

This more hands-on approach to pre-trial adjudication can move beyond judges simply deciding a narrow, interlocutory issue that has been submitted to the court. As Justice David Brown recently wrote in this Journal:

> Single-judge case management is a useful means to control access to judicial time while moving a case toward a resolution on the merits expeditiously and at a reasonable cost. Single-judge case management offers huge potential for creative innovation on how best to use judicial time.[2]

This is a refreshing take on the more traditional view of judging in an adversarial system as a process in which the judge is impassive and detached from the case, with the parties largely left to their own devices in presenting their disputes to the court for adjudication. It is also a perspective that is consistent with the "culture shift" the Supreme Court called for in *Hryniak*.

Following *Hryniak* there has been a recognition that increased judicial management of proceedings is an important tool for ensuring proportionality and promptness in litigation. Appellate jurisprudence since *Hryniak* has to a large extent poured cold water on the idea that partial summary judgment to narrow issues is the best way to do this. But this outcome should not limit the scope for active judicial management through case conferences.

The single-judge case management model is common across the United States, was endorsed in an influential report on case management in Canadian civil litigation by the American College of Trial Lawyers,[3] and, in part in reliance on this report, has been adopted in Manitoba. There is currently a pilot program in place in Ontario where parties can request, on consent, that a case be placed into single-judge case management, and consultations are underway with respect to whether there should be an expansion of this program.[4]

There are potential objections to expanded case conferencing and single-judge case management: that it will lead to parties running to the judge at the drop of a hat where there is no real need to do so; that, after an initial adverse decision, a party may not want the same judge handling the subsequent disputes in the case; or that there will be difficulties with judicial calendars and parties not wanting what they perceive as an important procedural dispute to be dealt with informally. On balance, none of these considerations outweighs the clear benefits of the change: faster and less expensive adjudication.

Make prejudgment interest sting

Prejudgment interest (PJI) in Ontario is currently 0.5 percent. Over the years 2009–19, the average prejudgment interest rate in the province was 1.21 percent. In that same period, the S&P 500 and

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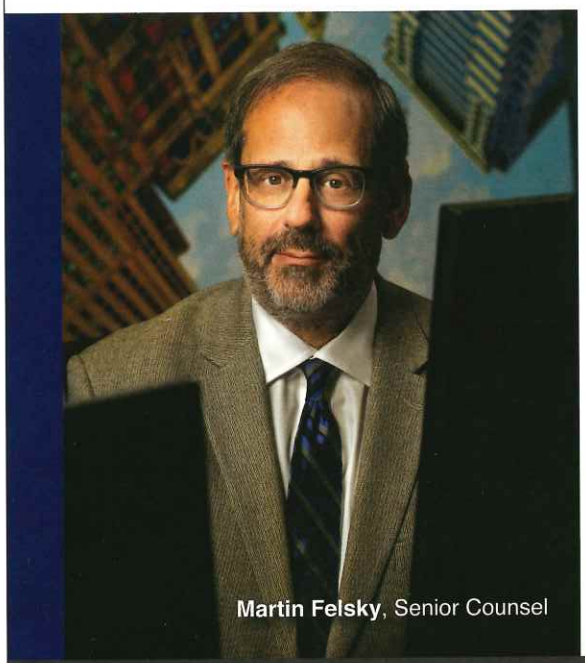

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the Dow Jones Industrial Average grew at annual rates of, respectively, 14.70 percent and 15.03 percent. There is something wrong with this picture.

Adopting such preposterously low rates of PJI simultaneously creates a real risk for injustice and represents a lost opportunity to disincentivize litigation delay. The risk for injustice is obvious. Imagine your business partner swindled you out of a million dollars and it took two years of litigating to finally obtain judgment. Your crooked erstwhile partner in that two-year period could have invested your cash and easily earned a return of 10 percent per year, bringing home a cool $200,000 in gains. You, meanwhile, were expecting to do the same with that money, and are now $200,000 poorer as a result. How much PJI are you entitled to after winning in court two years later? At today's rate, $10,000. Even at the highest rate of PJI in the past 10 years, being 2.0 percent, you would receive $40,000. Crime may not pay, but torts and breaches of contract evidently do.

Perhaps even more important is the lost opportunity to disincentivize delay. Many defendants in litigation seem to operate under the default assumption that the longer the litigation takes, the better. Defendants seem to believe that the more it costs the plaintiff to litigate, and the longer it takes, the more likely he or she is to give up or compromise. Whatever the motivation, defence delay tactics come at virtually no financial cost to the defendant. If these tactics drag matters three years longer than necessary, the defendant merely has to pay an additional three years of non-compounding interest that might as well be 0 percent.

Imagine, instead, a litigation model in which prejudgment interest was 10 percent. One suspects this would fundamentally change the mindset of defendants. Three years of delay tactics would now come with a price tag – a 30 percent higher claim.

Of course, many would fear that such a rate would simply incentivize plaintiffs to drag their heels. Why litigate quickly when one's claim is achieving a plum rate of return? But anyone who thinks this way has not represented plaintiffs in Ontario's civil justice system. Unless you have sociopathic tendencies, litigating in this province is not fun. It is extraordinarily expensive. It is emotionally draining. It is stressful, and disruptive, and uncertain, and not something anyone of sound mind wants to prolong. It is difficult to imagine a plaintiff – a wrongfully dismissed employee, say – sitting back and enduring this process for years longer than necessary all to pocket more interest from the defendant.

There is, in any case, a ready means to deter any such conduct. We could set the default PJI rate at, say, 5 percent, but vest a discretion in the trial judge to deviate from that rate in appropriate circumstances. If the plaintiff had delayed the proceeding by absconding to Central America for a year instead of attending discovery, the court would reduce the rate paid. Trial judges already accept submissions on prejudgment interest, so this would not put the courts to additional work.

In short, if we want to keep incentivizing delay by defendants, we should maintain interest at their current rates. But if we are looking to light a fire under defendants' behinds, prejudgment interest would appear to be a ready source of ignition.

Conclusion

Economists are fond of reminding us that there is no free lunch: to get something we like, we usually have to give up something else we like. But the reforms proposed here are as close to free as they come. They will not require hiring more judges or building more courtrooms, or any significant surrendering of procedural rights. They simply require that we stop giving speeches about access to justice and start making concrete rule changes to create it.

Notes

1. *Davies v The Corporation of the Municipality of Clarington*, 2018 ONSC 4370, at para 462.
2. The Honourable Justice David M Brown, "Red block, yellow block, orange block, blue: With so much competition, what do we do?" *The Advocates' Journal*, 38 Adv J No 2, 14–19 (Fall 2019).
3. "Working Smarter but Not Harder in Canada: The Development of a Unified Approach to Case Management in Civil Litigation," Judiciary Committee of the American College of Trial Lawyers, 2016.
4. Some versions of one-judge case management, including Ontario's pilot program, envision more radical changes, including that a trial date be set at the outset of the action and that the judge responsible for case management be the judge who hears the trial. Although these changes are certainly worth considering, we will beg off dealing with them here on the grounds that they are not the kinds of obvious "no brainer" solutions we aim to focus on.