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INTERIM REPORT OF THE SUBCOMMITTEE ON EXPERT EVIDENCE TO THE CIVIL RULES COMMITTEE ON THE LATE SERVICE OF EXPERT EVIDENCE REPORTS

I. INTRODUCTION

In recent years, the Superior Court of Justice's ability to settle and to try civil cases has come under increasing pressure. The reasons are many but two of the most significant are the Supreme Court of Canada's insistence that criminal cases be tried expeditiously as a matter of utmost priority because they engage the liberty of the subject, and the increasing devotion of system resources to family law cases. These competing demands for judicial time and attention make it critical for the civil justice system to operate as efficiently as possible, while meeting the objective set out in r. 1.04 of the *Rules of Civil Procedure*: "the just, most expeditious and least expensive determination of every civil proceeding on its merits" in a manner that is "proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding."

The late delivery of experts' reports contrary to r. 53.03 has vexed the Bench and the Bar for years. Chief Justice Morawetz and Associate Chief Justice McWatt, along with Justice Myers and other Superior Court judges, have brought to the attention of the Civil Rules Committee the ways in which the late service of experts' reports wastes scarce judicial resources and challenges the system's ability to meets its objectives.

First, counsel are increasingly arriving at pre-trial conferences without any or all of the experts' reports that will be required to effectively pre-try and to try the case. This wastes the pre-trial judge's time and often requires another pre-trial conference. Second, the late service of experts' reports sometimes leads to the last-minute adjournment of civil trials. When a civil trial is adjourned, it is not always possible to simply schedule another trial immediately and judicial resources are squandered, quite apart from the delay in justice.

The Civil Rules Committee therefore mandated the Expert Evidence Sub-committee, as a matter of urgency, to consider these increasingly problematic practices and to propose ways to address them. This interim report sets out and explains the Subcommittee's proposals.

The members of the Subcommittee are: Justice Peter Lauwers, Justice Mark Edwards, Justice Darla Wilson, Ranjan Das, Brian Bangay, Todd McCarthy, Stephen Wojciechowski, Jim Vigmond, Tom Curry, and Barbara Legate. We were assisted by Jennifer Anderson of the Secretariat, Lauralee Bielert, counsel for the Court of Appeal, and Caitlin Leach, law clerk. We met virtually on eight occasions from April 26, 2021 and also consulted with the Bar and with users of the civil justice system. A summary of the results of the consultation is attached as Appendix A. It lists the organizations we consulted, all of whom took the task seriously and who provided valuable feedback.

II. THE HISTORY

Rule 53.03 of the *Rules of Civil Procedure* sets out detailed rules that parties intending to call expert evidence at trial must follow. The rule first came into force in 1985 and required a party intending to call an expert witness to serve the expert's report at least ten days before the start of trial. This proved too short a time and, in 1997, the rule was changed to require experts' reports to be served at least 90 days before trial, responsive reports to be served at least 60 days before trial, and supplementary reports to be served no less than 30 days before trial. No expert was permitted to testify, except with leave of the trial judge, unless a report was served under the rule. The rule was amended again in 2010 to move back the service dates of experts' report so that they relate to the date of the pre-trial conference, and not the trial.

These successive changes reflect the policy thrust expressed by the editors of *Holmested and Watson*:

> The requirement of early disclosure is consistent with the modern goals of civil litigation, which include, among other things, full and early discovery and the elimination of "trial by surprise," the promotion of settlement and the use of trial only as a procedure of last resort, and effective case management which requires that not only the parties but the court understand the issues and complexities of the case.[1]

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[1] *Holmested and Watson: Ontario Rules of Civil Procedure,* Commentary on the Rules of Civil Procedure, at s. 8, 53§1.

III. THE PROBLEMS

We consider trials and pre-trials in sequence.

(1) Late-served Experts' Reports and the Trial

As noted**,** the late delivery of experts' reports sometimes leads to the last-minute adjournment of civil trials. Because it is not always possible to simply schedule another trial immediately, judicial resources are squandered.

The context is set by the operation of the schedule for the service of experts' reports set out in r. 53.03. The consequence for any failure is prescribed by r. 53.08. Currently:

- Rule 53.03(1) requires a party who intends to call an expert witness at trial to serve the expert's report not less than 90 days before the pre-trial conference.

- Rule 53.03(2) requires a party who intends to call an expert witness at trial to respond to the expert witness of another party to serve their expert's report not less than 60 days before the pre-trial conference.

- Rule 53.03(2.2) provides that within 60 days of an action being set down for trial, the parties must agree to a schedule setting out dates for the service of experts' reports in order to meet these requirements, unless the court orders otherwise.

- Rule 53.03(3) provides that an expert may not testify, except with leave of the trial judge, if the substance of their testimony has not been set out in a report served under r. 53.03, a supplementary report served no less than 45 days before trial, or a responding supplementary report served no less than 15 days before trial.

- Rule 53.03(4) provides that the time provided for service of an expert's report under r. 53.03 may be extended or abridged by the judge or case management master at the pre-trial conference or a r. 77 conference, or by the court, on a motion.

Rule 53.08(1) applies to the failure to serve an expert's report as required by r. 53.03(3). The expert evidence is only admissible with leave of the trial judge:

> If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2) [which includes the failure to serve an expert's report], leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of trial. [Emphasis added.]

A number of cases have grappled with the mandatory wording of r. 53.08(1).[2] Because the rule states that "leave shall be granted," trial judges have been reluctant to refuse the admission of late reports and have yielded to requests to adjourn long-scheduled trials. This was the observation of the Honourable Coulter Osborne in his report on civil justice reform in 2007 and it remains true today.[3] His report led to various amendments to the Rules in 2010, including the amendments to r. 53.03 mentioned earlier.

Justice Osborne commented specifically on the problem of late service:

> There will still be those who will seek late requests to file expert reports on the eve of trial. During Review consultations, some judges said they feel compelled to permit late delivery of expert reports given the language of 53.08(1), which states leave "shall" be granted unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial. Since time must be granted for the filing of reply reports, trial dates often have to be rescheduled. Thus, many proposed that the word "shall" be replaced by the word "may" in rule

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[2] *Pearsell v. Welsh*, 2011 ONSC 4582, *per* MacKinnon J.; *Gardner v. Hann*, 2011 ONSC 3350, *per* Wilson J.; *Prabaharan v. RBC General Insurance Co.*, 2018 ONSC 1186, *per* Stinson J.; *Balasingham v. Desjardins Financial Security*, 2018 ONSC 1792, *per* Firestone J.; *Stadnyk v. Dreshaj*, 2019 ONSC 1184, *per* Firestone J.; *myNext Corporation v. Pacific Mortgage Group Inc.*, 2019 ONSC 4481, *per* Wilson J.

[3] The Honourable Coulter Osborne, *Summary of Findings and Recommendations of the Civil Justice Reform Project*, submitted to the Attorney General in November 2007: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/. A summary of Justice Osborne's report is contained as an appendix along with the discussion in several cases where courts have grappled with the rule.

> 53.08(1), so that judges do not feel compelled to allow late delivery of expert reports. I endorse this change, which would provide flexibility in appropriate cases and at the same time signal that allowing late delivery of expert reports should not be taken for granted.[4] [Emphasis added.]

While there is no statistical information to substantiate the views on the effects of late service expressed by the Chief Justice, the Associate Chief Justice, the Regional Senior Justices' Council and other Superior Court judges that prompted the Subcommittee's mandate, we accept their view that the situation requires repair.

The Proposed Solution for Trials

We believe that the authority of the trial judge to effectively address the problem of late-served experts' reports and consequential requests for adjournments must be enhanced to discourage such requests.

We propose two key changes to the trial judge's authority to admit late-served experts' reports, aimed at adjusting the risk calculus for the parties. First, the language should be changed from "leave shall be granted", as appears in r. 53.08(1), to "leave may be granted", as Justice Osborne recommended, enhancing the trial judge's authority to refuse admission, but only with respect to late-served experts' reports.

Second, we recommend that the onus be reversed so that a non-compliant party seeking to have a late-served report admitted will be required to satisfy the trial judge that there is a reasonable explanation for the failure to serve a report on time, and also that admitting the evidence would not cause either prejudice to the opposing party that could not be compensated for by costs or an adjournment, or undue delay in the conduct of the trial.

The Subcommittee believes that these changes will reduce the incidence of such requests and consequent late adjournments.

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[4] Osborne Report, at p. 78.

(2) Late-served Experts' Reports and the Pre-trial Conference

Effective pre-trial conferences are important to the efficient operation of the civil justice system. Settlement success rates at pre-trial conferences are often critical to the ability of the system to try cases that cannot be settled.

As noted, the problem is that counsel are increasingly arriving at pre-trial conferences without any or all of the experts' reports that will be required to effectively pre-try the case, wasting the pre-trial judge's time and often requiring another pre-trial conference.

Rule changes to catch this practice proved to be more difficult to design. This is because there are some quite innocent explanations for the late service of experts' reports. Sometimes, the experts themselves fail to meet their deadlines. Other times, the time between the pre-trial conference and the trial can be a year or more, which in a medical malpractice or personal injury case makes an expensive expert's report, prepared for the pre-trial, useless for trial. In addition, some experts' reports are not needed for an effective pre-trial although they will be necessary for the trial. Economic loss reports sometimes fall into this category.

To encourage more effective pre-trial conferences without undermining the ability of the parties to manage their own cases, we propose several changes.

First, we propose a new rule, r. 50.03.1, to create a process to address the situation expeditiously where it appears that an expert's report might not be ready for the pre-trial conference. The new rule would require each party to serve and file, at least 60 days before the pre-trial conference, a certificate of readiness stating whether the party has served or intends to serve a report of an expert witness within five days of the pre-trial conference and stating the reason for the absence of the report.

Second, a party who receives a certificate of readiness and who believes that an expert's report is required for an effective pre-trial may cause the court to convene a virtual case-conference for the purpose of establishing a timetable for the delivery of reports. The judge or case management master may not adjourn the trial for purposes of accommodating the timetable, although the pre-trial conference may be rescheduled to a later date that does not require an adjournment of the trial. Similarly, parties may agree to vary the time requirements in rr. 53.03(1) and (2) on consent, provided that doing so does not affect the scheduled date of the pre-trial conference or the trial. However, a timetable

established by a judge or case management master may not be varied by the parties on consent.

The experience during the pandemic has persuaded members of the Subcommittee and those consulted that a virtual case conference process would be sufficient to police the issue. This would be the exclusive means for obtaining an extension of time for service of experts' reports. A party would no longer be permitted to bring a motion seeking such an extension.

Third, we propose giving the presiding judge or case management master authority to order the costs of the pre-trial conference or the case conference and make them payable promptly on a substantial indemnity basis where a party, without reasonable explanation, did not serve the report of an expert witness on a timely basis.

Fourth, the enforcement provision in new r. 53.03(12) is that neither a late-served expert's report nor the evidence of the expert is admissible without leave of the trial judge. Because we recognize that some experts' reports are not needed for an effective pre-trial but will be necessary for the trial, we propose to permit the presiding pre-trial judge or case management master to order under rr. 50.07(1.1), (1.2) and (1.3) that such reports will not be inadmissible at trial even though they were served just before the pre-trial conference or at a later date specified by the order. In such circumstances, parties should not have to worry that the trial judge might exclude the expert evidence on that basis alone.

(3) Miscellaneous Changes

There are incidental rule changes proposed that are self-explanatory.

Lawyers have asked for trial adjournments in order to obtain a defence medical examination. We propose that r. 33.01 be amended to require notice to be provided no later than 60 days after the trial record is filed.

Lawyers have argued that a medical report under r. 33.06 is not an expert's report and that it is not bound by the same service deadlines. We propose amending the rule to provide that medical reports are to be served according to the schedule for other expert witnesses.

(4) Other recommendations beyond the Subcommittee's mandate

In the course of our consultations a number of other suggestions were made that fell outside the Subcommittee's mandate.

(a) Pre-trial Conferences

The consensus view is that for maximum effectiveness, pre-trial conferences should be scheduled no earlier than 90 days before a scheduled trial. Earlier dates require expensive experts' reports to be redone for trial for personal injury cases and medical malpractice cases especially, imposing additional costs for no benefit. Pre-trials conferences that are scheduled months in advance of the trial are useless and this practice should cease.

(b) Running trial lists and sittings

Some jurisdictions in Ontario have running civil trial lists where, too frequently, long-scheduled trial dates are missed in favour of criminal trials or family trials. In the Subcommittee's view, long and complex civil trials do require their own trial list to be managed properly. But some regions have found that semi-annual civil sittings, in which most if not all trial judges participate for a short time, work to reduce the backlog of civil cases considerably, particularly since scheduled trial times concentrate the minds of parties and cause them to focus on settlement. Regions that do not have civil sittings should consider instituting them

(c) Case management

The pandemic has demonstrated that active virtual case management is now technologically feasible. One format is "light-touch" case management to address specific problems. Another format is case management from the inception of a file. Conducting conferences virtually could be handled expeditiously, avoiding the need for, and the cost of, the physical attendance of parties and the judge. This option should be studied by the Civil Rules Committee, perhaps in part by means of pilot projects.

(d) Pre-trial Memoranda

The practice around Ontario is inconsistent. Some regions require experts' reports to be filed with the pre-trial brief but others prohibit it. In the Subcommittee's view, there should be consistency regarding the length and format of pre-trial memoranda. Parties should be permitted to file experts' reports or excerpts of experts' reports on key issues. The settlement function of pre-trials is otherwise undermined.

(e) Bifurcation

The letter from Chief Justice Morawetz that led to this Subcommittee's mandate also proposed that the Rules be amended to permit bifurcation without consent of the parties, as is presently required. This part of the Chief Justice's letter has not yet been addressed by the Civil Rules Committee, and the Subcommittee believes that the issue should be studied. Bifurcation has the potential to reduce the length and complexity of trials.

(f) The need for education and training

We believe that the problems these proposals address can be partly attributed to the fact that the civil bar is vast and includes many untrained and inexperienced lawyers. The bar must be better educated about the Rules of Civil Procedure and trained in their use

The text of the proposed amendments is attached as an Appendix B