



The Advocates' Society La Société des plaideurs

June 7, 2023

VIA EMAIL

The Honourable Justice William S. Chalmers
Ontario Superior Court of Justice
361 University Avenue
Toronto, Ontario M5G 1T3

The Honourable Justice Darla A. Wilson
Ontario Superior Court of Justice
Osgoode Hall
130 Queen Street West
Toronto, Ontario M5H 2N5

Dear Justice Chalmers and Justice Wilson:

RE: Delay in Scheduling Civil Motions in Toronto

The Advocates' Society writes to you in your capacity as team leads for the Toronto Civil List and as co-chairs of the Toronto Civil Bench and Bar Committee. We greatly appreciate the opportunity to have our representative, Hilary Book, participate in the important work of the Committee and contribute to improving the administration of civil justice in the Superior Court of Justice in Toronto.

We are writing further to the discussion that took place at the Committee meeting on March 27, 2023 relating to the delays in scheduling civil motions. We know that the Court is aware of this problem and trying to address it. In addition, we understand that Chief Justice Morawetz is leading an overhaul of the *Rules of Civil Procedure*, which we are confident will ultimately reduce delay and streamline proceedings.

However, this remains an issue of serious, urgent concern to our members who practise in the Toronto Superior Court of Justice. We have received numerous reports from these members that they are experiencing lengthy delays when scheduling short and long motions in civil proceedings. Available dates for short or long motions are over a year away. This delay is having a serious impact now on access to justice and public confidence in the justice system in Ontario, and we believe that steps must be taken in the short and medium term to address delay in booking civil motions in Toronto while more long-term solutions are developed.¹

We write to highlight the impact of delay, and to suggest potential solutions for the Court's consideration that may be implemented within the existing *Rules* and resources.

A. The Impact of Delay

The inability to have a motion heard by the Toronto Superior Court of Justice within a reasonable period of time is having severe deleterious effects on access to justice and public confidence in the administration of justice. In an ideal world, parties would act reasonably and resolve most issues (especially procedural

¹ In making these submissions regarding delays in scheduling Toronto civil motions, The Advocates' Society does not wish to minimize the delays that litigants are experiencing when booking motions in other types of matters throughout Ontario. We would be pleased to consult with the Court to develop potential solutions to these acute delay issues as well.

issues) without the need to bring a motion. However, delay in obtaining hearing dates can exacerbate unreasonable behaviour. Parties may take unreasonable positions because they know that the other side has little meaningful recourse. Further, even where all parties are acting reasonably, there will always be some issues that cannot be resolved without the Court's assistance.

Whatever the reason for the motion, the advancement of the entire litigation (including settlement discussions) is often stalled while parties are awaiting the hearing and determination of a procedural or dispositive motion. Costs are thereby increased. In addition, minor issues left unresolved can become major issues that ultimately require significant judicial resources to address.

Our members report that their clients (and their insurers) are frequently astonished and dismayed when informed about the delays in getting a hearing date for motions in their cases. In our view, this situation has unfortunately reached crisis proportions and merits immediate and corresponding action.

We know that Ontario's justice system has long been under-resourced and that the COVID-19 pandemic only intensified the strain. To address these issues, The Advocates' Society has called on the Federal Government to fill the many vacancies on superior courts across the country in a timely manner.² We have also made a submission to the Ontario Government encouraging the allocation of greater funding for the courts in the 2023 budget, including increased investments in court staff and court technology.³

The Advocates' Society also proposes for the Court's consideration the ideas below to address the delay in scheduling civil motions. We believe they could be implemented within current *Rules* and with minimal or no additional resources.

B. Potential Short- and Medium-Term Solutions

1. Expanding the Use of Case Conferences

The Advocates' Society recommends that the Court consider expanding the use and availability of case conferences under Rule 50.13 to resolve short motions and applications that do not require a fulsome evidentiary record or extensive legal argument. This could include, for example, motions to set dates or timetables, to compel production of an affidavit of documents, or to compel answers to undertakings or address simple discovery issues.

We appreciate that case conferences require significant judicial resources, but we believe that expanding their use would ultimately save judicial resources by reducing the volume and backlog of motions and short applications before the Court. The experience of our members who practise on the Commercial List and the Estates List is that case conferences are an efficient and effective way of avoiding motions. This effort would be aided by a practice direction from the Court clearly setting out: (1) what matters can and

² The Advocates' Society Letter to The Honourable David Lametti, P.C., M.P., re: Judicial Vacancies and Access to Justice in Canada (December 12, 2022), online: https://www.advocates.ca/Upload/Files/PDF/Advocacy/Submissions/JudicialVacancies/The_Advocates_Society_Letter_to_Minister_of_Justice_re_Judicial_Vacancies_December_12_2022.pdf.

³ The Advocates' Society Letter to The Honourable Peter Bethlenfalvy, M.P.P., re: 2023 Pre-Budget Consultation – Funding for Ontario's Justice System (December 12, 2022), online: https://www.advocates.ca/Upload/Files/PDF/Advocacy/Submissions/Ontario2023BudgetConsultations/Letter_to_Minister_of_Finance_from_The_Advocates_Society_re_2023_Ontario_Budget_Dec_22_2022.pdf.

will be dealt with at a case conference, as opposed to by motion; and (2) the materials to be filed in advance of a case conference.

The successful implementation of this recommendation depends on the ability to book a case conference in a reasonable period of time, with relative ease (perhaps utilizing online scheduling software, as discussed further below).

In addition, if the case conference judge does not resolve the motion or application, we recommend that

- (1) the judge book a motion date rather than leaving it to the parties to book a date afterwards with the civil scheduling unit or in Civil Practice Court, such that the parties leave the case conference with either a disposition of their matter or a date for a motion; and
- (2) the judge set a timetable for the service and filing of motion materials by both the moving and responding parties, which is measured from the date of the case conference. Setting a timetable for the preparation of the motion materials after the case conference will force parties to consider their position on the motion and commit resources to defending it in advance of the motion date, which we expect will lead to more frequent out-of-court resolutions.

2. Improving the Mechanics of Scheduling

Many motions may be resolved or adjourned before the hearing, especially where they are booked a year in advance. We understand that when this happens, it is difficult for counsel and court staff to know what dates have become available. We note with interest that the Court is now using Calendly to schedule short civil motions in Ottawa and Brampton. The Advocates' Society recommends that the Toronto Court adopt the use of Calendly (if the experience in Ottawa and Brampton is positive) or some other scheduling software to make scheduling motions easier and make full use of the Court's existing capacity.

3. Discouraging "Placeholder" Motions

The Advocates' Society understands that one of the causes of delay is that counsel are booking placeholder motions which then do not proceed, causing motion lists to be less than full on the actual day. We recommend that the Court once again start enforcing the requirement that the notice of motion be filed with payment of the motion fee within 10 days after the motion date is requisitioned, as required by the Court's *Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region*.⁴ The use of scheduling software such as Calendly may make it easier from an administrative perspective to enforce this policy.

4. Establishing an Express Motions List

The Advocates' Society recommends that the Court consider establishing a weekly "express motions" day. The Ottawa Superior Court of Justice has established a weekly list for civil motions that fall within the jurisdiction of an associate judge; are on consent or are expected to be uncontested; and typically require

⁴ See Superior Court of Justice, *Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region*, online: <<https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/t/>> (section I.B.4. "Elimination of Placeholder Motions").

five to ten minutes (but no more than fifteen minutes) to hear.⁵ In The Advocates' Society's view, the use of such a list could dispose of a number of minor issues delaying civil matters before the Toronto Superior Court.

5. Offering Virtual Motions Hearings with Judges Outside Toronto

As the Court has recognized by piloting virtual trial sittings for civil, non-jury cases in the Southwest Region, virtual proceedings present an opportunity to mobilize the Court's judicial complement across the province to support busier or more backlogged regions. The Advocates' Society encourages the Court to continue to explore this potential using judges outside Toronto to hear motions virtually in order to diminish the delays in scheduling civil motions in Toronto.

6. Until the Backlog Is Eliminated, Increasing Use of Motions in Writing to Address Procedural Issues

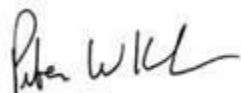
We understand that the turnaround time for motions in writing is significantly shorter than for motions heard orally. While The Advocates' Society is not generally in favour of motions in writing ordered over the objection of one of the parties, we believe the Toronto civil bar would be open to having the Court direct that more matters be heard in writing until the current crisis resolves.

Simple procedural motions that cannot be resolved at a case conference, such as motions compelling answers to undertakings and refusals or motions to set timetables, may be appropriate to be heard in writing. We suggest that if the judge hearing a motion in writing has questions arising from the written materials, a brief case conference with the parties be convened to have their questions answered through short oral submissions, instead of booking an oral hearing for full argument of the motion.

In order for this proposal to be effective, we recommend greater transparency to the parties regarding the expected turnaround time for a motion in writing, and the status of motions in writing that have been filed. The Court ought to proactively advise the parties when the motion has been referred to a specific judge for decision, the anticipated date of disposition, and if the anticipated date of disposition changes.

We would be pleased to discuss this issue with the Court further, or to consult with the Court on the implementation of the potential solutions identified above. Thank you for considering our suggestions.

Yours sincerely,



Peter W. Kryworuk
President

CC: The Honourable Justice Stephen E. Firestone, Regional Senior Judge for the Toronto Region
Hilary Book, Board Director, The Advocates' Society
Vicki White, Chief Executive Officer, The Advocates' Society

⁵ See Superior Court of Justice, *Notice to the Public and the Profession Regarding Civil Matters in Ottawa as of April 19, 2022*, online: <https://cdn.ymaws.com/www.ccla-abcc.ca/resource/resmgr/pp-civlit/OttawaCivilScheduling_revMar.pdf> (section 2 "Express motions").

The Advocates Society's Task Force on Toronto Motions

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