SUPERIOR COURT OF JUSTICE

CIVIL REVIEW PROJECT REPORT

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Overview

The mandate of the Judicial Working Group of the Civil Review Project is to make recommendations reducing wait times on the civil list in Toronto. This report provides initial recommendations for civil long motions and begins to canvas long-term solutions to reduce unacceptable delays in the litigation process. It does so in three sections. First, the report describes the aims and mandate of the Judicial Working Group. Second, it sets out "Phase One" of the Project – initial recommendations to reduce the wait times for civil long motions. Third, it lists suggestions for "Phase Two" of the Project – a broader strategic review with recommendations to be implemented over a longer period of time.

I. The Judicial Working Group

Chief Justice Smith charged Toronto Region with the task of reducing wait times for long motions to within four months by the end of the year. In her remarks for the 2013 Opening of the Courts of Ontario, delivered on September 24, 2013, the Chief Justice stated:

> While we have experienced no significant change in the number of civil proceedings commenced or added to the trial list this year, nevertheless, some centres have had increased wait times to the hearing of long motions and long trials. This issue is already being addressed as our top priority by me, the Associate Chief Justice, and the Regional Senior Judges of the GTA Regions affected by this trend.
>
> Certainly, the Bar has a very important role to play in supporting the court's efforts to control overburdened civil motions and trial lists in the GTA. The Bar's input and insight into these challenges will be most welcome, and its collaboration will be key in resolving this issue. When counsel seek trial or motion dates for matters that are not truly ready for hearing, earlier dates become unavailable for matters that are ready to proceed.
>
> On the court's side, we are engaged in an internal review of our judicial scheduling and assignment practices to identify best practices and to maximize the scheduling of our judicial complement. We are poised to take further steps to ensure that only motions and trials that are truly ready to proceed are placed on the appropriate civil motions or trial list.
>
> In Toronto, RSJ Then has already re-engaged the Civil Bench and Bar Committee to support our judicial commitment to reduce the civil wait times for long motions and trials…

> We have already begun meeting with leaders of the Bar – the Treasurer, Executive Members of the Toronto Lawyers Association, the OBA and The Advocates' Society – to develop a collaborative approach to this problem… We will not rest until we achieve reasonable time periods to the hearing of all civil long motions and long trials in the GTA. This goal, too, we see as an essential deliverable for real access to justice in civil proceedings.

RSJ Then requested Justice Morawetz oversee this review.

A Judicial Working Group has been established consisting of Justice Baltman (Brampton), Justice D. Brown (Toronto), Justice Edwards (Newmarket), Justice Firestone (Toronto), Justice Frank (Toronto), Justice McEwen (Toronto), and Justice D. Wilson (Toronto). Justice Archibald (Team Leader – Civil Long Trial), Justice Low (Team Leader – Civil) and Administrative Master Glustein have also been intricately involved in the review.

The Working Group met on a regular basis with a Task Force made up of representatives of The Advocates' Society, the Ontario Bar Association and the Toronto Lawyers' Association.

Mandate

The Judicial Working Group of the Civil Review Project had a broad mandate. We reviewed practices and procedures and made recommendations designed to reduce wait times on the civil list in Toronto. We reviewed practices and procedures in neighbouring regions of the GTA for comparison. We hoped that certain practices and procedures followed in Newmarket and Brampton could be adopted in Toronto Region as part of our initiative to reduce wait times. Conversely, it is hoped that Newmarket and Brampton may benefit by adopting certain practices and procedures from Toronto Region.

The initial emphasis of the Project was to adjust certain scheduling practices to reduce the wait times for civil long motions. Chief Justice Smith identified this as the first priority item.

The delays experienced at the end of August were unacceptable and threatened to make litigation through courts irrelevant. It was essential that the review produce results that were both immediate and tangible. In the ideal scenario, it would be preferable to conduct a full strategic review before implementing any changes. However, in order for the review to achieve a degree of credibility, the Working Group was of the view that certain scheduling practices had to be modified immediately. The initial recommendations comprise Phase One of this Report. Phase Two is the strategic review. Judges of the Toronto Region and the Task Force were asked to identify areas that they felt should be the subject of review. The Working Group discussed a number of suggestions submitted by the Toronto Judges.

There was overwhelming support for increased case management. Case management is currently available through Rules 37 and 77, but the perception of the Task Force is that it is not readily available. This perception and any reality flowing from this perception had to be addressed. Recognizing that the court has limited resources, the focus of the Working Group was to craft a realistic response to the Task Force and implement a case management system that is credible.

We want to ensure that, as judges, we can deliver a case management system that works. In doing so, it is necessary to have the support of court services, the bar and the judiciary. We believe that the recommendations in Phase Two meet this challenge.

II. "Phase One"— Initial Recommendations

Current Practice (September 2013)

As of September 1, 2013, the regular Civil Team operated on a schedule that required a daily total of eight sitting judges: two judges for long motions, two judges for regular motions, one pre-trial judge, one estates judge and at least two trial judges. Due to non-sit weeks, vacations, seized matters, etc., it was not always possible to accommodate the Team's requirements in-house. As a result, help from other Teams was often required to meet these daily demands. Frequently, one to two judges, either as rovers or from other Teams (CP, Long Trial, Commercial, Divisional Court) were redirected to hear motions for all or part of the week.

Regular motions were booked assuming a collapse rate of 50%. The Motion Scheduling Unit scheduled 20 hours of regular motions per day, based on the following: (i) a court date for the purpose of regular motions was considered to be five hours; (ii) two judges heard regular motions daily; (iii) accounting for the collapse rate, each judge was assigned 10 hours. There were occasions when the collapse rate was less than anticipated which caused some overage in bookings and assignments to be heard.

Long motions were also booked on a collapse rate of 50%. The Motions Scheduling Unit booked an average of 8 hours per day for each judge hearing long motions. After the 50% collapse rate was applied, the Motions Scheduling Unit booked sufficient motions such that, on average, four hours of motions actually proceeded daily for each judge hearing long motions.

Recommendations

1. Long Motions – Additional Scheduling

The long motions statistics for September 2013 demonstrated that additional long motions could be scheduled.

Status: Implemented November 13, 2013

2. Transferring Estate Matters from the Civil List to be Heard by Commercial List Judges

Until November 18, 2013, one judge from Civil was designated on a weekly basis to hear Estate matters.

It was determined that Estate matters could be accommodated on the Commercial List (excluding Consent and Capacity Board Hearings). Activity levels on the Commercial List have decreased due to a decline in insolvency matters.

The immediate result of this scheduling adjustment was that one additional judge could be assigned to hear civil long motions each week. The change was implemented on November 18, 2013.

The Office of the Regional Senior Justice projected that this scheduling adjustment should decrease wait times for long motions and short motions to 15 weeks.

It was anticipated that the Estates Bar would raise issues with respect to the transfer of Estate matters from a Civil List judge to a Commercial List judge. In order to address these anticipated concerns, a meeting of the Estates Users Committee was convened. A number of logistical issues were discussed.

It was also emphasized that the aim of the change was to assist with the overall objective of improving timelines on the Civil List. The Estates Bar was informed that this is "Phase One" of the strategic review and that the effectiveness of the changes would be reviewed after a few months.

Consent and Capacity disputes will continue to be heard on the Civil List. Efforts should be made to ensure that Consent and Capacity hearings are heard by a limited number of judges.

Estate trials will continue to be heard by the Civil Team.

Status: Implemented November 18, 2013

3. Eliminating "Placeholder" Applications and Motions

A practice developed whereby parties could book an application or motion without having to file a record. This practice developed due to long wait times and was not consistent with best practices. If a party is intent on bringing an application or motion, they should be in a position to file the Notice of Motion or Application when they obtain the appointment or shortly thereafter.

The profession was advised, on November 13, 2013, of the requirement to file the Notice of Motion/Application within 10 days, failing which the date requested for the motion would be vacated. The profession was also advised that dates for existing motions would be vacated if the Notice of Motion was not filed by January 3, 2014.

Status: Implemented – November 13, 2013

Results

The implementation of the above Recommendations resulted in a significant reduction in wait times for both long motions and short motions such that the wait times were considered to be in the acceptable range as of December 31, 2013.

III. "Phase Two" – Strategic Review

Phase Two is the strategic review of recommendations that can be implemented over the next few months. These recommendations have been developed in consultation with the Task Force of Bar Representatives. The Bar Representatives have been constructive and thorough in their comments. Submissions from The Advocates' Society, Ontario Bar Association, Toronto Lawyers' Association and The Holland Group were considered. In addition, the Working Group has reviewed a number of suggestions submitted by judges and Bar representatives.

Mission:

The Joint Working Group and the Task Force acknowledge that the court has limited resources. The number of judges is fixed. The size of the support staff is not likely to increase and the financial resources allocated to the administration of the courts are not likely to increase. Consequently, the strategic review is directed at increasing the efficiency and effectiveness of the courts.

Our mission is to facilitate the administration of justice and to develop initiatives designed to reduce the time and the cost it takes a proceeding to be resolved. These initiatives are directed to all aspects of the proceeding, whether it is an application or action. We have to ensure that the court's resources are utilized to further a timely and cost-effective resolution of proceedings.

1. The Importance and Scope of Active Case Management

It is recognized that active judicial management is often capable of fostering earlier resolution of proceedings. This does not mean that there will be judicial case management in all cases. Case management is not required in all cases. In many cases, counsel are able to self-manage. However, there are cases where supervision is required. As the Honorable Jack Zouhary commented in an article entitled "Ten Commandments for Effective Case Management", *The Federal Lawyer*, March 2013 – "Case management is all about prioritizing time and resources – devoting attention where needed … each case is unique. The justice system needs to be flexible and considerate of lawyers and parties so that cases can proceed efficiently and cost-effectively."

Case management is more than just a scheduling tool. It is a management tool that directs parties to focus on the significant issues involved in the dispute – such that a framework for the adjudication or resolution of the dispute can be scheduled on a timely basis.

Case management means different things to different people. It is essential that all parties acknowledge we do not have the resources for each proceeding to be case-managed, nor does each proceeding require case management. As noted by D.M. Brown J., Rule 77 contemplates that in most proceedings case management will be "light handed" or "light touch", with resort to more intensive case management when required. Rule 77 describes a system "that provides case management only of those proceedings for which a need for the court's intervention is demonstrated and only to the degree that it is appropriate". It is expected that each judge will develop her or his own style of case management.

The aim is to develop recommendations that can lead to achievable goals in Toronto. It is hoped that the comments below can assist in developing a "road map" to this end.

- Any case management initiative must be unique to and take into consideration the "motion culture" which exists in Toronto.

- The type of case management will vary depending on the type of case being litigated, *i.e.* personal injury, negligence versus contractual dispute. It is important to identify what the case management needs of each particular case.

- It is necessary to develop criteria to determine which cases should be targeted for case management and what such case management will consist of.

- It is important to recognize that:
  (a) Not every case requires case management.
  (b) Different cases require case management at different times.
  (c) Certain "markers" could be identified to determine which cases require it, at what stage they require it, and what kind of case management a case requires, *i.e*. "light touch" etc.

- It is important to recognize that too much case management at the wrong time could actually be counterproductive.

- It is important to consider the prior case management system in Toronto and why it did or did not work.

2. Implementing Case Management Through a Rebranded and Enhanced Motion Scheduling Court

We are of the view that an enhanced Motions Scheduling Court (for purposes of this report, its new name "Civil Practice Court" will be used) can serve a multitude of purposes and, if properly

structured, can bring about a new culture for civil litigation in Toronto. The Team Leader (Civil) will supervise Civil Practice Court and that multiple Civil Practice Courts will be utilized.

Currently, a number of counsel come to Motions Scheduling Court unprepared or send junior counsel who have insufficient knowledge of the file. A significant concern expressed by counsel is that an attendance in Motions Scheduling Court can be time consuming and unproductive. A number of suggestions were received to the effect that Motions Scheduling Court should be modeled after the 9:30 a.m. appointments on the Commercial List which deal with consent matters, scheduling matters and a degree of case management.

Case Management and Civil Practice Court

A rebranded and enhanced Civil Practice Court will be the entry point for case management for appropriate cases.

The judge in Civil Practice Court will identify cases that require a degree of case management. This could occur at either the initial hearing or at any subsequent attendance at Civil Practice Court. The presiding judge will be able to identify the obvious cases at the initial hearing that will require and benefit from case management. Alternatively, if it is not evident at the first hearing, but the situation changes during the conduct of the proceedings such that at least one party is of the view that case management would be beneficial, the proceeding can be designated for case management at a later date. The designation for case management does not affect the parties' ability to apply for case management under R. 77.05(2).

It is expected that the vast majority of proceedings where case management is invoked will be complex matters or matters where long motions are involved. It is also contemplated that when long motions are booked, the presiding judge in Civil Practice Court may decide case management is warranted. This could involve a variety of methods from scheduling through to a case conference identifying the significant issues involved in the motion and ensuring the parties are focused on preparing for the motion on a timely basis.

There will be insufficient time for presiding judges at Civil Practice Court to engage in all aspects of the case management process outlined above.

Other judges on the Civil List will be engaged in case management as assigned by the Team Leader. Appointments can either be in person or by conference call, depending on the views of the presiding judge. The objective remains constant: to provide guidance and assistance for matters subject to case management, ensuring they are provided enhanced direction to be resolved in an organized, timely and cost-effective basis. Obviously, to ensure that the system works, a significant degree of cooperation from the Bar will be required.

Case Management for Summary Judgment Motions

In the post-*Hryniak* era, a certain degree of case management may be required in cases involving motions for summary judgment. We also expect an increased number of summary judgment motions.

In order to accommodate increased demand for summary judgment motions, we have to develop a system whereby case conferences are conducted well in advance of the summary judgment motion. This should apply where the motion is expected to take more than 2 hours. These situations will be identified at Civil Practice Court and it is contemplated that these cases, where possible, will be referred for management purposes to the judge who will be scheduled to hear the motion.

Consideration may also be given to directing long summary judgment motions from the motions list to the trial list. In many cases, the summary judgment motion is, in reality, a mini-trial or a hybrid trial.

Changes to Civil Practice Court

The following changes will be implemented on Monday, November 10, 2014:

1. Motions Scheduling Court will be renamed as Civil Practice Court and rebranded, consistent with its expanded and enhanced role.

2. Civil Practice Court will commence at 9:30 a.m.

3. Civil Practice Court will be expanded. There will be three or four courts sitting simultaneously. At least one court will be available for self-represented litigants. Some of the judges will sit in Chambers.

4. Gowns will not be required in Civil Practice Court.

5. The computer program used to schedule motions will be enhanced. John Cottrell, Executive Assistant and Manager of Trial Scheduling, is taking the lead on this project. Currently, the program will not permit the scheduling registrar to instantly identify the next available time slot for the motion. The scheduling registrar has to search on a daily basis to find available time. This is time consuming and is prone to error. It is much easier for the scheduling registrar to identify the next clear day on the schedule and to fix that time for the motion, notwithstanding that earlier times are sometimes available. The

revised system will enable the scheduling clerk to automatically identify the next available time slot for the amount of time required. This program will be used for both long and short motions.

6. We also have situations where dates are available on a timely basis (for example, 8 – 10 weeks out), but counsel decline to take such appointments as they indicate they will not be prepared to argue the motion for a number of months. This results in the booking of time many months in the future even though significant time is available prior to the date of the scheduled motion. We believe that booking motions on this basis results in inefficient practices as counsel are not in a position to give an informed time estimate for the hearing. When parties book a motion, they should be prepared to finalize their materials on a timely basis and argue the motion on a timely basis. In order to address this problem, motions will only be booked if parties can confirm their availability to have them heard in the next 100 days (14 weeks). In order to implement this practice, it is incumbent upon the court, absent extraordinary circumstances, to be able to schedule the motion within 100 days. If parties are ready to proceed within 14 weeks, they will be able to book the motion. If they are not in a position to proceed within that time frame, they can return to Civil Practice Court to schedule the motion when they are ready to proceed and the matter will be scheduled within 100 days. In order to effectively implement this policy, it will be necessary to adopt a "no adjournment within 2 days of the scheduled hearing" policy within 2 days of the scheduled hearing, in the absence of extenuating and exceptional circumstances.

3. Miscellaneous Changes

1. Combining the Long Civil/ Short Civil Team for organizational purposes.

2. Request chronology and compendium on long motions and summary judgment motions.

   By encouraging counsel to file a chronology and a compendium, the time spent by the judge in preparing for the motion, hearing a motion, and determining the motion should be reduced. In addition, in preparing the chronology and the compendium, counsel will be required to focus at an earlier stage on the merits of the motion which could result in a higher resolution rate or, at the very least, a more focused approach by counsel. It is noted that this is a "request" change as opposed to a "mandated approach".

3. Adopt the Toronto Region Commercial List, e-Delivery of Documents Project for long motions and summary judgment motions.

The e-Delivery of Documents Project has been in place on the Commercial List for approximately 18 months. The protocol guide is posted on the Ontario court website and a copy is attached (http://www.ontariocourts.ca/scj/practice/practice-directions/edelivery-scj/). There are many benefits for following the protocol. The file is organized. The physical volume of work that has to be taken home is reduced to zero. However, the real benefit is that the factums and authorities are fully searchable and can be inserted into an endorsement, regardless of whether the document is in pdf or Word format.

The foregoing will be the default position, subject to override by a judge at Civil Practice Court.

4. Increase in-writing motions

Counsel are encouraged to bring in-writing motions when appropriate under Rule 37.12.1 for *ex parte*, consent, and unopposed matters. Counsel must provide the consent (under Rule 37.12.1(2)) or notice that the motion is unopposed (Rule 37.12.1(3)), along with a draft order for the court. In particular, motions such as default judgments, Norwich orders, non-party production or substituted service orders may be well-suited to in-writing motions. The bench and bar can discuss other types of motions which may be suited to be heard in writing.

In-writing motions are more common in Brampton and Newmarket as opposed to Toronto. Toronto operates in multiple locations and tracking the work product is more challenging. However, the bringing of in writing motions should be encouraged.

The objective for Toronto Region to provide turnaround in a maximum of three weeks has been achieved.

5. Require a Costs Outline and insist that parties address the question of costs payable in the event they are unsuccessful

The rules provide for a costs outline (Rule 57.01(6)). However, this rule is often not followed. The result is that in many cases costs outlines have to follow the determination of the motion. The judge then spends additional time reviewing the decision, reviewing the costs outline and writing a costs endorsement. It would expedite the process if Rule 57.01(6) was strictly enforced and counsel were directed to have a meaningful discussion on resolving the issue of costs depending on the outcome of the motion. If costs are determined or agreed upon at the time of the hearing, the judge can use his or her time more productively.

It is noted that in Newmarket, a practice has developed of requesting costs submissions at the commencement of the hearing. This practice could be considered for Toronto.

6. Impose consistency in the conduct of a pre-trial conference

    a. Trial management component
    b. Settlement component

    The Bar has indicated that there is an inconsistency in the way in which pre-trial conferences are being conducted. There is no doubt that there has to be a trial management component to ensure that time estimates are firmly established and that counsel will be prepared for trial. There should also be a settlement component at the pre-trial conference. In addition, for long trials, ongoing trial management conferences should be scheduled leading up to trial. This approach should result in an increased resolution rate and more accurate time estimates in matters that are not resolved.

7. Separate time-sensitive matters

    a. Mostly concerned with identifying injunctions
    b. Dedicate a judge to deal with real time sensitive issues

    The cases will be identified at Civil Practice Court and scheduled appropriately.

8. Fast Track

    a. Establish a roster of judges who would be available to set schedules and generally fast track procedural issues

    b. Only available in cases where all parties have signed an appropriate certification promising to cooperate in fast tracking procedural issues

    c. If the parties want to fast-track the case, the court will do it

    These cases will be identified at Civil Practice Court and scheduled appropriately.

RSJ, G.B. Morawetz