

Civil Justice Reform Project Consultation Paper

Civil Justice Reform Project Mandate

On June 28, 2006, Attorney General Michael Bryant asked the Honourable Coulter Osborne, former Associate Chief Justice of Ontario, to lead the Civil Justice Reform Project (CJRP). Mr. Osborne has been asked to propose options to reform the civil justice system to make it more accessible and affordable for Ontarians. Recommendations for action are to focus on proposals which will produce meaningful results in enhancing access to justice for Ontarians and which will be suitable for implementation within a reasonable amount of time.

In conducting this review, the CJRP will engage in province-wide consultations, research relevant civil justice studies and literature, recent reforms in other jurisdictions, and consider available quantitative and qualitative data. A final report is anticipated in the late spring of 2007.

The work of the CJRP will take into account the following principles and considerations:

- **Access:** Recommendations should promote access to justice for both represented and unrepresented litigants.
- **Proportionality:** Recommendations should reflect the principle that the time and expense devoted to civil proceedings should be proportionate to the amount in dispute and the importance of the issues at stake.
- **One size does not fit all:** Recommendations should recognize diversity and the different issues facing different jurisdictions, particularly larger urban centres such as Toronto.
- **Culture of litigation:** Recommendations should recognize that rule and other regulatory reform alone might not adequately respond to problems in the system. Ways to foster “cultural change” among the bench and bar should be considered.

Comments & Suggestions Sought

This consultation paper outlines in general terms some of the problems that have been identified as areas where reform may be needed, as well as possible reform options. The CJRP invites comments on the issues canvassed below, and any other suggestions for improving the civil justice system in Ontario. Please take the time to respond by **November 17, 2006**. The views of those who use the civil justice system are very important to the CJRP, including both represented and unrepresented litigants. You may send your comments to Mohan Sharma, Project Director:

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Background

In 1996, the Ontario Civil Justice Review released its final report setting out an overall strategy to make Ontario's civil justice system speedier, more streamlined and more efficient.¹ At around the same time, the Canadian Bar Association's (CBA) *Systems of Civil Justice Task Force Report* made recommendations, on a national basis, to develop strategies and mechanisms to assist in the continued modernization of the civil justice system.² Since then, significant reforms have been implemented in Ontario to enhance access and affordability, including the introduction of simplified procedures, as well as the increase in the monetary limit of the Small Claims Court to \$10,000. In addition, case management and mandatory mediation were introduced in Toronto, Ottawa and Windsor. In May of 2005, the rules relating to case management and mandatory mediation were modified in Toronto on a three-year pilot basis by virtue of rule 78. Its operation is currently the subject of ongoing evaluation.³

In 2001, the Government of Ontario and the Superior Court of Justice appointed the Task Force on the Discovery Process in Ontario to identify problems with discovery and to make reform recommendations. In its 2003 Report, the Task Force found that discovery can result in unacceptable cost and delay in large complex cases, or where there is a lack of cooperation between opposing counsel, which can thereby impede access to justice.⁴ The Task Force made recommendations on two fronts. The first was the incorporation of enhanced cost and time saving mechanisms into the Rules of Civil Procedure. However, the Task Force acknowledged that not all discovery problems could be addressed simply by the imposition of more rules, and noted that many could be attributed to the adversarial "culture of litigation", or the conduct of particular lawyers. Accordingly, the Task Force made a second set of recommendations for the development of best practices to be adopted by the bench and the bar as appropriate conventions or norms for the conduct of discovery.

Ten years have now passed since the Civil Justice Review and the CBA released their respective reports. Many of their recommendations have been implemented throughout Canada, with positive results. Ontario's ongoing civil justice reform strategy has been applauded for significantly enhancing access to justice.

Yet cost and delay continue to be cited in national and provincial reports as formidable barriers that prevent average Canadians from accessing the system. Recent conferences and policy forums have sought to further assess the state of Ontario's civil justice system and reform options. In March of 2006, the Advocates' Society held a Policy Forum, entitled *Streamlining*

¹ Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, November 1996). Posted at: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/>

² Canadian Bar Association, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, August 1996). Posted at: http://www.cba.org/CBA/cba_Reports/pdf/systemscivil_tfreport.pdf

³ Given the ongoing evaluation of rule 78 in Toronto, case management will not be a primary focus of the CJRP. However, comments are welcome on methods to improve or expand upon the use of mandatory mediation and other ADR mechanisms. See the section under "Litigation culture" below.

⁴ Task Force on the Discovery Process in Ontario, *Report of the Task Force on the Discovery Process in Ontario* (Toronto: Task Force on the Discovery Process in Ontario, November 2003). Posted at: http://www.ontariocourts.on.ca/superior_court_justice/discoveryreview/index.htm

Justice, to search for creative ways to promote efficient, less expensive dispute resolution in our courts so that access to justice may be enhanced.⁵ And in May of 2006, the Canadian Forum on Civil Justice hosted a national conference, entitled *Into the Future: the Agenda for Civil Justice Reform*. The Conference sought to examine a variety of issues, including the status of civil justice reforms in Canada, impediments to effective reform, and the development of a national direction for civil justice reforms in the future.⁶

As we mark the ten-year anniversary of the Civil Justice Review and the CBA report, it is appropriate to assess whether further refinements can result in meaningful improvements for those who use the system.

Issues for Consultation

The following discussion highlights areas in the civil justice system that may be in need of reform, as well as potential reform options. Respondents are invited to comment on any or all of these issues and in so doing, to consider the following questions:

- Which solutions are likely to have the most positive impact on making the civil justice system more accessible and affordable for Ontarians?
- Are the problems identified more acute in certain regions of Ontario than in others, or in certain case types than in others (e.g. medical malpractice, commercial)? Why?
- What reforms might best respond to the needs of unrepresented litigants?
- Are there feasible options to introduce greater technology into the civil justice system to help reduce the cost of litigation or to make it more accessible?
- Are there other areas of reform that should be addressed but are not mentioned in this consultation paper?
- Are there other solutions that you would recommend that are not mentioned in this consultation paper?

Simplified procedure

Lawyers, judges and litigants frequently observe that the simplified procedures in Rule 76 are not working as intended. Three key problems have been identified. First, counsel often disregard the prohibition on the use of discoveries in the rule, either by engaging in pre-trial discoveries or in effect conducting discoveries at trial. The result is that the cost- and time-saving benefits of this rule are not realized. Second, while Rule 76 allows parties to elect to proceed by way of summary trial, this method of hearing is rarely selected by the parties or ordered by the court. Accordingly, litigants are not reaping the cost- and time-saving benefits of the summary trial option. Third, the jurisdictional limit of Rule 76 is currently set at \$50,000 (although Rule 76

⁵ A copy of a the Advocates' Society report arising from this policy forum, entitled *Streamlining the Ontario Civil Justice System: A Policy Forum, Final Report*, may be accessed at: http://www.advocates.ca/pdf/Final_Report.pdf

⁶ Papers from the Canadian Forum on Civil Justice's *Into the Future* Conference may be accessed at: <http://www.cfcj-fcj.org/IntoTheFuture-VersLeFutur/>

may be used at the plaintiff's option for claims over \$50,000 unless the defendant objects). Where a claim of a relatively modest value (e.g. between \$50,000 and \$100,000) does not proceed under Rule 76, the ordinary procedures regarding disclosure, discovery, experts, interlocutory motions and trials apply, and litigants may spend more time and money litigating such claims than is proportionate to the amount or issues at stake.

Reform options include:

- ❑ Restrict length of oral discovery to a prescribed time limit (e.g. 2 hours per party).
- ❑ Require or encourage parties to proceed by summary trial in certain case types.
- ❑ Raise the monetary limit of Rule 76 to \$100,000.

Use of expert evidence

The increased use of expert evidence in civil cases is generally regarded as contributing to the increased time and cost of litigation. In addition, it has been argued that experts increasingly adopt the polarized, adversarial bias of the parties who hire them, rather than assist the court in a neutral evaluation of an issue. The United Kingdom and Australia have both introduced reforms to the practices and procedures applicable to expert evidence. Some of these reforms require parties to agree upon a single jointly-appointed expert, impose obligations on opposing experts to consult and to produce a single joint report, or require an order of the court before any expert evidence may be adduced.

Reform options include:

- ❑ Require parties to retain a single, joint expert, except in cases where there is a compelling reason for separate experts. Alternatively, enhance the pre-trial or trial judge's power to exclude expert evidence.
- ❑ Where opposing parties retain different experts, require those experts to consult and prepare a single joint expert report for the court, or specifically identify the matters on which they disagree, and if practicable, the financial consequences on those areas where there is disagreement.
- ❑ Require experts to affirm that their duties are owed to the court, and not to a particular party.
- ❑ Require parties to file expert reports prior to the pre-trial conference. In addition, require experts to attend pre-trial conferences to permit the court to assist the parties in reaching a settlement of some or all of the issues.
- ❑ Require counsel to notify opposing parties where there is a dispute about the qualifications of an expert to give opinion evidence in accordance with all or part of the expert's report.
- ❑ Permit oral or written examination for discovery of experts on the content of their reports.
- ❑ Dedicate pre-trial hearings to issues relating to expert evidence.

Discovery

The Task Force on the Discovery Process in Ontario released its Report in November 2003.⁷ The Task Force made recommendations for specific rule amendments intended to save time and cost. Several of these recommendations have not yet been incorporated into the Rules of Civil Procedure. The Discovery Task Force also recommended the development of best practices to provide lawyers and the court with practical suggestions on how best to manage discovery-related issues. Best practices for the conduct of electronic discovery were released in the fall of 2005.

Reform options include:

- ❑ Impose a default time limit of 7 hours per party on oral discovery, subject to the parties' agreement otherwise or a court order.
- ❑ Require parties to participate in early discovery planning, and to commit to a plan in writing.
- ❑ Narrow the scope of discovery (eliminate the "semblance of relevance" test and replace it with a standard "relevant" or "relating to" test).
- ❑ Encourage greater use of written discovery (e.g. allow both oral and written discovery on parties' consent, or by court order, provided there will not be duplication and discovery will be conducted in a cost-effective manner).
- ❑ Increased sanctions and greater consistency in sanctions for abuse of the discovery process.

Litigation culture

Numerous studies in Canada and abroad have identified the adversarial nature of litigation as a key factor contributing to cost and delay in the civil justice system. The notion that legal disputes are best resolved through a contest between competing adversaries remains strongly held by lawyers in common law jurisdictions. This emphasis on adversarialism results in demands for more disclosure, more experts, more discovery, more interlocutory motions, and longer trials. A related concern is an increasing lack of civility among the civil litigation bar, which appears to be particularly acute in large urban centres. There is a general consensus that lawyers in smaller communities and specialty practices tend to be more collegial than those in large urban centres.

Reform options include:

- ❑ Introduce new rules that restrict opportunities for adversarialism and encourage early resolution of disputes (e.g. use of joint experts, early discovery planning, pre-action protocols).
- ❑ Greater opportunities for alternative dispute resolution ("ADR") (e.g. make ADR mandatory as a pre-condition to commencing litigation, increased use of mandatory mediation or voluntary mediation).

⁷ See Task Force on the Discovery Process in Ontario, *supra*.

- ❑ Encourage bench and bar to participate in the development of best practices to minimize impact of adversarial litigation culture.
- ❑ More active role played by the Law Society of Upper Canada in overseeing lawyers' conduct that results in additional cost and delay to litigants.
- ❑ Greater imposition of personal cost sanctions against lawyers who cause delays through intransigence and a lack of civility.
- ❑ Emphasize civility and more cooperative dispute resolution in legal education.

Summary judgment

Rule 20 permits a court to grant summary judgment if there is “no genuine issue for trial.” Many complain that this rule is not working as was intended because the common law threshold for establishing that there is no genuine issue for trial is extremely high. The result is that there is not an effective mechanism for screening out frivolous or unmeritorious claims.

Reform options include:

- ❑ Amend Rule 20 to set a new threshold. For example, “no genuine issue for trial” could be replaced with “no real prospect of success.”
- ❑ Amend Rule 20 to allow a court to order summary judgment, even when there are disputed facts, after undertaking a limited review of affidavit evidence addressing the disputed facts.
- ❑ Where there is a factual issue in dispute that would prevent the court from granting summary judgment, improved trial scheduling practices could be implemented to permit the court to hold a “mini-trial”, forthwith, that is restricted to the disputed factual issue.

Pre-action protocols

Pre-action protocols set out rules and timelines for the exchange of certain information before a party can commence an action. They are premised on the idea that civil actions are not resolved at an early stage because parties lack adequate information about their opponent's case. Accordingly, pre-action protocols are intended to provide for the early exchange of information to permit early settlement of cases before the court even becomes involved. Certain pre-action protocols may work to weed out cases early, or at least unnecessary parties, at the front-end of the litigation process.

Pre-action protocols were a cornerstone of the Lord Woolf reforms introduced in the U.K. At present, there are protocols in place for eight types of civil disputes, including professional negligence, personal injury, and housing and repair. Pre-action protocols have also been introduced in Australia (Queensland) for personal injury disputes. The Queensland rules also require parties to exchange offers to settle as well as information about the dispute, with cost consequences for parties who reject unreasonable offers.

Pre-action protocols have been very effective in promoting early settlement of cases. However, they have also been criticized for raising litigants' costs for certain case types early in the litigation process.⁸

Reform options include:

- Introduce pre-action protocols for specific case types on a pilot basis (i.e. case types determined to involve the greatest amount of delay)

Civil Juries

The *Courts of Justice Act* permits a party, as of right, to have a civil jury trial to assess damages or decide issues of fact in most civil actions in the Superior Court of Justice. A party may select a jury trial by delivering a jury notice. While there is some authority for the court to dispense with a jury on the motion of a party, case law suggests that trial judges do not have the authority to dispense with a jury on their own initiative.

Jury trials may add to the cost and complexity of a trial, which may be disproportionate to the amounts or importance of matters in issue. Furthermore, where the issues in a trial are so complex that a typical jury would not be able to discharge its responsibilities effectively, the merits of having a jury trial are questionable. On the other hand, given the history of jury trials, they may now be seen to be a substantive right which also ensures public participation in the civil justice system.

Reform options include:

- Eliminate access to civil jury trials in all civil cases.
- Eliminate access to civil jury trials in all cases, except those where the predominant issues in the action concern the values, attitudes or priorities of the community.
- Eliminate access to civil jury trials in all civil cases below a fixed monetary threshold (i.e. \$50,000, or a larger amount).
- Provide trial judges with the authority to dispense with a jury trial where they are of the view that the trial will be so complex that the jury will be unable to discharge its duties, or where a jury trial is otherwise unwarranted given the nature and importance of the matters.

Cost of civil litigation

A tension exists between the bar's stated intention to confront the problem of cost and delay in the civil justice system on the one hand, and the hourly billing structure common among the profession that arguably discourages efficiency and early problem solving on the other. Allowing market forces to fully dictate the cost of legal services reduces lawyers' ability to provide pro

⁸ See, Robert Musgrove, Civil Justice Council, "Lord Woolf's Reforms of Civil Justice. The reforms, their impact, and the future for civil justice reform in England and Wales" (Paper presented to the Advocates' Society Policy Forum, 9 March 2006) [unpublished].

bono services, impedes access to justice, and erodes the public's confidence in the legal profession.

Reform options include:

- ❑ Explore alternatives to the hourly billing model, including fee-for-service billing.
- ❑ Require lawyers to provide their clients with a detailed litigation plan for each case. Litigation plans would include time and cost estimates for each step and may include penalty clauses for non-compliance.
- ❑ Require lawyers/law firms to devote a prescribed number of hours to pro bono work annually. This could include providing civil duty counsel services at the Superior Court.

Trial Management

The number of actions that actually go to trial is estimated at approximately 2% of all actions commenced. However, it has been argued that cases are increasingly complex, involving more parties, more documents, and more experts, which can result in an increase in the length of time it takes to hear those cases that do proceed to trial. In some cases a lengthy trial is the inevitable result of complex issues and facts. However, anecdotally, some say that more long trials are being held even when the amount or issues at stake do not warrant it.⁹ Poor trial management, late requests for trial adjournments, late disclosure of expert reports, and the presence of unrepresented litigants may also contribute to lengthier trials or delays in obtaining trial dates.

Reform options include:

- ❑ Enforcement of fixed trial dates, without opportunity for adjournment, except in cases of emergency (e.g., illness or death of a lawyer or witness).
- ❑ Greater involvement by the pre-trial judge in trial management. Examples include the issuance of pre-trial orders fixing the time for completion of all pre-trial steps, and time limits for the trial (i.e. each party is allotted a fixed number of hours to complete all steps within a trial, or a time limit for each step of the trial is ordered).
- ❑ Impose sanctions on parties who fail to adhere to time limits.
- ❑ Require examinations-in-chief and expert evidence to be submitted by way of affidavit.
- ❑ Promote and seek greater judicial control over the trial process during the trial.
- ❑ Provide more resources to unrepresented litigants (e.g. civil duty counsel).

⁹ See Advocates' Society Report, *supra* at p. 18.