**SOME THOUGHTS ON CREATING A SUSTAINABLE PUBLIC CIVIL JUSTICE SYSTEM**

**Ontario Bar Association Civil Litigation and Insurance Sections End of Term Dinner**

**Wednesday, June 11, 2014**

**INTRODUCTION TO THE PROBLEM**

This year a number of members of our family spent the Easter season in Florence. In preparation for the visit I decided to brush up on my Florentine history. In the course of reading a biography of Nicollo Machiavelli, I came across this passage from Machiavelli’s *The Art of War*, which contained part of a dialogue between Fabrizio Colonna and some young people in the Rucellai garden. According to Machiavelli, Colonna said:

And I repine at nature, who either should have made me such that I could not see this, or should have given me the possibility for putting it into effect. Since I am an old man, I do not imagine today that I can have opportunity of it. Therefore, I have been liberal of it with you who, being young and gifted, can at the right time, if the things I have said please you, aid and advise your princes to their advantage.

Not words which stuck in my mind when I studied Machiavelli at university some 40 years ago, but words which now resonate at this stage of life being, as I am, a little more than halfway between the date of my appointment as a judge and my eligibility for early retirement or supernumerary status. Without stretching the literary reference unduly, over the past several years I have written and talked about things that I have seen in the public civil justice system, and I thought that this evening I might take advantage of being in the presence of you, "who being young and gifted, can at the right time, if the things I have said please you, aid and advise your princes to their advantage". “Princes” obviously is not the right word, but one can substitute for “princes” those who hold positions which can influence making improvements to our public civil justice system.

Rule 1.04(1) of the *Rules of Civil Procedure* sets out the fundamental goal of our public civil justice system:

These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

The Fundamental Goal, then, is: the fair, timely, and cost-effective determinations of civil cases on their merits.

As it currently operates, our public civil justice system is not achieving that Fundamental Goal.

This evening I would like to offer some thoughts on why that is so, and what can be done to remedy that problem. I will break this talk down into three sections: (i) first, I will describe some of the main symptoms of the problem; (ii) second, I will identify what I consider to be some of the key causes of the problem; and, (iii) finally, I will suggest possible remedies for the problem, although my approach might strike some as unorthodox.

But before I do, let me say a few words about why I intend to say what I am going to say, so that my remarks are not misconstrued.

As old-fashioned as it may seem, I applied to become a judge in order to serve my country. I had benefitted greatly from private practice. I wanted a chance to perform some public service.

To that end, I would like to see the Ontario Superior Court of Justice be recognized as the best trial court in North America. I am not speaking about the quality of the Court’s judgments: the overall quality of our judgments is second to none. I am speaking about the overall level of service which our Court offers to the public when dealing with the public’s civil disputes.

Our overall level of service needs improvement. We are not yet the best. We have the institutional ability and the skills to get there. We just need to unleash them.

So, that is the spirit in which I will offer some comments on problems in our public civil justice system. I will couple those comments with a possible approach to finding solutions, solutions designed to achieve my dearest goal - to see the Ontario Superior Court of Justice regarded as the best trial court on this continent.

**PART I: THE SYMPTOMS**

I see three main symptoms of the public civil justice system’s failure to meet its stated Fundamental Goal.

First, the lack of timeliness of adjudication of a civil dispute on the merits. While statistics are not published on this point, I have no doubt that in terms of the average civil case commenced in Superior Court of Justice, the final adjudication of the proceeding, irrespective of the form of hearing, does not occur within two years of its commencement. In the life of the ordinary person, two years is a long time.

Second, the cost of civil proceedings. Simply put, the cost of lawyer-represented civil litigation in our province in this day and age is beyond the reach of small businesses – which form the mainstay of our economy - and the middle class. Our system is only truly accessible to the upper classes and mid- to large-size corporations, if we regard the legal representation of a party as a fundamental aspect of access to justice.

Third, while over the past two decades commentators have spilt much ink bemoaning the “vanishing civil trial”, the reality is that over the last decade our civil justice system has seen the “vanishing civil litigator”. A procedural system designed on the assumption that parties will enjoy legal representation now increasingly witnesses litigants fleeing from lawyers in large numbers and representing themselves.

**PART III: THE CAUSES**

These are the primary symptoms of the problem; what is causing them? That is a more difficult question to answer, but let me offer my own thoughts based upon a career which has consisted of 23 years practising civil litigation and its variants as a barrister, and now close to eight years sitting as a judge of the Superior Court of Justice, primarily hearing civil and commercial matters.

I think there are four main reasons why our public civil justice system is not achieving its Fundamental Goal. I cannot rank one above the other; each plays an important role in causing the problem, and I think they all must be addressed together in order to ameliorate the problem. Here is my list:

**FIRST CAUSE: Although in their first section the *Rules of Civil Procedure* articulate the Fundamental Goal of securing the just, timely and cost-effective determination of every civil proceeding *on its merits*, they then go on to create a set of rules which, in large part, erects obstacles to that very goal.**

There is a certain irony embedded in the composition and structure of the *Rules of Civil Procedure*. While the Fundamental Goal enunciated by Rule 1.04(1) talks about securing the determination of every civil proceeding on its merits, many of the rules - indeed the majority of the rules - do not concern final adjudications on the merits.

There are 77 rules. Putting aside the three that deal with appeals, of the remaining 74 rules arguably only 17 deal with final adjudications on the merits.[[1]](#footnote-1) That leaves 57 out of 74 rules which do not involve procedures or issues dealing with a final determination on the merits.

Today, we are witnessing the result of a set of procedural rules which focus more on interlocutory matters than on the final adjudication on the merits: more time is spent on the civil side of our court dealing with issues which do not involve the final adjudication on the merits, such as discovery motions, than with final adjudications on the merits.

Moreover, a pernicious assumption haunts this package of 74 *Rules of Civil Procedure* – the assumption that all rules merit equal treatment. Put another way, in practice our civil rules operate on the basis that the demand for judicial time to deal with a problem under Rule A is of equal worth, and merits equal attention, as the claim for judicial time to deal with a problem under Rule B. For example, our Rules assume that demanding one hour of judicial time to deal with a "where should the examination of a deponent be held motion" merits equal treatment and access to judicial time as demanding one hour of judicial time to adjudicate a summary judgment motion in a simple case.

That is wrong. Why? Because the assumption of "equal worth" underlying the various rules itself assumes the availability of unlimited judicial resources. At present we do not have unlimited judicial resources in most urban parts of Ontario. In urban areas, the demand for judicial time outstrips the supply of judicial time. The constant delays to get to hearings in urban areas is the most obvious manifestation of this imbalance of supply and demand.

In conditions of such imbalance, we need to inject an element of “discrimination” into our Rules, or using a medical analogy, an element of “triage” into our Rules to rank and separate the "really important" from the "not so important" when it comes to making claims on judicial time. All rules are not of equal litigation importance. The Fundamental Goal of securing the fair, timely and cost-effective adjudications on the merits should serve as the benchmark by which to discriminate amongst the rules when deciding what types of requests merit access to judicial time.

A more rigorous separation of the litigation wheat from the chaff is also required because the body of our substantive law continues to become more complex, not more simple. The complexity of the law imposes its own constraints on the accessibility of a civil justice system. The more complex the body of substantive law, the more inaccessible becomes the system of justice which administers it, and the greater the need for focusing adjudication resources on the heart of disputes, not on their periphery.

**SECOND CAUSE: The *Rules of Civil Procedure*, and the companion cost and fee framework surrounding our public civil justice system, do not reward litigation conduct which secures the Fundamental Goal of a fair, cost-effective and timely adjudication of the dispute on the merits, nor does it penalize litigation conduct which thwarts that goal.**

American Express has a long-standing ad campaign touting its “Front of the Line” service – use our cards and you can get better access to entertainment events. If two parties are prepared to agree that their case will be ready for trial within six months of its start, where in the Rules of Civil Procedure can they find a “Front of the Line” rule? If two parties agree that they will not bring any motions before trial, where can they find a “Front of the Line” rule? Why shouldn’t the Rules reward good litigation conduct which seeks the timely and cost-effective adjudication on the merits? Why shouldn’t good litigation conduct have “Front of the Line” access to judicial time? How can we hope to encourage good litigation conduct which fosters the system’s Fundamental Goal unless we offer tangible rewards for good litigation conduct?

Let me turn to the flip side of the carrot and stick equation. As presently designed our civil system of justice does not require those who use it to take into account the social costs of their use of the system, only their private costs (which may well end up including some of the costs of the other side). Apart from paying their nominal filing fees, parties do not have to think about how their litigation conduct will affect public resources. Put another way, as long as they pay their $127 to bring a motion, parties can litigate away without regard for how their conduct is affecting the use of a scarce public resource.

It is ironic that our public decision-makers have not taken this problem seriously, given their constant attention to the costs which private use imposes on another public resource - the environment. If judges could somehow wrap the issue of the enduring health of the civil justice system in the cloak of "green-ness", then perhaps political decision-makers would pay more attention to the illnesses from which our system presently suffers.

But, in an age which concerns itself only with the material and the tangible - the purity of the air or the health of the human body - it is difficult to persuade people to think seriously about the intangible - such as the need of a democratic polity for accessible civil justice. Even when the intangible may well represent the "greater good", it holds little sway in an age focused on the short-term and on the material.

**THIRD CAUSE: A litigation culture has arisen in this province over the last three decades which extols creating and litigating peripheral procedural disputes, instead of moving towards the timely adjudication of disputes on their merits. That culture now lauds, as the skilled barrister, the motions specialist, not the final hearing expert.**

It is not clear to me why this has happened. But it has, and it is a most unfortunate development. The emergence of a strong “motions culture” signals, in my view, a growing inability of counsel to discern the wheat from the chaff in any particular piece of litigation, with the result that counsel are placing unreasonable demands on judicial time to deal with peripheral issues.

The pervasiveness of this “motions culture” is one of two reasons why I think we must question the viability of continuing with one of the bedrocks of our civil justice system – the party prosecution principle.

Our civil justice system operates on the premise that the parties should be the ones who design the process by which any particular dispute proceeds, including selecting all of the steps which occur prior to the final adjudication of the case on the merits. Under the party-prosecution principle, it is the parties who decide what is important, or what is not, when it comes to seeking access to court time.

There are several problems with the "party prosecution" principle as it presently operates. First, decisions by parties about what steps to take in a proceeding are made against the backdrop of virtually free access to judicial resources. For example, a party can initiate and bring a civil case through to trial in the Superior Court of Justice for a filing fee of slightly over $500,[[2]](#footnote-2) with no financial obligation to pay more for a long, versus a short, trial. Access to the court to bring an interlocutory step is a mere $127. For that amount of money one can bring any type of motion authorized by the Rules and pay the same access fee for a 4-day motion as for a 20-minute motion. That decision is left in the hands of the parties, subject to varying degrees of judicial scheduling oversight.

What happens when a scarce resource is priced at almost zero? People abuse it. They waste it. We are seeing that every day in our Court with parties bringing motions which, were they required to pay a "real" access fee which properly priced the value of the scarce public resource, judicial time, they would never think of bringing.

A second problem with the party prosecution principle is that not all parties are interested in achieving the Fundamental Goal of our system - the fair, timely, and cost-effective adjudication of a dispute on the merits. Some plaintiffs bring lawsuits simply to vex or annoy the other party, with the blatancy of the attempt varying with the sophistication of the party – some plaintiffs are quite adept at dressing-up otherwise meritless claims. And, of course, many defendants would be more than content to drag a case out, relying on attrition as their best defence. Both strategies are countenanced under a party prosecution system, with the lore of common-law advocacy extolling, as master tacticians, those who "play the game well".

Finally, the historical embrace of the party prosecution system rested on a major assumption - lawyers would represent the parties. That, no longer, is a valid assumption. Indeed, in one area of our Court - family law disputes - more parties are unrepresented than represented. As a result, courts can no longer rely on the professional filter of the judgment of barristers to keep the pre-hearing process within the realm of the reasonable and the somewhat necessary. Increasingly, the naked emotions of the unrepresented parties, unschooled by any knowledge of the substantive or procedural law, and indifferent to the overall health of the civil justice system - for they will only touch it while their particular case is alive - are what is driving the design of civil cases and the consequent demands by unrepresented parties on judicial time.

In a speech last November to The Advocates’ Society I queried the practicality of moving towards a model of civil justice based primarily on judicial inquiry and judicial control of the process. I thought that selective case management would represent a workable, middle-ground solution to this part of the problem. I remain firmly of the view that in the short-term we must expand the use of case management. But, increasingly I am coming to the conclusion that in the longer term we must radically alter the “party prosecution” principle – perhaps even discard it - and move towards much greater judicial control over the design and the selection of permissible steps in a civil suit.

**FOURTH CAUSE: The public civil court system is operating with front and back office administrative systems which are hopelessly outdated, based on a disappearing medium of communication – paper – and which are unable to provide court staff, the judiciary and users of the court with needed, usable information about the inventory of civil cases in our public court system.**

When looked at in a certain way, stripped to its functional basics our court system intakes high volumes of data prepared by litigants or their legal representatives, attempts to present that data in a somewhat organized fashion to specialists – the judges – who consider that data, along with evidence out of the mouths of witnesses, deliberate upon it, measure it, weigh it, and release their own set of data adjudicating the legal rights of the litigants. In a word, our court is like a big Amazon.com warehouse of data, but we are still using 1950s techniques to manage and track the inventory in that warehouse. Until our court modernizes its inventory control techniques, it will be impossible – and I use that word advisedly – to improve, in any material way, the timeliness and cost-effectiveness of our civil justice system.

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In broad strokes, then, these are what I perceive to be the causes of the failure of our civil justice system to meet its Fundamental Goal. In order to end this after-dinner talk on a more upbeat note, let me offer some thoughts on a possible approach to solving the problem, specifically on how to ask the questions needed to develop a "sustainable" civil justice system which will meet the Fundamental Goal of the fair, timely and cost-effective adjudication of cases on their merits.

**PART III: THE REMEDIES**

Early in my judicial career I thought that if one simply brought to light the problems in the public court system, remedies would occur. How naïve I was. The resistance to institutional change ingrained in both our public court system and the legal profession which practices in it is profound. Much work will be required to make our civil justice system the best on the continent. I suspect that I will not be around to see most of the results of that effort. Nevertheless, whatever degree of discouragement one faces in advocating the need to change in a reasonably quick fashion, one cannot let despair prevail. Therefore, I offer up some thoughts on possible solutions to the current problem.

**Re-building the public civil justice system**

About two years into this job of judging I formed the view that the critical problems in the public civil justice system could not be fixed incrementally or piece-meal. Instead, I thought that the system should be re-built afresh on new first principles. I still hold that view; actually with more force today than I did 6 years ago. Will that happen? Of course not. There are far too many entrenched interests in and around our court system, so the appetite for radical reform is not great or wide-spread. By that I mean that it is difficult for those who have grown up in the system – myself included – to take some big steps back and look, with fresh eyes, at whether the system truly is serving those it was designed to serve – the litigants who need their legal disputes determined.

Nonetheless, I would ask you to bear with me for a few minutes while I conduct a “thought experiment”. What would we have to do to re-build our public civil justice system from scratch in a way which would meet the Fundamental Goal? What questions would we have to ask?

**Designing a new civil litigation process**

[1] Well, first, we would have to decide who controls how any particular dispute proceeds through the court - would it be the parties through the old "party prosecution" style of litigating, or would it be the judge, importing the more inquisitorial style of adjudication seen in Continental systems? Or, would we create a hybrid, with parties controlling certain limited procedural decisions and judges the others?

[2] Second, how would we go about answering any of those questions? Would we employ the safe, time-honoured traditions of leaving such design choices in the hands of those legally-trained, such as lawyers and their older incarnations, judges, as well as the numerous policy-makers resident in the Ministry of the Attorney General, or would we start with the real users of the system - the litigants whose rights are at stake in a civil lawsuit?

Imagine the discussions which might ensue if, for starters, you brought together different groups of litigants whose disputes represent those most often seen in our civil justice system. What if they were asked to design the type of civil litigation process which they, as paying litigants, would like to see, recognizing that in any particular case they could be either claimant or defendant? What if they were asked how much money they would be prepared to spend to see claims of a certain size or kind adjudicated? What if they were asked what sort of rules should be put in place to keep the playing field level, while ensuring a fair result? And, what if they were asked how "fair" the result would have to be in order to meet their sense of justice? Would they trade some part of "absolute abstract fairness" for a faster decision as, for example, in some arbitration systems which offer a choice between awards with reasons attached and awards without any reasons?

I would be fascinated by the answers. Unfortunately, few people are asking these questions, deferring to the expertise of those already entrenched in the system.

Who is to say that the answers to such questions would result in a "one size fits all" type of civil justice system? I suspect if we really listened to those whose rights are in play in our system of justice, we would develop several different civil-process "packages" or “offerings”, varying with the amounts at stake, the substantive nature of the dispute, whether the parties would represent their own interests in the case or rely on lawyers, and whether their priority is a quick decision or one which was the product of longer reflection and deliberation.

I have no doubt that what would emerge from such a consultation process would be a set of Rules quite different from those we see today which, at their core, simply represent a tweaking of the pre-1985 rules which, in turn, traced their lineage back to the late 19th Century.

Just to stir the pot a bit more, what if those bodies which debate and make civil rules were to suspend their deliberations for two years and, instead, embark upon a grass-roots consultation process with litigants who have actually used or who are using our civil court system? And make it a real grassroots consultation - like meeting folks up in Timmins in the middle of winter when they have to work their way through the snow to a courthouse. Would electronic filings and hearings conducted by Skype or other technologies suddenly become a more attractive policy option in the winters of the North?

[3] And would the current practice of allowing parties to make extensive oral arguments on detailed written arguments which they have already filed with the court survive such a review? I highly doubt it. I strongly suspect that radically reducing the availability of oral argument would be one outcome of such a review process.

**Pricing a new civil litigation process**

In addition to re-casting the design and control of the civil process, what other aspects of the civil justice system would have to be re-built? The price a litigant would have to pay in order to gain access to the system would be one.

[4] In times of constrained judicial resources, we must stop pricing judicial time as if it were free. It is not. Judicial time is scarce relative to demand. In my view, existing judicial resources should be focussed only on two aspects of civil cases: (i) the final adjudication of disputes on the merits, and (ii) the interlocutory preservation of rights pending the final adjudication. Most (but not all) other disputes are ones for which we simply lack adequate judicial resources to deal with in a timely way – that is to say, judges and masters should not be spending their time on such peripheral disputes in civil cases.

The pricing of access to judicial time should reflect those priorities. If public policy requires low-cost access to core civil justice activities, then set modest fees for requests which seek the judicial interim preservation of rights or the final adjudications on the merits, but charge much, much higher fees for requests for most other interlocutory process-related relief.

[5] Also, allocate standard time limits for interim preservation of rights motions and final adjudications on the merits based on the amount at stake and the nature of the dispute, and then charge “run-over” fees if the time actually consumed by the case exceeds the standard allocation.

[6] In order to minimize the gamesmanship which invariably accompanies any set of procedural rules, we need to re-jig our approach to the pre-trial disclosure of evidence in civil cases, given that our current set of Rules is the product of the more document-constrained paper age, not the “here comes the deluge” digital age. Three thoughts.

First, documentary disclosure should accompany pleadings, not follow them; and the touchstone of “relevance” should give way to that of “materiality” for the proof of a claim or defence at trial. This happens in many arbitration systems.

Second, we should curtail dramatically rights to oral discovery, fixing unalterable time limits which vary according to the amount at stake and complexity of the case – time limits which the parties could not alter.

Third, if we aim to reduce or eliminate the amount of judicial time allocated to production and discovery disputes, at the same time we must toughen up the consequences to a party of failing to comply with production obligations. For example, at present Rule 53.08(1), in its practical operation, permits the late disclosure of material evidence at trial – the usual consequence for late disclosure is a brief adjournment or modest slap on the costs-wrist. If material documentary disclosure must accompany pleadings and the scope of oral discovery is radically reduced, why not make the default for the late disclosure of material evidence its inadmissibility at the final hearing, with few escape hatches? Why reward bad litigation conduct? If a party won't take its production obligations seriously or is trying to game the system, why shouldn't they have to pay the price, regardless of the merits of the party’s case? Isn't this what a "green" approach to the civil justice system requires - attach a tangible financial penalty to the social costs of harmful private litigation conduct?

## Administrative support and infrastructure

Next, we would have to rebuild the system of administrative support for our courts. The simple reality is that without an appropriate administrative support system, no court system can function. Changing the rules of procedure and filing fees only gets you part of the way – the organization, monitoring and management of the inventory of cases are critical to the success of any civil justice system.

[7] So, let me continue with my “thought experiment”. What if some extra-ordinary event occurred, and one day we woke up to find that all our courthouses had crumbled to the ground and we had to replace every courthouse in this province? What would we re-build in their place? Well, not the edifices we now have. Two questions would have to be asked before any spade hit the ground.

First, how would this newly re-built court communicate with its customers? I daresay the answer won't be: "by paper". Re-casting the flow of data into and out of the courthouse from paper to digital would radically alter the need for physical bricks-and-mortar space.

So, too, with the second, question: what would the new courtrooms look like? That, I suspect, would prompt folks to ask whether we even need courtrooms for all hearings - would the default be some sort of on-line hearing, with attendance in a physical courtroom required only for exceptional circumstances?

[8] And what about the “front office” and “back office” functions of the court – how would they change? Would the “front office” of a courtroom change so that courtroom staff who serve as the interface between the litigants and the judge more closely resemble the stable, registrar-centred teams which support judges in the U.S. District Courts, thereby doing away with our current model of “musical chairs” staff which harkens back many decades?

And would one re-build courthouses with “back offices” in which almost as much space is taken up in storing paper records as is available for real, live human beings to work in and serve the public? I think the answer is self-evident.

**Conclusion**

In conclusion, in order to make Ontario’s public civil justice system the best in North America, we have to re-think the key assumptions upon which our system has been built. Tweaking the *Rules of Civil Procedure* won’t get us there. And although it is most certainly necessary to continue to implement incremental improvements to our existing system in the short-term, ultimately a more radical re-construction of the system will be required.

The Bar, including organizations such as the Ontario Bar Association, needs to start thinking about such a radical re-construction and to pose some of the questions I have identified, not only for the betterment of our public civil justice system, but for the Bar’s own self-preservation. The sands upon which our system of justice rests are beginning to experience a tectonic shift, and I suspect they will shift with increasing speed over the next 10 years.

My thanks to the executives of both sections for inviting me to your dinner tonight. Judges always cherish the privilege of being given the opportunity to talk with members of the Bar.

1. [Rules 19 through 22, the special proceeding rules; Rules, 64, 66 and 76; the eight rules dealing with trials (Rules 46 through 53); and, the two Rules dealing with references – Rules 54 and 55.] [↑](#footnote-ref-1)
2. $181 to issue a statement of claim and $337 to file a trial record. [↑](#footnote-ref-2)