ONTARIO BAR ASSOCIATION
TASK FORCE ON CIVIL JUSTICE REFORM

OBA SUBMISSION TO THE CIVIL JUSTICE REFORM PROJECT
The Honourable Coulter Osborne, Chair

INTRODUCTION

The OBA is unique among professional associations for lawyers in that its members are drawn from virtually every practice area and from every region of Ontario. Not surprisingly, there are many different views among members of the organization as to how to address the problems currently plaguing the civil justice system in Ontario, and even as to the extent of those problems.

However, most members of the OBA, whatever their practice area, agree that there are three basic principles that should guide any reform of the civil justice system:

1. The problems of our civil justice system cannot be solved by the creation or refinement of rules. The main cause of inefficiencies in the justice system is under-resourcing by relevant levels of government.

As demands on the justice system have increased, funding as a percentage of government budgets has decreased. There are not enough judges. Wait times for motions and trials are too long. Delay increases expense, making the system inaccessible to most and unresponsive to the needs of even those who can afford it.

2. There are too many obstacles and diversions on the way to trial.

The increasing number and complexity of mandatory pre-trial procedures, such as mandatory mediation and extensive trial management, add significant expense that is not always justified. Mediation aside, it is the trial, or the threat of trial, that resolves most cases. The more quickly and cheaply a matter can be brought to trial, the more responsive and relevant the system will be to the average taxpayer.

3. Governments have a responsibility to educate the public about the fundamental role played in a democracy by the judicial branch of government.

The public has a poor understanding of the justice system, both in a general sense and as it pertains to their everyday life. Many people have no idea how, or for what reason, they would access the justice system. Ignorance of the purpose and availability of the justice system are as much barriers to it as expense and delay. Currently, this work is undertaken almost single-handedly by a small agency called the Ontario Justice Education Network (OJEN), the brainchild of the Chief Justice of Ontario.

THE FUNDAMENTAL PROBLEM – LACK OF JUSTICE FUNDING

The Task Force acknowledges that issues of funding and public education appear to be beyond the parameters of the Civil Justice Reform Project ("the Project"). However, it is an overriding concern of the Task Force that the comments and suggestions that follow not be taken as an acknowledgment that "tinkering" with rules of procedure can cure the ills of the justice system. While acknowledging that better procedure can improve efficiency, it is the belief of the Task Force that many rules and procedures actually impede access to justice, and that the only solution to the systemic problems currently undermining the justice system is an increase in resources.

OBA RESPONSE TO THE CONSULTATION PAPER

The following is the OBA position on issues identified by the consultation paper.

i) Simplified Procedure

The OBA opposes raising the monetary limit of Rule 76, unless such an increase is accompanied by enhanced discovery procedures. $100,000 is an enormous amount of money to the average taxpayer, and to deny litigants access to procedures available in more "significant" cases is inconsistent with the principle of universality.

The Task Force believes that the elimination of discovery procedures may actually lead to longer than necessary trials. OBA supports limited but better discovery procedures in simplified cases, perhaps by written interrogatories or time-limited oral examinations.

OBA supports the concept of summary trial (examination in chief by way of affidavit) in principle. However, some members of the Task Force expressed the view that in many instances it is unfair to subject a witness to cross-examination without any opportunity to "warm up" by giving oral evidence in chief. For this reason, it is suggested that there be some opportunity for examination in chief on the witness' background etc., limiting the affidavit evidence to the substance of the dispute.

- No across-the-board increase in monetary limit
- Better discovery process, perhaps on a sliding scale with respect to cases involving between $50,000 and $100,000
- Limited opportunity for examination in chief in summary trial cases

ii) Experts

OBA does not support the use of joint experts. It is believed that the British experience with joint experts would not translate easily to Ontario, for a number of reasons. It is also believed that the use of joint experts would be resisted strenuously by the practicing bar.

It is the view of the Task Force that the current regime governing expert evidence is generally satisfactory. It seems doubtful that administrative tinkering with the rules governing expert evidence will lead to a substantial reduction in cost or delay.

In some cases, such as personal injury cases, and in particular in medical malpractice cases, it may be beneficial to have disclosure of expert evidence prior to the pre-trial. OBA supports earlier disclosure of expert evidence in cases where it is appropriate, rather than imposing such a requirement "across the board".

- Earlier disclosure of expert evidence in appropriate cases

iii) Discovery

OBA supports limiting a parties' right to oral examination for discovery to one day per opposing party, subject to an agreement between counsel or leave of the court. The limit would apply in all but the most complex cases. Most members of the Task Force believe that such a rule would simply codify what is already the customary practice, but would go a long way toward stemming abusive discovery tactics.

The test to be used in determining relevance for the purpose of discovery, whether it be "semblance of relevance", or something else, is a very problematic issue. In many cases, such as those involving complex commercial fraud, a broad test is critical. There is a fear that courts may interpret a legislated change in the test as a direction to clamp down on the scope of oral discoveries. For these reasons, OBA does not recommend a change in the test for determining relevance.

- Impose limit on oral examination for discovery to one day per opposing party in all but complex cases. Subject to agreement between counsel or leave of the court.

- No change in test for relevance

iv) Litigation culture

a) Ethics, professionalism and civility

OBA rejects the notion that abuses of the justice system arise from the adversarial nature of civil disputes. Rather, abuses arise from ethical and professional lapses and breakdown. The competitive nature of legal education and a perception among many counsel that knowledge of the law and "tactics" are what win cases and advance careers are among the factors that have led to a breakdown in the collegial, even collaborative nature of the litigation bar.

OBA supports better training for lawyers and students in ethics and professional responsibility. Efforts in this regard should be coordinated with

the law schools and professional organizations. OBA does not support "policing" of professional or ethical standards on an individual or case-by-case basis, except in extreme cases (as is currently the situation). OBA is also of the view that the courts should not become involved in issues of civility between counsel or professional standards to any greater extent than they are currently.

- Better training for lawyers and students in ethics and professional responsibility

b) ADR

OBA supports an increased, but more rational, use of ADR in the civil justice system. Many members of the litigation bar view mandatory mediation as a barrier to justice, unless the parties are given substantial control over the timing of the mediation and the identity of the mediator. If parties are required to mediate at a time when there is very little possibility of resolution, or with an ineffective mediator, then mediation is simply another impediment to getting to trial cheaply and quickly.

On the other hand, almost everyone agrees that mediation serves a useful purpose if properly conducted, and certain sectors of the civil litigation bar, such as family lawyers, see a vastly increased role for mediation. This is reflective of the general consensus that, when it comes to ADR, "no one size fits all". Mediation is better suited to the resolution of certain types of disputes, and intervention in the form of mandatory mediation needs to be carefully tailored, in terms of timing and choice of mediator, depending on the type of dispute.

Many lawyers emphasize the importance of the choice of mediator and, in particular, the effectiveness of senior judges as mediators of complex disputes. OBA supports greater availability and use of senior judges as mediators in complex matters at the request of counsel.

- Current regime of mediation before trial is acceptable in most cases, and should be expanded across the Province

- In certain areas, such as family and estate law, earlier mandatory mediation should be encouraged or enforced

- Make a roster of senior judges available for mediation in complex cases at the request of counsel

- The Law Society of Upper Canada should be encouraged to consider a specialty designation in ADR, in order to promote good mediators and assist parties in selecting mediators in whom they have confidence

- Introduce mandatory mediation in Small Claims Court

v) Summary Judgment

Many lawyers believe that the current "crisis" given rise to by the increasingly restrictive approach taken to the availability of summary judgment is a direct result of the under-funding of the justice system. Given the expense and delay associated with trial, parties are seeking to avail themselves of Rule 20 in cases that are close to the proverbial line. Quite rightly, in the view of many, the courts are extremely cautious about granting the remedy in cases where a trial is the more appropriate venue for resolving the dispute.

OBA does not support amending Rule 20 to relax the threshold test. The purpose of the rule is to weed out cases that do not require a trial because there are no genuine issues of credibility. The rule as it is currently drafted does not prevent the court from granting judgment in cases where there are disputed facts; it prevents the court from granting judgment in cases where the disputed fact are based on genuine issues of credibility that are material to the issues to be decided. Relaxation of the threshold test to the point where it permits judgment to be granted in cases where there are genuine (not spurious) issues of credibility undermines the primacy of the trial system and brings in the administration of justice into disrepute. OBA believes that issues of credibility should be decided at trial.

In some cases, such as strictly commercial matters, issues of credibility are less significant. Such cases are routinely determined by way of application. If the facts of the case are sufficiently disputed that proceeding by way of application is inappropriate, and if the disputed issues involve the acceptance of one version of events over another as a matter of credibility, then the matter should be determined by trial. Allowing the subjective assessment of credibility without the opportunity for a witness whose credibility is in question to be heard will not build public confidence in the justice system.

It has also been observed that the summary judgment rule is so dependent on nuances of the jurisprudence that is virtually inaccessible to self-

represented litigants. In this regard, it may be advisable to revise the rule, not to change the threshold test, but to express it in more definitive terms. As noted above, what generally arises from the cases is that a "genuine issue for trial" is a material issue of credibility that is not simply spurious. A spurious issue of credibility has been defined as one based on facts that are simply too incredible to be accepted by reasonable minds.

Many lawyers believe that the use of Rule 20 could be enhanced by the removal of the adverse cost consequences contained in rule 20.06, and by more active use of the powers and directions given to the court by rule 20.05.

- No changes to threshold test, but perhaps revise the rule to express it in clearer terms

- Eliminate or relax adverse cost consequences

- Encourage more active use of rules that permit narrowing of issues and expedition of "mini-trial"

vi) Pre-action protocols

Pre-action protocols are not new to Ontario. Under the *Insurance Act*, s. 258.3, plaintiffs who are motor vehicle accident victims are required to give notice and particulars, as well as submit to medical examination. Most proceedings against the Crown require pre-action notice.

The new two-year limitation period will likely limit the effectiveness of pre-action protocols to prevent actions from being commenced.

The OBA would also urge the courts to consider that any reforms involving the filing of more forms, and sanctions for the failure to file more forms, and similar administrative add-ons, will only increase the cost of litigation. This was the experience of the Toronto Case Management pilot project.

Notwithstanding, there is support within the OBA for earlier exchange of information in certain types of cases, such as in personal injury and family law cases.

- Introduce pre-action protocols in certain types of cases on a pilot project basis

vii) Civil Juries

OBA does not support the elimination of jury trials in all civil cases. OBA rejects the proposition that trying a case by jury adds expense and delay in every case. OBA acknowledges however, that in certain types of cases, particularly matters of technical complexity, jury trials may place an undue burden on both the system and, just as importantly, the jury itself. For this reason, OBA supports giving trial judges increased power to dispense with a jury trial where he or she is of the view that the trial will be so complex that the jury will be unable to discharge its duties, where a jury trial is otherwise unwarranted given the nature and importance of the matters, or where, as a separate factor, the trial would place an unjustified burden on either or both of the civil justice system or the jury.

- Give judges increased power to dispense with juries

viii) Cost of civil litigation

OBA acknowledges that hiring a lawyer to conduct a civil action is beyond the financial capacity of many people. However, OBA rejects the proposition that lawyers charge too much. The often cited example of the partner in a downtown Toronto law firm who charges $750 an hour in fact bears very little relevance to the issue of cost as a barrier to justice. There are only a handful of lawyers charging these rates, and the clients for whom they act have no difficulty accessing the system, save for issues of delay.

Both inside and outside of Toronto, there are many lawyers who have difficulty making ends meet, and would gladly take cases at much reduced rates. The problem is that the cost of conducting a civil action, even at very reduced rates, is prohibitive for most people. There are several reasons for this:

1. conducting a civil action is inherently time-consuming;

2. lawyers increasingly conduct litigation defensively, as a result of a perception of increased liability;

3. delays in the system cause lawyers to do work on a case that they might not otherwise do;

4. many of the steps mandated by the justice system, such as extensive pre-trial procedures and trial management, often

have little practical effect but are extremely expensive for litigants.

Toronto's experience with civil case management illustrates that excessive administration of the civil justice system can have the opposite of the intended effect. More case management, more forms and more time-tabling, scheduling, and planning do not necessarily get cases resolved more efficiently. Endless pre-trials and trial management or settlement conferences tie up judicial resources, cause expense and delay, and often have little or no practical effect.

OBA does not support regulation of lawyers' incomes or of retainer agreements between lawyers and clients. Many lawyers already operate at a subsistence level. The solution to the cost of litigation issue is not to require them to reduce their incomes even further.

Nor is the solution to download the cost of the civil justice system from government onto the shoulders of lawyers by imposing mandatory pro bono quotas or duty counsel service. No other profession requires pro bono work of its members, and no other profession performs more pro bono work than lawyers.

OBA believes that one of the main elements of a solution to the access to justice problem must be an increase in legal aid funding. Government spending on the justice system, including legal aid, is a tiny fraction of the overall budget. Spending on justice is dwarfed by spending on health care. Public demand for increased access to justice should be satisfied by a reallocation of resources, including increased funding for legal aid. The public recognizes that there is an improper allocation of public resources when a visit to the doctor for any reason is "free", but access to basic justice is an entirely private matter available increasingly only to those who can afford it.

- Reduce or eliminate complicated administrative steps, such as excessive timetabling and complicated pre-trial procedures

- Reduce reliance on the justice system to control standards of practice for lawyers, and increase the role of the Law Society and other professional organizations in this regard

- Dramatically increase funding for legal aid

ix) Trial management

OBA agrees that trials are becoming too long. There are many reasons for this. OBA supports measures that will assist counsel in predicting and controlling the length of trial without unduly interfering with the conduct of the trial by counsel, such as the following:

- Greater judicial scrutiny of estimates of time required for trial
- Enforcement of fixed trial dates
- Greater consistency by the bench in the application of laws of evidence, so that counsel know what to expect and can plan the case accordingly
- Encourage greater use of requests to admit and earlier exchange of expert reports
- Provide more resources to unrepresented litigants
- Better education of judges and lawyers on matters of trial procedure and evidence

Generally, OBA opposes strict enforcement of time limits in relation to trials, other than with respect to the overall length of trial, as it is often difficult to predict the exact course a particular examination may take. OBA also opposes presentation of examination in chief by way of affidavit, because of the unfairness it presents to a witness who is subjected to cross-examination immediately upon being called.

OTHER ISSUES AND SUGGESTIONS

Technology in the Court House

The website of the courts of Ontario is maintained by the Judges' library. As valiant an effort as this may be, there is no excuse for the rudimentary exploitation of modern technologies.

- For longer than a decade, the people of Ontario have been able to use internet and other technologies to purchase their own tickets to the theatre, make their own seat selections on airline flights, and order

gourmet pizzas with their selection of toppings. The technology underlying the justice system in Ontario is seriously out of date.

- Dedicated and up-to-date internet publication of court scheduling, such as motions, trials and appeals. Give counsel access to the court lists on-line, so that the waste of judicial resources resulting from collapsing lists are avoided. If parties are ready for trial and trial time opens up by a settlement or adjournment, they should be entitled to ask for the time.

Special Education for Judges

- The OBA does not advocate specialization of judges, except in the area of family law. Generally speaking, judges should come from a diverse experiential background. The generalist judge is the bedrock of an impartial judiciary. This does not mean, however, that judges should not receive special training.

- Although the OBA warns below of the problems of judges duplicating the role of mediators, there are many "problem" cases in which the opportunity must be taken to bring in a judge to settle a dispute or to resolve a procedural point that will save days or weeks of trial time. Judges with problem-solving aptitudes should be recruited and given training to "troubleshoot" difficult cases threatening to take up months of trial time.

- Currently, judicial training is difficult because they tend to require courts to shut down. The OBA is prepared to offer special dinner and weekend sessions in which judges seeking to learn from senior counsel can do so outside of court time.

Should judges be reserved only for judging?

The OBA is united in the position that judges should be spending less time running the courts and more time in the courtroom. Some thoughts include:

- A single judge sitting on pre-trial conferences in Toronto represents one percent of judicial resources being allocated to a non-judicial role. The same can be said for a judge presiding over assignment court, trial scheduling court, and status hearing court. Without suggesting radical

reforms, it should be a priority of the Civil Rules Committee to investigate ways to allow the courts to conduct mundane scheduling and case management without removing judges or masters from their adjudicative roles.

French Language Services

Many OBA members believe that the justice system does not adequately provide services in the French language. Obviously, the ability of Ontario taxpayers to access justice in either official language is of paramount importance. OBA supports any measures that would increase the number of French-speaking judges and support staff.

It is also recognized that many of the time limits imposed on litigants by the Rules of Civil Procedure do not take into account the extra burden of translation often faced by Francophone litigants. OBA recommends that time limits on such steps as discovery and the delivery of experts' reports be adjusted in cases involving French-speaking litigants to allow time for translation, if required.

Use and Role of Supernumerary Judges

The OBA urges the Attorney General and other courts administration stakeholders to study the effective use of supernumerary judges.

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