



July 17, 2017

The Honourable Heather Forster Smith
Chief Justice of the Superior Court of Justice
361 University Ave, Room 170
Toronto, Ontario
M5G 1T3

Dear Chief Justice Smith,

Re: Authorities in Civil Proceedings

On behalf of the Civil Litigation section of the Ontario Bar Association (the "OBA"), we write to provide for your consideration a proposal to amend the Consolidated Provincial Practice Direction (the "CPPD")¹ with respect to the reproduction of authorities in civil litigation proceedings. We have sent an identical proposal to Chief Justice Strathy for consideration in respect of the Court of Appeal for Ontario's practice direction for civil appeals.

The OBA is the largest voluntary legal organization in the province, representing over 16,000 lawyers, judges, law professors and students in Ontario. In addition to the Civil Litigation section, this proposal has benefitted from the input of the Insurance Law and Class Actions sections of the OBA, which collectively have over 2000 members. Our members regularly represent the broadest range of clients in the Superior Court of Justice across the province.

The Issue

At present, litigants in Ontario civil proceedings are almost always required to serve, and file, casebooks (also known as books of authorities or briefs of authorities) in paper. Counsel often do so in single-sided format. Casebooks often comprise a significant proportion of the paper being exchanged in cases, and often contain voluminous decisions which are only being relied upon for a handful of sentences or paragraphs. It is not uncommon for responding or intervening parties to reproduce cases in their books, which have already been filed in the initiating party's casebook.

Because of the size of the cases, single-sided printing, and the need to serve all parties and file a copy with the court, these casebooks end up costing clients enormous amounts of money for printing and copying. Furthermore the copying and filing of these casebooks imposes tremendous costs on the courts because of the associated storage costs, and on the environment because of the consumption of natural resources in producing them.

¹ See <http://www.ontariocourts.ca/scj/practice/practice-directions/provincial/>

What Has Been Done and Our Proposal

The Ontario Courts have taken laudable steps towards reducing the size of casebooks by adopting practices consistent with this objective. The CPPD includes a Direction relating to the list of “Often Cited Family Law Cases,” which indicates that in Family Matters only extracts from cases on the list to which counsel intend to refer to the court shall be included in the casebook.² Similarly, the Ontario Divisional Court and Court of Appeal have each published a list of frequently cited authorities that need not be reproduced in casebooks. Counsel are advised to only include head notes and excerpts of the cases they intend to rely on.³

The Supreme Court of Canada has taken this approach a step further, dictating that casebooks shall contain only the relevant excerpts from decisions that are available on an electronic database, and that counsel are not to duplicate authorities already contained in another casebook.⁴

The OBA supports these initiatives and believes they should be instituted for all Ontario Courts and civil proceedings. In our view, the Ontario Courts can go even further by embracing double-sided printing (which is currently permitted, but not mandatory), practicality and cooperation amongst counsel, and by adopting parts of the Supreme Court of Canada’s approach to casebooks. We therefore propose a practice direction amendment for civil proceedings in the Superior Court with the following provisions:

1. A requirement that, to the extent cases are printed, the casebooks be printed double-sided.
2. A direction that joint casebooks for a proceeding are strongly encouraged, though parties may each provide a casebook where a joint book is not practical or appropriate. In any event, responding and intervening parties shall not include authorities already contained in a served/filed casebook (unless counsel are relying on different portions of the same authority, in which case only those specific excerpts will be provided).
3. A direction that only excerpts on which counsel intend to rely be printed along with the case’s cover page/headnotes. An exception can be made for instances in which new cases are being submitted to the Court on the day of a hearing. In these instances, it makes sense for counsel to bring full copies of the cases for opposing counsel and the Court. Such a provision will not prohibit counsel from putting an entire decision in their casebook when necessary. For example, if counsel has found a case that is squarely on point with the matter at hand, they can put the entire decision in their book and rely on it accordingly. However, in our view, this provision will significantly reduce the instances

² http://www.ontariocourts.ca/scj/practice/practice-directions/provincial/#B_Often_Cited_Family_Law_Cases

³ <http://www.ontariocourts.ca/coa/en/notices/pd/cases-civil.htm> and <http://www.ontariocourts.ca/scj/divisional-court/casebook/>.

⁴ Section 44 of the Rules of the Supreme Court of Canada (SOR/2002-156 to the Supreme Court Act)

in which counsel are relying on a large decision for just a few paragraphs of legal analysis which do not rest on the facts of that specific case, but the entire decision is reproduced in their case book.

4. A provision requiring the exchange and filing of full electronic copies of the referenced authorities in a mandated format. Counsel will have inevitably downloaded the authorities they rely on from an electronic database (such as CanLII, Quicklaw or Westlaw), and such a provision would allow for the efficient exchange of these documents with counsel and/or the Court.

Conclusion

In our view, the above amendments will significantly reduce the costs of litigation to clients, thereby enhancing access to justice. They will save the courts significant space, streamline the serving and filing processes, and reduce environmental harm. While the ideal, long-term solution would be to move to an all-electronic service and filing regime for casebooks, we recognize that progressive change is often incremental. We invite you to consider the foregoing proposal and welcome any opportunity to discuss this matter with you further.

Yours truly,



Maureen Whelton, Chair
OBA Civil Litigation Section