August 27, 2021

VIA EMAIL

The Honourable Peter D. Lauwers
Chair of the Expert Evidence Subcommittee of the Civil Rules Committee
Court of Appeal for Ontario
130 Queen Street West
Toronto, Ontario M5H 2N5

Dear Justice Lauwers:

RE: Ontario Civil Rules Committee Consultation on Late Delivery of Expert Reports

The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association of approximately 5,500 members throughout Canada, including approximately 4,500 in Ontario. The Society's mandate includes making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

We write in response to your correspondence dated July 16, 2021. We thank you for carefully considering the Society's June 14, 2021 submissions on the late delivery of expert reports (which are attached for your reference).

The Society reconvened its task force to discuss the Expert Evidence Subcommittee's ("Subcommittee") proposed revisions to the *Rules of Civil Procedure* ("Rules"). We appreciate the opportunity you have provided for the Society to consider the proposed new Rules.

It is apparent that the Subcommittee made considerable efforts to develop new Rules that could eliminate the concern that the late delivery of expert reports would undermine the usefulness of pre-trials or cause scheduled trials to be delayed. However, the Subcommittee's interim report to the Civil Rules Committee does not include any statistical data to support the concern that the proposed amendments are intended to address.[1] There is no analysis that identifies whether, if this is a problem, it is province-wide.

The Society does not believe that these proposed new Rules are required or will be helpful to alleviate the very real problem of delay in the civil justice system. To the extent that trials are being adjourned because of the late delivery of expert reports, the current Rules give the Court the ability to meaningfully address that issue. If, however, the Subcommittee believes that new Rules are necessary to fix a real problem, the proposed amendments ought to be streamlined and clarified. Any new Rules should also provide for region-by-region discretion (perhaps by way of practice directions) and ought not to fetter the ultimate discretion of the trial judge.

[1] Please see page 5 of the "Interim Report of the Subcommittee on Expert Evidence to the Civil Rules Committee on the Late Service of Expert Evidence Reports", dated June 25, 2021; the Subcommittee notes there is no statistical information to substantiate the views that prompted the Subcommittee's mandate.

The Society believes that a more comprehensive study should be undertaken to determine the number of trials that are being adjourned in each region and the reasons for those adjournments. This data would allow the Subcommittee to recommend reforms that will address the major causes of unnecessary adjournments without the need for province-wide changes to the Rules that may cause issues in regions where none currently exist.

The proposed new Rules also appear to move away from certain core principles which underlie the Rules and serve as the foundation of how the profession is expected to practise. The proposed Rules do not promote civility or cooperation amongst counsel, and the Society is concerned that they purposefully hamper judicial discretion.

Proposed Amendments to Rule 33.01 – Motion for Medical Examination

The proposed new Rule 33.01 requires that notice of a motion for an order under section 105 of the *Courts of Justice Act* (for the physical or mental examination of a party) be given no later than 60 days after the trial record is filed. It is unclear whether the motion itself must be brought within 60 days after the trial record is filed, or whether a party would be barred from bringing a motion or providing a report if the motion is not brought within 60 days. The Society's members believe that this timeline will prove to be much too early in cases where the trial date is a year or more away.

Proposed New Rule 50.03.1 – Certificate of Readiness to be Filed (Actions)

The process set out by the proposed new Rule 50.03.1 is intended to identify when there will be delays with the delivery of expert reports that could affect pre-trials and trial scheduling.

As set out in the Society's June 14, 2021 submission, there are circumstances in which incurring the cost of expert evidence is not necessary before a pre-trial and, if the case settles at the pre-trial, may not be a necessary expenditure at all. The first pre-trial in a matter in jurisdictions that do not have mandatory mediation often provides an effective opportunity to settle a dispute. Expert reports are not always needed for this to happen. However, the Society agrees that requiring counsel to advise opposing counsel and the Court that a party intends to rely on expert evidence at trial but will not have that evidence for the pre-trial, as proposed by Rule 50.03.1(1), should facilitate more thoughtful discussions about liability, damages, and the parties' readiness for trial.

In considering the impact of Rule 50.03.1 on trials, it is important to recognize that trial scheduling processes differ significantly in regions across the province. For example, on the Toronto civil list, parties receive the dates for their pre-trial and trial at the same time. However, it is commonplace in many other regions to have a pre-trial or numerous pre-trials before a trial is scheduled. The Society's members in these regions have emphasized that the late delivery of expert reports is not a problem impacting the adjournment of trials. They expressed concern that the proposed new Rules will introduce additional layers of process and cost to address a non-issue.

The proposed new Rule 50.03.1(3) relies on case conferences to deal with adjourning the pre-trial if necessary and to establish a timetable for the delivery of any delayed expert reports. This procedure will only work if the Court has the necessary resources to ensure that case conferences are readily available. For example, at present in Toronto, a party may wait 6 to 8 months for a civil case conference. This becomes more problematic if counsel provide their Certificate of Readiness only 60 days before a scheduled pre-trial.

The requirement in proposed Rule 50.03.1(4) that the party who does not intend to serve an expert report by the deadline shall explain the reason why does not appear to the Society to be necessary. If counsel requires an extension and does not offer an adequate explanation for their failure to comply with the deadlines set out in the Rules, the Court will deal with the matter as it sees fit.

With respect to proposed Rule 50.03.1(5), any Rule which does not allow the parties to amend timetables on consent and file the updated timetable with the Court appears likely to add unnecessary work to the Court's dockets and cost to the proceedings. Provided that a consent amendment to the timetable does not require the adjournment of the pre-trial or the trial, such amendments are cost-effective, efficient, and consistent with the efforts to promote cooperation and communication between counsel.

Proposed Rules 50.03.1(6) and (7) create an incentive to schedule the pre-trial long before the trial in order to accommodate the possibility that additional time will be required for plaintiffs or defendants to obtain and finalize expert reports. There are jurisdictions where a trial will only be scheduled once the pre-trial judge is satisfied that the matter is ready. But in other jurisdictions, pre-trials tend to be scheduled six to eight weeks before trial. These differences in practices illustrate how the imposition of general rules like those proposed may be problematic.

The Society is concerned that proposed Rule 50.03.1(9) is confusing. It is not clear whether the proposed Rule would require leave of the trial judge to admit a late expert report even if the party meets the deadlines set out in a timetable established by a judge or case management master at a case conference. Delivering an expert report within the deadline set out in a court-ordered timetable should be sufficient to ensure that the report is not rejected as inadmissible for being out of time.

The Society does not believe that a specific Rule setting out that the judge or case management master may fix substantial indemnity costs for the case conference, as proposed in new Rule 50.03.1(10), is helpful or necessary. The current Rules allow costs to be awarded for the case conference if appropriate.

Proposed Amendments to Rule 50.07 – Powers

New Rule 50.07(1.1) appears to require an order in addition to the order made by the case conference judge or case management master. Again, the Society is concerned about the layers of process and the resulting increased costs. The Society also believes that there ought not to be a Rule unless it is necessary to achieve a specific result. As such, the Society questions why it is necessary to implement a Rule about orders being binding or being respected by judges.

Proposed Amendments to Rule 53.03 – Expert Witnesses (now Expert Evidence)

With respect to proposed Rule 53.03(4), the Society is concerned that allowing supplementary reports to be delivered 45 days before trial, with responding reports due 15 days before trial, will cause counsel to be ill-prepared or trials to be adjourned. Supplementary reports delivered in this timeframe may cause prejudice to the responding party if their experts are not immediately available to review or respond to a supplementary report or if a new expert is required. The supplementary reports delivered this close to trial may also lead to argument among the parties about whether new issues are being raised that make the report more of a new report in substance than a supplementary report. Given that the goal of the changes to the Rules is to avoid adjournments of trials as a result of late-delivered expert reports, the Society does not believe that the deadlines set out in this new proposed Rule are sufficiently in advance

of trial to achieve that objective. Furthermore, the deadlines do not account for potential reply or sur-reply reports that may be necessary.

Proposed Rules 53.03(6), (7), and (8) also concern the Society. With respect to subrule (6), the Society agrees that case conferences are more efficient than motions and offer an appropriate mechanism for dealing with arguments about extending timetables. However, the Society is very concerned about the resources necessary to schedule a case conference for every single file in the province of Ontario in which a party may not have every expert report available for the pre-trial.

Proposed subrule (7) appears to be a disincentive to counsel dealing with scheduling issues in a cooperative manner. The Society believes that a cost-effective agreement between parties to extend a timetable may be appropriate when dealing with a request for an adjournment of a pre-trial or trial.

Proposed subrule (8) appears to the Society to be overly harsh. The Society agrees that extensions ought to be sought before the deadlines for the delivery of expert reports expire. However, if counsel determines a certain report is necessary for trial after the expiration of the deadline, the Court ought to have the discretion to grant an extension if appropriate.

The Society is concerned that the proposed Rule 53.03(10), which sets out that the trial cannot be adjourned by the judge or case management master, is a fixed rule that will become problematic because it allows no exceptions.

Proposed Amendments to Rule 53.08 – Evidence Admissible Only with Leave

The Society believes that adding the requirement in Rule 53.08(3)(a) that a party provide a "reasonable explanation" for the late delivery of an expert report in order to obtain leave to have the report admitted adds undue uncertainty to the process. The current Rule precludes the adjournment of the trial if it causes prejudice or undue delay and the Society believes that the Court's focus should not be expanded to include the "reasonableness" of the explanation for the delay.

Access to Justice

The proposed new Rules will likely increase the costs of a proceeding. This is especially of concern where the litigant has limited resources or in lower-value cases. The proposed amendments also add new steps, complexity, uncertainty, and risk to the process, and the Society believes that these changes will impact access to justice.

Conclusion

The Society believes that stricter enforcement of the current Rules, perhaps with some minor revisions, would be sufficient to deal with the problems that exist with the late delivery of expert reports in certain regions. The Rules require delivery of expert reports before pre-trial. The Rules also provide that trial judges ought not to grant leave to admit a late-delivered expert report if to do so would cause prejudice or delay. Requiring the Certificate of Readiness before a pre-trial and having the pre-trial judge deal with a timetable for expert reports would ensure that reports are delivered in a timely manner.

Rule changes occur infrequently and carry significant impact on the practice of counsel and the administration of justice. That will be particularly true of these proposed Rules. As a result, the Society

believes a more comprehensive study should be undertaken to obtain data-driven evidence of the causes of adjournments of trials. If new Rules dealing with the delivery of expert reports are necessary, more time should be taken to consider how the Rules could be amended as simply and clearly as possible and to study how they would be applied.

The Society is concerned that new problems will arise because of a lack of judicial resources to implement the proposed Rule changes. If current judicial resources do not permit the assignment of a case-management judge to every single case, consider:

(i) Assigning a case-management judge to hear urgent matters for cases that have been set down for trial;
(ii) Having the pre-trial judge serve as the case-management judge for matters that do not settle at pre-trial.

Either of these approaches would focus case management on the cases that most need it and are consistent with the requirement that counsel cooperate with one another and the Court.

In conclusion, the Society believes that the proposed changes to the Rules add a level of complexity to the process that may cause uncertainty, increased costs, and new sources of delay. While there may be a problem with the late delivery of expert reports that needs to be fixed in some regions, these Rules add complexity in every region. The Society is also concerned that these proposed Rules do not encourage cooperation amongst counsel or recognize the extent to which counsel regularly cooperate effectively together and with the Court.

Ultimately, the Society believes that trial judges should have all relevant and probative evidence necessary for a just determination of the litigants' dispute. This must remain the paramount goal of the Rules and the civil justice system. This is most likely to happen where the Rules are clear and permit flexibility to address the unique circumstances of any matter.

Thank you for consulting with the Society. We would be pleased to discuss our comments with you further.

Yours sincerely,

Deborah E. Palter
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society

Attachments:

1. The Advocates' Society Letter to The Honourable Peter D. Lauwers, dated June 14, 2021

Members of the Society's Task Force:

Robin Clinker, *Petrone & Partners*
David Conklin, *Goodmans LLP* (chair)
Sabrina A. Lucenti, *Dooley Lucenti LLP*
Sarah Naiman, *Thomson Rogers*
Maureen Whelton, *Stevenson Whelton LLP*

June 14, 2021

VIA EMAIL

The Honourable Peter D. Lauwers
Chair of the Expert Evidence Subcommittee of the Civil Rules Committee
Court of Appeal for Ontario
130 Queen Street West
Toronto, Ontario M5H 2N5

Dear Justice Lauwers:

RE: Ontario Civil Rules Committee Consultation on Late Delivery of Expert Reports

The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association of approximately 5,500 members throughout Canada, including approximately 4,500 in Ontario. The Society's mandate includes making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

The Society is concerned by the worsening backlog of civil matters in Ontario's courts and appreciates the opportunity to provide input to the Civil Rules Committee on recurring issues or practices that contribute to the delay experienced by litigants in the resolution of their disputes. The Society struck a task force to discuss the Expert Evidence Subcommittee's questions regarding the late delivery of expert reports, and offers the following responses, which we hope assist the Subcommittee in formulating its recommendations.

1. **Is late service of expert reports a problematic practice in the experience of your members?**

Although members of the Society are aware that counsel may serve expert reports late, the Society does not believe this reflects a widespread or common practice. While the delay in civil matters is an extremely significant problem impacting access to justice in Ontario, the Society does not believe that the late service of expert reports is contributing in a material way to that problem.

It is important to distinguish between the following issues: the late service of an entirely new expert report, as distinguished from an updated or supplemental expert report; the late service of a report that is the result of counsel's actions as opposed to those of the expert; and the late service of reports affecting pre-trials as opposed to trials. Moreover, the Society notes that the issues with trial management and late service of expert reports may vary in regions throughout the province. Each of these different factors suggests that new general rules addressing the consequences of serving a report late would not be appropriate and should not be necessary.

2. If so, what problems have they experienced?

While the Society does not regard the late delivery of expert reports to be a problem materially contributing to delay in civil litigation in Ontario, the Society views late delivery of expert reports at the pre-trial stage as a less significant concern than at trial. Pre-trials vary across the province from region to region, and even within one region. Pre-trials do not tend to be wasted just because expert reports have been delivered late.

3. Is the conscious delay in the delivery of expert reports until after the pre-trial conference something your members have seen or done?

There are regions in Ontario where it is not unusual for counsel to consent to holding a pre-trial prior to the service of expert reports, in order to attempt to resolve the action without incurring the cost of experts. In the experience of the Society's members in these regions, pre-trials are not wasted as a result of this practice and trials are not delayed.

Experts are expensive. This expense is particularly felt in actions where a lower amount is in dispute: counsel may wish to try to resolve the action with the assistance of the pre-trial judge before causing their clients to incur the cost of an expert. In the anecdotal experience of the Society's members, this practice may be more prevalent in regions that do not have mandatory mediation, as the pre-trial may be the first opportunity to discuss settlement with the opposing party.

Often pre-trials are held many months and even years ahead of trial dates, which has a significant impact on the timing of expert reports. The Society's members have also noted that they may at times hold off on obtaining an expert report before the pre-trial, given the long period of time between the pre-trial and the trial. This may be done because of the expense associated with the expert report and the fact that the report may have to be updated before trial at significant cost.

Attending a pre-trial without all necessary expert reports can in some circumstances be problematic and result in a lost opportunity to settle the matter. Some types of expert reports are particularly relevant to meaningful settlement discussions; for example, the absence of an income loss report where the plaintiff believes that there is significant income loss and the defendant does not agree, is likely to preclude meaningful settlement discussions. However, that is not always the case. Meaningful settlement discussions can occur with the assistance of a judge in many cases even where the parties have not obtained every expert report necessary for trial.

The Society also notes that, even where meaningful settlement discussions cannot occur as a result of the lack of expert reports, trial management discussions are still productive and a valuable use of a pre-trial. Rule 50.06 of the *Rules of Civil Procedure* sets out the matters to be considered at a pre-trial conference. The late delivery of an expert report is not likely to impact many of the items listed therein.

4. Why would parties serve expert reports on the eve of trial and then seek an adjournment?

In the Society's view, there are likely three reasons that parties serve expert reports on the eve of trial.

First, the Society believes the most common reason is inadvertence or poor planning. Counsel, particularly those with high-volume practices, may not realize their clients need a particular expert report to prove their claim until they have commenced trial preparation. Alternatively, counsel may only realize that they

need to update an existing expert report when undertaking trial preparation. The impact of this practice may be compounded by the fact that many experts are also very busy and require time in order to prepare their reports.

Second, something may have happened in the matter that alters the landscape and counsel concludes an expert report is required to take a case to trial. For example, a new issue has arisen out of a step taken by the other party, there has been a change in a medical outcome, or an event has impacted an income loss assessment.

Third, the late service of an expert report may be tactical in order to either gain an advantage, or to respond to another party trying to gain an advantage. The Society believes this type of sharp practice is very rare, and it does not condone that approach to practice.

The party or parties opposite the party delivering the last-minute expert report may, depending on the issues and circumstances of the case, be compelled to request an adjournment in order to have an opportunity to deliver a responding expert report.

5. **What suggestions would your organization have to remedy the problem of last-minute pre-trial conference and trial adjournment requests arising from the late service of expert reports?**

Members of the Society practising in regions with significant case management have found that clear timetables and readily available case conferences have been helpful to ensure that trials are ready to proceed as scheduled.

A timetable should be required prior to a pre-trial or trial being scheduled. In addition, trial management conferences should take place ninety (90) days before trial to ensure that any last-minute problems are dealt with sufficiently in advance of trial to ensure the trial proceeds as scheduled.

In terms of sanctions that will deter the practice of delivering expert reports late, costs thrown away is an effective deterrent if such costs are awarded in a consistent and predictable manner. Such costs, however, ought to be reserved for particularly egregious circumstances that could have and should have been avoided.

The Society believes that case management with readily available case conferences will provide the best means of ensuring the trial management process is effective and trials are not delayed by the late delivery of expert reports.

6. **Should late service of expert reports be permitted on consent of the parties if that results in a wasted pre-trial conference or the adjournment of a fixed trial date?**

Yes.

With respect to pre-trials, the Society does not believe that late service of an expert report necessarily wastes a pre-trial. As noted above, Rule 50.06 sets out the matters to be considered at a pre-trial and a late-delivered expert report will not impact many of these matters. Also, as explained above, the Society believes that there are valid reasons, in many instances, for not delivering expert reports in advance of pre-trials.

With respect to trials, the just determination of the dispute ought to remain the primary consideration when determining whether to allow the late service of an expert report. While wasting judicial resources should be discouraged in all circumstances, that goal should not come at the expense of admitting all available relevant and probative evidence for the just determination of the issues on the merits. If the parties agree that the late expert report is relevant and probative, the report should not be discarded by the judge solely because it will require the trial to be adjourned. Other available options can discourage the misuse of limited court resources without impacting a fair hearing of the issues on the merits. A genuine award of costs thrown away is an example of an effective deterrent to this practice in appropriate circumstances. Case management may be the most effective means of ensuring delays are avoided unnecessarily and court resources are not wasted.

7. **What factors should judges consider in deciding whether to allow late service of expert reports for pre-trial conferences and trials, and should the factors be different for each?**

The Society believes that the late delivery of an expert report has a very different impact before a pre-trial as opposed to before a trial. As noted above, pre-trials are not necessarily wasted as a result of late delivery of expert reports. While the factors for the judge to consider when an expert report is delivered immediately prior to a pre-trial may be similar to the factors to consider when an expert report is delivered immediately prior to trial, the analysis of the factors will not be the same.

While every case must be considered on its unique facts, the Society suggests the following non-exhaustive list of factors which may be relevant to the judge's decision of whether to allow the late service of an expert report:

- The age of the claim and the history of the action
- The issues in dispute between the parties
- Whether new issues arose that required a new expert report
- When the expert was retained
- The timing of the delivery of the expert report
- The reason the expert report has been delivered late, such as inadvertence, change of counsel, retirement of a witness, and the expert’s availability to provide a report
- Whether the report materially impacts the case
- Whether the report is from a new expert or is an updated or supplemental report
- Whether the other party or parties object to the late service of the report

The Society believes, however, that the two key considerations when considering whether to allow late service of an expert report must be:

- Any prejudice to the party serving the report if compelled to proceed without the report
- Any prejudice to the other party that cannot be compensated for by an adjournment and the award of costs thrown away

8. **Should pre-trial judges be empowered to impose immediately payable costs sanctions for a wasted pre-trial conference, and should a judge hearing a leave motion to late file expert evidence be able to do the same?**

Rule 50.12 empowers judges to impose cost sanctions for a wasted pre-trial conference. Judges are also empowered to award costs of a leave motion and costs thrown away for an adjourned trial. These powers should only be used with caution in egregious cases or where the delay is not satisfactorily explained. The Society does not believe any additional cost sanctions are necessary beyond what is already provided for in the Rules.

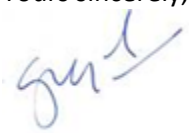
9. **Should the wording in r. 53.08(1) of the *Rules of Civil Procedure*, which sets the trial judge's authority to admit late expert reports, be changed from "leave shall be granted" to "leave may be granted"? Would this assist in addressing the problem?**

The Society does not support revising the wording in Rule 53.08(1) from "leave shall be granted" to "leave may be granted". The priority must remain the just determination of every civil proceeding on its merits. The current rule ensures that probative and relevant evidence is before the court unless there is prejudice to a party that cannot be compensated with costs or an adjournment and this should not be sacrificed to the goal of avoiding the waste of judicial resources. That important goal can be achieved in other ways and with other, less severe tools, including timetables, case management, case conferences, and costs thrown away. The suggested rule change will create uncertainty on the eve of trials and will not advance the interests of justice.

In summary, the Society does not believe that the late delivery of expert reports is materially impacting the delay in the civil system in Ontario, and does not believe that changing the *Rules of Civil Procedure* with respect to the late delivery of expert reports is necessary or warranted in the circumstances. To the extent that the late delivery of expert reports is impacting the expeditious resolution of civil cases, readily available case conferences and case management would likely be helpful in mitigating this problem. The Society does not believe that any Rule changes are necessary to address concerns related to the late service of expert reports.

Thank you for consulting with the Society. We would be pleased to discuss our comments with you further.

Yours sincerely,



Guy J. Pratte
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society

Members of the Society's Task Force:

Robin Clinker, *Petrone & Partners*
David Conklin, *Goodmans LLP* (chair)
Sabrina A. Lucenti, *Dooley Lucenti LLP*
Sarah Naiman, *Thomson Rogers*
Maureen Whelton, *Stevenson Whelton LLP*