



The Advocates' Society

La Société des plaideurs

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,



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President

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