Justice delayed

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We have a lot to be proud of in Ontario's civil justice system and in the high quality of adjudication litigants can expect. But if litigants cannot actually get adjudication in a timely and affordable manner, the quality of that adjudication is meaningless.

The Supreme Court's decision in *R. v. Jordan*[1] has renewed focus on court delays in criminal proceedings. As *Jordan* and cases before it have shown, section 11(b) of the *Canadian Charter of Rights and Freedoms* and the potential for serious criminal charges to be stayed serves as an effective tool for getting the government's, and the public's, attention. Unfortunately, in civil proceedings there is no such tool. Private litigants are at the mercy of a system rife with institutional delays, often with seemingly little concern from the public, the government or the media.

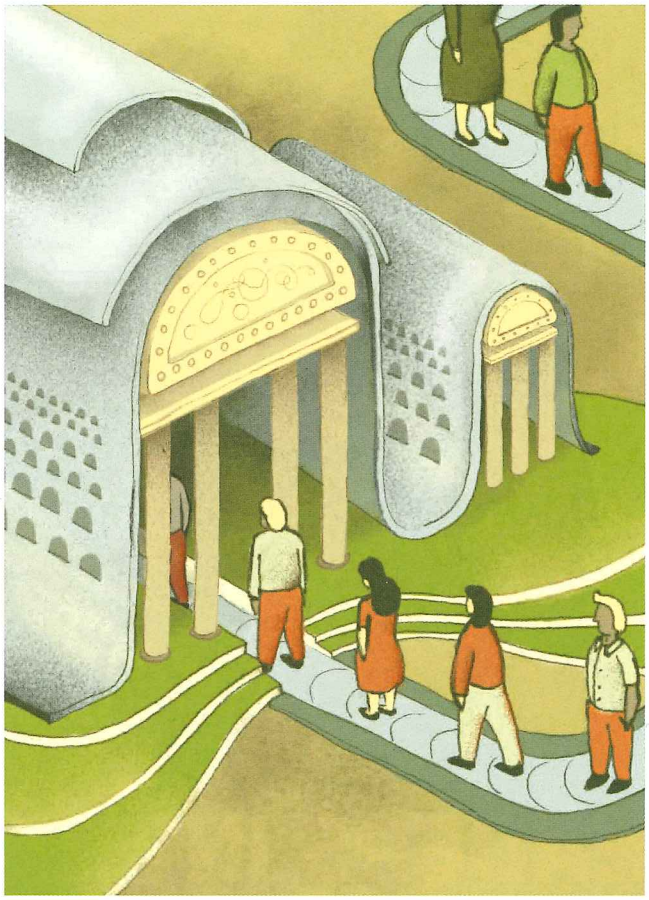
Right now, when a new client walks in the door, most lawyers in Toronto have to tell the client that obtaining a determination of his or her case by the courts will realistically take around three to five years, if not longer. A client who is a plaintiff has to be told that attempts by the defendant to prolong matters will likely be successful and that, in many modest-value cases, the costs of pursuing the claim may outstrip its value. If the client is a defendant to an unmeritorious claim, he or she may need to be told that, because of the costs and delays inherent in litigation, it may be more economical to settle the claim than to fight it.

This state of affairs is a terrible one, in which justice is at risk of being distorted by delays in the court system. The obvious and badly needed solution to this problem is to appoint more judges. While we wait for this eternal problem to be addressed, there are systemic changes to the rules and practices governing civil litigation which would go a long way toward reducing delay and expense.

A significant cause of delay is a model of adjudication which requires that various steps be taken, assembly line style, before a claim arrives at a final adjudication. For example, the timeline for a typical case may look something like this:

Pleadings:	2–3 months
Productions:	2–3 months
Discoveries:	4–6 months
Motions:	4–6 months
Mediation:	4–6 months
Pre-trial:	4–6 months
Trial:	12–24 months
Total:	32–54 months

Removing some of these steps, particularly for smaller-value claims, will provide both cost savings and speedier justice. Allowing parties to obtain a trial date while these steps are being taken will significantly reduce delays by allowing parties to take any necessary steps while waiting for trial, rather than having a file wait idly for a trial after all necessary steps have been taken.



Set a trial date earlier and work backward

The wait time for trial dates is now two years for a trial over 10 days and close to a year or more for a short trial. A trial date can, of course, be obtained only after the party seeking to schedule the trial has completed discoveries, scheduled a mediation and brought any necessary motions. Accordingly, as things stand, there is a baked-in period of one to two years of virtual inactivity between when the case is ready for trial and when the trial is heard.

Presumably, when Rule 48.04 (prohibiting motions or discovery after having set an action down for trial) was implemented the wait time for trials was nowhere near what it is today. Given the current realities, this rule needs to be rethought.

If parties could obtain trial dates before completing every step necessary for trial, the remaining steps could be taken while waiting in line for a trial. This process would significantly reduce the overall wait time for a trial date.

The objection to this change is that it will lead to parties requesting trial dates for matters that will not truly be ready for trial, an outcome that will result in adjournments and squandering of valuable court time. However, in most actions the parties should be able to map out the remaining steps with reasonable accuracy. (Indeed, parties are expected to do so through a discovery plan.) In any case, the risk of a few extra adjournments is preferable to the current system, where litigants who are able to get their actions ready for trial are effectively required to wait for months, if not years, for trial-ready actions to proceed.

9:30 appointments for Master's motions

The new Commercial List–style 9:30 chambers appointments currently available in Toronto for civil cases are a great idea. The problem is that they are available only for judge's motions, not Master's motions, and most of the procedural disputes that delay the progress of an action are the latter. The chambers appointments should be expanded to Master's motions.

Short motions on demand

In Brampton and Milton, short motions can be booked on set days of the week and are available as long as materials are served and filed on seven days' notice pursuant to the Rules. In Toronto and Newmarket, the wait time for the shortest of short motions is often months. The exercise of even scheduling a motion is cumbersome because dates need to be obtained from the court, then canvassed with counsel and then confirmed again with the court – unless, as is often the case, the date is by that point no longer available, in which case the entire process needs to be repeated.

Many short motions are simple, brief and ultimately unopposed. They are nonetheless often necessary before proceeding with further steps in the action – for example, service issues, third-party records, pleadings motions and refusals motions. Having wait times for short motions injects further unnecessary delay into the adjudicative process as a whole.

Short motions should be available in all courthouses on seven days' notice on set days of the week.

The likely objection to this proposal is that counsel will inevitably try to jam longer motions into these dates when they cannot properly be dealt with as short motions. The answer is to hold counsel to time estimates and to recognize that most matters can in fact be dealt with in a reasonably short period. As I was reminded around the time of the *Carter* assisted-dying case[2] while arguing about something much more mundane: "Mr. Wilson, if the Supreme Court can decide matters of life and death on two hours of argument, surely you can finish this afternoon!"

Eliminate examinations for discovery for Simplified Rules actions

Examinations for discovery are generally the most expensive and time-consuming step in an action, aside from the actual adjudication of the claim. While discoveries are undoubtedly helpful and enable each side to better understand the case, to obtain admissions and (arguably) to narrow the issues in dispute, they are frequently not essential and add further delay and expense to a proceeding. In Simplified Rules actions, discoveries impose a

burden disproportionate to their benefit and should be eliminated.

This proposal was considered and rejected as part of the Honourable Coulter Osborne's 2007 Civil Justice Reform Project report. The reasons provided were concerns expressed by the bench and bar about discoveries being conducted at trial and delays to settlement discussions. In 2017, these concerns should give way to the more important priority of ensuring timely and affordable justice.

The two-hour cap on Simplified Rules discoveries does not effectively restrain their cost because discoveries frequently cannot be completed in one day, particularly in multi-party actions. Discoveries also spawn the need for undertakings and refusals motions. And the cost of a court reporter and transcripts are significant relative to a proceeding where less than $100,000 is at stake.

While any party is currently free to forgo its right to discoveries and set an action down for trial, there is an understandable reticence to do so to ensure that the other side does not gain an undue advantage given the opportunity discoveries present for strengthening a case. Eliminating them for both sides provides an "equality of arms" and allows both sides to proceed faster and with less expense.

A default rule against discoveries could be tempered by allowing discoveries where both parties consent, by permitting limited discovery to be conducted by way of written interrogatories, or by allowing a party to seek leave of the court to conduct discoveries where doing so is truly necessary in light of the particular nature of the case.

Eliminate mandatory mediation

Mandatory mediation does not work. I rarely settle cases with roster mediators, and a trip to 77 Grenville is almost always unproductive. This has nothing to do with the quality of the mediators. It has to do with the fact that for one reason or another the case is not capable of being settled at that time. In my experience, if the parties recognize there is a prospect of settlement they will agree to use a private mediator.

This is not just stubbornness or parties being difficult. There are good reasons that cases cannot settle, and counsel should be trusted to make this assessment. The only thing accomplished by forcing the parties to go through the motions of a mediation is further delay, expense and frustration for clients who must pay for and participate in a process with a preordained negative result.

Where the parties agree there is no hope of settlement they should not to be forced to mediate.

Eliminate scheduling court

Mandatory scheduling court for long motions or trials is one of the most wasteful uses of judicial and lawyer resources in Ontario's court system. The combined value of all the time lawyers spend sitting in assignment court is astronomical and shows the real burden this exercise places on litigants, lawyers and judicial resources. In addition, waiting for a court date to schedule another court date adds yet further delay. (Even saying it screams inefficiency.)

Requiring attendance to obtain a date where there are no actual disputes between the parties serves no purpose other than perhaps cursory vetting of time estimates by a judge. This job is something counsel should be trusted to deal with between themselves, with a trip to assignment court only in the event of a real dispute.

Long motion and trial dates should be available by email or other correspondence with the court's scheduling office. Where attendance at trial scheduling court is necessary, an attendance date should be available promptly.

A recent and not atypical anecdote serves to illustrate the current delays facing a party who has an action ready for trial: A trial record is filed in May 2016. A trial certification form received from the court in July 2016 is immediately completed and sent to the three defendants with a time estimate. The defendants (as defendants sometimes do) refuse to complete the form because they say they cannot yet provide a time estimate. The plaintiff has to go to triage court to address the impasse, and this attendance is booked for November 2016. Four lawyers attend. Outside the courtroom all lawyers agree to a three-week trial. The triage court cannot give the parties a long trial date so they have to rebook for long trial scheduling court, for which a scheduling attendance is mandatory. Four lawyers attend again. The earliest long trial scheduling date available is in March 2017, at which the parties are lucky to obtain a trial date of December 2018.

Justice delayed is justice denied. If we are to ensure timely justice unnecessary steps, attendances and wait times must be eliminated.

Higher small claims limits and consecutive trial days

The monetary limit of Small Claims Court should be raised to $50,000, if not higher. The purpose of Small Claims Court is to provide accessible and affordable justice for smaller-value claims. The Superior Court's procedures are incapable of delivering this for claims less than $50,000 – the costs of productions, discoveries, mediation, pre-trial and a trial in Superior Court are likely to cost close to if not significantly more than $50,000, no matter how efficiently the claim proceeds. This is not a radical idea: Alberta raised the limit of its Small Claims Court to $50,000 several years ago.

At the same time, Small Claims Court scheduling procedures should be adapted to provide for consecutive days of trial. Right now, trial dates can be obtained only one day at a time. If a trial does not finish in one day, it will often be several months before it continues – requiring additional and otherwise unnecessary preparation and further delay. Consecutive trial days would result in significantly speedier and more affordable adjudication.

Conclusion

Lawyers are good at advocating for their clients, and judges are good at judging. Let's focus on identifying and addressing what the system is not so good at: ensuring that cases move forward quickly and affordably. If we do so, the public will be in a better position to appreciate the good lawyering and good judging that go on in our courts.

Notes

1. *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631.
2. *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.