

CIVIL JUSTICE REVIEW PROJECT FALL OUT: CHANGES IN LEGISLATION, THE RULES AND THE IMPACT ON PRACTITIONERS AND THEIR CLIENTS IN ONTARIO

OTHER ACCESS TO JUSTICE ISSUES

Venue

In July 2004, Rule 13.1 was introduced. It permitted a plaintiff to start a proceeding anywhere and it particularly required that Motions had to be heard in the place where the action was started. Complaints, particularly from practitioners in Northern Ontario poured in about this Rule. For example, a creditor's main office may be located in Toronto so debt collection actions were started there even though the key participants and debtors were in another Region. If the party from Sudbury wanted to move the action to Sudbury, the Motion had to be brought in Toronto. Rule 13.1.02 has now been amended to permit the change of venue Motion to be brought and heard in the County to which the transfer of the proceeding is sought.

Civil Juries

Although Justice Osborne recommended changes to Ontario's jury system, these have not been implemented as yet. He suggested that cases where the value of the claim was \$50,000 or less, should have the right to a jury trial abolished except in claims for defamation, malicious prosecution and false imprisonment. He also recommended that the Court be allowed, on its own motion, to dispense with a jury. The justification advanced for the abolishment of civil juries is that "a disproportionate amount of institutional resources is required to hear jury cases" and jurors are "inconvenienced", often over small amounts.

Unrepresented Litigants

Although unrepresented litigants apparently require more court time, increased services (such as Court reporters) and arguably place more strain on already limited judicial resources, little has been done to address this issue. The increase in Small Claims Court and Simplified Procedure jurisdictions could lead to increased unrepresented litigants.

Justice Osborne felt that one of the reasons there was an increasing number of unrepresented litigants had to do with the cost of litigation. The proliferation of "do it yourself" kits and perhaps even assistance provided by the Court and other legal

providers gives some litigants the sense that they can and should proceed without assistance by lawyers.

In the civil litigation world (excluding Family Law) services such as the Lawyers Referral Service, Pro Bono Law Ontario and Contingency fees make this less of a problem. Nevertheless, the Osborne report contained recommendations for a review of the availability of Legal Aid Certificates in the civil justice system. It was thought that at least the rendering of an opinion on the chance of success to a litigant through a Legal Aid Certificate would help deter unrepresented litigants at an early stage. Given the recent problems with Legal Aid this "solution" seems highly unlikely.

Judicial Resources

The Osborne report found that Ontario had the highest population -to-Judge ratio of any province. However, he also noted that the recent increase in federally appointed judges in Ontario and additional resources pumped into the system have been directed towards Family Court for new projects and towards Criminal Court. The reality is that little to nothing has been done recently to address the need for judges in the Civil system. Justice Osborne recommended immediate consideration by the Federal Government of the appointment of new Judges in certain regions and a more structured analysis of the needs for Civil matters in Ontario. He also recommended specialization within the judiciary.

Civil Rules Committee

By far the most significant response to Justice Osborne's Civil Justice Review Project has been the amendments to the Rules of Practice. The Rules are, by and large, a product of the Civil Rules Committee which is aided by a Secretariat. Ontario's Civil Rules Committee has 29 members (the largest by far of all Provinces – some don't even have a committee). The Secretariat has a private bar counsel, an academic, a Judge and a lawyer from the Ministry of the Attorney General. The job of the Secretariat is to review and analyze proposed changes and provide commentary.

By way of background, the Civil Rules Committee is mandated in s. 65 of the Courts of Justice Act. It must be composed of: (1) the CJO and AJO (2) the CJSCJ and ACJSCJ (3) the CJOCJ (4) two CA justices (5) 8 SCJ judges (6) one Prov Ct. (Civil Division) judge (7) a designate of the AG (8) a law officer of the Crown (9) two court administrators, and; (10) 9 lawyers – four appointed by the LSUC, four by the CJSCJ and one appointed by the CJO. These persons serve for 3 year terms but may be reappointed without limit. Only 1/3 are needed for a quorum.

Justice Osborne noted changes should be made to the Committee itself to improve its role, mandate and relationship with the public. He felt transparency could be improved with publication of the Committee's membership, its agenda and where appropriate its

minutes. He recommended that the Committee consider making a recommendation that it downsize itself. The Secretariat should be strengthened and given additional responsibilities. None of these suggestions have been taken to heart as of yet.

Impact on Practitioners and their Clients

It can be easily argued that the longer more detailed pre-trials, the increased number of anticipated summary judgment motions and the expected increase in motions fought over the new definition under the discovery rules and the discovery plans will at least result in an increase in the demands placed on judicial time in the short term. There can be little to no doubt that a corresponding increase in the number of claims filed will in the immediate term strain judicial resources in the Small Claims Court as was experienced the last time the monetary jurisdiction was increased. Yet, no thought nor apparent consideration has been provided by the Ministry to address these shortcomings.

The increased costs to litigants imposed by the new Rules will have the exact opposite effect to the desired goals of streamlining and making access to the judicial system more reasonable and affordable.

