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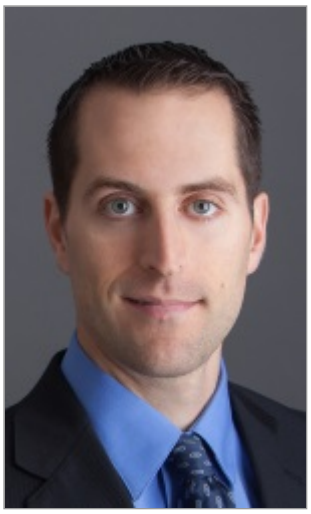
Other Areas of Practice

Time to put civil justice out to pasture? | Michael Lesage

By **Michael Lesage**



Michael Lesage

(October 8, 2020, 12:34 PM EDT) -- Objectively speaking, the Ontario court system has long functioned poorly, a state of affairs much aggravated by COVID-19. Long delays in criminal prosecutions continue to result in dismissed cases, despite the dictates of the *Jordan* decision (*R. v. Jordan* 2016 SCC 27). The Ontario family law system can charitably be described as a shambles and is perhaps best known for its Byzantine rules and procedures (see CLEO Family Law flowcharts) and close to 60 per cent rate of self-representation.

Meanwhile, the civil system to which the population is most often subject, and which is paid for by that same population, increasingly sees decisions made based solely upon natural morbidity, rather than any underlying principles of justice and/or law. As this has been allowed to continue, it is becoming apparent that the Ontario civil system acts more in conflict to Charter values than in the defence thereof.

Specifically, the Charter contains equity rights, including guarantees that every individual is equal before and under the law. However, much as some animals in Animal Farm were more equal than others, some entities are much more equal before Ontario's court system than others, specifically corporations over people.

With that being the case, it becomes questionable why public funding of the court system (and specifically the Ministry of the Attorney General) is justified when increasingly little public benefit is derived from such system. Perhaps like a lame donkey, it is time to put civil justice out to pasture and permanently close the courts, lest citizens improperly be led to believe that a functioning court system exists to protect their rights too?

Much as in the Middle Ages (to which our court system remains firmly wedded), disputes could again be resolved by duels, arm wrestling or even the flip of a coin.

Nowhere is this disparate treatment more evident than in the courts of Toronto. For regular people, the Toronto courts simply don't work. For instance, at the discovery stage, examinations are subject to counsel grandstanding, objections and outright refusals to answer, which is both encouraged by the *Rules of Civil Procedure* (Rules) and condoned by the masters hearing refusals and undertakings motions, who seldom award sufficient costs to effectively deter such conduct.

Moreover, many issues involving regular people are not of the type our courts deem appropriate for summary judgment (i.e., injury claims, professional negligence claims) meaning that trial is required. Ignoring the time and expense of trial itself (driven to large extent by the court's fetish for expert witnesses), obtaining a trial is itself increasingly impractical, given common seven- to 10-year wait times. As our population ages, many people simply don't have sufficient life expectancy to see that "justice be done."

Why then should they pay to maintain the illusion?

The above are however "regular people problems." Corporations can, at the outset of transactions,

elect to have future disputes resolved via arbitration, ensuring both prompt determination, and if desired, determination of the dispute by a subject matter expert. Should corporations fail to elect arbitration, which can be expensive, Toronto has a subsidized and speedy backstop for corporations known as the Commercial List.

For instance, in a recent case involving a commercial tenancy, counsel were able to move from initial application to final hearing within approximately four weeks. Such cases are doubtless of more significance to the public writ large than the case of a nurse seriously injured in a car accident who is no longer able to work, and has lost her job, savings and perhaps home. Priorities. ...

Not surprisingly, the intermediate steps leading to decisions are also much more favourable in cases involving corporations. For instance, while normal discoveries may be subject to grandstanding and refusals, as noted above, where corporations are involved (i.e. *Construction Lien Act* cases), orders may be obtained beforehand that questions at discovery are to be answered despite objection, in many cases eliminating the need for interlocutory motions or reattendance. At least on its face, that would seem to much better further the stated purpose of the Rules in securing the just, timely and least expensive determination of matters, but again, perhaps that benefit is really intended solely for corporate interests?

While it may be tempting to blame the current sorry state of affairs upon the Ontario Ministry of the Attorney General (perennially the most useless government Ministry), or the justices sitting on the Civil Rules Committee, who have failed to either notice the problems, or to benchmark the performance of the Ontario court system against comparable jurisdictions (i.e. New York, civil matters to trial within 27 months of filing, B.C. about two years), fault too rests with the Law Society of Ontario (LSO), which has focused perhaps too much of its efforts on enforcement and its restaurant operations, and not enough on its mandate to further access to justice.

Much as night is always darkest before the dawn, perhaps the current nadir in the justice system presents the LSO with an opportunity to further its core mandate of access to justice (absent a functioning system and working lawyers, there is no one to regulate).

For instance, while playing only a bit role in setting the rules and the operations of the courts, the LSO is certainly capable of tabulating statistics and metrics as to the functioning of our court system (i.e. average number of days from filing to trial) and publishing them on the home page of its website, alongside information from comparable jurisdictions such as B.C. and New York. Perhaps it will turn out that Ontario's justices are perfectly content to earn more than their New York counterparts, while taking three to four times as long to see cases resolved? It wouldn't necessarily mean they are less capable, simply slower and less hard working (which I don't believe for a second, as we have many excellent jurists in the mould of Justice Fred Myers).

Likewise, by finally shining a light upon the real problems with our system, perhaps the LSO could provide the MAG with the performance metrics and benchmarks it has to this point sorely lacked?

As so eloquently stated by the legal scholar Tupac "you see the old way wasn't working so it's on us, to do what we gotta do to survive."

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