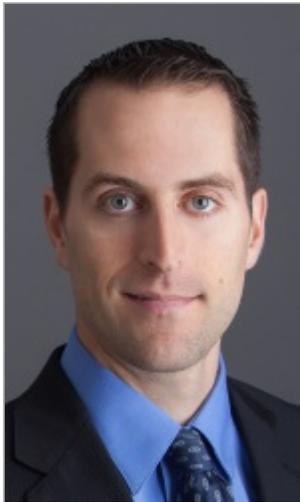


Labour & Employment**Law society leaves Superior Court in its dust | Michael Lesage**By **Michael Lesage**

Michael Lesage

(February 16, 2022, 11:21 AM EST) -- Nearly a decade ago, Justice David Brown warned of the dangers of operating Ontario's "courts like some kind of fossilized Jurassic Park" (*Bank of Montreal v. Faibish* [2014] O.J. No. 1639). His warning went unheeded, and the Superior Court stumbled along. Performance was about as could be expected, with long delays in family and civil cases and hundreds of criminal cases being dismissed annually for delay. Then COVID-19 hit, and the entire house of cards came tumbling down. It must have been an embarrassing time to be a senior justice of the Ontario Superior Court.

In the years since, the Superior Court has admittedly made some progress. Upon discovering the Internet, circa March 2020, most proceedings moved online, and electronic filing was belatedly implemented. However, with few trials being held, the court backlog continues to grow (and there still doesn't appear to be any plan to address this; i.e. why can't more matters be delegated to associate judges or other adjudicators, rather than relying upon natural morbidity?). Meanwhile, the Toronto small claims court, for unknown reasons, has failed to implement Zoom hearings and return to regular business.

Heading into COVID, the Law Society Tribunal was similarly backwards. Like the Superior Court, filings were not by default electronic and the tribunal remained paper based and in person, (generally) downtown. Like in Superior Court, service of documents remained a two-person affair, in addition to requiring the assistance of Canada Post, courier or process server. Little was happening remotely, and as a result, with the onset of COVID, tribunal operations also effectively ceased.

However, the Law Society Tribunal was much better equipped to handle the disruption and has bounced back much faster. This was likely the case for a number of reasons. Initially, the Law Society Tribunal takes its operations seriously. It knows that it is responsible for adjudicating cases of alleged professional misconduct and has implemented systems and processes to see that this is done. Like most businesses (and functioning court systems south of the border), it tracks various (meaningful) performance metrics, such as time from filing to file closure, and it publishes these in an annual report. For unknown reasons, this is still not done by the Superior Court.

Additionally, and unlike the Superior Court, at the Law Society Tribunal, there is accountability. The Tribunal is overseen by elected benchers, and if the tribunal (or the law society itself) goes too far off the rails, benchers get fired. Likewise, as benchers themselves fund the operations of the tribunal, along with the licensees they answer to, there is a built-in incentive to find practical and economical ways of operating. Such accountability is sorely lacking at the Superior Court, where judges answer, if at all to appellate courts, while the Ministry of the Attorney General remains entirely unaccountable.

The adaptability of the Law Society Tribunal is manifested in its Rules, which have been significantly revised. By way of example, one of the stated purposes of the tribunal's Rules is to "ensure efficient processes and proceedings" while another states that "the Tribunal operates electronically to the extent reasonably possible." Service of documents meanwhile can be accomplished by one individual, and is as simple as copying the other party on the e-mail when submitting the document to the

tribunal. Also, unlike the Superior Court, the tribunal can take notice of generally recognized scientific or technical facts, which in practice, means that it can consult Google. It remains to be seen when the Superior Court will “discover Google” but until that happens, times should remain bountiful for Ontario’s many “hired gun experts,” even as the doors of justice remain closed to many residents.

While it has been recognized by justices at the highest levels that our court system is broken, this information has apparently failed to reach Canada’s Chief Justice Richard Wagner, who continues to publicly assert that our “justice system is excellent.” This of course is at odds with objective reality, either as manifested by the sheer number of self-represented litigants, the fact that our courts can’t timely adjudicate cases, remain partially closed, or as measured by impartial outside organizations such as the World Bank. Maintaining such legal fiction, in the face of the facts, serves as an obstacle to much-needed court reform. Could it be that the chief justice is misinformed because Ontario’s senior justices have failed to set or monitor any standards for courthouse performance?

Though a Superior Court judge recently said, albeit in another context that “you can’t rely on the Law Society to do anything particularly helpful,” that ignores the significant improvements made to Law Society Tribunal operations, which demonstrate that high quality, timely and efficient adjudication can in fact occur within the province of Ontario (this may also be the case with other tribunals and the Federal Courts, but is certainly not true of the Superior Court). As the old saying goes “where there’s a will there’s a way.”

Of course, the Superior Court faces a unique challenge that the law society does not, in that the running of the courts is the shared responsibility of court operations, under the Ministry of the Attorney General. However, in most cases, specifically within the civil and family sphere, court staff are required for little more than scheduling, and should be counted upon by the judiciary for about as much. Thus, if improvement is to happen, it will be because the senior judiciary takes the lead and does it in spite of, rather than with the assistance of the Ministry of the Attorney General. Until that time, in addition to significantly lagging the performance of all other court systems in Canada or the U.S., the Ontario Superior Court is being left in the dust by the Law Society of Ontario. Indeed, it must be an embarrassing time to be a senior justice of the Ontario Superior Court.

Michael Lesage is a trial lawyer and the founder of Michael’s Law Firm, a litigation boutique that specializes in complex cases involving professional negligence, business litigation, insurance coverage disputes and cases of serious injury. When not representing clients, he can often be found playing competitive sports. He also sits as a bencher at the Law Society of Ontario. You can e-mail him at michael@michaelsfirm.ca.

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