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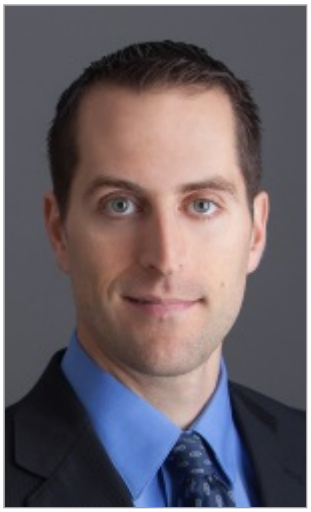
Other Areas of Practice

Chief Justice Morawetz leads court backwards| Michael Lesage

By **Michael Lesage**



Michael Lesage

(March 18, 2022, 1:15 PM EDT) -- Ontario Chief Justice Geoffrey Morawetz must find it difficult to get good information about his domain. Presiding over a dysfunctional and opaque court system that runs off of inertia (as opposed to objective and transparent performance measurements), it performs well below (and is behind) that of other jurisdictions in Canada or the U.S. The court's most recent Guidelines to Determine Mode of Proceeding in Civil will aggravate, rather than alleviate those problems.

In some respects, and specifically with regard to most in court matters, the guidelines are satisfactory. For instance, many court proceedings that are now happening virtually will continue that way. Given the focus of the guidelines upon access to justice, that makes a lot of sense. Courtrooms are expensive, as is travel, and the modern practice of law, dependent upon multiple monitors and office resources, is not easily replicated by counsel in a remote, low-tech courtroom environment. While it is problematic that judge alone trials will by default be in person, the impact of that is blunted by the general inability of the Ontario court system to actually conduct trials in the first place.

However, the guidelines are more problematic in matters not directly involving the judiciary, and represent a significant step backwards, in favour of again recording evidence using "quill and ink." Specifically, I am talking about examinations for discovery, mandatory mediations and mandated return to (in office) gowning, which is just silly, though perhaps not quite as silly as the court's new Etiquette/Miss Manners guideline concerning the required transparency of drinking containers appearing on video. (I'm not making this up, the court actually put this in its new guideline).

The most problematic change involves the return to in-person discoveries, absent consent. Given adversarial counsel, in many cases, that simply means discoveries must happen in person, as without a motion, virtual discoveries are at the discretion of the most tech averse counsel or party on the file. This will lead to significant travel costs (and motions under Rule 34.03), which must ultimately be borne by the public, whose interests the chief justice apparently failed to take into account. Additionally, this will allow those with resources (i.e., insurers) to take further advantage of those without, by requiring more expensive and disruptive, in-person attendances. This change will also lead to counsel spending much more of their working time commuting, rather than providing legal services, though perhaps that was intended as a feature, (as opposed to a bug)?

Speaking of bugs, with COVID apparently here to stay, is it really wise, from a health and safety perspective, to bring the public together with counsel, from all over the province, in often poorly ventilated office settings, and then repeat the next day? Was any thought given as to the health risks this was subjecting the public or counsel to, and if so, what are those risks? Does this not risk needlessly turning in person discoveries into superspreader events, especially at larger court reporting offices?

Moreover, given the fact that virtual discoveries were working, and that the law on this had apparently been settled by *Worsoff v. MTCC 1168* [2021] O.J. No. 5050 and its progeny, it also raises a question as to why the chief justice thought that needed fixing? Likewise, can the chief justice

really change the *Rules of Civil Procedure* and established common law by diktat, as opposed to via a change to the rules themselves, and if so, what does that say about our system?

Changing the established mode of discovery is further unfair to, and disregards the interests of Ontario's court reporters, who play a vital role in our system. Many court reporters are small businesses and are now faced with great uncertainty as to their requirements for office space, which will depend to large extent upon the proportion of their clientele (counsel) who are septuagenarians.

Requiring in-person mediation (absent consent) raises similar concerns, although the impact is much more limited, given that mandatory mediation only applies in several areas of the province and typically lasts no more than one day. Nonetheless, who is clamouring to have to again drive to a central location, so that the parties can, to large extent, sit in separate rooms? Can that not be accomplished virtually, without the driving or added cost, or need to seek consent?

The requirement to gown for Zoom calls is similarly puzzling. While lawyers were present in ancient Greece and Rome, the use of black robes by lawyers traces its history back only to 1637, when the British Privy Council ruled that "lawyers need to dress according to their status in society," with some lawyers further seeking to denote their higher status by adding "silk tufts and extra adornments." Ontario of course imported this requirement as a vestige of colonization, which in the several hundred years since, we have yet to jettison.

Despite that, it is curious the court would reimpose a requirement that lawyers set themselves apart from the society they represent, in gowns that set them apart from the best part of $1,000, after including the vests, shirts and rabbit teeth (tassels)? What objective benefit does that provide to the legal system, and would it be any different were the robes white (which are much cheaper, if somewhat out of fashion), as opposed to black? Moreover, why can lawyers not wear professional clothing (suits) like other professionals, while on Zoom calls? Must Ontario lawyers continue to dress as though they just fell out of the Age of Sail?

Ultimately, the new guidelines in large part reinforce, rather than eliminate, the archaic nature of the Ontario court system. While not going so far as to require communications by telegraph, they nonetheless represent a step backwards that will lead to increased costs and increased delays, making justice even less accessible for regular Ontario residents. Perhaps that too was intended as a feature. ...

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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