Background

Judicial Reform in Ontario

Judicial reform in Ontario started in 1985 with the first major overhaul of the Rules of Civil Procedure. This was followed in 1987 by the Zuber Report which recommended structural changes to Ontario Courts. This led to the regionalization of Ontario's Courts and the merger of the Supreme Court of Ontario and the District Court's. At the same time, initiatives in civil case management had been promoted by a group of lawyers and judges called The Joint Committee on Court Reform. The first experiments in civil case management actually took place in Toronto, Windsor and Sault Ste. Marie. The Windsor experiment failed. There were mixed results in Toronto but the program in Sault Ste. Marie had some success.

By the early 1990s, there were increasing concerns about the high cost of civil litigation and the delays in bringing matters to trial. The Civil Justice Review Task Force was created in 1994 to examine these issues and to make recommendations. At the same time, a pilot project in court connected mediation was launched at the ADR Centre on Grenville Street. In summary, the Task Force recommended province-wide case management and mandatory referral to mediation for all civil cases. It further recommended the restoration of the office of the Master under a new name; Case Management Master. The Task Force's goal was not to increase the number of case that settled before trial, but to achieve more timely and less costly resolution of civil disputes.

Case Management in Ottawa

The Attorney General agreed to implement the Task Force's recommendations and three pilot project sites were chosen: Toronto, Windsor and Ottawa. Ottawa was selected because it had shown great success in eliminating its backlog. The Ottawa bench and bar had demonstrated an ability to work with each other in achieving solutions.

The New Rule 77 was to take effect on January 1, 1997. At the November 1996 Montebello Conference, then Attorney General Charles Harnick, gave his support to a pilot project for mandatory referral to mediation in Ottawa. Chief Justice Patrick Lesage agreed. Mandatory referral to mediation commenced in February, 2007under a practice direction.

To support the implementation of case management, SUSTAIN software was installed in Ottawa Toronto and Windsor. Robert Beaudoin was appointed the first Case Management Master in Ottawa.

Rule 77 had two significant features. The first required the Registrar to schedule a settlement conference within 240 days of the first defence being filed. The second required that defence or judgment be filed within six months of the issuance of the statement of claim failing which there would be an automatic dismissal of the action. The rule permitted three types of conferences; case conferences, settlement conferences and trial management conference. The Mediation Practice Direction required that referral to mediation take place within three months of the filing of the statement of defence.

Two problems became apparent from the outset. While the bar accepted automatic referrals mediation, there was a strong belief that examinations for discovery were necessary before mediation could take place. As a result extensions to mediation for that purpose were routinely granted.

The second problem was triggered by the requirements have the Registrar fix a settlement conference date within eight months of the statement of defence being filed. At that time, Ottawa judges were still busy addressing the remaining backlog of pre-case management cases. A decision was made that the Registrar would not give notice of a settlement conference unless that event was scheduled in someone's calendar. The eighth month rule could not be complied with since there were not enough dates available. Nevertheless, the overall objective of resolving civil cases within 2 to 3 years from the date of their commencement was being achieved.

The pilot project on mediation was evaluated and proven to be successful and Rule 24.1 was adopted by the Rules Committee. SUSTAIN software permitted access to data and the production of local reports that allowedasn evaluation of the effectiveness of both mediation and settlement conferences. The data revealed that 50% of the court's inventory was resolved before a defence was filed; 50% of the remaining cases were settled at the mediation sessions or shortly thereafter; and 75% of the remaining cases were resolved at the settlement conference or before trial.

Critics of case management pointed out that cases settled in any event and that the introduction of case management and referrals mediation created additional steps and additional costs. This criticism was strongest in Toronto. Dissatisfaction in Toronto with case management led to the repeal of rule 77 and implementation of Rule 78; a watered-down version of rule 77. Notwithstanding the success case management and of mandatory referral to mediation in Ottawa, there seemed to be no interest in the implementation of these measures by any other court.

More Recent Rules Changes

In 2007 the Hon. Coulter Osborne was asked to conduct a further review of Ontario's civil justice system. Implementation of some of those recommendations led to significant rule changes. On the one hand there was strong pressure to have standardized rules across the province yet the Ottawa bench and wished to preserve Rule 77. In the end, a form of compromise was achieved. Parts of Rule 77, specifically those sections dealing with settlement conferences were repealed in favour of a province wide pre-trial rule. Case management under rule 77 was still available in Ottawa but it was no longer automatically applied to all cases.

The Registrar no longer fixed the settlement conference dates after the filing of the first defence and only scheduled the pre-trial after the parties set the matter down for trial. Status Hearings were reinstated. At the same time, the Ministry of the Attorney General removed the SUSTAIN software in Ottawa, Toronto and Windsor and replaced it with a new system called FRANK. It was no longer possible to get local access to Frank data and the ability to generate local reports disappeared.

The new pre-trial procedure now called upon the presiding judge or master to conduct two very separate functions; to attempt a resolution of the case and prepare the case for the trial. This impacted the amount of time allocated to conduct pre-trials.

A second case management master, Master Calum MacLeod had been transferred Ottawa in 2007. His transfer coincided with the implementation of rule 42 for Ottawa's Family Court. As a result, Ottawa's two Masters alternated their time between family and civil matters. Since then, the Masters have taken on additional responsibilities for Construction Lien references and as Registrars in bankruptcy. Status hearings are now scheduled twice a week before the Masters further reducing their availability. There are an increasing number of self-represented litigants in civil matters and they can consume a great deal of the court's time

Recent Challenges

Since the implementation of the new rules there has been a delay in scheduling pre-trial conference since the case management office no longer manages the inventory and only responds if a trial record is passed. As a result, if a high volume of trial records is set down in any particular month, this can have a great impact on available pretrial dates. At the same time, the case management office is reporting a high number of last-minute cancellations and request for adjournments. The most significant concern is that the Masters report a growing trend where the parties attend the pre-trial with no real interest in discussing settlement and they are there simply to obtain a trial date. Parties admit to failing mediation simply so that they can get a pre-trial date. As a result, there are long delays to get a pre-trial date; yet many are adjourned at the last minute. Delays encourage more motions. The scheduling of long motions continues to be a challenge. The *Hryniak* decision may increase the number of summary judgment motions and create further scheduling problems.

Since there is occasionally no real interest in settlement at the first pre-trial, we are now often conducting no less than two pre-trials for each case and sometimes three. It appears that motor vehicle insurers are sometimes reluctant to settle cases until the very last minute. As a result, a great deal of effort is being placed into scheduling events that are not a very productive use of our judicial resources. Our previous success with the early resolution of our disputes seems to be falling behind.

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