



**DELAY NO LONGER.
THE TIME TO ACT IS NOW.**

A CALL FOR ACTION ON DELAY
IN THE CIVIL JUSTICE SYSTEM

2023

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DELAY NO LONGER. THE TIME TO ACT IS NOW.

The Advocates' Society calls on the federal, provincial and territorial governments to urgently dedicate additional resources to the civil and family justice system, and calls on all stakeholders in the justice system, including governments, the courts, the bar and the public, to take immediate and concerted action to solve the endemic delays plaguing the delivery of civil and family justice across Canada.

Introduction

Canada's civil and family justice system is in crisis. Many Canadians – separating spouses, small business owners, and others who need help enforcing their rights – wait months or years to have basic civil disputes scheduled and heard by the courts. This crisis pre-dates the COVID-19 pandemic, but was also exacerbated by it.

Lengthy delay in the delivery of civil justice is a critical barrier to access to justice for Canadians. Delays increase costs, deny timely relief, create opportunities for injustice, squeeze people out of the system, or discourage them from accessing it in the first place. Access to timely justice can be the difference between having a roof over one's head, putting food on the table, being safe from a violent ex-spouse, keeping a business going – or not. Justice delayed is justice denied, and for many, the consequences of justice being delayed are life-altering.

The civil justice system is foundational to the well-being of our constitutional order, our economy, and the lives of thousands and thousands of Canadians. Governments must dedicate greater resources to the civil justice system and concerted, urgent action must be taken by all justice stakeholders to prevent the system from failing entirely and losing the confidence of the public.

Why does the civil justice system matter?

The justice system, and the civil and family justice system in particular, does not generally receive attention and scrutiny from the media, the public or policymakers to the same extent as healthcare or education, despite being in a crisis of comparable severity. The harmful effects of the justice crisis are not felt until someone needs the system, at which point the effects are felt acutely. We, who work within the justice system and feel these effects every day, therefore begin our call to action with a broad reminder of why the civil justice system matters – to all of us.

The civil justice system resolves disputes between people, businesses and governments in a just and fair way. The civil justice system is critical to every person, family, organization and business in Canada, and to the peaceful and democratic society in which we live.

Nearly all Canadians will experience at least one civil or family justice issue in their lifetime.¹

The resolution, or lack thereof, of these issues by the civil justice system can alter the course of an individual's life – affecting their health, their family, their work or their finances.

A court's decision in a particular case may also become precedent, establishing and reinforcing norms for the community and shaping the law for future litigants. The existence of an open, impartial and trusted dispute resolution system ensures the rule of law and the maintenance of an orderly society.

The types of disputes that the civil justice system may address are vast and can be highly complex. And many of them require timely resolution — at the very minimum, on an interim basis. Some of the issues addressed by the civil justice system include:

- **Family law.** Families need timely access to the civil justice system to deal with all child-related matters, including child protection, parenting time, medical and other important decisions, and even child abduction; financial matters including child and spousal support, vacating or selling the home, and property division; and to protect victims of family violence.
- **Protection of vulnerable persons and estates law.** When a loved one falls ill or lacks capacity, families need timely access to the civil justice system to assist with powers of attorney and guardianship. After death, surviving dependants require timely access to the civil courts for financial support and wills and estates matters.
- **Compensation for injuries.** Individuals need timely access to the civil justice system to obtain compensation for injuries caused by the negligence of others, including to replace lost income and defray medical and other expenses.
- **Employment law.** Employers and employees need timely access to the civil justice system to resolve employment disputes, for example to obtain compensation in cases of discrimination.
- **Business disputes.** Small, family-owned businesses and multinational corporations alike need prompt access to the civil courts to protect their legitimate business interests, enforce contracts or restructure or liquidate in an orderly manner.
- **Holding government accountable.** The civil justice system holds federal, provincial and municipal governments to account when a government exceeds its lawful power or negligently harms citizens.

The civil justice system resolves these human differences in a reliable, open, impartial and consistent way. The alternative to a civil justice system that holds the confidence of the public is civil unrest and disorder, and the disintegration of the rule of law. As Dame Hazel Genn has aptly written,

[T]he machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly reaffirm norms and behavioural standards for private citizens, businesses and public bodies. [...] If the law is the skeleton that supports liberal democracies, then the machinery of civil justice is some of the muscle and ligaments that make the skeleton work.²

“Nothing is more important than justice and the just society. It is essential to flourishing of men, women, and children and to maintaining social stability and security. In this country, we realize that without justice, we have no rights, no peace, no prosperity.”³

The Right Honourable Beverly McLachlin, Former Chief Justice of Canada

Delay in the civil justice system has become endemic across Canada

Although backlogs and delay in Canada’s civil and family justice systems are universally acknowledged as problematic, reliable data about the magnitude and characteristics of the delay are challenging to find and even more challenging to interpret. As the Court of Appeal for Ontario recently commented:

It is an unfortunate state of affairs that neither the Superior Court of Justice in Ontario nor the Court of Appeal for Ontario publishes information about how they manage and dispose of their caseload. The lack of detailed, consistent operational data from those courts and the resulting lack of transparency, impedes the ability to understand and then improve the performance of those courts.⁴

Similar comments apply to other jurisdictions across Canada.

Despite the lack of quantitative data, the day-to-day experiences of members of The Advocates’ Society and the litigants we serve convince us that delay in scheduling and hearing matters before the courts is a standard feature of civil and family justice across the country. Some examples of the magnitude of this delay include:

- In **Quebec**, it was estimated that in 2021-2022, litigants would wait an average of 593 days between the filing of their claim in the Small Claims Division (for claims of less than \$15,000) and trial.⁵
- In **British Columbia** in 2022, the Supreme Court “bumped” (i.e. delayed hearings because of the lack of judicial resources) 10.9% of all long chambers applications, 24.6% of civil trials (102 bumped compared to 312 heard) and 14.4% of family trials (26 bumped compared to 154 heard).⁶
- In **Alberta**, it routinely takes more than 9 months for an application longer than 20 minutes to be heard by a judge in Edmonton or Calgary; and 2 to 3 years for a trial longer than 5 days to be scheduled from the date the parties certify readiness.
- In **Ontario**, it currently takes almost 1.5 years for a motion longer than 2 hours to be heard by a judge in Toronto; more than 1.5 years after the trial management conference (or more than 4 to 5 years from the issuance of the original application) for a 3-week family law trial to be heard by a judge in Brampton; and more than 4 to 5 years for a civil action to proceed from commencement to trial.

Anecdotal evidence about the impacts of delay in Canada’s civil and family justice system is plentiful.⁷

These are some of the stories we heard from our members about the impact of delay on their clients...

"I was interviewed by a potential client, a major international corporation, for an arbitration retainer. They told me they wanted to go to arbitration because the delay they encountered in litigation in Ontario was the worst they had ever encountered in their worldwide operations."

"A colleague of mine had fully prepared for a weeklong trial, and clients and witnesses had already flown in for the trial. The first day of the trial was cancelled because there was no judge available, but the court told the parties to stay in town and wait to see if one could be found. The next day, the rest of the trial was cancelled for lack of a judge. The costs of counsel's preparation for the trial and for participants' travel were completely wasted. This is not even that unusual, unfortunately."

"As a family lawyer, I have to tell my newly-separated clients that I cannot get court orders that will help them leave intolerable (and, in some cases, abusive) home situations for many months or more than a year, such as orders for temporary parenting or support. If they need the court's help on multiple issues in order to move out, it is considered a 'long motion', which are booking well over a year away — and this is for temporary relief, never mind a trial. Clients often start court applications earlier than they would otherwise, just to start the clock rolling. The financial and personal costs are unbearable for most family litigants."

"In May 2021, we issued a claim on behalf of a commercial property owner in relation to an overholding tenancy. We attempted to schedule a summary judgment motion in Fall 2021, and after several court attendances and case conferences, the motion was finally heard in October 2022, after an earlier adjournment because no judge was available to hear the matter. We still do not have a decision. While waiting for a court order evicting the tenant, our client had to find other space to lease."

"The plaintiff obtained a Certificate of Pending Litigation (CPL) in December 2022, shortly before the closing date of a real estate transaction. As counsel for the seller, my firm sought to bring a motion to set aside the CPL and close the transaction promptly, but was advised that the earliest hearing date was October 2023, some 10 months later. As a result, our firm's client was forced to settle the issue. Settlement should be encouraged, but the inability to bring a timely motion should not be the primary reason for a settlement."

"Timely resolution of Aboriginal law cases – which are often complex and expensive, and require aggressive case management – facilitates reconciliation. In contrast, when Indigenous litigants are forced to abandon meritorious cases due to delay-associated costs, Aboriginal rights have no more force than mere words on paper, and Indigenous Canadians are still denied access to justice in this country's courts. For example, in one time-sensitive case regarding ongoing negative impacts of industrial activity, there are no two-day court hearing dates available for more than a year — and in the meantime, the First Nation's traditional territory continues to be degraded."

"My client separated from their partner in 2019. The action was brought in the spring of 2020 and has been ready for trial since 2022. We could not get a trial scheduling conference until April 2023, and then set the earliest possible trial date — more than one and a half years down the road. We will have to re-do all of the financial disclosure and update all of the expert reports before the trial, at great expense to the parties, because the information will be stale by the time of the trial. In the meantime, my client is bearing a temporary monthly support order that significantly favours their ex-spouse, which means the other party has no motivation to settle."

"A member of my firm recently appeared before the senior scheduling judge to arrange a date for a special application to resolve various document and production issues. The court advised that due to vacancies on the court and judicial leaves of absence, the earliest available date was in 18 months."

The impact of delays in civil and family justice are severe and far-reaching

Lengthy delays have severe negative consequences not only for the litigants, but for the justice system as a whole.

1. Delay compromises access to justice

The right to access the civil justice system is a fundamental pillar of the protection of the rights of Canadians. Delays in having civil and family legal issues heard and decided by courts across Canada mean that litigants are unable to have their rights determined or enforced for years on end, effectively rendering their rights non-existent in the interim. This state of affairs leads litigants to make decisions they would not otherwise have to make, and to suffer consequences that would not otherwise arise. As Chief Justice Wagner observed in 2018,

It can take a year or more even to get a date for a trial that might last two months. In the meantime, parties suffer financial losses or family disharmony; physical and mental health issues remain unresolved. An injured person might be persuaded to take a lower settlement because he can't work and needs to pay the bills. Delays cause people to make difficult, and life-altering, choices.⁸

As the Supreme Court stated in *Hryniak v. Mauldin*, “[p]rompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice.”⁹

2. Delay damages the rule of law

The Supreme Court of Canada has held that the rule of law “is a highly textured expression, [...] conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority”¹⁰ and that “[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs.”¹¹

The alternative to the rule of law is “anarchy, warfare, and constant strife.”¹² If the public views the civil justice system as failing to prosecute and enforce a person's rights and obligations in a timely manner, there is a greater risk of a lack of accountability, and parties will act accordingly. Potential litigants may be tempted to take matters into their own hands when resolution of a dispute by the justice system is a remote and unattainable option.

The public may further feel disenfranchised from the justice system when it is not responsive to citizens' needs, which weakens the legitimacy of the entire justice system – and by extension, the legitimacy of our democracy as a whole.

3. Delay makes wars of attrition into a successful litigation strategy

Delay in the context of civil litigation does not just extend the litigation process; often, it determines the outcome in a way that is manifestly unjust and perpetuates inequality.

Delay *drives* costs, as lengthier civil proceedings often result in more correspondence, more disclosure updates, more motions, more case management conferences, and more procedural steps.¹³ When litigants cannot access courts in a timely fashion, civil cases often become wars of attrition, in which success is determined not on the merits of the case but by the resources of the parties. As a result, many meritorious cases never even reach the trial stage; litigants (typically plaintiffs) run out of money and are forced to either accept unfair settlements or no resolution at all. Delay also forces lawyers who work on a contingency fee basis to be more selective in taking on cases, because delays inflate the cost of prosecuting or defending a matter; this reduces access to justice for people who simply cannot afford to pay a lawyer up front.

For cases with public interest dimensions – such as those involving Aboriginal or *Charter* rights, or with potential precedential value – the negative impacts of the court system’s delay extend beyond the individual case and may affect broad segments of the population.

4. Delay undermines substantive results for parties

Delay can also unfairly diminish the actual substantive relief to which a party is entitled, simply by virtue of the passage of time and the changing of an individual’s life circumstances over the course of a delayed proceeding. For example, the damages owing to personal injury claimants may reduce substantially over time due to statutory provisions applicable to the calculation of damages.

For parties who need real-time financial relief, such as child support or salary continuance, delay can mean the difference between an individual or family keeping a roof over their head – or not. In family law, delay can deprive children of time with a parent, contrary to their best interests and resulting in possible long-term harm to the child’s well-being.

5. Delay risks the privatization of civil justice

When litigants cannot access the courts in a timely manner, they increasingly rely upon private alternative dispute resolution (ADR) mechanisms, such as mediation and arbitration. While there can be many benefits to using ADR, a systemic overreliance on it – coupled with an abandonment of the courts – can have negative effects on the justice system as a whole.

First, the courts’ central role in upholding the rule of law is diminished. Second, ADR processes are almost always carried out in private and on a confidential basis. While this is often a benefit to the immediate parties, justice cannot be seen by the public to be done between parties. No legal precedents that are public and binding can develop from such a process, which, combined with limited rights to appeal, prevents the law from evolving. Third, a systemic overreliance on ADR mechanisms can create a two-tier legal system, in which litigants with deeper pockets can avail themselves of a speedy alternative to the backlogged public court system and less economically advantaged litigants are relegated to the public system.¹⁴

It also bears emphasis that ADR requires the consent of the parties. Parties that benefit from delays often decline to engage in ADR. This is another way in which litigants with greater power and resources can wage a war of attrition at the expense of justice.

6. Delay diminishes public confidence in the justice system

The negative impacts of delay described above all diminish public confidence in the civil justice system. As the Saskatchewan Court of Appeal noted in 2022,

Delay in civil proceedings tends to have deleterious effects on the parties. Witnesses die, become unavailable or simply forget things. Documents disappear. Costs soar. However, the consequences of delay go beyond the parties to an action. [...] unnecessary delay inevitably saps public confidence in the judicial process as a method for dispute resolution.¹⁵

CALL TO ACTION

The Advocates' Society calls on the federal, provincial and territorial governments to urgently dedicate additional resources to the civil and family justice system, and calls on all stakeholders in the justice system, including governments, the courts, the bar and the public, to take immediate and concerted action to solve the endemic delays plaguing the delivery of civil and family justice across Canada.

Potential ideas to explore

The Advocates' Society calls upon justice system stakeholders across Canada to come together as soon as possible and dedicate resources to developing solutions that will diminish the delay in civil and family justice, and, in particular, diminish the time between when a matter is ready to be determined by a judge (either at a conference, motion, application, or trial) and when it can be heard by a judge.

Below we set out some ideas that stakeholders may wish to explore, to determine their feasibility and helpfulness in a particular jurisdiction. The Advocates' Society emphasizes that none of these ideas will, alone, fix the problem of delay in the delivery of civil justice. While we believe the current crisis situation calls for immediate action to lessen delay as much as possible in the short term, we caution that a piecemeal approach will not solve delay over the long term. The civil justice system must be the subject of global and comprehensive consideration, with a view to developing a multi-pronged and coordinated plan of action that targets the root causes of delay.

The below ideas are offered as starting points for discussions about effective solutions to the problem of delay.

1. Measure delay and set targets

Data collection and analysis can help locate pain points in a system and develop remedies. The Advocates' Society believes that collecting data about delay in the justice system is an essential first step to developing and targeting policies to improve access to justice over the long term.¹⁶ While we are advocates and not data scientists, the collection of the metrics listed in Appendix A, and other data, by courts and governments may help us understand the source and magnitude of the delay problem better and develop effective solutions to permanently diminish delay.

Measurement of relevant data also makes it possible to work towards targets and to measure the progress made toward hitting those targets. The Advocates' Society suggests that it would be reasonable to work towards a civil and family justice system in which you can always book a long motion within 90 days of the request and a trial within a year of the request. Urgent motions, such as some family law motions and other time-sensitive matters, should be triaged and addressed on a prompt target timeline as well.

2. Increase resources and deploy them flexibly

(i) Greater overall funding for the justice system

The civil and family justice system has been chronically underfunded for decades. The Advocates' Society believes it is time for governments to remedy this longstanding neglect and make real, forward-looking investments in the civil and family justice system to bring it on par with other critical democratic institutions. Delay and backlogs simply cannot be remedied, and will continue to grow, without allocating more dollars to justice. Below, we identify some key funding priorities for consideration.

(ii) Judicial resources

The experiences of members of The Advocates' Society strongly indicate that there are simply not enough judges at present to handle the caseload before the courts – to manage matters, hear matters, and issue decisions after hearings in a timely fashion. We need more judges and more support for judges in the form of court staff and law clerks.

The Advocates' Society has long encouraged the federal government to fill judicial vacancies on superior courts across the country in a timely manner to decrease delays in scheduling and hearing matters before the courts.¹⁷ As of June 1, 2023, there remained 79 judicial vacancies on Canadian superior courts and courts of appeal.¹⁸ We continue to recommend that the government establish and adhere to a policy mandating that judicial vacancies be consistently filled within a reasonably brief period of time after they arise.

Moreover, there is currently no publicly available formula for determining the adequacy of Canada's federal judicial complement (the number of judicial positions) in relation to its population. The baseline for the current complement of federally appointed judges was established in 1990 when the population of Canada was approximately 27.5 million, and individual judicial positions have since been added from time to time. Given that the Canadian population is now estimated at over 39 million people (representing an almost 42% increase in population over the past 32 years), it is hard to imagine that the current judicial complement is sufficient to meet the justice needs of Canadians. The Government of Canada, in cooperation with provincial and territorial governments, ought to consider whether it is time to undertake an assessment of the current federal judicial complement as part of a larger commitment to correcting court delay.

Attention should also be paid to the adequacy of other judicial resources, and whether current processes create a bottleneck in the system that can be remedied. In some courts, associate judges, applications judges, masters, or special clerks have jurisdiction over important matters in civil actions. For example, in Alberta, applications judges are the gatekeepers for an average of 110,000 active civil actions per year. In Edmonton and Calgary, the two most populous cities in the province, there are currently only 6 full-time applications judges and 2 part-time applications judges, exacerbating significant delay.

(iii) Court staff

Courts across the country are suffering from high turnover and shortages in court staff, which slows down every aspect of the civil litigation process. Court staff are essential to the proper functioning of all levels of court. Their work includes providing information about policies and procedures to the public, processing court filings, collecting fees, maintaining court records, scheduling court cases, managing the jury system, providing administrative and courtroom support to judges, organizing court interpretation services, and court reporting. Adequate human resources to support the courts, judges, and parties, including thorough training, are crucial to the optimal functioning of the civil and family justice system.

(iv) Flexibility

The recent implementation of technology and virtual proceedings presents an unprecedented opportunity to efficiently mobilize the courts' judicial and other human resources across a given jurisdiction to support busier or more backlogged regions. Technology can be used to redeploy judicial resources to areas within a province or territory where they are most needed, without having to incur the significant cost and disruption of travel or permanent relocation. The Advocates' Society encourages courts to continue to explore this potential, in particular to support backlogged courts in addressing shorter civil matters such as pre-trials or motions, so local judges are free to focus on longer motions or trials.

3. Improve the use of technology

Courts across Canada pivoted in record time to adopt the use of technology to permit virtual hearings as a result of the COVID-19 pandemic. Unfortunately, in other areas, the courts have not made full use of technology that could reduce costs and delay. The Advocates' Society encourages governments and the courts to continue to commit the necessary resources, monetary and otherwise, for the thoughtful integration of technology into the administration of justice. In particular, The Advocates' Society recommends the implementation of technology to improve court filing and scheduling systems across the country as an essential step towards curing the delay crisis.

While some Canadian courts developed electronic filing systems either before or during the COVID-19 pandemic, others still require litigants to file paper materials, either in person or by fax. The Advocates' Society urges these courts, and their respective provincial governments, to explore e-filing solutions to alleviate the delay occasioned by the need to move, file and store paper materials.

Another area where the use of technology can diminish delay is in scheduling court dates. There are many software solutions that would permit court users to schedule their own dates, automatically send reminders and automatically strike matters from the list if deadlines are not met. More sophisticated software might be able to predict the likelihood of certain types of cases resolving or proceeding and use that information to maximize the effective use of court time. To our knowledge, apart from some small pilot projects, this software is not being used by Canadian courts, and scheduling is still done manually via email, fax or telephone. The implementation of online scheduling applications that centralize and automate the scheduling of appearances before the court could greatly reduce inefficiencies and errors, and save money by freeing up court staff to focus on other important tasks.¹⁹

4. Review and revise procedural rules that are roadblocks

At the opening of the Ontario courts in 2014, then-Chief Justice George Strathy observed as follows:

We have built a legal system that has become increasingly burdened by its own procedures, reaching a point that we have begun to impede the very justice we are striving to protect. With the best of intentions we have designed elaborate rules and practices, engineered to ensure fairness and achieve just results. But perfection can be the enemy of the good, and our justice system has become so cumbersome and expensive that it is inaccessible to many of our own citizens.²⁰

The Advocates' Society welcomes comprehensive overhauls of antiquated and overly complex rules of civil procedure that do not account for modern realities.²¹ The nature of how parties before the court conduct their lives and affairs has changed dramatically, and some rules have not kept pace. In addition, experience has shown that certain rules allow the parties to introduce significant delay in the pre-trial phase without sanction, which requires reform. Complete rewrites of rules of procedure should and will take thought to avoid unintended consequences, however. These types of projects will require broad consultation with stakeholders, changes to administrative processes and infrastructure, and education for the judiciary, court staff and counsel.

In the meantime, the rewriting of rules of civil procedure should not prevent more discrete changes to rules and legislation from being made now, keeping in mind the need to consider the impacts on the system as a whole. Some possible examples include:

- **Consider setting trial dates early.** In many jurisdictions, owing to certain rules of procedure, a trial date is not set until after the discovery process is complete. Setting an early trial date (and ordering a realistic timetable to ensure the case is ready for trial) might prevent cases from getting dragged out for months or years in the discovery process, and can avoid the months- or years-long delay that now often occurs between completing discoveries and trial. Associated rules may be required to encourage parties to continue to try to resolve the matter and narrow the issues in dispute while waiting for their trial date; and to ensure parties cannot easily adjourn an early trial date unless the justice of the case demands it.
- **Expand the use of applications and summary trials.** Many cases may be determined without the need for *viva voce* evidence on all issues. Applications, "trials of an issue" and summary trials should be used more often (and where necessary, rules should be amended to permit their use) to ensure the just determination of disputes on their merits in a proportionate way.
- **Reduce discovery-related disputes and deal with them efficiently when they arise.** The discovery process is often the most costly and time-consuming part of civil litigation, and in some jurisdictions, discovery-related motions clog up the civil justice system. Changes to rules of procedure may help to streamline the discovery process and avoid using scarce resources on discovery-related motions: for example, encouraging or requiring discovery questions to which an examinee objects to be answered (unless privilege is at issue or the question is blatantly irrelevant or an abuse of process) and reserving the question of relevance for the trial judge;²² stipulating an adverse inference for failure to answer discovery questions; strictly enforcing time limits on discoveries; or providing for presumptive awards of substantial indemnity costs if a party acts unreasonably or abusively in the discovery process. In addition, courts may wish to consider establishing weekly motions lists to deal with simple procedural issues that can be heard in a short period of time, such as discovery disputes.²³
- **Increase the availability of case management.** Case management can be an effective way to reduce the number of contested hearings before a court. Having one judge assigned to a civil case from the outset, as envisioned in single-judge case management models frequently used in the United States and piloted in certain jurisdictions in Canada,²⁴ can go even further towards encouraging parties to act efficiently and proportionately throughout the proceeding. Also, having a judge that is familiar with the case would save significant court time, as parties

would not need to bring a different judge up to speed each time a motion or application is brought. The Advocates' Society recommends that courts explore ways to implement greater case management. Judges must be trained in case management techniques, and empowered by the rules of procedure to make tough decisions as case managers.²⁵

5. Ensure lawyers continue to support the efficient use of court resources

Lawyers have several roles to play in reducing the delays plaguing the civil and family justice system.

A number of sources conclude that lawyers assist in the functioning of an efficient civil justice system. Studies have found that early access to legal advice increases the opportunity for the early resolution of disputes;²⁶ judges believe self-represented litigants slow the court process;²⁷ court staff report that self-represented litigants in family law matters use greater court staff resources;²⁸ lawyers and judges report that self-represented litigants in family cases “take up more court time, are less likely to settle, and that when one party is represented, the legal costs for that party increase”;²⁹ lawyers help move matters through the courts more quickly and reduce the burdens on the courts;³⁰ and legal representation has positive impacts on court processes.³¹ In addition, the participation of lawyers in the civil justice system ensures meaningful access to justice for litigants, acting as the guardians of the client’s best interests and ensuring the client is aware of their legal rights. On a principled basis, an independent bar is fundamental to ensuring an effective civil justice system.

Lawyers can ensure they contribute to diminishing pre-trial delay by resisting any efforts by clients to use delay as a tactic, resolving or narrowing the issues for decision by the court, being accountable to the court, abiding by timelines, informing the court of any expected delays, keeping adjournments to a minimum, and overall ensuring each case progresses effectively to disposition.³² Courts can encourage this accountability on the part of lawyers by refusing to enable complacency or unreasonableness on the part of parties or their counsel, and when warranted, sanctioning conduct that unreasonably delays or extends proceedings. Hearing dates must be available in the reasonably near future to ensure the court’s oversight, however; parties may take unreasonable positions when they know the other side has little meaningful recourse.

Lawyers can also support the efficiency of the civil justice system by remaining up-to-date on new technology and best practices.³³

It is clear that in these ways, lawyers can play a key role in making the civil justice system work more effectively and efficiently.

Conclusion

Delay in the civil justice system is negatively impacting the rights of thousands of Canadian individuals, families, businesses and other organizations. The Advocates' Society calls on the federal, provincial and territorial governments to urgently dedicate additional resources to the civil and family justice system, and calls on all stakeholders in the justice system, including governments, the courts, the bar and the public, to take immediate and concerted action to solve the endemic delays plaguing the delivery of civil and family justice across Canada.

The Advocates' Society looks forward to working with other stakeholders to facilitate meaningful change.

The Advocates' Society Task Force on Civil Justice Delay

Hilary Book, Chair, *Book Law* (Toronto)

Daniel Baum, *Langlois Avocats, S.E.N.C.R.L.* (Montreal)

Sheree Conlon, K.C., *Nijhawan McMillan & Conlon Barristers* (Halifax)

Scott R. Fairley, *Dooley Lucenti LLP* (Barrie)

Craig A.B. Ferris, K.C., *Lawson Lundell LLP* (Vancouver)

Sheila Gibb, *Epstein Cole LLP* (Toronto)

Jennifer Hunter, *Lerners LLP* (Toronto)

Leona Kung, *Koskie Minsky LLP* (Toronto)

Aria Laskin, *JFK Law LLP* (Vancouver)

Robin A. Lepere, *Petrone & Partners* (Thunder Bay)

Douglas A. McGillivray, K.C., *Burnet, Duckworth & Palmer LLP* (Calgary)

Tamara Prince, *Cassels Brock & Blackwell LLP* (Calgary)

Jeffrey Robinson, *Rush Ihas Hardwick LLP* (Kelowna)

Stephen G. Ross, *Rogers Partners LLP* (Toronto)

Tara Sweeney, *Soloway Wright LLP* (Ottawa)

Appendix A: Data to Collect about the Civil Justice System

- Number of civil and family cases in the system in a given year, and their age
- Number of civil and family cases entering and exiting the system in a given year
- Time between when a motion is sought and when it is scheduled
- Time between when a motion is scheduled and when it is heard
- Time between motion hearing and issuance of decision
- Time between commencement of matter and when it is set down for trial
- Time between when a matter is set down for trial and trial
- Time between trial and issuance of decision (if judge-alone trial)
- Time between commencement of matter and final disposition
- Percentage of actions that get set down for trial
- Percentage of actions that proceed to trial
- Percentage of actions in which motions are brought (and types of motions)
- Length of trial
- Number and length of adjournments of hearings, broken down by reason for the adjournment, e.g.:
 - Plaintiff request/default
 - Defendant request/default
 - Judicial discretion
 - Lack of court resources (e.g. no judge, no clerk)
 - Exceeding allotted time
- Final disposition type, e.g.:
 - Default judgment
 - Settlement
 - Withdrawal
 - Dismissal for delay
 - Summary judgment motion
 - Decision after trial

It may assist to be able to break down these metrics further, for example by case type and proceeding type.

Of course, data ought to be collected and recorded in a manner that makes aggregate and disaggregate analysis relatively straightforward to conduct. The Advocates' Society suggests that the ongoing development and implementation of new technology for the courts, in particular online platforms for filing, scheduling and case management, create excellent opportunities to build in data collection and analysis at the front end.

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- ¹ Trevor C. W. Farrow *et al.*, “Everyday Legal Problems and the Cost of Justice in Canada: Overview Report” (2016), online: <<https://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>>.
- ² Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2009), pp. 3-4 [references omitted].
- ³ Supreme Court of Canada, “The Challenges We Face: Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada” (March 8, 2007), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/bm-2007-03-08-eng.aspx>>.
- ⁴ *Moffitt v. TD Canada Trust*, 2023 ONCA 349, at footnote 2.
- ⁵ Kathrynne Lamontagne & Pascal Dugas Bourdon, « Petites créances: les délais ont triplé depuis l'arrivée de la CAQ » *Le Journal de Montréal* (18 mai 2022), en ligne : <<https://www.journaldemontreal.com/2022/05/18/les-delais-explosent-aux-petites-creances>>.
- ⁶ Supreme Court of British Columbia, *2022 Annual Report*, online: <https://www.bccourts.ca/supreme_court/about_the_supreme_court/annual_reports/2022_SC_Annual_Report.pdf>.
- ⁷ See Jacques Gallant, “Your whole life on hold’: As feds fail to fill judicial vacancies, Ontarians are waiting years for civil hearings” *Toronto Star* (May 24, 2023), online: <<https://www.thestar.com/news/gta/2023/05/24/your-whole-life-on-hold-as-feds-fail-to-fill-judicial-vacancies-ontarians-are-waiting-years-for-civil-hearings.html>>.
- ⁸ “Access to Justice: A Societal Imperative”, Remarks of the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, 7th Annual Pro Bono Conference (Vancouver, British Columbia) (October 4, 2018), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx?pedisable=true>>.
- ⁹ *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 24.
- ¹⁰ *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 805-806.
- ¹¹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 70-71.
- ¹² Quoted in *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at para. 60.
- ¹³ Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (August 2016), >, at p. 8, online: Senate of Canada, <https://sencanada.ca/content/sen/committee/421/LCIC/Reports/CourtDelaysStudyInterimReport_e.pdf>; Roy Weinstein *et al.*, “Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings” (March 2017) *Micronomics Economic Research and Consulting*, online <<https://go.adr.org/rs/294-SFS-516/images/Economic%20Impact%20of%20Delay%20Micronomics%20Final%20Report%20%282017-03-07%29.pdf>>.
- ¹⁴ Trevor C. W. Farrow, “Privatizing our Public Civil Justice System” *News & Views on Civil Justice Reform* (2006), Volume 9, p. 16, online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2929&context=scholarly_works>; Barbara A. Billingsley, “Book Review: Civil Justice, Privatization, and Democracy by Trevor C. W. Farrow” *Osgoode Hall Law Journal* 54.1 (2016): 317-323, online: <<https://digitalcommons.osgoode.yorku.ca/ohlj/vol54/iss1/11/>>.
- ¹⁵ *Huard v. The Winning Combination Inc.*, 2022 SKCA 130, at para. 86.
- ¹⁶ Action Committee on Court Operations in Response to COVID-19, “Roadmap to Recovery: Orienting Principles for Reducing Court Backlogs and Delays”, online: <<https://www.fja.gc.ca/COVID-19/Orienting-Principles-Reducing-Backlog-and-Delays-Principes-d-orientation-reduire-les-engorgements-et-delaies-eng.html>>.
- ¹⁷ See The Advocates’ Society Letter to The Honourable David Lametti, P.C., M.P., Minister of Justice and Attorney General of Canada re: Judicial Vacancies and Access to Justice in Canada, dated December 12, 2022, online: <https://www.advocates.ca/Upload/Files/PDF/Advocacy/Submissions/JudicialVacancies/The_Advocates_Society_Letter_to_Minister_of_Justice_re_Judicial_Vacancies_December_12_2022.pdf>.
- ¹⁸ Office of the Commissioner for Federal Judicial Affairs Canada, “Number of Federally Appointed Judges as of June 1, 2023”, online: <<https://www.fja.gc.ca/appointments-nominations/judges-juges-eng.aspx>>.

¹⁹ Action Committee on Court Operations in Response to COVID-19, “Roadmap to Recovery: Orienting Principles for Reducing Court Backlogs and Delays”, online: <<https://www.fja.gc.ca/COVID-19/Orienting-Principles-Reducing-Backlog-and-Delays-Principes-d-orientation-reduire-les-engorgements-et-delaies-eng.html>>. See Section 10. “Optimizing Case Flow Processes and Eliminating Administrative Inefficiencies”.

²⁰ “Opening of the Court of Ontario for 2014: Remarks of the Honourable George R. Strathy, Chief Justice of Ontario” (September 9, 2014), online: <<https://www.ontariocourts.ca/coa/about-the-court/archives/opening-of-the-courts-of-ontario-for-2014/>>.

²¹ At the 2022 Opening of the Ontario Courts, Chief Justice Geoffrey Morawetz of the Ontario Superior Court of Justice called for Ontario’s *Rules of Civil Procedure* to be overhauled for the first time in 40 years, explaining that civil proceedings have become bogged down by process, and there is an opportunity to create a new, simpler path forward: “Opening of the Courts – Remarks of Chief Justice Geoffrey B. Morawetz” (October 3, 2022), online: <<https://www.ontariocourts.ca/scj/opening-of-the-courts-remarks-2022/>>.

²² See e.g., *Federal Courts Rules*, SOR/98-106, rule 95(2) (“A person may answer a question that was objected to in an oral examination subject to the right to have the propriety of the question determined, on motion, before the answer is used at trial.”); *Nova Scotia Civil Procedure Rules*, rule 18.17(1) (“Making no objection to a question, or making an objection but giving an answer, at a discovery is not an admission that the subject of the question, or the answer, is admissible.”). In Nova Scotia, courts have made clear that counsel are expected to act reasonably and streamline the discovery process as much as possible; as such, where a discovery question is objected to on the basis of relevance, it is accepted that the best practice is to object but allow the witness to answer.

²³ This solution has been effective in multiple jurisdictions. See e.g. Superior Court of Justice, *Notice to the Public and the Profession Regarding Civil Matters in Ottawa as of April 19, 2022*, online: <https://cdn.ymaws.com/www.ccla-abcc.ca/resource/resmgr/pp-civlit/OttawaCivilScheduling_revMar.pdf> (section 2 regarding “Express motions”); *Nova Scotia Civil Procedure Rules*, Rule 24 (regarding “Appearance Day Chambers”).

²⁴ See Superior Court of Justice, *Practice Advisory Concerning the Provincial Civil Case Management Pilot – One Judge Model*, online: <<https://www.ontariocourts.ca/scj/practice/civil-case-management-pilot/>>.

²⁵ See the Action Committee on Court Operations in Response to COVID-19, “Roadmap to Recovery: Orienting Principles for Reducing Court Backlogs and Delays”, online: <<https://www.fja.gc.ca/COVID-19/Orienting-Principles-Reducing-Backlog-and-Delays-Principes-d-orientation-reduire-les-engorgements-et-delaies-eng.html>>.

²⁶ “White Paper on Justice Reform, Part Two: A Timely, Balanced Justice System” *British Columbia Ministry of Justice*, (2013) at pp. 6, 9, online: <<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/whitepapertwo.pdf>>.

²⁷ Linda Klein, “Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts (Preliminary)” *ABA Coalition for Justice* (July 12, 2010), at pp. 14-15, online: <<https://legalaidresearch.org/2020/02/04/report-on-the-survey-of-judges-on-the-impact-of-the-economic-downturn-on-representation-in-the-courts/>>. This is a report documenting the conclusions of a 2009 survey of judges across the United States. 78% of judges surveyed said the courts were negatively impacted when parties are not well represented. 90% of those judges said that one of the negative impacts was that court procedures were slowed.

²⁸ Government of Canada Research and Statistics Division, “JustFacts: Self-Represented Litigants in Family Law” (June 2016), online: <<https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html>>.

²⁹ *Ibid.*

³⁰ Lisa Moore & Trevor C. W. Farrow, “Investing in Justice: A Literature Review in Support of the Case for Improved Access to Justice” *Canadian Forum on Civil Justice* (2019), online: <<https://cfcj-fcjc.org/wp-content/uploads/Investing-in-Justice-A-Literature-Review-in-Support-of-the-Case-for-Improved-Access-by-Lisa-Moore-and-Trevor-C-W-Farrow.pdf>>; Sharon Matthews, “Making the Case for the Economic Value of Legal Aid – Supplemental Briefing Note” *Canadian Bar Association British Columbia Branch* (2012), at pp. 1, 5, online: <https://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/ForThePublic/LegalAid/ReportsResearchPapers/Economic_Value_of_Legal_Aid.pdf>.

³¹ “Judicial Council Report to the Legislature: Sargent Shriver Civil Counsel Act” *Judicial Council of California* (2017).

³² Action Committee on Court Operations in Response to COVID-19, “Roadmap to Recovery: Orienting Principles for Reducing Court Backlogs and Delays”, online: <<https://www.fja.gc.ca/COVID-19/Orienting-Principles-Reducing-Backlog-and-Delays-Principes-d-orientation-reduire-les-engorgements-et-delais-eng.html>>. See Section 4. “Promoting the Accountability of Parties and their Counsel”.

³³ The Advocates’ Society has published a number of best practices to assist lawyers in using court resources effectively, including *Best Practices for Civil Trials* (2015), *Principles of Civility and Professionalism for Advocates* (2020), and *Best Practices for Remote Hearings* (2nd ed. 2021). See The Advocates’ Society’s Best Practice Publications page for these publications and more, online: <https://www.advocates.ca/TAS/Publications/Best_Practices_Publications/TAS/Publications_Resources/Best_Practices_Publications.aspx?hkey=12ee9725-d4e8-408d-93bc-462a365c7d82>.