Speaker's Corner: Is there too much judicial intervention in civil litigation?

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Have you received a status notice recently?

Rumour has it the Ontario Superior Court may be considering doing away with status notices due in part to its inconsistent implementation throughout the province. For non-litigators, a status notice is a form issued by the court advising that it will dismiss the matter unless the parties do one of following within 90 days: set the action down for trial or terminate the action; request a status hearing; or consent to an order establishing a timetable. A status hearing essentially entails the parties — typically the plaintiff — trying to persuade the presiding judge or master as to why the court should not dismiss the action. If the party takes no steps, the court will dismiss the action with costs. A status hearing is in essence a way for the court to supervise the parties to ensure that the proceeding does not fall dormant.

The last two decades have witnessed important reforms to the Ontario Rules of Civil Procedure to augment judicial oversight of proceedings in the name of improving efficiency. The changes, including the introduction of simplified procedure, case management, and discovery plans, were ostensibly an effort to alleviate the substantial court backlogs and make the litigation process more efficient and effective.

The irony is that both costs and delays have swelled in the interim. Access to justice has become unaffordable for the middle class and working poor who are not eligible for legal aid in Ontario as evidenced by the increasing number of unrepresented litigants navigating the court system on their own. The court system does not publish official statistics on the number of unrepresented litigants, but by some estimates, 40 per cent of litigants in Canada and as many as 80 per cent of the parties in Ontario's family court do not have counsel.

One such measure of judicial oversight is judicial management of civil cases. Case management under Rule 77 came into force on Feb. 3, 1997, in Toronto and Ottawa and expanded to Windsor, Ont., on Dec. 31, 2002. The rule had been designed so the court would aggressively manage virtually all civil cases through prefixed timetables, conferences with case management judges or masters, and judicial intervention if the parties do not adhere to tight timelines. The court suspended universal case management in 2004 for Toronto and in 2010 for Ottawa and Windsor and replaced it with a model on the lines of "case management where necessary, not necessarily case management." It became apparent it was unfeasible for the court to micromanage every case that comes through its doors, particularly in Toronto with about 31,000 new claims filed each year.

The approach contrasts starkly with the long-standing way in which our courts have operated. For many years, the parties largely dictated the pace and corresponding expense of litigation. An action would begin with a statement of claim filed by the plaintiff and it proceeded through the various steps at a pace driven by the parties. There might be a short or lengthy interval between

pleadings and disclosure, for example, or any other stage of the process as the historical approach offered litigants considerable flexibility. Parties could rely on the doctrine of laches and bring motions to dismiss an action if the other side unreasonably delays the case from moving forward.

From the perspective of the courts, the introduction of case management fundamentally altered the role of judges. In the adversarial tradition that is the hallmark of common law, the judge is a passive, impartial adjudicator whose only role is to decide at the end of the proceedings. Since the 1990s, however, judges started assuming a more active, interventionist role beyond the confines of the formal courtroom in supervising the steps leading to trial.

Litigation is in essence a public process of dispute resolution. Parties launch lawsuits for a number of reasons with some actions simply a bid to guard against the limitation period running out in case the parties cannot resolve their dispute and decide to pursue the court route more seriously later on. Not every action is ripe to move along at the same pace and by the same standard order of litigation steps. Accordingly, a judicial interventionist approach may present more encumbrance than assistance. This is consistent with the sentiments captured in former Ontario associate chief justice Coulter Osborne's report on the civil justice reform project: "Lawyers expressed general support for limited case management, that is, for case-tailored management where required — not a one size fits all approach to the management of cases. . . . One obvious feature of case management is that, although it is helpful in some cases, it is not needed in all cases, on any reasonable assessment. In those cases where counsel can effectively move the case forward, case management adds layers of cost that some convincingly say are unnecessary."

At the end of the day, unsolicited judicial intervention can unduly impose upon litigants' resources and take away judges' attention from performing their chief role as passive, impartial adjudicators in our adversarial system. If litigants require the court's assistance in managing opposing parties who are unco-operative, unresponsive or looking to cause strategic delay, they can bring a motion or request case management. The court should refrain from dictating a one-size-fits-all pace of litigation by way of status notices, status hearings, and other unilateral moves.

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