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Hard statistics on court delays in Canada are hard to come by, but the personal experiences of business clients across the country speak to both the scope and consequences of the problem — everything from disrupted operations and inflated costs to decreasing confidence in our civil court system. Not surprisingly, litigants and lawyers alike — including The Advocates' Society — are calling for change. Here are some suggestions from BLG's cross-country disputes team: five practical, effective strategies to reduce court delays and improve business outcomes, including ideas from jurisdictions where they're already meeting with success. Watch the quick videos below to discover an approach that could save your business time and money.

Idea #1: Streamlined trials

Idea #2 - Transcript

Backlogs are a reality of the court system in British Columbia at the moment. This makes arbitration of contractual disputes an attractive option. Through arbitration, you can gain access to a tribunal almost immediately or within a few weeks, depending if the appointment procedure goes smoothly. The tribunal can set a procedural timetable all the way through to the hearing and be available to hear procedural issues, such as documents, applications or other evidentiary issues that arise along the way.

In arbitration, you can not only gain access to a tribunal more rapidly, than a court, unless the matter is urgent, but the process itself is also more expedient, or has the potential to be. A complex multi-million-dollar case could be determined within a year of being filed in arbitration. As I mentioned, you have access to the tribunal through written submissions throughout the case.

There's also the potential for much shorter hearing length because all of the evidence can go in writing. A large, multinational complex dispute could be set for 3 to 5 days of hearing as opposed to, say, 30 days in court or more. Arbitral institutions also have developed expedited procedures for lower quantum disputes.

The Vancouver International Arbitration Centre, for example, has developed expedited procedures for matters that are under $250,000 within Canada or internationally up to $500,000. These procedures allow the parties to have a determination of their dispute within 3 to 6 months of filing the claim.

I'm not saying arbitration is a magic bullet that can fix all of the backlogs or delays in the courts. Of course, arbitration is a creature of consent and it's only available to parties where they consent or contract into the case. Some cases will only be appropriate for the court system, but arbitration should not be overlooked as an alternative that can provide a more efficient determination of a dispute and it certainly becomes a more attractive option as court backlogs persist.

Similarly, arbitration presents a faster alternative to court proceedings, particularly for contractual disputes. In British Columbia, arbitration can commence almost immediately, with shorter hearings and expedited resolutions. Complex disputes can be settled within a year, far quicker than traditional court cases. For businesses, arbitration offers the dual benefits of reduced legal costs and swift resolutions, crucial for maintaining business continuity.

Idea #3: Review the rules of civil procedure

Idea #3 - Transcript

Increasingly, I think we need to consider whether the rules of procedure for court proceedings are a barrier to access for justice.

Some provinces and the Federal Court have launched extensive, far-reaching reviews of their rules of civil procedure. Ontario announced such a such a review in late January of 2024. While the review is expected to take two years, there are going to be ongoing changes that will be made throughout that period.

And similarly, in early April of 2024, the Federal Court announced the creation of a special subcommittee to conduct the global review of the Federal Court rules. Early signs from both of these reviews point to a comprehensive rethink of rules of procedure. Ontario's civil review of the rules will be guided by several principles, including an attempt to try and triangulate the values of accuracy, time and cost, because delays and runaway costs are the most pressing threats to proportional justice. But also it will consider consideration of the contribution that each existing rule makes to the truth seeking and procedural fairness, and that must be balanced against any inefficiencies associated with that rule, including any potential for its abuse.

Some of the things on the table include the potential for a broader role for streamlined applications, or even a single, simplified form of pleading to start a case. There will be easier ways to serve parties, establishing firm, enforceable timetables at the outset of a proceeding, maybe even increasing the threshold of what counts as a relevant document that must be produced in litigation.

One option being considered is the potential elimination of oral discovery in certain kinds of cases and eliminating refusals from answering questions on discovery, except where privilege is implicated. There'll be more active case conferences and potentially even a cap on the number of motions. All of these kinds of reforms, which will be considered over the coming years, will prioritize substance over process and will, in my view, have the real potential to meaningfully increase the pace at which civil justice is administered.

An innovative twist on arbitration is using arbitrators for interlocutory work, such as discovery disputes and motions. This approach can alleviate delays by expediting preliminary stages, ensuring cases move quickly to a final decision. Businesses benefit from saving time and resources typically lost in prolonged litigation.

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Idea #4: Use arbitrators for interlocutory work

Idea #4 - Transcript

Arbitration is not always the panacea for solving the court backlog. Arbitration can be expensive and it's not suited for every case. But if the parties to a dispute share a mutual interest in an efficient, cost-effective adjudication, there is a role that arbitration can play.

It's a truism that the longer litigation goes on, the more expensive it becomes, and a lot of that time is consumed in the discovery and motions process at the interlocutory stage, the time between the start of the case and its determination on its merits by means of summary trial, summary judgment, or even a full-blown trial.

I think the parties should consider using an arbitrator to help them move through the interlocutory stage of a case more quickly. If the parties agree, the expense and delay for waiting a year to resolve a discovery dispute or a motion can be alleviated.

Comprehensive reviews of the rules of civil procedure in provinces like Ontario aim to enhance efficiency and reduce delays. Potential reforms include simplified applications, streamlined pleading forms and enforceable timetables. These changes promise more predictable legal processes and reduced litigation costs, a significant boon for businesses.

Idea #5: Borrow from tribunals

Idea #5 - Transcript

A significant amount of litigation actually takes place before tribunals. For example, here in Ontario, Tribunals Ontario, which is a group of 13 Ontario tribunals, reports that they're receiving and resolving nearly 100,000 cases a year. So a significant amount of litigation, and there are a number of advantages that tribunals have.

For one, they have specialized adjudicators who are experts in particular areas, but they also present other unique opportunities for efficiency in litigation. For example, tribunals are building on the experience gained during the COVID-19 pandemic by continuing to make significant use of virtual attendances, motions and hearings, and that is really increasing the efficiency of proceedings and reducing scheduling time by allowing tribunal members located throughout, in my case, the province of Ontario, to adjudicate matters.

It also expands the pool of experts and lawyers available to represent parties and reduces the cost of participation. And it makes those proceedings much more accessible to the public. For example, the Ontario Land Tribunal has recently started streaming high-profile cases from a dedicated YouTube channel and also provides access to the public to attend these proceedings.

Really a whole lot more public access that wasn't there before. Tribunals also have the ability to be more nimble about changes to rules of practice or procedure. And we've seen that recently with changes to rules dealing with, for example, increased focus on mediation. And finally, we've seen an increased use of case-specific procedural orders to streamline proceedings and that's also proven to be very helpful. So there's a lot of developments happening in the tribunal space that are really reducing the cost of litigation and improving efficiency.

Lessons can also be learned from tribunals, which handle large litigation volumes with specialized adjudicators and flexible procedural rules. Tribunals often make significant use of virtual attendances, motions and hearings, improving the efficiency of proceedings. Courts can emulate these approaches to streamline their processes and reduce backlogs.

By embracing these strategies, the legal system can better serve businesses, ensuring timely and efficient resolutions. This allows businesses to allocate resources more effectively, minimize operational disruptions, and enjoy a more predictable legal experience.

BLG's Future of Law series captures the perspectives of industry leaders on the biggest issues facing law and business over the next decade and beyond, with the goal of starting conversations and supporting action in organizations across Canada. The year-long series was created in honour of BLG's 200th anniversary in 2023-2024.

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