Time for time-limited trials

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The authors thank Sam Hargreaves, articling student at Lenczner Slaght, for invaluable assistance with this article.

The notion that courts should limit trial times has long been on the table. In *Hryniak v Mauldin* [*Hryniak*], the Supreme Court of Canada observed that "protracted trials" can cause Canadians to "give up on justice." The Supreme Court of Canada emphasized that a "proportionality principle," balancing accessibility and timeliness with the truth-seeking function of the courts, can "act as a touchstone for civil justice."[1] Former Associate Chief Justice of Ontario Coulter A. Osborne's 2007 Civil Justice Reform Project report recommended that pretrial judges "be vested with the authority to impose time limits" on the presentation of each side's case.[2] Members of The Advocates' Society have recognized in these pages the efficiency of time-limited trials,[3] and the Society's 2015 publication *Best Practices for Civil Trials* endorsed trial time limits in appropriate cases.[4] The Society's 2021 report *The Right to Be Heard: The Future of Advocacy in Canada* echoed *Hryniak*, stating that achieving access to justice meant that "we must be open to applying proportionality principles to ensure that resources are appropriately allocated."[5]

A recently published statistical analysis of the number and length of Canadian civil trials and decision reserve periods provides, for the first time, extensive empirical evidence supporting the imposition of trial time limits.[6] Published in September 2021 in the *Canadian Bar Review*, the study of more than 2,500 reported cases determines the average and median length of bench trials and reserve periods in the Ontario Superior Court of Justice, the Supreme Court of British Columbia, and the Federal Court. The study establishes that reducing the average trial time by 10 percent would be the rough equivalent of adding at least 23 judges to the Ontario Superior Court, 11 judges to the BC Supreme Court, and five judges to the Federal Court.[7] The study also finds a statistically significant association between the length of trials and reserve periods, confirming that the longer the trial, the longer it takes to get a decision.[8] In other words, reducing trial time would not only save litigants money but also get them to a decision more quickly.

For the reasons we submit in this article, time-limited trials are an available and ready means of achieving the accessibility and timeliness goals that the Supreme Court of Canada called for in *Hryniak*. Those goals can be achieved without departing from the courts' truth-seeking function. We now outline a specific proposal for reaching those goals.

The proposal

We propose that the total length of bench trials be prescribed on a discretionary basis by judicial order and that the court allocate a specific number of hours for the presentation of evidence to each party. These time-limited trials are sometimes called "chess clock" or "stopwatch" trials.[9] The time limits do not necessarily have to be shared equally. Under this model, which is the model endorsed by the American Bar Association (ABA),[10] a party's right to present evidence ends when its allocated time ends, subject to judicial discretion. The parties remain masters of their case within the time allocated to them. *How* a party makes its case is for the party to decide. *How long* the party may take to do so is up to the court.

Our proposal thus leaves to parties, not judges, the selection of issues they wish to try and evidence they wish to lead. We do

not propose the assignment of trial time limits on the basis of formulaic criteria (such as the amount of the monetary claim). Rather, trial time limits must be set on a case-by-case basis, having regard to the factors discussed below.

Judicial time-limit orders act as both methods and frameworks. As a method, time-limit orders operate as an "invisible hand," compelling parties to themselves focus their cases to their best issues and evidence. As a framework, time-limit orders set the stage for a variety of other, ancillary orders intended to ensure that the proceedings are fair and proportionate.

By way of example, an order limiting total trial time might be accompanied by orders requiring that evidence-in-chief be pre-filed, that objections to categories of evidence be determined in writing prior to trial, or that experts be deposed before trial. Parties faced with a time-limit order are likely to become more efficient and co-operative. Indeed, counsel working under time limits have noted time limits make for better trials.[11] Where parties do not display co-operation, the court must be prepared to step in and make ancillary orders.

The experience of Canadian courts with trial time limits

Trial time limits are not *terra incognita* to Canadian courts or tribunals. Time limits are imposed by various Canadian administrative tribunals, including the Competition Tribunal,[12] and have been used (on consent) in major commercial litigation cases. A chess clock order was made by Justice Newbould in *Nortel Networks Corporation (Re)*.[13] Counsel involved in *Nortel* later wrote in this journal:

> Most advocates well understand the tension between the knowledge that most cases only ever turn on a limited number of issues and documents, and the concern of being criticized for not pursuing every argument at trial. And trial judges are traditionally loath to limit counsel once the trial is under way. The early imposition of reasonable time constraints at trial addresses this issue by forcing all parties, prior to the start of the trial, to more critically examine the case and identify the issues and evidence that are most likely to be material to the resolution of the dispute. The Nortel trial took a fraction of the time it would have taken if traditional processes were adhered to; indeed, the trial was shorter than less complicated matters using the traditional process.[14]

Summary trials, which incorporate trial time limits, are mandated in various provinces for cases where the claim does not exceed a specified amount. Rule 76 in Ontario mandates a summary procedure for claims with a value of less than $200,000. Rule 76 trials may not exceed five days. Rule 15-1 in British Columbia provides a summary trial process for claim with a value of less than $100,000. Rule 15-1 trials may not exceed three days. Parties may opt into these regimes, regardless of the amount in issue, on consent.

These examples establish that there is already acceptance in Canada, in principle, that some trials should be time limited. But no reason exists to suggest the amount in dispute should form the foundational criterion for imposing time limitations.

The rules of the BC Supreme Court specifically permit trial judges to make orders imposing time limits in any case. Rule 12-2(9) permits a judge at a trial management conference to impose time limits for the direct examination or cross-examination of witnesses, opening statements and final submissions, and, inferentially, the number of days reserved for trial. Ontario does not have an equivalent of British Columbia's Rule 12-2(9). However, superior courts have broad inherent powers to control their own processes.[15] They also have a general power (and, as a consequence of *Hryniak*, a responsibility) to ensure proportionality. In Ontario and British Columbia the proportionality principle is codified, and an express codification of the proportionality principle is proposed for the Federal Court Rules.[16]

Monetary amounts may be a factor in, but are no substitute for, a system that allocates scarce judicial time proportionally. What then should be the criteria governing the imposition of trial time-limit orders?

Criteria

The "Civil Trial Practice Standards" manual published by the American Bar Association prescribes standards for the making of trial time-limit orders which are a useful starting point for Canadian judges, given the nearly 50 years of experience in the United States with time-limited trials.[17] The ABA's suggested factors are:

i. The complexity of the case;
ii. The claims and defenses of the parties;
iii. The respective evidentiary burdens of the parties;
iv. The subject matter of evidence that is considered for limitation; and
v. Whether proposed limits allocate trial time fairly.

This list is a useful starting point. Other factors may be particular to the case. A judge might wish to know:

i. What work the parties themselves have done to narrow the scope of the issues;
ii. The utility and practicality of ancillary orders designed to make the trial process more efficient;
iii. The economic impact of any time-limit or related order on the parties;
iv. Whether translation services are required; and
v. Whether a party is self-represented and, if it is, whether that is likely to impact trial time.

Against these case specific factors, the court must consider systemic factors relating to the availability of judicial resources in the jurisdiction in which the trial is to occur. Is there a backlog? What is the clearance rate? What is the local judicial complement? These systemic factors require judges to manage caseloads as a whole, recognizing that "too much justice" in one case means too little in the next.

These lists are not exhaustive. A judge's imposition of a trial time limit is an exercise in discretion. The criteria that guide the exercise of that discretion will change over time. What matters, from the perspective of a judge making a time-limitation order, is the process engaged before he or she exercises that discretion.

When and how should an order be made?

A time-limit order ought only to be made on notice, after affording the parties the opportunity to be heard. US appellate courts have held that trial judges act within their discretion "after making an informed analysis based on a review of the parties' proposed witness lists and proffered testimony, as well as their estimates of trial time" and where they "allocate trial time even-handedly,"[18] although not necessarily equally.[19] Conversely, arbitrary time limitations have invited reversal,[20] as have limitations resulting in the exclusion of material evidence.[21] Appellate decisions have also analyzed the imposition or variance of time limits in the midst of trial, stating that "an allocation of trial time relied upon by the parties should not be taken away easily and without warning."[22]

Finally, orders are preferable to agreements. Agreements on time limits between parties must be treated with caution. The court must be concerned with the *systemic*

impacts of the length of any trial. The fact that the parties may between themselves agree on time limits does not mean that the agreed limits are the right limits. Due regard must be given for systemic issues: concerns that lie mainly with the courts, not parties. Accordingly, the existence of an agreement between the parties limiting trial time is a place for the court's inquiry into the need for time limits to *start*, not where it should *end.*

What should the order say?

The purpose of a time-limiting order is to induce a party to prune its case to the best issues and the best evidence. That pruning is simple enough. But it would be self-delusion to suppose that adverse parties will not attempt to use time-limit orders *tactically* to frustrate an opponent's presentation of its case. This tactic might be carried out, for example, by interfering in an opponent's examination-in-chief of a witness by prolix objections, thereby playing out the clock.

Terms in the time-limit order can increase the likelihood that behaviour sought to be encouraged will be encouraged, and that which is sought to be discouraged is in fact discouraged. This goal is primarily achieved by both the court setting *a total time limit* for each party, rather than a variety of time limits for given witnesses or stages in the proceeding, and attributing the time to the party expending it.[23] A "global" order of this nature counts each party's opening, examinations-in-chief, cross-examinations, objections, read-ins, and closing against the party. Within that allocated period, a party is free to lead and address the case it wishes, in the manner it wishes. When a party is on its feet, the clock runs against it. When its allotted time ends, so too does its case, subject only to the court's overriding (and exceptional) discretion to vary the time-limit order, which we discuss below.

Variations of a "global" order exist. One might, for example, allocate time spent on mid-trial motions against the losing party. Minimally the order should "make clear what activities are and are not included in the total time limit. Specifically, it should state whether the limit applies to opening statements, closing statements, all witness examinations (whether conducted live in court or by the reading or playing of previously taken testimony), and time spent reading evidence into the record or publishing evidence to the jury."[24]

The order must also stipulate who will be in charge of keeping time and the means by which they will do so. It is important, as the ABA notes, that the court announce, as a matter of record, the total elapsed time to be charged to each party at the end of each day, and the time remaining.[25]

When should an order be modified?

In what circumstances might a judge exercise residual discretion to amend a time-limit order? The court should reassess imposed limits in light of developments up to and during trial and should grant a variation upon a showing of good cause. Courts should be extremely reluctant to extend mandated limits on the simple ground that "things have taken longer." The point of setting trial time limits is to impose discipline on the trial process. That discipline is lost if parties believe they can "blow by" those limits with relative impunity. If a party can on motion convince the court that new facts or considerations have emerged since the limit was set – which, had they then been known, would have resulted in a longer period, or none at all – then the court should exercise its discretion.

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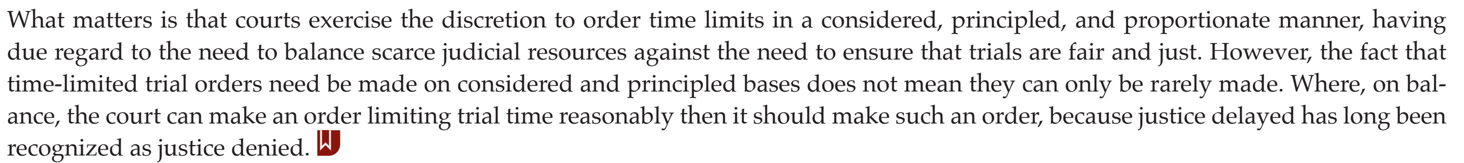

Conclusion

What matters is that courts exercise the discretion to order time limits in a considered, principled, and proportionate manner, having due regard to the need to balance scarce judicial resources against the need to ensure that trials are fair and just. However, the fact that time-limited trial orders need be made on considered and principled bases does not mean they can only be rarely made. Where, on balance, the court can make an order limiting trial time reasonably then it should make such an order, because justice delayed has long been recognized as justice denied.

Notes

1. *Hryniak v Mauldin*, 2014 SCC 7 at paras 24–25, 30 [*Hryniak*].
2. Coulter A Osborne, J, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007), para 49; online: *Ministry of the Attorney General*, <https://wayback.archive-it.org/16312/20210402175121/http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/020_recommendations.php>.
3. David Stockwood, Benjamin Zarnett, and Sheila Block, "Shortening Trials: Less Is More" (2005) 24:2 Adv Soc J, para 49.
4. *Best Practices for Civil Trials* (Toronto: The Advocates' Society, June 2015), 9–12; online (pdf): *The Advocates' Society* <https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/The_Advocates_Society-Best_Practices_for_Civil_Trials-June_2015.pdf>.
5. *The Right to Be Heard: The Future of Advocacy in Canada (Final Report of the Modern Advocacy Task Force)* (Toronto: The Advocates' Society, 2021), 94; online (pdf): *The Advocates' Society* <https://s3.amazonaws.com/tld-documents.llnassets.com/0027000/27521/the_right_to_be_heard_the_future_of_advocacy_in_canada_digital.pdf>.
6. Kevin LaRoche, M Laurentius Marais, and David Salter, "The Length of Civil Trials and Time to Judgment in Canada: A Case for Time-Limited Trials" (2021) 99:2 Canadian Bar Review 286.
7. *Ibid* at 307–8.
8. *Ibid* at 306.
9. This method of time allocation has also been called the "Böckstiegel Method." See Johnathan Kay Hoyle, "Procedural Innovation in the Federal Court?" (2017), 7; online (pdf): <http://11stjames.net.au/wp-content/uploads/2017/10/FCA-Practice-Note-Paper-by-Jonathan-Kay-Hoyle.pdf>.
10. See American Bar Association, "Civil Trial Practice Standards" (August 2007), 18–19; online (pdf): <https://www.americanbar.org/content/dam/aba/administrative/litigation/leadership-portal/ctps.pdf> [ABA Civil Trial Practice Standards]; Hon William W Schwarzer, "Reforming Jury Trials," (1990) 1:6 University of Chicago Legal Forum, 119 at 123–24.
11. See, e.g., Stephen D Susman and Thomas M Melsheimer, "Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases" (2013) 32 Rev Litig 431, 441–42.
12. See Sandra Simpson, J, "Noticed on 'Chess Clock' Proceedings" (December 2010); online: *Competition Tribunal* <https://www.ct-tc.gc.ca/en/procedure/notices/chess-clock-proceedings.html>.
13. 2015 ONSC 2987.
14. Alan H Mark and Jason Wadden, "Nortel's Litigation Legacy: The Truly Cross-Border Trial and Other Lessons for the Future" (Summer 2019) 38:1 Adv J 6, para 26; See also James Bunting, Chantal Spagnola, and Anisah Hassan, "A Paperless Courtroom: Embracing the Use of Electronic Trials" (Fall 2016) 35:2 Adv J 7, paras 12–14.
15. See *R v Caron*, 2011 SCC 5 at para 54; *MacMillan Bloedel Ltd v Simpson*, [1994] 4 SCR 725 at paras 29–30.
16. *Rules of Civil Procedure*, RRO 1990, Reg 194, s 1.04; *Supreme Court Civil Rules*, BC Reg 168/2009, r 1-3(2); Courts Administration Service (2021) C Gaz 1, Vol 155, No 15 (*Rules Amending the Federal Courts Rules [proportionality, abuse of process and Federal Court of Appeal motions]*).
17. ABA Civil Trial Practice Standards, *supra* note 10, 16–17; see also Federal Judicial Center, "Manual for Complex Litigation (Fourth)" (2004) at §11.644 at 127; online (pdf): <https://public.resource.org/scribd/8763868.pdf >; Federal Judicial Center, "Benchbook for US District Court Judges" 6th ed (March 2013) at § 6.01 at 203; online (pdf): <http://www.fjc.gov/sites/default/files/2014/Benchbook-US-District-Judges-6TH-FJC-MAR-2013.pdf>.
18. *Duquesne Light Co v Westinghouse Elec Corp*, 66 F (3d), 604 at 610 (1995) [*Duquesne*].
19. *Sparshott v Feld Entm't Inc*, 311 F (3d), 425 at 433 (2002).
20. *Chandler v FMC Corp*, 35 Mass App Ct, 332 at 338–39 (1993); *Ingram v Ingram*, 125 P (3d), 694 at 698–99 (Okla Ct Civ App 2005).
21. *Doe v Doe*, 44 P (3d), 1085 at 1095–96 (Haw Sup Ct 2002; *Turner v Belman*, 883 NW (2d) 537.
22. *Duquesne*, *supra* note 18.
23. *See* ABA Civil Trial Practice Standards, *supra* note 10 at 17.
24. *Ibid*.
25. *Ibid*.