Ontario Superior Court of Justice

Ministry of the Attorney General

CIVIL RULES REVIEW

FINAL POLICY REPORT
Submitted by the CRR Working Group

October 31, 2025

CIVIL RULES REVIEW **RÉVISION DES RÈGLES CIVILES**

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Re: CRR – Final Policy Report

We are pleased to submit the Working Group's Final Policy Report, following the completion of Phase Two of the Civil Rules Review.

This Final Policy Report represents the culmination of the Working Group's efforts, supported by eight subgroups during Phase Two of the project. It reflects extensive consultation and engagement with civil justice system stakeholders across Ontario along with comparative analysis of best practices in other Commonwealth jurisdictions.

In it, we propose a broad range of reforms across core areas of the civil litigation process. The proposed reforms, offered in satisfaction of our mandate, are designed to reduce delays and costs and increase access to the civil justice system for Ontario litigants.

Yours truly,

Cary Boswell **Allison Speigel**

EXECUTIVE SUMMARY

The civil justice system is fundamental to enforcing legal rights, ensuring government accountability, and sustaining economic confidence. Yet Ontario's system is plagued with delay, prohibitively costly, and obsessed with process over substance, rendering it fundamentally incapable of delivering meaningful justice to most Ontarians.

If left unaddressed, these challenges will continue to erode public and investor confidence, impede access to justice, drive disputes out of the courts, slow the law's development, and ultimately weaken both the rule of law and Ontario's economic competitiveness. Simply put: Ontario's civil justice system is in crisis and requires urgent, meaningful reform.

The Civil Rules Review ("**CRR**") was launched in January 2024 as a joint initiative of the Chief Justice of the Superior Court, Geoffrey Morawetz, and the Attorney General of Ontario, Doug Downey. Its mandate was to propose reforms to the current *Rules of Civil Procedure* R.R.O. 1990, Regulation 194 (the "**Rules**") to make Ontario's civil justice system more accessible and to reduce costs and delays. As the project proceeded, the Chief Justice and Attorney General made it clear that the intent was not to simply "tinker around the edges." Rather, it was wholesale reform—a reimagining of the civil justice system from the ground up.

In their current form, the Rules are failing to achieve their core objective of ensuring the just, expeditious, and least expensive resolution of civil proceedings. The CRR Working Group (defined below) believes that this failure stems from several factors, including insufficient resources, the "complete discovery" model instituted in 1985, a framework that promotes delayed case theory, the ability to use interlocutory processes to delay or increase costs, a pervasive motions culture, and weak enforcement of the Rules. Given that resourcing lies beyond our mandate, we have focused on reforms aimed at addressing the remaining systemic factors impeding the effective administration of civil justice.

Following a scoping phase in the first half of 2024, we set to work on developing a new process model for civil litigation in Ontario. That process model, along with numerous ancillary proposed reforms, was set out in our Phase 2 Consultation Paper, which was the subject of broad consultation with justice system stakeholders between April 1 and June 16, 2025.

The Phase 2 consultation generated extensive stakeholder feedback demonstrating strong overall support for the need to reform the civil justice system. Many of our proposals were well received, including adopting a single originating process, imposing shorter timelines, enforcing deadlines more strictly, using directions conferences to resolve procedural motions, introducing presumptive summary hearings, simplifying the process for removal of counsel, and expanding mandatory mediation. Views were more divided on proposals such as pre-litigation protocols and various ancillary reforms, including those addressing the duty to cooperate, amendments to pleadings, service by email, joint books of documents, and a fixed delay penalty. The least supported

proposals were those most central to the new model: namely, the introduction of an up-front evidence framework and the elimination of oral discoveries.

We carefully reviewed and considered all submissions received from consultees, which led to significant revisions to our proposed reforms. In this executive summary, we provide a brief overview of our comprehensive suite of proposals that, if adopted, will not only reform, but meaningfully transform, Ontario's civil justice system.

As noted, the CRR's mandate is to recommend reforms to the Rules that reduce costs, reduce delays, and make Ontario's civil justice system more accessible for Ontario litigants. These three areas of targeted reform are not distinct from one another; rather, they are inextricably intertwined. Finding ways to reduce delays will, for instance, simultaneously reduce costs and improve access to justice. We have done our best to identify reforms that will individually, or collectively, achieve the CRR's mandate.

Delay Reduction

We are proposing a holistic approach to reducing delay, beginning with a shift from the current party-driven system to a Court-managed one. We aim to reduce the time from the close of pleadings to a dispositive hearing in "two-party claims" (i.e., cases involving only claimants and defendants) to two years for most proceedings, with slightly longer timelines in matters involving additional parties (e.g., third parties). We propose to do so by doing the following:

- Introducing pre-litigation protocols to promote early resolution or, at a minimum, to identify and narrow issues in dispute;

- Setting early and firm dispositive hearing dates, which will require parties to quickly focus on the real issues in dispute, promote early resolution, reduce interlocutory wrangling, and prevent delay tactics aimed at increasing costs or achieving a result through attrition rather than merit;

- Employing the up-front-evidence model, which will also require parties to focus quickly on the real issues in dispute, promote early resolution, enable cases to become trial-ready within a condensed timeframe, and streamline the trial process;

- Prescribing timelines for the completion of pleadings, discovery, out-of-court examinations, and the exchange of experts' reports;

- Reducing the existing motions culture that drives delays and costs by screening all proposed motions through case conferences and deciding most procedural interlocutory disputes at the conference itself; and,

- Prescribing sanctions for missed deadlines and introducing other measures to increase compliance with the Rules.

Cost Reduction

Reducing delay will help reduce costs. In addition, we propose several targeted cost-reduction reforms, including:

- Allowing service of originating processes by email;
- Introducing the up-front evidence model to focus parties on the issues that truly matter;
- Transitioning from a relevance-based disclosure standard, which currently results in exponential overproduction, to a reliance-based standard focusing on the documents essential to resolving the dispute;
- Reducing the existing motions culture, one of the principal drivers of costs and delays;
- Introducing the presumptive use of joint experts for a limited range of subject matters;
- Streamlining motion materials and procedures for common motions, including discovery disputes, motions to remove counsel of record, and motions commonly referred to as "***Wagg* Motions**", while replacing motions to dismiss with notices of discontinuance in most cases as the default process for ending a proceeding;
- Creating a summary process for the disposition of lower-to-moderate-value and less complex cases by replacing the conventional trial with a paper-based hearing, thereby acknowledging that traditional trials are often financially out of reach for ordinary Ontarians and small businesses; and
- Facilitating the process for enforcing judgments.

Access to Justice

Reducing costs and delays will correspondingly improve access to justice. Moreover, the summary process envisioned for lower-to-moderate value and less complex cases will make an adjudicative hearing a realistic prospect for many more litigants. Expanding access to adjudicative hearings, in and of itself, constitutes a significant advancement in access to justice. In addition, because most civil disputes settle before reaching a dispositive hearing, creating a system where an adjudicative hearing is a realistic possibility within a reasonable timeframe will have a positive ripple effect on settlements. Litigants will no longer feel compelled to settle at a discount simply because they cannot afford to proceed to trial or wait a long time for a decision. This will lead to fairer outcomes that better reflect the merits of each case.

Other initiatives that we have proposed that are aimed at improving access to justice include:

- Transitioning to a single form of originating process— the "**Notice of Claim**"—which will be available in an online, fillable form, as well as a paper version for those litigants unable to access the online form;

- Moving to a reliance-based documentary production regime, which will be simpler for litigants to understand and fulfill;

- Enhancing case management to clarify procedures and create a more level playing field;

- Requiring that the Court provide litigants with orders outlining the next steps in the proceedings and their associated deadlines;

- Requiring court orders to specify whether they are interlocutory or final, identify the correct appeal Court (i.e., Divisional Court or Court of Appeal), and set out the applicable deadline for filing a notice of appeal;

- Codifying certain common law tests, including, for instance, the prerequisites to obtain a pre-claim discovery (Norwich) order and the test to be met for the admissibility of expert evidence;

- Expanding access to plain-language resources and procedural guidance tailored for self-represented litigants to empower informed participation (e.g., the creation of guided pathways for civil procedures); and

- Recommending the establishment of Civil Law Information Centres, similar to existing Family Law Information Centres, in local court houses to help self-represented litigants.

Central to our proposed revisions is the creation of a three-track system—comprised of the "**Application Track**," "**Summary Track**," and "**Trial Track**"—each with distinct procedures tailored to the nature and value of the case. This structure is designed to achieve cost efficiencies and streamlined processes for lower-value and summary matters, while improving efficiency and timelines for higher-value cases.

A general overview of the reforms set out in this Report is as follows:

(i) The proposed framework will apply to all civil cases commenced in the Ontario Superior Court of Justice, excluding the Small Claims Court, with exceptions for, or modifications to, some types of proceedings that involving unique policy considerations or legislative schemes: namely, bankruptcy matters, class proceedings, construction lien matters, non-contentious estate proceedings, and Indigenous litigation;

(ii) In many types of cases, parties will be required to follow a pre-litigation protocol. Generally, this will require parties to potential litigation to communicate with one another, exchange a small subset of the most relevant documents, and discuss whether early mediation makes sense before starting a civil proceeding. These protocols are intended to facilitate information-sharing, help focus the issues in dispute, encourage early settlement, and reinforce the message that litigation should be a means of last resort;

(iii) There will be one entry point to the system: an online, fillable form, known as a Notice of Claim. This form will be suitable for all proceedings, whether previously commenced

by Statement of Claim or Notice of Application. The focus of this entry point is on substance over form;

(iv) There will be three presumptive procedural tracks: (a) the Application Track; (b) the Summary Track; and (c) the Trial Track.

(v) Cases that will presumptively proceed by way of the Application Track include proceedings currently required or authorized to proceed by way of application pursuant to statute or under what is now rule 14.05(3)(a)-(g.1);

(vi) Cases that will presumptively proceed by way of the Summary Track include:

a. claims exclusively for money or personal property, where the total of the amount of money claimed or the fair market value of the property (as at the date the claim is commenced) is greater than the Small Claims Court ceiling (currently set at $50,000) but less than $500,000, exclusive of interest and costs;

b. claims for less than $500,000, exclusive of interest and costs, that are outside the jurisdiction of the Small Claims Court (e.g., claims for real property where the fair market value of the property is less than $500,000);

c. mortgage enforcement proceedings, regardless of the amount claimed;

d. claims exclusively for liquidated damages, regardless of the amount claimed;

e. construction lien claims; and

f. contested estate claims;

(vii) All other cases will proceed by way of the Trial Track;

(viii) Cases that proceed along the Application and Summary Tracks will presumptively be decided at what we refer to as a "**Summary Hearing**". Cases that proceed along the Trial Track will presumptively be decided at a conventional trial;

(ix) Matters on the Application Track will proceed directly to a directions conference following the issuance of a Notice of Claim. At that conference, the judicial officer will schedule a dispositive Summary Hearing and order a timetable for any steps that must be taken before it. Cases on the Application Track will proceed largely as they do now since they already follow a relatively efficient process;

(x) In cases on the Summary Track,

a. The Court will schedule a directions conference following the close of pleadings;

b. At the directions conference, the judge will schedule a dispositive Summary Hearing and order a timetable for the exchange of witness statements and reliance documents, the exchange of further documents and information through specific

requests, expert reports, out-of-court cross-examinations, a mandatory mediation, and the exchange of factums; and

c. Limits may be placed on the length of witness statements and cross-examinations, depending on the needs of the case;

(xi) In cases on the Trial Track,

a. A case conference known as the "**One-Year Scheduling Conference**" will be scheduled for approximately one year after the close of pleadings;

b. Before attending the One-Year Scheduling Conference, the parties will be expected to have done the following:

i. Completed all disclosure required by the up-front evidence model; namely, by:

1. exchanging all reliance documents (defined below), witness statements for all party witnesses, and will-say statements for all non-party witnesses on which a party intends to rely to prove its case, which will constitute a large part of their case-in-chief;

2. exchanging further documents and information through specific requests; and

3. agreeing on a timetable for the exchange of expert reports and "**Focused Examinations**" (defined below); and

ii. Conducted focused examinations, if desired, limited to 90 minutes per party;

c. At the One-Year Scheduling Conference, a judicial officer will schedule the trial and order a timetable for the completion of the exchange of any outstanding expert reports, an outsourced mediation, and a trial management conference;

(xii) The Court will have discretion to transfer cases between the Summary Track and the Trial Track. If a party seeks to transfer a matter from one track to another, they will make that request at a directions conference;

(xiii) Any interlocutory issues that arise will be addressed initially or ultimately through a directions conference. Parties seeking interlocutory relief will attend a directions conference, which will result in an order resolving the interlocutory issue where possible and scheduling formal motions only when necessary; and

(xiv) Where a directions conference is conducted before the parties' One-Year Scheduling Conference in Trial Track matters, the scheduling conference may be vacated and the judge presiding at the directions conference may schedule an outsourced mediation, the exchange of expert reports, a trial management conference, and a trial.

Following a transition period, the goal will be to conduct dispositive hearings for most claims commenced under the new system within roughly two years of the close of pleadings. Cases that involve subsequent parties (third parties, fourth parties, etc.) will inevitably take longer.

Dispositive hearing dates on all tracks will be set early and are intended to be inflexible once set. They will be adjourned only in exceptional circumstances and only with the approval of a Regional Senior Justice or his or her designate.

Our proposed new model is reflected in the flowchart included in Section V(B) below.

The detailed proposals that follow outline many other proposed reforms aimed at improving the civil justice system. They include reforms to the rules governing service, default processes, conferencing, out-of-court examinations, trial management, expert evidence, costs, enforcement, and appeals. Together, these proposed reforms represent, in our view, a significant step towards a more accessible, timely, and proportionate civil justice system. Implementation will require careful planning and coordination, but the potential benefits for litigants, the Court, and the broader public promise to be substantial.

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A. THE MANDATE

The Civil Rules Review ("**CRR**") was launched on January 25, 2024, as a joint project of the Chief Justice of the Ontario Superior Court of Justice, Geoffrey Morawetz, and the Attorney General of Ontario, Doug Downey. Drawn from the bar, bench, and academia, a working group of 14 individuals (the "**Working Group**") was mandated to identify issues and develop proposals for reforming the *Rules of Civil Procedure*[1] (the "**Rules**") to make civil court proceedings more efficient, affordable, and accessible.

At first blush, the CRR's mandate sounds similar to the mandates of prior reform projects, notably the 1995 Civil Justice Review[2] and the 2007 Civil Justice Reform Project.[3] What sets this project's mandate apart, however, is its scope. After a generation of serious decline, Ontario's civil justice system has reached a state of existential crisis. Fundamental change is necessary to ensure a robust and sustainable civil justice system for the next generation of Ontarians. To that end, the CRR was tasked with reimagining Ontario's civil justice process and re-engineering it from the ground up.[4]

We advance the policy proposals in this final policy report (the "**Report**") to fulfill that mandate. Representing the culmination of the Working Group's efforts and based on public consultations conducted during the first two of the CRR's three phases, we recommend substantial changes to

[1] *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194.

[2] Its mandate was to develop a strategy to provide a speedier, more streamlined and more efficient civil justice system which would maximize the utilization of public resources.

[3] Its mandate was to review potential areas of reform and deliver recommendations which, if implemented, would make the civil justice system more accessible and affordable for Ontarians.

[4] As Chief Justice Morawetz said at the Opening of the Courts in 2024: "The Civil Rules Review Working Group have taken on an immense project. And let me be clear – the objective is not just to tinker with the Rules, it is a wholesale reform. The group is tasked with conducting a comprehensive and complete review of the Rules to identify the necessary changes which would increase efficiency and access to justice for Ontarians, reduce complexity and costs, and maximize the effective use of court resources."

the conduct of civil proceedings in Ontario. These include proposals for fundamental reform across each of the core stages of a civil proceeding—pleadings, discovery, interlocutory motions, pretrials, and trials—as well as reforms to various ancillary aspects of the civil justice system.

There was disagreement within the Working Group regarding several of the proposed reforms. Accordingly, the proposals do not necessarily represent the unanimous views of all members. Throughout this Report, the terms "we," "the Working Group," and "our" are used for ease of reference; they should not be read as meaning that the Working Group's members were unanimous in the particular view being expressed. The members also participated personally and not on behalf of their firms, employers, or any other organization with which they are affiliated.

B. THE COMPOSITION OF THE WORKING GROUP

Co-Chairs

- The Honourable Justice Cary Boswell, Ontario Superior Court of Justice
- Allison Speigel, Partner, Speigel Nichols Fox LLP

Project Coordinators

- Yashoda Ranganathan, Senior Counsel, Ministry of the Attorney General, Deputy Attorney General's Office (Phases 2 and 3)
- Jennifer Hall, Senior Counsel, Ministry of the Attorney General, Deputy Attorney General's Office (Phase 1)

Working Group Members

- John Adair, Partner, Adair Goldblatt Bieber LLP
- Tamara Barclay, Senior Counsel, Ministry of the Attorney General, Civil Law Division
- The Honourable Justice Jennifer Bezaire, Ontario Superior Court of Justice
- Professor Suzanne Chiodo, Osgoode Hall Law School
- Chantelle Cseh, Partner, Davies Ward Phillips & Vineberg LLP
- Jacob Damstra, Partner, Lerners LLP
- Trevor Guy, Special Counsel, Office of the Chief Justice of the Superior Court
- Rebecca Jones, Partner, Lenczner Slaght LLP
- The Honourable Justice Sunil S. Mathai, Ontario Superior Court of Justice
- Zain Naqi, Partner, Lax O'Sullivan Lisus Gottlieb LLP
- Jeremy Opolsky, Partner, Torys LLP
- Darcy Romaine, Partner, Boland Romaine LLP

Administrative

- Jennifer Smart, Ministry of the Attorney General, Court Services Division
- Claudia Lapa, Speigel Nichols Fox LLP
- Chantel Biggley, Ministry of the Attorney General, Civil Law Division

C. THE PROJECT'S DESIGN

The CRR consisted of three principal phases.

Phase 1 was a scoping phase. It was completed in May 2024. Through a process of discussion and targeted consultation, it involved identifying a range of potential reforms for more in-depth consideration. It led to a Phase 1 report, which can be found here.

Phase 2 involved further study of the potential reforms identified in Phase 1, including significant consultation with jurisdictions outside of Ontario. The Working Group was supported in this phase by eight subgroups that reflected a broad cross-section of civil justice system participants (listed in **Appendix "A"**). The work undertaken in Phase 2 led to the creation of a proposed new procedural model for civil proceedings commenced in Ontario.

That proposed new procedural model, along with numerous related reforms, was outlined in a comprehensive Phase 2 Consultation Paper (the "**Consultation Paper**"), found here, which was released to the public on April 1, 2025. The Co-Chairs and other Working Group members also delivered presentations on the proposed reforms to a variety of organizations, including the judiciary of the Ontario Superior Court of Justice, The Advocates' Society ("**TAS**"), the Ontario Bar Association ("**OBA**"), the Ontario Trial Lawyers Association ("**OTLA**"), the Federation of Ontario Law Associations ("**FOLA**"), the Toronto Law Association ("**TLA**"), the County of Carleton Law Association ("**CCLA**"), the Hamilton Law Association, the Middlesex Law Association ("**MLA**"), the Peel Law Association's Civil Law Section, the Ontario Courts Accessibility Committee, and the Ontario Chamber of Commerce. In addition, the Law Society of Ontario ("**LSO**") hosted a half-day hybrid information session, open to all members of the public, during which the Working Group addressed various aspects of its proposals through panel discussions that included several senior members of the bar. These presentations drew significant audiences, including more than 1,200 individuals who registered for the TAS webinar and more than 1,400 individuals who registered for the LSO event.

Public consultation during Phase 2 generated substantial feedback through, among other things, written submissions responding to the Consultation Paper. We refer to these submissions throughout this Report. Indeed, the Consultation Paper has seemingly sparked more discussion—and certainly more urgent discussion—about civil justice reform among stakeholders than has been seen in decades.

The Working Group carefully considered the input received during the consultation process, which, as discussed below, further refined our thinking. If the policy proposals in this Report are approved, in whole or in part, Phase 3 will begin and will involve drafting and implementing any approved revisions to the Rules.

D. DEFINED TERMS

The proposals that follow, particularly in Section VI below, introduce many new concepts and new terms of art. For ease of reference, a glossary of defined terms (not including names of some Consultees, cases, statutes, or regulations) is provided at **Appendix "B**".

SECTION 2: REORIENTING THE CIVIL JUSTICE SYSTEM

A. THE NEED FOR REFORM

On August 29, 1906, a young Nebraskan lawyer—then dean of the University of Nebraska College of Law—stood to address some 370 members of the American Bar Association at their 29th annual meeting in St. Paul, Minnesota. His name was Roscoe Pound, a future dean of Harvard Law School. His presentation was titled "The Causes of Popular Dissatisfaction with the Administration of Justice."[5] He argued that public dissatisfaction with the civil justice system could be categorized into four main groups. As he worked his way through those groups, he came to what he described as "the most efficient causes of dissatisfaction with the present administration of justice." Those, he said, were "uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice."[6]

The world has changed in many ways since 1906. But, for Ontario civil litigants, the most efficient causes of dissatisfaction with the administration of justice continue to be delay, expense, and a disproportionate focus on process, all of which contribute to a lack of access to civil justice. We will briefly consider each of these root causes of dissatisfaction, as they underpin the current—and, as many agree, urgent—need to reform our civil justice system.

Delay: Delays have long been decried as anathema to justice yet have been permitted to become a defining feature of our current civil justice system. They have grown increasingly problematic over at least a generation. During that time, we have seemingly become complacent about delay, resigned to the belief that circumstances will simply never improve. Today, litigants face daunting wait times in many of the province's regions, whether for short or long motions, judicial pre-trials, or trial dates. Undoubtedly, resourcing challenges contribute significantly to this problem. Still, delay is not limited to waiting to get before the Court. More endemically, delay is embedded in the litigation process itself. Procedural steps often unfold slowly, with little or no urgency. In that sense, delay is not simply a symptom of a failing justice system—it is a critical design flaw inherent in how our current Rules govern, or more accurately fail to govern, civil proceedings.

While our current Rules prompt parties to complete certain steps necessary to resolving their dispute, they also permit parties to control the pace of litigation—often allowing cases to linger for years before the parties feel ready to proceed to a hearing. Regrettably, our current Rules also allow parties to exploit delay as a litigation tactic, enabling, if not incentivising, them to win through attrition rather than on the merits of their case.

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[5] *American Lawyer*, 14 Am. Law. 445 (1906).

[6] *Ibid*, p. 448.

The resulting delay is harmful across all types of litigation. For businesses, prolonged delays can mean the difference between staying afloat and bankruptcy, particularly when a dispute involves unpaid invoices or interferes with day-to-day operations. In employment cases, individuals may be relying on severance or unpaid wages to meet basic needs, in which case delays can place them in financial jeopardy, forcing premature or unfair settlements simply because they cannot afford to wait any longer. And, in cases involving personal injury, delay compounds the harm inflicted by the initial injury, often hindering recovery and depriving a party of much-needed resources for many years. In this latter context, Professor Erik Knutsen of Queen's University Faculty of Law, aptly captured the problem of delay in his consultation submission, noting that:[7]

> [T]he fact that it can take 10 years or more for an injury or insurance case to wind through Ontario's civil justice system is a dire problem for this province. It is cruel. The accident victim must live as a "victim" for all those years, while the system makes sick people more sick. The defendant, institutional or otherwise, has to have that matter hanging over their heads for that long time period. The present system cannot sustain if it generates delays like that. The play is too long and has lost its plot.

Regardless of the subject matter, justice delayed often becomes justice denied.[8]

Expense and Disproportionate Focus on Process: Delays are only part of the problem. The cost of litigation is prohibitive for many Ontarians, leading to a serious access to justice problem.

In its 2014 decision in *Hryniak v. Mauldin*,[9] the Supreme Court observed that ordinary Canadians cannot afford to access the civil justice system. We would add that even those who can afford to litigate are soon confronted with the troubling reality of excessive costs, rendering many civil cases economically irrational to pursue.

Litigants also devote disproportionate time and money on procedural skirmishes rather than substantive issues, often leaving them feeling as if they have been taken for a ride by a system uninterested in, or incapable of, addressing their core dispute.

The excessive costs of litigation invite exploitation by those willing and able to do so. As The Right Honourable The Lord Woolf lamented during his comprehensive review of the civil justice system in England and Wales in the mid-1990s:

> [E]xploitation is endemic in the system: the complexity of civil procedure itself enables the financially stronger or more experienced party to spin out proceedings and escalate costs, by litigating on technical procedural points or peripheral issues instead of focusing on the real substance of the case. All too often, such tactics are used to

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[7] Submission of Professor Erik Knutsen ("**Prof. Knutsen**"), p. 2.

[8] "Justice delayed is justice denied" is a quote often attributed to British Prime Minister William E. Gladstone in a speech to the House of Commons in 1868. Its substance, however, can be traced much farther back, including to the Magna Carta in 1215, clause 40 of which states, "To no one will we sell, to no one deny or delay right or justice." See Tania Sourdin and Naomi Burstyner, *Justice Delayed is Justice Denied*, (2014) 4 Victoria J L & Just J 49.

[9] *Hryniak v. Mauldin,* 2014 SCC 7 ("***Hryniak***").

> intimidate the weaker party and produce a resolution of the case which is either unfair or achieved at a grossly disproportionate cost or after unreasonable delay.[10]

Similar concerns exist in Ontario's current civil justice system.

Access to Justice: Given the excessive costs and delays associated with the system, litigants with the financial means to do so are increasingly turning to private arbitration to resolve their disputes, while others without the means to engage are being excluded from any meaningful participation in the system entirely.

We face the troubling reality of inequality of access to our civil justice system. Asymmetrical access means that some individuals may be able to unlawfully infringe the rights of others without consequence. When that happens, confidence in the justice system and the rule of law is diminished. Those who are unable to adequately access the system are less likely to believe that courts will fairly and justly resolve disputes involving them or people like them.

B. WHAT'S AT STAKE

The stakes are high. The civil justice system provides the means for the peaceful resolution of civil disputes and the enforcement of legal rights. It is also intended to ensure that agreements are respected and to provide a means for citizens to scrutinize government and hold it accountable.[11]

Importantly, a fair, timely, and cost-effective civil justice system is essential to maintaining confidence in Ontario as an economic marketplace. When individuals and businesses trust that their rights can be enforced through the courts, they are more willing to invest, enter contracts, and take risks that drive economic growth. As the Ontario Securities Commissions (the "**OSC**") noted in its submissions:[12]

> The enforcement of contracts, the efficient resolution of commercial disputes, and the predictability of legal outcomes are fundamental to a stable and competitive business environment. Stated differently, a well-functioning civil justice system is a core pillar of business confidence and investment.
>
> The current system is slow, costly and unpredictable for business. Delays in scheduling, inaccessible procedural complexity, and uneven access to justice across regions have created barriers to efficient dispute resolution. These barriers can be particularly acute for small and medium-sized enterprises … which often lack the resources and financial capacity to navigate prolonged litigation.

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[10] Woolf, Harry, Sir, Access to Justice: interim report to the Lord Chancellor on the civil justice system in England & Wales. (London: Lord Chancellor's Dept., 1995), p. 27.

[11] See Stephen Clark and Sir Rupert Jackson, *The Reform of Civil Justice*, 2nd Ed. (London: Sweet and Maxwell, 2018), quoting Professor Dame Hazel Gunn, at ¶ 1-010.

[12] Submission of the Ontario Securities Commission ("**OSC**"), p. 2.

> A robust civil justice system can create a comparative advantage for Ontario markets, to ensure that Ontario is, and is seen as, a competitive player in the global economy. The OSC supports civil justice reforms that will mitigate the perception or reality that Ontario's civil justice system is a barrier to investment in Ontario businesses.

The generation-long civil justice crisis has reached a point where the publicly funded system risks becoming irrelevant. This has serious consequences: as public confidence in the civil justice system erodes, so too does the willingness to invest in Ontario, threatening the province's economic stability and long-term viability.

This is exacerbated by the fact that, as more disputes are removed from the public courts—or never litigated at all—the development of the law slows, providing fewer decisions and precedents the public can use to guide their conduct. This makes it more difficult for individuals, businesses, and institutions to assess legal risks and understand their rights and obligations. Over time, the law's stagnation undermines the legal system's predictability and coherence, making the province even less economically attractive and stable.

C. OUR RESPONSIBILITY

In an address to the Benchers of the Law Society of Upper Canada on October 14, 1999, former Supreme Court Justice Rosalie Abella described the legal profession as "the gatekeepers and groundskeepers of the fields of law."[13] As stewards of the justice system, we have a fiduciary responsibility to do what we can to improve the process.

The proposals for reform set out in this Report offer a model that we believe will substantially improve the civil justice system in Ontario. Civil litigation will never be cheap. What our proposals offer, however, is easier access to the system, greater efficiency, less delay, and improved focus on the issues that really matter to the resolution of a legal dispute. Under the proposed model, litigants can have greater confidence that their resources will be directed to resolving substantive issues, not wasted on procedural battles.

[13] Opening Address Benchers' Retreat, October 14, 1999, Hockley Valley, Ontario.

SECTION 3: CIVIL JUSTICE REFORM IN ONTARIO

A. A BRIEF HISTORY OF MAJOR REFORM PROJECTS

While others before us have sought to improve Ontario's civil justice system, our proposals stand apart in their ambition. We propose reforms that are not only more comprehensive, but also more foundational, designed to fundamentally reshape the system.

To appreciate the bold nature of our proposed reforms, it is necessary to understand a little about the nature and scope of prior reform projects undertaken in this province.

Our civil justice model can generally be traced back to the *Ontario Judicature Act*, *1881* and its schedule of some 500 rules. Despite that extensive schedule, the law provided that, where a matter was not specifically addressed by the rules, the Court should employ "the most convenient practice." The concept of convenience proved to be troublingly vague, prompting attempts to codify a complete set of rules. Those attempts bore fruit in September 1913, when the "Middleton Rules of Practice" came into effect as a schedule to the *Judicature Act, 1913*. Our current process model can be more specifically traced to the Middleton Rules.

While it has seen many modifications, the underlying model has remained fundamentally the same since then. Even though alarm bells have been ringing for decades about a state of crisis in the civil justice system, responding reforms have been relatively modest—incremental efforts aimed at attenuating, rather than solving, the core problems of delay and runaway costs.

The current iteration of the Rules was introduced in 1985. The 1985 Rules were the product of a lengthy reform process, which began in 1975 with the appointment of Walter B. Williston, Q.C. to lead the Civil Procedure Revision Committee (the "**Williston Committee**"). The Williston Committee completed its work in 1980 and referred a draft set of Rules to a special subcommittee of the Civil Rules Committee. That subcommittee spent a further four years refining the Williston Committee draft, leading to the enactment, in 1985, of the *Courts of Justice Act* and the new *Rules of Civil Procedure*.

Despite the obvious care that went into drafting the new Rules, they proved to be sufficiently unsatisfactory that three major reform projects followed in relatively short order. The first was the Civil Justice Review, which began in 1995. It concluded that the civil justice system was in crisis due to excessive delays and costs. Concern was expressed about an economically unsupportable model of documentary discovery that had led to, in their words, "trials by information landslide."[14]

[14] Civil Justice Review, First Report - March 1995, p. 236.

The second was the Discovery Task Force, which began in 2001. It found that, while many lawyers were satisfied with the current discovery process, many others considered the costs and delays associated with discovery to be an impediment to access to justice.[15] It did not result in any immediate changes to the Rules, though, consistent with its recommendations, time limits were later imposed on oral discoveries through Regulation 438/08, which came into effect in January 2010.

The third was the Civil Justice Reform Project, which began in 2007. It led to the "Osborne Report", which expressed concerns about the disproportionality of interlocutory processes. The introduction of proportionality as an overarching interpretive principle of the Rules followed as part of the 2010 amendments. While undoubtedly laudable, the principle has not led to more proportionate usage of available processes. In fact, although proportionality is intended to inform each step in the litigation process, it is often overlooked and rarely enforced, rendering it more aspirational than operational.

The simple fact is that, notwithstanding the efforts of prior reform projects, the crisis associated with costs and delays in the civil justice system has only deepened since 1995. Indeed, this crisis was exacerbated in 2016 by the Supreme Court's decision in *R. v. Jordan.*[16] That decision established hard time limits within which to complete criminal cases in compliance with the constitutional demands of s. 11(b) of the *Charter of Rights and Freedoms*. In *Jordan*'s wake, the court's already stretched resources were forced to pivot towards criminal cases to ensure *Charter* compliance. As a result, civil justice, if not already the poor cousin to its criminal counterpart, was undoubtedly relegated to that position.

B. A MORE PRAGMATIC APPROACH IS REQUIRED

Early on, the Working Group's members agreed that meaningful change demands a more pragmatic approach to how civil litigation is conducted. We adopt Chief Justice Richard Wagner's observation that the time has come to focus on "getting good justice for everyone, not perfect justice for a lucky few."[17]

Justice is a fundamental cornerstone of a free and democratic society. It is understandable that those drafting the civil rules would seek to design processes that strive for perfect justice. But perfect justice is, of course, elusive, and perfection is often the enemy of the good.

The search for perfect justice has arguably resulted in an overburdened process model that tends to impede the very justice for which it strives.[18] Returning to Justice Abella's remarks to the Benchers' Retreat, she made the same point in observing that:

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[15] Report of the Task Force on the Discovery Process in Ontario, November 2003, p. 81.

[16] *R. v. Jordan*, 2016 SCC 27.

[17] Remarks of the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, to the 7th National Pro Bono Conference, Vancouver, British Columbia, October 4, 2018.

[18] Remarks of the Honourable George R. Strathy, Chief Justice of Ontario, September 9, 2014.

> [w]e have moved from being a society governed by the rule of law to being a society governed by the law of rules. We have become so completely seduced by the notion, borrowed from criminal law, that process ensures justice, that we have come to believe that process *is* justice. Yet to members of the public who find themselves mired for years in the civil justice system's process, process may be the obstacle to justice.

Recognizing that we need a more pragmatic approach to civil justice processes is the easy part. Translating that approach into practice is much more difficult. Doing so requires one to candidly consider what is important in the delivery of civil justice on both a case-by-case and systemic basis. As Professor Noel Semple of the University of Windsor, Faculty of Law, posits in his submission, we must strive to build a civil justice system that promotes three key forms of justice:[19]

- Substantive justice, meaning outcomes that align with the rights and entitlements of the parties under Canadian law;
- Procedural justice, meaning fair hearings conducted by impartial judges, with reasonable notice and followed by reasons for decision; and
- Public justice, meaning justice that serves those not directly involved in a case by deterring wrongful conduct, disseminating legal knowledge, and providing opportunities for the law to develop.

We will take a moment to further consider the concepts of substantive and procedural justice and how they intersect with concerns about costs and delays.

Substantive justice requires the fair and just resolution of disputes. It is grounded in the pursuit of truth through accurate fact-finding and the correct application of the substantive law to those facts.

Procedural justice, on the other hand, focuses on establishing fair, transparent, and impartial processes through which legal disputes are resolved, increasing the likelihood that substantively just outcomes will be achieved.

Substantive and procedural justice, however, are not entirely distinct from one another. Procedural justice not only supports, but is essential to, substantive justice. If procedural justice falters, so does substantive justice. As the Supreme Court of Canada explained in *Hryniak,* "undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes." Put in practical terms, if a corporation succeeds in a $5M contractual dispute but goes bankrupt by the time judgment is rendered seven years later, can the corporation truly be said to have received either procedural or substantive justice? Similarly, can a person involved in a terrible motor vehicle accident who is awarded $2 million in damages—but only after ten years of litigation—truly be said to have received procedural or substantive justice?

In our two examples, neither litigant is likely to conclude they obtained a fair and just outcome. The reason is that procedural and substantive justice are inextricably intertwined with one another and with the issues of cost and delay. Fair and just resolutions depend not only on accurate fact-

[19] Submission of Professor Noel Semple ("**Prof. Semple**"), p. 7.

finding and the proper application of the law, but also on procedures that can be completed at reasonable expense and within acceptable timelines.

Deciding what procedures are reasonably affordable and what timelines are acceptable depends in large part on the system's identified aims.

If the pursuit of perfect justice is the goal, as it historically appears to have been, then it may seem justified to adopt procedures that allow parties to demand the broadest possible range of relevant evidence. Similarly, a permissive approach that lets parties take as much time as they wish to refine the issues and prepare for a dispositive hearing might also be defensible. Such processes, the argument goes, place parties in the best position to uncover the truth. Nevertheless, they tend to be expensive and time-consuming.

If, on the other hand, the aim is to promote a broader conception of justice—one that balances the pursuit of truth with a proportionate expenditure of time, money, and resources—then the process itself must be reimagined to support that goal. Inevitably, this approach requires some compromise in the parties' ability to pursue every possible avenue of truth-seeking. But that trade-off is justified: in a world of finite resources, a proportionate process is not merely a concession, it is as essential to justice as the pursuit of truth itself.[20]

In the context of strained judicial resources, a reality that has persisted for at least a generation, a pragmatic approach to civil justice must also account for systemic procedural justice, which arguably falls within Professor Semple's concept of "public justice." This perspective involves not only inter-party justice, but the place that any given proceeding occupies in the context of the civil justice system overall. If it is a worthwhile aim to ensure that the system runs efficiently and economically for all litigants, as we assert it is, then fair and just processes are ones that ensure individual cases do not use more than their fair share of resources. In this respect, access to justice cannot be measured only in relation to a single party but, instead, must also account for the needs of others seeking access to the same justice system.

In summary, by taking a more pragmatic approach to civil justice procedures, we are proposing a model that seeks to achieve fairness through procedures that balance the pursuit of truth with the proportionate use of time, money, and resources for the benefit of the parties and all others who rely on, and need to access, the system. This approach is manifested in various aspects of our proposals.

[20] For an excellent discussion on the determination of fair and just civil processes in the context of the adversarial model of justice, see Alexandra Allan, *Promoting Proportionate Justice: A Study of Case Management and Proportionality*, pp. 51-55.

SECTION 4: THE CREATION OF A NEW PROCESS MODEL AND THE PHASE 2 CONSULTATION PROCESS

A. MEANINGFUL REFORM REQUIRES MORE THAN TINKERING

The Working Group was not tasked with determining whether there are pressing problems with accessibility, costs, and delay within Ontario's civil justice system. Rather, it proceeded from the recognition that such problems exist and require solutions. Regardless, there is broad consensus that serious problems are plaguing the system. The overwhelming majority of entities and individuals with whom we consulted during Phase 2 (collectively, the "**Consultees**" or, individually, a "**Consultee**") agreed that there is an urgent need for civil justice system reform in Ontario. We agree with Professor Gerard Kennedy, of the University of Alberta, Faculty of Law, who noted the following in his submission:[21]

> Tinkering with procedural law to achieve access to justice has been repeatedly tried over the past forty years and has had minimal benefit. Given the state of our civil courts, and their circumscribed but essential role in our constitutional order, we cannot fairly say that the system is working. Minor amendments around the margins will not fix the status quo.

Returning again to Justice Abella's remarks to the Benchers' Retreat, she lamented the reluctance of the administration of justice in Ontario to make any serious advancements in its service model in the previous hundred years, saying the following:[22]

> If the medical profession has not been afraid over the century to experiment with life in order to find better ways to save it, can the legal profession in conscience resist experimenting with old systems of justice in order to find better ways to deliver it? How many lawyers could themselves afford the cost of litigating a civil claim from start to finish?

If we are to solve the problems plaguing the civil justice system, including runaway costs, delays, and impaired access to justice, we can no longer resist or avoid fundamentally restructuring our conventional process model to improve how our civil courts deliver justice. Now more than ever, meaningful change requires re-evaluating our approach to the main elements of civil claims: pleadings, discovery, interlocutory motions, and dispositive hearings.

The CRR's Terms of Reference required broad consultation on reform options with justice system participants during Phase 2. As we noted, over the course of the fall of 2024, the Working Group,

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[21] Submission of Professor Gerard Kennedy ("**Prof Kennedy**"), p. 1.

[22] Opening Address Benchers' Retreat, October 14, 1999, Hockley Valley, Ontario.

supported by eight subgroups, developed a comprehensive package of proposed reforms. Those reforms were set out in the Consultation Paper released on April 1, 2025.

In this section, we will briefly describe the process that led to the reforms set out in the Consultation Paper, summarize its key contents, provide an overview of the submissions received in response, and address some of the criticisms levelled against the CRR process.

B. EXTRA-JURISDICTIONAL RESEARCH

The proposed reforms were the product of discussions within the Working Group, consultation with and input from the roughly 60 members of the eight subgroups, and an examination of civil justice systems in other Commonwealth jurisdictions where civil justice reform projects have occurred. Direct consultations were undertaken with judges and lawyers in England, New South Wales Australia, New Zealand, and Singapore, as well as with senior judges in Manitoba where a one-judge process model was recently introduced.[23] We also spoke with several arbitrators and considered various arbitration models.

To give a better sense of the systems we examined, we attach, at **Appendix "C"**, comparative information regarding these jurisdictions. We also include statistics that the World Justice Project published comparing the relative performance of these other systems to the Canadian civil justice system.

C. THE PROPOSED REFORMS IN THE CONSULTATION PAPER

The Consultation Paper proposed reforms in 11 key areas, along with several miscellaneous items, including, among other things:

(i) Establishing fundamental goals against which all processes should be measured;

(ii) Introducing pre-litigation protocols to encourage early resolution and a narrowing of and focusing on the real issues in dispute;

(iii) Using a single form of originating process;

(iv) Transitioning from a relevance-based documentary disclosure model to a modified reliance-based model, to better target the documents that are genuinely helpful to resolving the live issues in dispute;

[23] We also conducted research on, but did not engage directly—or, in some cases, engaged only to a limited extent—with individuals in several other jurisdictions, including Texas, New York, British Columbia, Nova Scotia, the Cayman Islands, and Mauritius.

(v) Introducing an up-front evidence model that would require parties to exchange their cases in chief, through sworn witness statements, "**Reliance Documents**," (defined below) and "known adverse documents," following the close of pleadings;

(vi) Eliminating oral examinations for discovery, on the basis that they are unnecessary in the context of the up-front evidence model and would impose costs disproportionate to any benefits they might add to that model;

(vii) Eliminating most interlocutory motions through the use of case conferences that we referred to as "**Directions Conferences;**"

(viii) Extending outsourced mandatory mediation across the province; and

(ix) Reducing the time from the commencement of a case to trial to roughly two years in most cases, following a reasonable transition period.

We initially anticipated releasing the Consultation Paper to the public on February 7, 2025, with the consultation period closing May 2, 2025. As a result of the provincial election cycle in early 2025, however, the release of the Consultation Paper was delayed to April 1, 2025, with a revised submissions deadline of June 16, 2025.

D. OVERVIEW OF SUBMISSIONS RECEIVED

In response to the Consultation Paper, the Working Group received more than 200 written submissions, totalling roughly 2,200 pages. We reviewed all of them in detail.

We would like to thank the many groups and individuals who took the time to respond to the Consultation Paper. Overall, the responses were excellent. Most Consultees took to heart our request that criticisms be paired with proposed solutions. This provided us with a wealth of thoughtful, constructive, and innovative suggestions. Many Consultees clearly invested a great deal of time, thought, and energy into preparing their submissions. Ontario is fortunate to have a passionate and engaged litigation bar, and we are grateful for this effort.

Throughout these proposals, extensive references will be made to the Consultees' submissions. For now, we will provide a brief overview of some of the main themes that emerged.

The submissions ranged from enthusiastic support to enthusiastic rejection, though it must be said that the critics far outnumbered the cheerleaders. Colourful adjectives such as "misguided", "ill-conceived", and even "bonkers" were used in reference to the least popular of our proposed reforms: the up-front evidence model and the elimination of oral examinations for discovery. This particularly strong response was not entirely unexpected, since those were arguably the most profound of our proposals.

Nevertheless, despite extensive criticism, there was a broad, indeed near universal, recognition that Ontario's civil justice system is in urgent need of reform.

The more well-received proposals for reform included the use of a single form of originating process, reduced timelines, more enforcement of the Rules (and, in particular, deadlines), the use of Directions Conferences as a means of resolving procedural motions, presumptive summary hearings for certain types of cases, a simplified process for removing counsel of record, and the expansion of mandatory outsourced mediation across the province. There was also strong support for simplifying the process for obtaining Crown briefs in motor vehicle accident cases, which presently require what are conventionally known as "***Wagg* Motions**."

Responses were mixed in relation to pre-litigation protocols as well as numerous ancillary proposals such as a proposed rule about the integrity of representations made to the Court, a general duty to cooperate, and rules governing amending pleadings, default procedures, service of an originating process by email, the use of joint books of documents and chronologies at trial, and the imposition of a fixed delay penalty.

The most poorly received proposals included the ones most fundamental to the reform package, such as the transition to a reliance-based threshold for documentary disclosure, the introduction of the up-front evidence model, and the elimination of oral examinations for discovery. Other proposed reforms that were not generally favoured included the ability to serve an originating process on a lawyer with whom a party had been communicating before the claim's issuance, presumptive joint experts, compelled expert conferencing (conventionally known as "hot tubbing"), and the proposed elimination of the settlement aspect of the mandatory judicial pre-trial conference.

There was particularly strong opposition to the proposal to eliminate oral discoveries. One Consultee described the proposal as being "roundly condemned" by the litigation bar.[24] Another expressed the view that it was "remarkable that the Bar is having to defend the continued existence of oral discoveries … because long experience clearly demonstrates they are self-evidently necessary and salutary."[25]

The reasons most cited in opposition to this proposal were: oral discovery's centrality in the testing of credibility; the need to obtain information and admissions; the fear that fewer matters would settle if discoveries were removed; and the important place that discovery transcripts have in trial preparation, including to control cross-examination at trial.[26]

There was similarly wide-spread opposition to the introduction of the up-front evidence model. The most frequently cited concern was that a front-loading of work and costs would impede, rather

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[24] Submission of the Waterloo Region Law Association, p. 2.

[25] Submission of Bennett Jones LLP, Ontario Litigation Group ("**Bennett**"), p. 2.

[26] See, for example, the submissions of Canadian Defence Lawyers ("**CDL**"), p. 25; Bennett Jones LLP, p. 2; Ontario Trial Lawyers' Association ("**OTLA**"), p. 9-11; Federation of Ontario Law Associations ("**FOLA**"), pp. 4-5; and Robert S. Harrison, pp. 4-7.

than facilitate, access to justice.[27] Concerns were expressed that retainers would become out-of-reach for ordinary people and small businesses and, likewise, that small firms and sole practitioners would be unable to cope with the workload that the up-front evidence model demands.[28] Others expressed the concern that requiring the up-front exchange of evidence may involve unnecessary expense, given that most cases settle before trial preparation would otherwise begin.[29]

We will address these concerns, along with others, in greater detail throughout this Report. We will also address several other themes that emerged from the submissions, including the following:

- Delays are principally the result of a lack of resources, not the Rules;
- The proposals, particularly those relating to conferencing, will place an unbearable strain on judicial resources;
- The proposals tend to take a "one-size-fits-all" approach even though different types of cases clearly have different procedural needs;
- Specialized courts (or lists) should be introduced for different types of cases, including construction, personal injury, medical malpractice, and debt collection; and
- There should be a pilot project to test the efficacy of the proposed reforms in a single region before they are introduced province wide.

E. CRITICISMS OF THE PROCESS

Some stakeholders have been critical of the CRR's design. They have voiced concerns that (a) the Working Group did not sufficiently reflect stakeholders from across the province or sectors of the legal community; (b) the proposed reforms set out in the Consultation Paper were not based on statistical data; (c) the proposed reforms are Toronto-centric; and (d) the Phase 2 consultation was too short. We address each in turn below.

The Constitution of the Working Group: Several organizations called for the Working Group's reconstitution based on concerns that it did not reflect a sufficient breadth of practice areas, mix of urban and rural practitioners, or range of firm sizes.[30] Others criticized the lack of representation from certain sectors of the bar, such as insurance defence lawyers.

[27] This concept was first asserted by FOLA in a letter to the Attorney General dated April 28, 2025 and was picked up by numerous other Consultees, such as the Thunder Bay Chamber of Commerce in its submission.

[28] See, for example, the submission of FOLA, p. 3.

[29] Submission of the Toronto Lawyers Association ("**TLA**"), pp. 5-6.

[30] FOLA, for instance, called upon the Attorney General to reconstitute the Working Group in a press release dated May 22, 2025. See also the submission of the Windsor Law Class Action Clinic, pp. 3-4.

The Working Group's members, including the Co-Chairs, come from diverse backgrounds and have experience in a wide range of practice areas. While it is true that not every justice system constituency was represented on the Working Group, it is equally true that an attempt to include representatives from every practice area and relevant public interest group from across every provincial region would have been an all-but impossible exercise. Moreover, it would have led to a Working Group so large as to be unworkable in practice.

Having said that, we make two observations. First, eight subgroups were created during Phase 2. They included almost 60 additional members who lent their time, expertise, and lived experiences to various aspects of the review. Their members included an academic, as well as judges and lawyers from judicial regions across Ontario, with expertise in a wide range of practice areas. Second, the Phase 2 consultation was extremely broad. We did our best to reach out to, and consult with, the entire spectrum of civil justice system participants. This is reflected in the consultation submissions we received. Consultees represented a diverse range of geographic locations, practice areas, firm sizes, legal organizations and clients, including both plaintiff and defence-side counsel.

The Lack of Data and Empirical Research: A common concern raised by those opposed to the core elements of our proposed reforms is that the CRR lacked statistical data and, likewise, did not design or test its proposals with empirical research.[31] The Working Group has been candid with stakeholders that the CRR has not been a data-driven process.

In carrying out its mandate, the Working Group relied on the observations and experiences of its members, the various subgroup participants, and the numerous judges, lawyers, mediators, arbitrators, and litigants from Ontario and other jurisdictions with whom we consulted. In addition, the Working Group conducted a two-stage consultation process, during which it received input from a broad cross-section of justice system participants—including judges, lawyers, mediators, arbitrators, business groups, legal organizations, litigants, and court staff from across Ontario—reflecting every major area of litigation. We note that civil justice reform initiatives both in Ontario and internationally have generally followed a similar approach, relying largely on the wisdom and experience of those tasked with proposing reforms, together with stakeholder consultation.

That said, the CRR did have access to a significant amount of Court data generated over a ten-year period from 2014 to 2023. Additional data for 2024 became available as this Report was being drafted. Although we reviewed the available data in detail and relied on it in certain respects, it was generally of limited assistance, largely because of the constraints associated with the Court's case management system from which that data was generated. That system, which is being replaced as part of the Courts Digital Transformation initiative, was designed primarily to help the Court track and manage cases, not necessarily to provide meaningful statistical insight into the Court's operations. While the data we requested and received illustrated some basic trends, it is very obviously open to interpretation and, frankly, may be misleading if not considered critically.

[31] For instance, in the letter from FOLA to the Attorney General dated April 28, 2025, FOLA expressed concern that the proposed reforms are "based on the anecdotes of the CRR Working Group's members and those with whom they have chosen to consult."

For example, one Consultee submitted that the Court's data shows, among other things, that in relation to motions:[32]

(i) "The number of motions were down by more than 45%" over the decade between 2014 and 2023," which they argued undermines the assertion that there is a "motions culture" in civil practice in Ontario; and

(ii) "The average number of motions heard, per case, has decreased from a low 1.4 motions heard per case in 2014, to an even lower 1.34 motions heard per case in 2023, demonstrating that relatively limited judicial resources are being used for interlocutory procedures under the current Rules."

While we understand how they may have arrived at this interpretation, a deeper analysis of the data does not support their conclusions. For instance:

(i) The data does not show how many motions were filed each year in *active* cases—that is, cases that were actively progressing through the system—excluding those resolved by default judgment, abandoned, or settled early without a formal dismissal. Such a figure, which is unavailable, would provide a more accurate picture of motion practice in cases that actively progressed through the system;

(ii) The data does not show how many motions parties attempted to bring in any given year. Wait times for both long and short motions have increased dramatically in recent years. In other words, scheduling constraints and delays in obtaining hearing dates—rather than any decline in the number of motions parties sought to schedule—likely account for at least part of the reduction in motions per case. As a result, the number of motions actually heard in a year likely underrepresents the number of motions litigants tried to schedule in that year;

(iii) There is no comprehensive data on the number of case conferences heard in any given year, nor on the issues addressed during those conferences. It is notable that in some regions, including Toronto and Central East, case conferencing is now being used as a tool to address disputed process issues to reduce the number of contested motions. This is a relatively new phenomenon and might partly explain the reduction in motion events in the last several years;

(iv) While the data might superficially suggest a decline in the number of motions heard per case per year, this is misleading. The 1.43 motion events heard per case per year figure from 2014 remained relatively stable until 2020 (when the Covid-19 pandemic appeared), when it dropped to 1.26. Since then, however, it has climbed back to 1.35 in 2023, approximately 95% of the 2014 level. Much like the trend in numbers of new civil filings in the Superior Court of Justice, motion activity appears to be rebounding toward pre-pandemic levels. In our view, the "motions culture" remains very much alive; and

[32] Submission of OTLA, p. 7.

(v) Regardless of the number of motions heard per year per case, the data also reveals that there were 35,923 motion events in 2023 and 36,034 in 2024, a significant burden on the civil justice system by any measure.

Although the CRR used the existing data to the extent it could, the reality is that much of the data that would meaningfully inform the policy proposal does not exist. For example, there is no data showing the average time to settlement across different types of actions or regions. Similarly, there is no empirical evidence quantifying the reasons parties choose to settle under the current system, such as the degree to which settlement decisions are influenced by the uncertainty of third-party adjudication, insights gained through discovery, the concern about the costs and delay of proceeding to trial, or other strategic considerations.

There is likewise no data assessing the cost of oral discovery relative to its value across a range of cases. And there is certainly no data that compares the average cost of proceedings under our current Rules, with the average cost of proceedings under the proposed system.

Even if it was logically, financially, and operationally feasible to begin collecting such data, it is unlikely to be generated within a reasonable timeframe to be useful or informative. The variables are numerous, the systems are deeply contextual, and the practical challenges and expense of gathering meaningful data are substantial.

Given the limitations of the available data, many of the most important questions must be answered through comparative analysis, informed judgment, and practical experience, rather than empirical evidence.

Many Consultees suggested that substantial changes to the existing civil justice process model should not be implemented hastily. The more significant the reforms, they argued, the greater the need for empirical study, data collection, and testing. In their view, to proceed otherwise would jeopardize the efficacy of the justice system by relying on speculation and mere hope.

While the Working Group did not participate in the CRR's design, the project proceeded on the premise that the civil justice system is in a state of acute—arguably existential—crisis. The provincial government and the Court agree that swift action must be taken. A strong majority of Consultees also agreed that the system is not working and is in serious need of reform. Yes, there are risks. But considering the current crisis, maintaining the status quo or tinkering around the edges is not an option. We concur with Professor Erik Knutsen, who said the following in his submission:[33]

> [W]hile of course, from a research perspective, more and better data would be ideal when approaching civil justice reform, the practical fact is that it is obvious there is a problem and "something" needs to be done in Ontario – there is little time to waste gathering better data or having drawn-out consultations and study – I applaud the CRR … with "getting on with it" as the house is already on fire – the general contours of

[33] Submission of Prof. Knutsen, p. 3. To be fair, Prof. Knutsen did not wholeheartedly embrace the proposals of the Working Group. For instance, he urged the Working Group to preserve some limited oral discovery.

> the problems are well-known and whatever solutions eventually thoughtfully landed upon have a high likelihood of at least not being worse than what is going on at present.

The Proposals are Toronto-Centric: Some Consultees expressed a concern that the proposals set out in the Consultation Paper were Toronto-centric and favoured Bay Street firms or large, commercial litigation. This is not borne out by the facts.

For instance, in its submissions, the CCLA indicated that "[t]he resounding feedback from our members is that the East Region is not affected by the same 'motions culture' that exists in other jurisdictions such as Toronto."[34] The CCLA was not alone in alleging that Toronto is the epicentre of the motions culture.

The data, however, tells a different story. The following table sets out, by region, the percentage of total cases commenced, motions heard, and proceedings scheduled for trial in 2023.

	% of total new matters commenced in 2023	% of total motions heard	% of total proceedings scheduled for civil trial
Central East	19.04%	12.91%	8.71%
Central South	11.33%	11.37%	19.48%
Central West	15.48%	18.87%	18.87%
East	8.26%	10.24%	10.62%
North East	2.94%	3.71%	2.84%
North West	1.10%	1.31%	0.2%
South West	9.01%	13.04%	10.95%
Toronto	32.84%	28.54%	28.33%

The data reflects that just under 33% of all new civil matters commenced in the Superior Court in 2023 were issued in Toronto. On the other hand, less than 29% of all motions and trial activity across the province in 2023 took place in Toronto. In other words, relative to the number of matters filed, Toronto accounts for fewer motions and cases scheduled for trial than any other region, aside from Central East. In fact, the data suggests that the East Region has a proportionately more robust motions practice than Toronto. All of this is to say that the motions culture is not Toronto-centric.

More broadly, the new framework for civil justice we are proposing was not a creation of the so-called Bay Street lawyers on the Working Group. Indeed, it was not the Working Group's creation at all. The core elements of the proposal—the up-front evidence model and the modified reliance-based standard for documentary disclosure (and even the elimination of oral discoveries proposed in the Consultation Paper)—are modelled on several foreign jurisdictions, including England and Wales, New South Wales Australia, New Zealand, and Singapore. Leaving the city-state of Singapore aside, the balance of these jurisdictions employ the core elements of the proposals in settings that span from major commercial centres to rural counties.

[34] Submission of the County of Carleton Law Association ("**CCLA**"), p. 49

There is no reason to believe the proposed model will operate differently in Toronto than elsewhere in the province. Finally, it is noteworthy that Toronto lawyers expressed largely the same concerns—particularly regarding the loss of oral discovery—as counsel in smaller centres.[35]

The Length of the Consultation Period: Concerns about the length of the Phase 2 consultation period are not entirely unfair. The project does involve an aggressive timeline. The relatively short consultation period in Phase 2 (April 1 to June 16, 2025), however, is attenuated by several factors. First, the Working Group's Co-Chairs made presentations about the core elements of the proposed reforms to the OBA and TAS in late January 2025. An earlier iteration of the general process flowchart included in the Consultation Paper was included as part of these presentations and was widely circulated thereafter. In the result, many legal organizations and litigators became aware of the core proposals well in advance of the Consultation Paper's release.

Second, the Working Group provided advance written notice, by way of a letter dated December 17, 2024, to a wide group of Consultees about when the Consultation Paper would be released. These Consultees were able to get organized to respond.

Third, the Co-Chairs received correspondence throughout April and May 2025 from Consultees such as FOLA and other county law associations, demonstrating that these organizations were quickly able to digest and provide detailed responses to the content of the Consultation Paper.

Finally, the volume and quality of the submissions received by the end of the consultation period support the conclusion that, while some parties may have preferred more time to respond, they were nevertheless able to offer thorough and thoughtful feedback by the deadline.

[35] See for instance the joint submissions by Bennett, Borden Ladner Gervais LLP, Crawley MacKewn Brush LLP, DLA Piper (Canada) LLP, Fasken LLP, Goodmans LLP, Lax O'Sullivan Lisus Gottlieb LLP, Osler Hoskin Harcourt LLP, Polley Faith LLP, and Tory's LLP (collectively, the "**Collaborative Submissions of Toronto Firms**"), pp. 2-3; Beard Winter LLP ("**Beard**"), pp. 2-3; Blaney McMurtry LLP ("**Blaney**"), pp. 2-4; Torkin Manes LLP, pp.2-4; and TLA, pp. 5-8.

SECTION 5: OVERVIEW OF THE PROPOSED REFORMS

A. INTRODUCTION

The current Rules are failing to achieve their overarching goal of securing the just, most expeditious and least expensive determination of every civil proceeding on its merits.

This failure is a result of a complex mix of factors. We believe that six of the more prominent contributors are: (1) a lack of sufficient resources; (2) the implementation in 1985 of a model of "complete discovery"; (3) the "back-end loading" that the current Rules foster; (4) the ease with which parties can use interlocutory processes to increase costs and delay to succeed by attrition, rather than merit; (5) the existence of a "motions culture"; and (6) the Court's inadequate enforcement of the Rules.

The Working Group is not in a position to do anything about insufficient resourcing. Our focus has, thus, been on identifying reforms that address the balance of the factors undermining the justice system's ability to achieve its overarching goal.

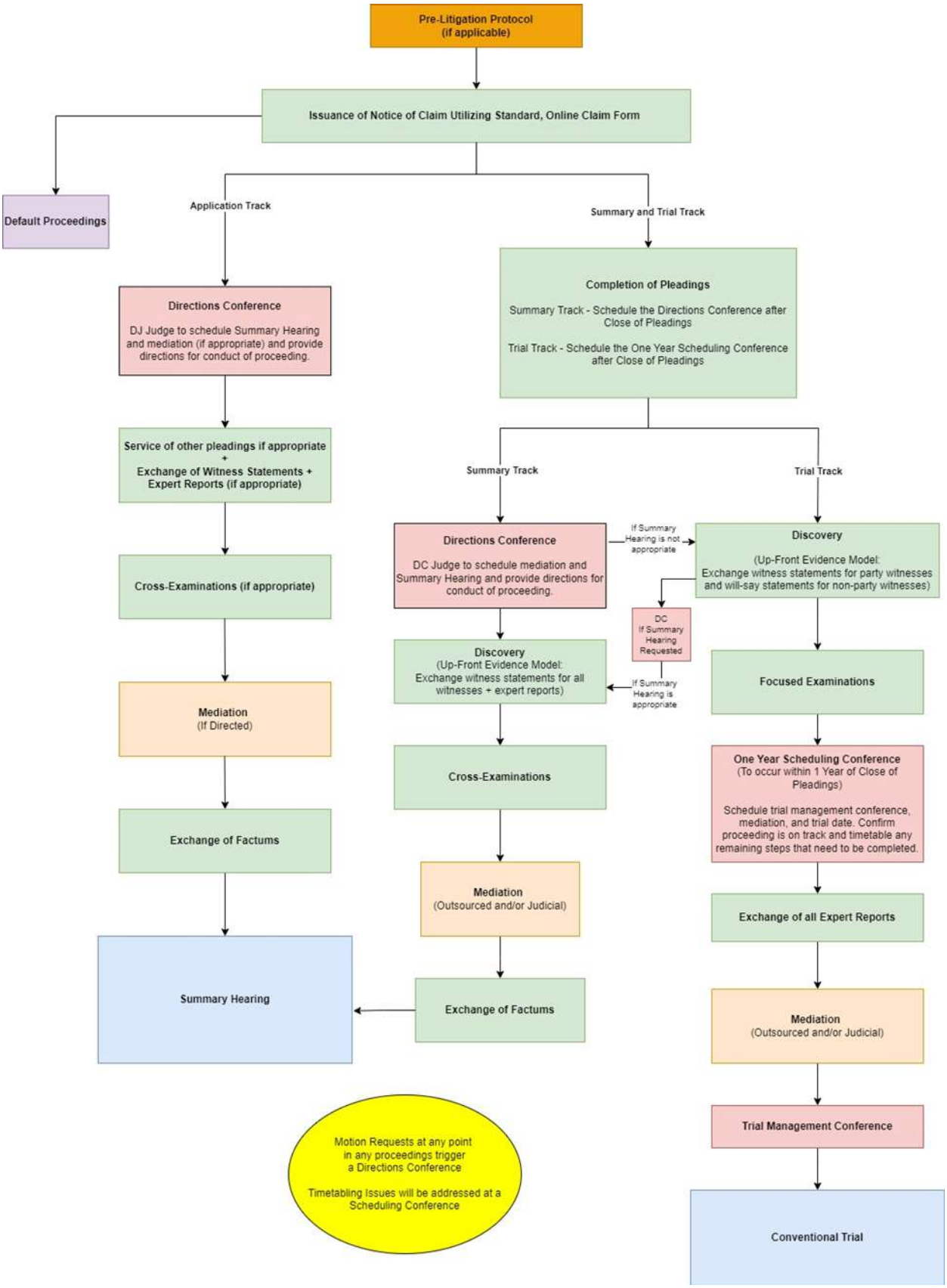
B. A HIGH-LEVEL OVERVIEW OF THE PROPOSED REFORMS

The Working Group's proposed reforms, if approved and implemented, will fundamentally reshape the procedural framework for civil litigation in Ontario, particularly in relation to the discovery process, interlocutory motions practice, and dispositive hearings for certain types of cases.

The reforms outlined in this Report build upon and refine the process model proposed in the Consultation Paper, incorporating, where indicated, the insights and feedback provided by Consultees.

An overview of the central aspects of our proposed reforms is set out in the Executive Summary. In brief, they include the creation of a new three-track process model—the "**Application Track**," the "**Summary Track,**" and the "**Trial Track**"—the introduction of pre-litigation protocols, enhanced case management, pre-screening of interlocutory disputes through Directions Conferences, a summary process for lower value and less complex claims, stricter timelines and enforcement mechanisms, and expanded opportunities for early settlement. Each of these reforms is described in detail in the sections that follow.

The proposed model is reflected in the following flowchart, which is an updated version of the flowchart found at page 10 of the Consultation Paper.


Pre-Litigation Protocol
(if applicable)
Issuance of Notice of Claim Utilizing Standard, Online Claim Form
Default Proceedings
Application Track
Summary and Trial Track
Directions Conference
DJ Judge to schedule Summary Hearing and mediation (if appropriate) and provide directions for conduct of proceeding.
Service of other pleadings if appropriate
+
Exchange of Witness Statements + Expert Reports (if appropriate)
Cross-Examinations (if appropriate)
Mediation
(If Directed)
Exchange of Factums
Summary Hearing
Completion of Pleadings
Summary Track - Schedule the Directions Conference after Close of Pleadings
Trial Track - Schedule the One Year Scheduling Conference after Close of Pleadings
Summary Track
Trial Track
Directions Conference
DC Judge to schedule mediation and Summary Hearing and provide directions for conduct of proceeding.
If Summary Hearing is not appropriate
Discovery
(Up-Front Evidence Model:
Exchange witness statements for party witnesses and will-say statements for non-party witnesses)
DC
If Summary Hearing Requested
If Summary Hearing is appropriate
Discovery
(Up-Front Evidence Model:
Exchange witness statements for all witnesses + expert reports)
Cross-Examinations
Mediation
(Outsourced and/or Judicial)
Exchange of Factums
Focused Examinations
One Year Scheduling Conference
(To occur within 1 Year of Close of Pleadings)
Schedule trial management conference, mediation, and trial date. Confirm proceeding is on track and timetable any remaining steps that need to be completed.
Exchange of all Expert Reports
Mediation
(Outsourced and/or Judicial)
Trial Management Conference
Conventional Trial
Motion Requests at any point in any proceedings trigger a Directions Conference
Timetabling Issues will be addressed at a Scheduling Conference

C. A CHANGE IN CULTURE

Our proposed reforms are as much about changing the culture of civil litigation as they are about revising its procedures.

Our proposals seek to shift the civil litigation culture from one that prioritizes process and tolerates unnecessary delay and gamesmanship to one that focuses on the substance of a dispute, promotes cooperation, and enforces timely deadlines. More specifically, the reforms aim to encourage the early exchange of information and meaningful consideration of resolution before litigation begins. They foster the timely identification of the real issues in dispute and ensure continued focus on those issues throughout the process. They seek to promote a more streamlined and cooperative approach to discovery and they introduce clear timelines for completing the requisite steps to prepare for a dispositive hearing, along with tools to enforce them. And finally, they are designed to ensure that court time is used more effectively.

Our proposals also aim to support a shift in judicial culture. We believe that judges must take active control of cases to ensure they are progressing efficiently and proportionately. As stewards of limited public resources, judges play a critical role in ensuring that court time is allocated equitably; not only between the parties before them, but also with fairness to all others with matters in the system or waiting to access it. We recognize that the efficient resolution of disputes is important not only to the parties in any given proceeding, but also to the public's trust and confidence in the civil justice system as a whole.

Finally, our proposals recommend a more streamlined approach to judicial decision-making based on the recognition that not every issue warrants extensive reasons and that, in some cases, the process must simply move forward.

D. LAWYERS MUST NOT BE HELD TO A STANDARD OF PERFECTION

The push for greater proportionality requires a recognition that lawyers cannot be held to a standard of perfection. If required to be perfect, counsel will understandably adopt overly cautious or disproportionate litigation tactics as a form of self-protection. Lawyers are often caught between two competing expectations: to come to Court armed with flawless materials and prepared for every possible eventuality and, at the same time, to provide advice and conduct litigation in a proportionate, cost-effective manner. In practice, these goals are not always compatible. Proportionality cannot succeed if lawyers are held to a standard of perfection. Instead, it must be recognized and reflected in how we define and apply a lawyer's standard of care.

As our proposed reforms introduce tighter timelines, earlier issue identification, and greater procedural discipline, it is essential that responsibility not simply be shifted onto lawyers. As many Consultees observed, the legal profession is already grappling with a well-documented mental health crisis, driven in part by relentless pressure to meet ever-increasing demands with limited time and support. Although the Rules do not, and cannot, specifically address the issue of a lawyer's standard of care, the concept must be kept in mind when implementing the new regime. Otherwise, the reform will come at a significant cost to lawyers.

In addition, while our proposed reforms call for stronger adherence to the Rules and meaningful consequences for non-compliance, we do not support an overly technical application where no actual prejudice arises. We reject "gotcha" litigation tactics. To the contrary, we believe that there should be costs consequences for parties who engage in such time-wasting conduct. Our focus is on substance, not procedural gamesmanship.

E. SELF-REPRESENTED LITIGANTS

The soaring cost of litigation has resulted in many parties commencing or responding to litigation without professional representation. Other times, parties are represented at the outset of a case but are unable to continue with counsel as the litigation wears on.

The civil justice system is complex, encompassing substantive law, procedural law, and the law of evidence. Unsurprisingly, self-represented litigants struggle. Some have difficulty accessing even basic information about the civil justice system.

The cost of legal counsel is out of our control. Even if our proposals are adopted, we expect that significant numbers of litigants will continue to represent themselves in the years to come. For that reason, many of our proposed reforms aim to make processes more understandable and manageable for self-represented litigants, though we recognize that navigating the civil justice system without the assistance of counsel will always pose challenges. These initiatives include the following:

(i) Simplifying the process for commencing proceedings, including making a fillable claim form available online that will assist in generating a "**Notice of Claim**";

(ii) Moving to a reliance-based documentary production regime, which will be simpler for self-represented litigants to understand and fulfill;

(iii) Enhancing case management to clarify procedures, avoid most procedural motions, and create a more level playing field;

(iv) Creating a rule that empowers a Directions Conference judge to make an order for the trial of one or more issues as an alternative to striking out a poorly drafted claim;

(v) Imposing a requirement for plaintiffs to serve a "**Notice of Default**" (defined below) on a defaulting defendant before requisitioning or moving for default judgment;

(vi) Requiring that the Court provide litigants with orders outlining the next steps in the proceedings and any associated deadlines;

(vii) Requiring that court orders specify whether they are interlocutory or final for appeal purposes and identify the appropriate appeal c ourt (i.e., Divisional Court or Court of Appeal) and the applicable deadline for filing a notice of appeal;

(viii) Creating three stand-alone sets of rules for appeals: governing appeals in the Superior Court of Justice, the Divisional Court, and the Court of Appeal;

(ix) Expanding access to plain-language resources and procedural guidance tailored for self-represented litigants to empower informed participation (e.g., the creation of guided pathways for civil procedures);[36] and

(x) Recommending the establishment of Civil Law Information Centres in local court houses to aid self-represented litigants, similar to existing Family Law Information Centres.

F. REJECTED ALTERNATIVE MODELS

During this project, the Working Group considered and rejected a variety of proposed reforms for various reasons. It is not possible to outline every suggested reform that was tabled and debated. Still, we believe it useful to highlight two of them given that both were raised by Consultees.

The One-Judge Model: One of the first ideas tabled during Working Group discussions was a proposal to implement a one-judge model, which would see each new civil proceeding commenced in Ontario assigned to a particular judge, who would case manage it until at least the completion of a pre-trial conference. A similar model was recently introduced in Manitoba, where increased and consistent case management has proven successful at reducing backlogs and delays.

We rejected the one-judge model after being advised that, from a judicial resourcing perspective, it is currently unworkable in Ontario. In 2023, there were 66,212 new civil proceedings commenced in the Ontario Superior Court of Justice. That figure rose in 2024 to 75,561—too many to manage individually with existing judicial resources.[37] Nevertheless, our proposed civil justice system is compatible with a one-judge model and would operate more efficiently under such a structure, should future resources permit or should the proposed reforms save sufficient judicial time to make it feasible. Thus, we strongly recommend increased judicial continuity within a proceeding to the extent possible, the benefits of which are beyond doubt.[38]

Bespoke Processes: Not all cases are the same. Some require and can afford more process than others. In *Hyrniak*, the Supreme Court called for a culture shift that promotes timely and affordable access to justice. That shift, they said, entails moving away from the conventional trial-based model in favour of proportional procedures tailored to the needs of each case. In effect, the Supreme Court was calling for, among other things, bespoke process modelling.

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[36] An example of existing guided pathways in the family law context is available here.

[37] Ontario Superior Court of Justice, Annual Report 2019-2023, p. 69 and the 2024 Annual Report of the Superior Court of Justice, Civil Statistics.

[38] See Working Smarter But Not Harder In Canada, a project undertaken by the Judiciary Committee of the American College of Trial Lawyers, pp. 11 and 21.

The Working Group considered whether we might funnel all cases through an initial Directions Conference with a judge following the close of pleadings. The idea was that, at the initial conference, orders would be made providing directions for what processes would be applicable to the case, including both interlocutory procedures and the process model for the dispositive hearing.

This bespoke model was largely rejected for the same reason as the one-judge model. The Court simply does not have the resources to conduct a Directions Conference and provide a bespoke model for every case that enters the system. That said, Directions Conferences, with bespoke modelling, are being recommended for Application Track cases. In our view, bespoke modelling is necessary for these cases, given the wide range of matters that may proceed by application. *Charter* litigation may have very different process requirements than applications under the *Bankruptcy and Insolvency Act*, for instance. And bespoke modelling in Application Track cases models the approach currently taken: a first return date is set out in the Notice of Application. At the first return date, or soon thereafter, an order giving directions is frequently made, setting out the procedural steps to be taken to move the matter towards a dispositive hearing.

Resources may one day reach the point where bespoke modelling is feasible. Until then, many of the procedures we recommend are prescribed, rather than bespoke.

We are also recommending the adoption of a "list system" on a province-wide basis, thereby creating more specialty courts as resources permit. A limited list system is already used in Toronto, which includes the commercial list, the estates list, and the class proceedings list. Our recommendation, as explained in Section VI(X)(1) below, is that these lists be expanded, province-wide, and supplemented by other subject-matter lists.

Tiered Process Model: Before we leave this section, we wish to comment on a reform that we debated and rejected before we released the Consultation Paper, but which we revisited following the Phase 2 consultation. The Working Group initially rejected a tiered process model for cases of differing value for several reasons which are detailed in the Consultation Paper. The feedback received through the consultation process persuaded us to revisit tiered processes. The three-track model we are proposing features limited tiering. It was created to respond to two major themes which emerged through the consultation. The first is that lesser process and greater cost control are necessary in lower value cases. The Summary Track addresses those concerns. The second is that oral examinations are viewed by many as being critical to the litigation process and will, thus, be maintained in a modified form, at least where they can be conducted at proportionate cost and completed in a timely manner. The Trial Track accordingly includes time-limited, focused examinations, as a response to overwhelming concerns raised by Consultees about the complete elimination of oral discoveries.

G. RESOURCING AND SYSTEMIC SUPPORTS FOR MEANINGFUL REFORM

We acknowledge and agree that the Rules are only one component of the broader civil justice system. While we believe our proposed reforms will help streamline court proceedings, the system's overall effectiveness will also depend on several external factors, including proper implementation, improved staff retention, minimizing the unnecessary rejection of filings for

technical defects that are not substantive problems, reducing the number of conflicting practice directions, efficient judicial scheduling, effective use of technology, and comprehensive training for lawyers, judges, court staff, and other system participants.

Many Consultees forcefully emphasized the impact of inadequate resources on the civil justice system,[39] a concern we share. A meaningful increase in both judicial and court administrative resources would significantly ease the growing pressure on the system and support the effective implementation of the proposed reforms.

H. FUTURE AMENDMENTS

We recognize that no reform of this magnitude will be perfect from the outset, and that adjustments may be required as the system is tested and refined in practice. To that end, we recommend that systems be put in place to actively collect data that may be helpful to future reformers.

[39] See, for example, the submission of the OTLA, p. 7. See also, however, the submission of Prof. Knutsen, p. 2, offering a different perspective when he opined that "the matter of increasing court delays and costs cannot be viewed simply as a problem due to a lack of judicial capacity – often, adding more judges exacerbates these very problems."

SECTION 6: DETAILED POLICY PROPOSALS

A. SETTING THE TONE: GENERAL PRINCIPLES

In their current iteration, the Rules contain guiding principles found in rules 1.04(1) and 1.04(1.1), which provide as follows:

> **1.04 (1):** These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **1.04 (1.1):** In applying these rules, the Court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

These existing principles are commendable but, in our view, lack the requisite specificity to provide clear guidance to both litigants and the Court as to the conduct they require.

In redesigning the Rules from the ground up, we begin with a trio of principled rules aimed at cultural change. They include (a) redefining the overarching goals of the Rules; (b) establishing representations that parties will be deemed to have made upon filing documents with the Court; and (c) establishing a general duty, shared by all users of the civil justice system, to cooperate with one another to ensure that the overarching goals are met. We propose to more clearly define the goals of the Rules and to foster a culture that will help achieve them.

1. The Goals

We propose that the Rules include guiding principles, expressed as the "**Goals**". The precise wording of any amendments will be determined by legislative counsel who are responsible for drafting all Ontario legislation and regulations. We envision, however, that the proposed substance of the new rule expressing the Goals will be as follows:[40]

(i) These Rules are to be given a purposive interpretation in accordance with the Goals.

(ii) These Rules seek to achieve the following Goals in all civil proceedings:

a. fair and practical results suited to the needs of the parties;

[40] The primary inspiration of these goals are the "Ideals" at Order 3, Rule 1, of Singapore's *Rules of Court 2021*, No. S 914, pursuant to the *Supreme Court of Judicature Act* (Ch 322).

b. cost-effective proceedings that are proportionate to:

i. the nature of the proceeding and its importance to the parties;

ii. the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises; and

iii. the amount or value of the claim;

c. expeditious proceedings that strive for settlement or final resolution of most cases involving only claimant(s) and defendant(s) within two years of the close of pleadings, with a slightly longer period for cases involving subsequent parties;

d. timely access to, and efficient use of, court resources for the parties and all other litigants who need to access court resources;[41] and

e. enforced compliance with the Rules and the orders and directions of the Court, while prioritizing substance over form and avoiding an overly technical application where a breach or irregularity creates no prejudice;

(iii) The Court must seek to achieve the Goals when imposing orders and giving directions, recognizing that enforcement of the Rules and systemic justice considerations may, in certain cases, take precedence over a merits-based determination.

Unlike the existing guiding principles (set out in rule 1.04), the new Goals provide: (a) increased specificity as to the Rules' aims, including proportionality, timeliness, and efficient use of the Court's resources for the benefit of all litigants who need to access the Court; and (b) express direction that the Court must seek to achieve the Goals when imposing orders and giving directions.

More importantly, while the current system outlines guiding principles, it defines a process that, to a significant degree, undermines them. By contrast, our proposed reforms will incorporate the Goals directly into the processes that will govern all aspects of legal proceedings.

2. Representations to the Court

The expediency of civil proceedings is undermined when parties make representations to the Court that lack factual support, pursue patently indefensible positions, and/or engage in litigation gamesmanship (e.g., by intentionally delaying matters or taking steps solely to drive up litigation costs).

[41] Goals 2(d) and (e) take inspiration from Rule 1.1 (otherwise known as "the overriding objective") of England and Wales' *Civil Procedure Rules 1998*, 1998 No 3132 (L 17).

To address this problem, we propose to introduce a new rule concerning representations made to the Court (the "**Representations Rule**"), the substance of which is as follows.[42]

(i) By presenting to the Court a pleading, written motion, or other document, a party certifies that, to the best of their knowledge or reasonably held belief at the time the representation is made:[43]

a. it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or unnecessarily increase the cost of litigation;

b. it is not frivolous or vexatious;

c. the factual contentions advanced are, or may be, after a reasonable opportunity for further investigation, supported by evidence; and

d. the denials of factual contentions are warranted in the circumstances.

Given that we are proposing that these certifications will be deemed to have been made by presenting a pleading, written motion, or other document to the Court, a separate certification document or attestation will not be necessary. Moreover, this new rule is also intended to apply whether a party signs or simply submits a pleading, written motion, or other document, or whether they authorize a lawyer to do so on their behalf.

As described in Section VI(S)(3)(b) below, a breach of the Representations Rule will presumptively result in the Court applying the Full Indemnity Presumption (defined below).

3. The General Duty to Cooperate

One of the reasons why rule 1.04 has been ineffective is that litigants simply do not cooperate to ensure its aims are achieved. That part of our litigation culture needs to change. To that end, we propose to introduce a general duty to cooperate (the "**Duty to Cooperate**"). This is not an attempt to undermine the adversarial process. We expect that parties will continue to zealously pursue their cases in their own self-interests. The Duty to Cooperate is about embracing a shared responsibility to manage the Court's limited resources to promote the Goals.

In the result, we propose that parties and their lawyers will have a Duty to Cooperate with one another to further the Goals. This duty will require that parties, or their counsel, engage in discussions to try to agree on how the proceeding will be conducted. More specific duties to cooperate will appear in relation to specific rules, such as disclosure and preparing a joint book of documents.

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[42] The proposed new rule is a modified version of Rule 11 of the *Federal Rules of Civil Procedure* of the United States.

[43] We revised the proposed language in response to the OBA's concern that the Representations Rule should be satisfied where a party reasonably held a belief at the time the representation was made. Submission of the OBA, p. 9.

The proposed substance of this new Rule is as follows:

> All parties have a duty to conduct their cases in a manner that will facilitate achieving the Goals. This includes, but is not limited to, a duty to:
>
> a. identify the central issues in dispute at an early stage;
>
> b. perform work in connection with the proceeding in a manner that is proportionate to the nature of the claim and its importance to the parties, the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises, and the amount or value of the claim;
>
> c. comply with the Rules, including timelines for steps in the proceeding, as well as any orders and directions of the Court;
>
> d. make reasonable efforts to resolve the dispute or to limit the issues in dispute and to resolve interlocutory issues before seeking the Court's assistance;
>
> e. make use of available technology where and to the extent that it will promote efficiency and efficacy; and
>
> f. maintain courteous, cooperative, and prompt communication between the parties, and between the parties and the Court.

4. Consultation Feedback

This trio of new rules—the Goals, the Representations Rule, and the Duty to Cooperate—were the subject of relatively modest submissions in response to the Consultation Paper. In short, they were not controversial.

Some Consultees expressed concerns about how the Representations Rule and Duty to Cooperate would be enforced. The Honourable Paul Perell and Joshua Perell jointly expressed concern that these rules might be exploited and, ironically, become a source of friction and contentious motions.[44]

We do not envision that alleged breaches of the Representations Rule or the Duty to Cooperate will offer a standalone basis for relief on a motion. Instead, these rules, and the culture change we hope they drive, will be reinforced by the Court through costs orders made at conferences, motions, and dispositive hearings.

In the Consultation Paper, we proposed that the Representations Rule include a certification that "the claims, defences, and other legal contentions advanced are warranted by (a) existing law (b) a non-frivolous argument for extending, modifying, or reversing existing law, or (c) establishing

[44] Submission of the Honourable Paul Perell and Joshua Perell (collectively, the "**Perells**"), p. 13.

new law." We have removed this proposal in response to concerns from several Consultees who felt it would be unfair to self-represented parties and could discourage public interest litigation.[45]

We otherwise maintain that the introduction of these three general principle rules ought to be included in any revised Rules to make clear, to both litigants and judges, what is expected of anyone starting or responding to a civil claim in the Superior Court. It will be up to judicial officers to reinforce the stated principles through their actions, which may include imposing costs consequences for breaches of the Representations Rule or the General Duty to Cooperate. Changing our litigation culture will require that all stakeholders accept and value these requirements. Thus, they need to know what they are being asked to accept and value.

5. Recommendations

The Working Group recommends revising Rule 1 to include the Goals, the Representations Rule, and the Duty to Cooperate.

B. PRE-LITIGATION PROCEDURES

Having set the stage for cultural change, we now move to the processes that will help realize the Goals.

1. Pre-Litigation Protocols

Timely and cost-efficient dispute resolution is best achieved when parties find a way to resolve their differences without the need for a court proceeding. Litigation should be a means of last resort. Accordingly, we propose to introduce a suite of pre-litigation protocols ("**PLPs**" or, individually, a "**PLP**") setting out the steps that the Court will expect parties to take before commencing a civil proceeding.

PLPs will mandate the early exchange of information and specific relevant documents and require parties to make a genuine effort to resolve their disputes before starting court proceedings. If a resolution cannot be reached, PLPs will aim to narrow the issues in dispute and streamline the court process when it starts.

PLPs do not currently exist in Ontario.[46] They are, however, effectively used elsewhere. England and Wales first adopted PLPs in 1999, following the Civil Justice Reforms introduced that same year (conventionally referred to as the "**Woolf Reforms**"). A study conducted five years after PLPs were first introduced found a significant reduction in new civil proceedings being started

[45] See, for example, the submission of the Advocacy Centre for Tenants Ontario, p. 5 and the submission of Ecojustice/Canadian Environmental Law Association ("**Ecojustice**"), p. 6.

[46] To be fair, the functional equivalent of a PLP is arguably found at s. 258.3(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 (the "**Insurance Act**"), which requires plaintiffs to take certain steps before the commencement of a claim for damages for personal injuries suffered in a motor vehicle accident. The PLP we are recommending, however, is qualitatively different than the provisions of s. 258.3(1) and has somewhat different aims.

annually across England and Wales. In particular, in each of 1997 and 1998, there were more than 2.2 million new civil cases issued in the civil courts of England and Wales. That number fell in each of the five years after the Woolf Reforms. By 2003, that figure had dropped to less than 1.6 million. While the authors of the study suggest there was a subtle interplay of factors responsible for the reduction in new cases on a year-over-year basis, they concluded that PLPs were certainly influential (presumably in a positive way).[47]

There are now more than a dozen area-specific PLPs presently in force in England and Wales.

In 2023, the UK's Civil Justice Council, which advises the Lord Chancellor, the judiciary, and the Civil Procedure Rules Committee on civil matters, conducted a review of the use of PLPs in England and Wales. The Council described PLPs as now occupying "a crucial space in the civil justice system."[48]

South Australia, Singapore, Scotland, and Northern Ireland have followed suit.

By requiring parties to meaningfully engage with one another, PLPs can help facilitate settlement, thereby reducing the number of claims commenced. Where settlement is not possible, PLPs can help narrow the issues in dispute, so that, if commenced, cases will proceed more expeditiously.

In addition, since the documents that need to be exchanged under a PLP are ones that would need to be produced in a proceeding in any event, PLPs may also help avoid unnecessary motions seeking their production. As Aviva noted in its submission:[49]

> the initial barrier to moving a claim along is productions. The tight timelines and agreed upon documents in the PLP would reduce the need for motions later.

Finally, PLPs reinforce the principle that parties should make every effort to resolve their disputes independently, turning to the courts only as a last resort.

a) Proposed Reforms

We propose to develop a series of dispute-specific PLPs, which would apply to the following categories of cases:

(i) personal injury;

(ii) medical malpractice;

(iii) collection of a liquidated debt or enforcement of a mortgage, unless the parties have agreed to an alternative pre-litigation protocol; and

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[47] J. Peysner and M. Seneviratne, *The Management of Civil Cases: The Courts and Post-Woolf Landscape,* (2005) prepared for the Department for Constitutional Affairs (UK), page 8.

[48] Civil Justice Council, Review of Pre-Action Protocols – Final Report, Part 1, August 2023. Part 2 of the Final Report was subsequently released in November 2024 and may be found online here.

[49] Submission of Aviva Canada ("**Aviva**"), p. 2.

(iv) other types of contractual disputes, unless the parties have agreed to an alternative pre-litigation protocol.

We also propose to develop a general PLP applicable to all remaining civil matters, subject to the following limited exceptions to which a PLP would not apply:

(i) counterclaims, crossclaims, or third (or subsequent) party claims;

(ii) the following types of claims (for the reasons set out in the following section):

a. claims alleging violence or abuse (whether that be gender-based, sexual, domestic, etc.);

b. estate matters;

c. class proceedings;

d. claims involving a person under disability, a minor,[50] or in which capacity is at issue;

e. claims proceeding on the Application Track;

f. appeals;

g. matters governed by the federal or provincial *Crown Liability and Proceedings Acts*;[51] or

h. any claim in which the claimant seeks (i) urgent relief or (ii) early relief and notice to the defendants is likely to defeat or frustrate the relief that the claimant seeks.

Each PLP will delineate the conduct required of prospective parties before the commencement of a court proceeding. The requirements set out in each PLP will be deliberately modest: parties will be required to (a) outline the nature of the claim and the response; (b) confirm or, where possible, provide the identity of the correct responding party; (c) identify any relevant insurer(s) who may respond to the claim; (d) disclose a defined set of documents within the party's possession (i.e., materials that would be exchanged in the proceeding in any event); (e) request the production of relevant and material documents in the possession of third parties; and (f) consider whether an early mediation would help to settle the dispute or narrow the issues.

The deemed undertaking rule will apply to any disclosure of information delivered to an opposing party pursuant to a PLP.

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[50] Except where the claim of the person under disability or minor is restricted to a dependant's claim for damages pursuant to Part V of the *Family Law Act,* R.S.O., c. F.3 ("***Family Law Act***").

[51] *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50; *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17 ("***CLPA***").

A PLP will not amend, vary, or extend any applicable statutory limitation period. If adherence to a PLP would result in the expiry of a limitation period, the claimant must commence the proceeding without completing the protocol's requirements, although the Court may direct that the PLP be completed after the Notice of Claim is issued.

It is important that PLPs be followed. Without an enforcement mechanism, PLPs will quickly fall by the wayside.

Claimants will be required to confirm on Appendix "A" to the Notice of Claim whether the parties have complied with any applicable PLP. If they have not, and the case is presumptively streamed to the Trial Track, a Scheduling Conference date will be set by the Court following the issuance of the Notice of Claim. At that conference, the Court will have discretion to schedule the completion of the PLP steps based on which party was responsible for the non-compliance. If the defendant failed to comply and the plaintiff wishes to proceed with the claim, it would make little sense to require further compliance before moving forward. The Court will also be required to order $1,000 in costs against the party responsible for non-compliance with the PLP, absent a satisfactory explanation for non-compliance. Finally, the Court will be responsible for imposing a schedule for the completion of all other process steps that follow up to the "One-Year Scheduling Conference" (defined below).

In Summary Track cases, the judge presiding at the initial Directions Conference (described below) will determine if the proceeding should be stayed pending compliance with the PLP and whether costs should be imposed for non-compliance.

In our Consultation Paper, we proposed introducing a limited series of PLPs specific to certain case types. We are now also proposing to implement a general PLP applicable to all remaining civil matters, other than those explicitly excluded. We believe a general PLP will be beneficial because, as set out below, we are proposing to introduce tight timelines once a claim is commenced. Introducing a general PLP will ensure that parties in most cases will have more time to consider the issues and potentially negotiate a resolution. It also provides defendants with a fairer opportunity to prepare their defence, helping to balance the advantage plaintiffs enjoy from being able to gather evidence before commencing a claim.

b) Rationale for Matter-Specific Exceptions

As outlined above, we propose that certain matters be excluded from the PLP process. Our rationale for these exclusions is set out below.

Claims alleging violence or abuse (whether that be gender-based, sexual, domestic, etc.): Many Consultees objected to a party being required to disclose their personal health and financial records to alleged abusers without any court oversight or protection.[52] They emphasized that forcing survivors to share deeply personal information with the very person who is alleged to have harmed them can reinforce feelings of violation, create acute safety risks, and exacerbate mental

[52] See for example the submissions of Ending Sexual Violence Association of Canada, p. 2; Family Transition Place, p. 2; Huronia Transition Homes, p. 1; and Women's Centre for Social Justice (better known as Womenatthecentre), p. 2.

health issues. We agree these are valid concerns and, thus, have proposed to exclude such matters from being subject to a PLP.

Estate matters: The Working Group had initially proposed to create a PLP for contested will challenges. These types of cases tend to pit family members against one another and can be hugely divisive. They cry out for the prompt exchange of information and documentation, as well as early consideration of alternate means of dispute resolution such as mediation. Several Consultees, however, objected to applying a PLP to estate matters, arguing it would be inappropriate for several reasons, including that:[53]

(i) it would require documentary production before an assessment is made about whether the claimant has met the common law minimum evidentiary threshold;[54]

(ii) many key documents, including, for instance, the deceased's financial records and the file of the lawyer who drafted a disputed will, cannot be produced without a court order;

(iii) in some cases, a court order is urgently needed to address estate administration issues even while a dispute is ongoing; and

(iv) new mechanisms would be required to involve the Office of the Public Guardian and Trustee ("**PGT**") and the Office of the Children's Lawyer ("**OCL**") at the PLP stage, as their statutory roles are often triggered by service of a claim.

The Working Group agrees that these issues undermine the viability and effectiveness of a PLP for these types of matters.

Class proceedings: Some Consultees suggested there should be a similar carve out for class proceedings.[55] We agree, and indeed assumed, that PLPs would not apply to class proceedings, as discovery/disclosure under the *Class Proceedings Act*, *1992*[56] does not take place until after the certification motion. Requiring broader disclosure at an earlier stage would therefore be inconsistent with the current statutory framework.

Claims involving a person under a disability, a minor, or in which capacity is at issue: For the reasons set out in the submissions of the PGT and the OCL,[57] we have determined that PLPs should not apply to claims involving a person under disability, a minor, or in which capacity is at issue. The one exception would be claims for damages pursuant to Part V of the *Family Law Act*, which we propose would be subject to a PLP since these types of claims are routinely advanced as derivative claims in personal injury proceedings.

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[53] See the submissions of the Office of the Children's Lawyer ("**OCL**"), pp. 2-5; the Public Guardian and Trustee ("**PGT**"), p. 6; Blaney, pp. 5-6; CCLA, p. 28; Margaret E. Rintoul ("**Rintoul**"); the OBA, p. 11; TAS, p. 10; Middlesex Law Association ("**MLA**"), p. 7; and WeirFoulds LLP, p. 2.

[54] See *Seepa* v. *Seepa*, 2017 ONSC 5368.

[55] See, for example, the submissions of the OBA, p. 12 and the Class Action Clinic, p. 2.

[56] *Class Proceedings Act*, *1992,* SO 1992, c 6 ("***Class Proceedings Act***").

[57] Submission of the PGT, pp. 6-8 and of the OCL, pp. 2-5.

Claims proceeding on the Application Track: There are a wide variety of matters that may proceed on the Application Track. PLPs may serve a purpose in relation to some, but not others. Moreover, some applications may require service on many parties, some of whom may never take a position in the proceeding (e.g., in an application involving a plan of arrangement under s. 182 of the *Ontario Business Corporations Act*[58]). In such cases, PLPs are not appropriate. We recommend that the applicability of PLPs to Application Track matters be revisited in a few years, once there is greater experience with the new framework.

Appeals: PLPs are designed to facilitate the early identification of issues and the exchange of documents. This purpose does not apply in the context of an appeal, where those steps will already have taken place and where the evidentiary record is generally complete.

Matters governed by the federal or provincial *Crown Liability and Proceedings Act*: At common law (and under the *CLPA* in the case of the provincial government), the Crown is only obligated to produce documents once a proceeding has been commenced.[59] Accordingly, it would be inappropriate to apply PLPs to these cases.

c) Consultation Feedback

Consultees had a mixed, though largely favourable, reaction to the proposed introduction of PLPs.

Some Consultees clearly supported the proposed introduction of PLPs, whether in specific types of cases[60] or more generally.[61] Some suggested there should be different PLPs for different practice areas, with each protocol being tailored to the unique needs of the particular types of disputes they are intended to address.[62] To that end, some Consultees suggested that PLPs should be developed

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[58] *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16.

[59] At common law, the Crown is generally immune from non-party discovery obligations (see *Canada (Attorney General) v. Thouin*, 2017 SCC 46). Before the commencement of proceedings, a person seeking to engage in a PLP would be a non-party. Additionally, section 17 of the *CLPA* stays any action against the Crown, an officer of the Crown, or Crown employee where it includes a claim based in misfeasance in public office or torts based in bad faith. The stay is *only* lifted upon a motion by the plaintiff where it establishes that there is a reasonable possibility that the action would be resolved in favour of the plaintiff. Section 17 also prohibits any form of discovery against the Crown, Crown officers, or Crown employees before the stay is lifted. A PLP, when applied to the Crown in an alleged misfeasance or other bad faith claim, would conflict with s. 17. See also the submission of Justice Canada, pp. 5-6, opposing the application of PLPs to proceedings commenced against the Federal Crown.

[60] See, for example, the submissions of CCLA, p. 27; Definity Insurance Company ("**Definity**"), p. 1; Healthcare Insurance Reciprocal of Canada ("**HIROC**"), p. 1; Prof. Knutsen, p. 4; Canadian Medical Protective Association ("**CMPA**"), p. 4; and The Holland Group, p. 2.

[61] See, for example, the submissions of Aviva, p. 2; Better Civil Rules Collaborative ("**BCRC**"), p. 3; David Bierstone, p. 4; FAIR Association of Victims for Accident Insurance Reform, p. 2; Hassell Trial Counsel p. 3; Lawyers' Professional Indemnity Company ("**LawPro**"), p. 5; TAS, p. 9; Ontario Water Works Association Construction Committee ("**Water Works Association**"), p. 2.

[62] Submission of the BCRC, p. 3. Some Consultees suggested specific protocols that should apply in certain areas. See the submissions of BCRC, pp. 14-21; Canadian Life & Health Insurance Association ("**CLHIA**"), p. 4.

in consultation with the relevant bar or, likewise, asked for the opportunity to comment on a dispute-specific PLP before its implementation.[63] Supporters of PLPs viewed them favourably because they promote earlier document production, narrow the issues, enhance settlement opportunities, and reduce the need for subsequent motions.[64]

Other Consultees, however, viewed PLPs as being problematic. We set out below certain concerns they raised, along with our responses.

Increased Costs: Some Consultees objected to the introduction of PLPs on the grounds that they will increase costs.[65] Although the introduction of PLPs adds an additional step to the litigation process, the requirements are modest and designed to align with existing and, in many cases, best practices. Specifically, PLPs will require (a) the equivalent of a demand letter and response, a practice that many lawyers already routinely perform, and (b) the production of a defined subset of the most relevant documents, which parties would have to produce in any event and which are essential to meaningful settlement discussions.

Regardless, complying with a PLP will result in one of two outcomes: the matter will settle or proceed to litigation. In the former, any costs associated with compliance will have been well spent. In the latter, those costs will have served a valuable purpose by defining the scope of the dispute, clarifying the issues, placing necessary documents in the hands of the opposing parties, and providing the parties with additional time to resolve the matter before tighter timelines take effect. Either way, engagement in a PLP is economically rational.

Several Consultees opposed applying a PLP to debt collection matters, arguing that the disclosure obligations would be onerous in that they would be comparable to current affidavit of documents requirements. They also argued that a PLP would offer little value because debtors typically know what they owe and already receive notices and demand letters (often required by existing laws and regulations) before any legal proceeding is commenced. In their view, imposing a PLP would only delay enforcement and increase collection costs, which, in turn, would raise the cost of lending and ultimately harm consumers.[66]

In further consultation with a subset of these Consultees, we explained that the disclosure obligations in the proposed PLP for these matters would be minimal, for the very reasons they had identified. We also noted that, since many of these matters are resolved by default judgment,

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[63] See, for example, the submissions of the CLHIA, pp. 4-5; Co-operators, p. 1; Definity, p. 4; HIROC, p. 1; OBA, p. 11; CMPA, p. 5; Holland Group, pp. 2-3.

[64] See, for example, the submissions of Aviva, p. 2; BCRC, p. 3; CLHIA, p. 4; Desa Law ("**Desa**"), p. 1; OBA, p. 11; Water Works Association, p. 2.

[65] See for example, the submissions of CDL, p. 14; CCLA, pp. 28-30; Justice Canada, p. 12; Dermot Nolan, p. 2; FAIR, p. 3; Gillian Hnatiw & Co., p. 2; Medico-Legal Society of Toronto ("**Medico-Legal**"), p. 3; Ontario Mutual Insurance Association, p. 2; OTLA, p. 11; the Perells, pp. 13-14; PJKJ Law, pp. 2-3; Dr. Alyssa King ("**Dr. King**"), p. 7; TAS, p. 3, 10; Hamilton Law Association ("**HLA**"), p. 2; Prof. Kennedy, p. 3; and Community Legal Aid University of Windsor Law, pp. 4-5.

[66] See, for example, the submissions of Agueci Calabretta and FIJ Law LLP, pp. 5-7; CCLA, p. 28; OSC, p. 2; Wade Morris, p. 2. However, see the submissions of Chad Pilkington ("**Pilkington**"), p. 5 and TAS, p. 10 in support of liquidated debt claims being governed by a PLP.

applying a PLP would benefit claimants by creating an additional legal obligation for defendants to ignore, thereby strengthening the basis for default judgment. The Consultees with whom we engaged appeared satisfied with this response.

Risk of Misuse: Some Consultees expressed concern about litigants being compelled to disclose sensitive personal information before litigation commenced, particularly where they are unrepresented. They noted that such information may be subject to privacy laws or give rise to related issues, including potential liability arising from disclosing information belonging to others.[67] In our view, these concerns, while valid, are overstated. PLP production requirements are modest, requiring only the exchange of a subset of documents that would have been produced in the ordinary course of litigation. All will be subject to the deemed undertaking rule, which can be spelled out in the applicable PLP so that unsophisticated parties understand their obligations.

Unrealistic Timelines: Some Consultees argued that the model timelines to disclose documents in the proposed PLP are unrealistic.[68] We disagree. Our proposed PLPs are not onerous; in most cases, compliance can be achieved in short order.

Over-Production: Some Consultees pointed out that, as currently proposed, PLPs would require greater production than what the newly proposed litigation process requires elsewhere.[69] We agree that the production obligations under PLPs should represent only a subset of a party's ultimate disclosure obligations. We recommend that our draft PLPs be refined to ensure that this occurs.

Inadvertent Insurance Policy Breach: One Consultee pointed out that an insured who admits liability under a PLP would thereby breach its insurance policy, something that in turn will only make litigation more complex.[70] Another pointed out that, without having received a Notice of Claim and knowing the precise amount being sought, a defendant cannot admit liability as the claim may be beyond its policy limits.[71] These are valid concerns, though one would expect that most insured parties would refer the initial claim letter to their insurer for response. Ultimately, the goal is for the plaintiff's counsel to engage with counsel for the insured. In the result, we propose that any personal injury PLP should include a warning to insureds that they should not engage in the PLP directly if they have insurance and, instead, should forward the claim letter to their insurer for response.

Redundancy: Some Consultees raised the interaction between PLPs and other obligations involving pre-litigation communications or disclosure, such as those required by s. 258.3(1) of the

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[67] See, for example, the submissions of CDL, p. 15-16; CCLA, p. 31; Medico-Legal, p. 4; Michael McGowan; OTLA, p. 11; MLA, p. 7; PJKJ Law, pp. 2-3; and Samfiru Tumarkin, p. 4.

[68] Submissions of CCLA, p. 10, 29 and TAS, p. 12.

[69] Submissions of CCLA, p. 31; OTLA, p. 19 (which queried whether that was the case); and PJKJ Law, p. 2.

[70] Submission of CDL, p. 17.

[71] Submissions of Aviva, p. 2 and Rita Bambers, p. 1.

Insurance Act, suggesting that complying with a PLP would be redundant.[72] We disagree. The PLP has different obligations and serves different purposes than s. 258.3(1). But, in any event, redundancy in this context is not problematic: if a single communication or disclosure satisfies multiple obligations, no additional cost or effort is wasted.

Jurisdiction: One Consultee raised a concern that, under the *Courts of Justice Act* ("***CJA***"),[73] there is no jurisdiction to create rules that govern parties' pre-litigation conduct.[74] Under our proposal, the Rules would not prescribe stand-alone obligations to comply with PLPs outside of the litigation process. PLP obligations will, instead, be reflected in Practice Directions, which we recommend be developed in consultation with the relevant bar to which they will apply. The proposal is that the Rules will provide that, if a party fails to comply with PLPs before commencing a claim, consequences will follow once that party seeks to engage the court process.

Some Consultees made suggestions to improve the use of PLPs, which included the following:

(i) PLPs need to be clear about when they apply.[75] We agree;

(ii) The consequences for failing to comply with a PLP should be clearly outlined in the Rules.[76] We agree and have outlined the consequences above;

(iii) PLPs should take account of the fact that almost all defendants in personal injury matters turn to insurers to provide their defence, but that insurers cannot become involved until receiving notice.[77] Again, we recommend the relevant PLP include a provision that instructs insured parties to promptly provide a copy of the claim letter to their insurer; and

(iv) While the model PLP attached to the Consultation Paper includes a requirement to produce video evidence, it should also include the same concerning photographs.[78] We agree.

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[72] Submissions of CDL, p. 16-17; Marcus Snowden, pp. 4-5; OTLA, p. 11; Water Works Association, p. 33 (re parallel dispute resolution mechanisms); Theodore B. Rotenberg and Tushar Sabharwal, pp. 2, 6-8; WSIB Ontario, p. 3.

[73] *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("***CJA***").

[74] Submission of CDL, p. 14.

[75] Submission of the OBA, p. 11.

[76] Submission of Pilkington, p. 10, where the suggestion is that non-compliance should be addressed through costs or the refusal to issue a claim. See also the submissions of OTLA, pp. 19-20 and TAS, p. 14.

[77] Submission of Definity, p. 4. The BCRC appears to make a related point at p. 6 of its submission in suggesting the inclusion of a "[r]ecommendation for referral to insurer." As CDL notes, at pp. 13 of its submission, there is "a risk that delayed reporting by an unsured to an insurer will result in denied coverage if the insurer is prejudiced due to violations of the PLP."

[78] Submission of the City of Toronto, p. 3.

2. Pre-Litigation Discovery from a Third Party

The existing *Norwich* Order: A "*Norwich* Order" is a form of equitable relief requiring a third-party to a potential claim to disclose information that is otherwise confidential.[79] This form of relief derives its name from the English case *Norwich Pharmacal Co. v. Customs and Excise Commissioners*.[80] The rationale for granting Norwich relief is that a third party, having become innocently involved in a wrongful act, has an equitable duty to assist the victim. In *Norwich Pharmacal*, Lord Reid explained the underlying rationale for such as follows:[81]

> [t]hey seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.

In *Alberta (Treasury Branches) v. Leahy* ("***Leahy***"), the Alberta Court of Queen's Bench undertook an extensive review of the history of *Norwich* orders in both England and Canada and identified the following considerations to guide the exercise of discretion on a *Norwich* application:[82]

(i) Does the moving party have a *bona fide* claim?

(ii) Was the third party from whom the information is sought involved in the events giving rise to the claim?

(iii) Is the third party the only practicable source for the information?

(iv) Can the third party be indemnified for the cost of complying with the order and any potential damages that might flow from compliance?

(v) Do the interests of justice favour granting the relief sought?[83]

Ontario courts have largely adopted these criteria other than the requirement for indemnification of potential damages. For instance, in *GEA Group AG v Ventra Group Co.,* the Court of Appeal largely adopted the *Leahy* criteria (other than the indemnification criteria) but emphasized the importance of necessity. It held that an applicant must show that the requested discovery is needed for a legitimate purpose, such as identifying a wrongdoer, assessing whether a claim exists, pleading a claim, tracing assets, or preserving evidence or property. The Court explained that it

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[79] The Superior Court of Justice's equitable jurisdiction flows from section 96 of the *CJA*, as well as the Court's inherent jurisdiction.

[80] *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 (H.L.) ("***Norwich***"). For a more fulsome analysis of *Norwich* orders, see "Norwich Orders in Canada: A Tool for Twenty-First Century Litigation."

[81] *Norwich* at ¶ 12 [emphasis added].

[82] *Alberta (Treasury Branches) v. Leahy*, [2000] A.J. No. 993 (Q.B.) aff'd (2002), 51 Alta. L.R. (4th) 94 (C.A.), application for leave to appeal dismissed [2002] S.C.C.A. No. 235 ("***Leahy***").

[83] *Ibid* at ¶ 106.

was unclear whether the necessity requirement should be considered under the third factor (i.e., whether the third party from whom the information is sought is the only practicable source of the information) or the fifth factor (i.e., whether the interest of justice favoured the granting of the order). Ultimately, the Court held that the necessity requirement was not a "stand-alone requirement" and noted that:[84]

> a Norwich order is an equitable, discretionary and flexible remedy. It is also an intrusive and extraordinary remedy that must be exercised with caution. It is therefore incumbent on the applicant for a Norwich order to demonstrate that the discovery sought is required to permit a prospective action to proceed, although the firm commitment to commence proceedings is not itself a condition precedent to this form of equitable relief.

What the foregoing discussion demonstrates is that the requirements for a *Norwich* Order are not readily identifiable in the jurisprudence. Their accessibility would be greatly improved for litigants, self-represented or otherwise, if they were codified.

Proposed Reforms: As is done in England, Australia, and Singapore,[85] we propose that the Rules be amended to clarify and codify the circumstances in which the equitable remedy of pre-claim discovery against a third party (i.e., not a defendant or prospective defendant) is available. Greater clarity will improve predictability and help all parties, especially self-represented litigants, better understand when this type of relief is available.

3. Recommendations

1. The Working Group recommends:

   a. developing a suite of industry-specific PLPs in consultation with industry stakeholders, along with a PLP for general application, that will be mandated through Practice Directions; and

   b. establishing consequences for parties who fail to comply with a PLP before commencing a legal proceeding as set out above.

2. We further recommend that the common law requirements for a pre-claim discovery order (i.e., *Norwich* order) be codified.

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[84] *GEA Group AG v. Ventra Group Co*., (2009), 96 O.R. (3d) 481 at ¶¶ 84-85 and 91 (C.A.). See also *Isofoton S.A. v. Toronto Dominion Bank* at ¶ 40, *Lesser v. Meta Platforms Inc*. et al, 2025 ONSC 2105 at ¶¶ 16-42; *Glaxo Wellcome plc v. M.N.R.*, 1998 CanLII 9071 (FCA).

[85] See *Civil Procedure Rules 1998* (U.K.), SI 1998 No 3132 (L 17), rules 31.16 and 31.17; *Uniform Civil Procedure Rules 2005* (NSW, Australia), Part 5, sections 5.2 and 5.3; and *Singapore Rules of Court*, Order 11, rule 11.

C. COMMENCING A CLAIM: A SINGLE-ENTRY POINT

1. The Need for Change

We have identified two issues with the current process for commencing a proceeding that would benefit from reform.

First, in the current system, civil proceedings are generally initiated in one of two ways: through an action or application. For many litigants, in particular self-represented litigants, it can be challenging to determine which option is appropriate. When proceedings are commenced by application where an action would have been appropriate, motions are needed to convert those applications into actions. There are also many matters, particularly in the estates context, that are properly commenced as applications but must later be converted into actions given the existence of contested issues of fact. In both circumstances, time and resources are spent converting applications into actions and reconciling steps taken under the first procedure with those required under the second.

Second, some claims in the current system are convoluted and prolix. Others fail to specifically articulate the actual causes of action being pleaded (e.g., claims of negligence, breach of contract, etc.). This can make it difficult, if not impossible, to understand what is being communicated or to quickly distill the central aspects of the claim. Motions inevitably arise. Time and money are wasted arguing about how the dispute should be properly framed.

2. The Proposed Reforms

The Working Group proposes to establish a single point of entry into the civil justice system. In our view, while it may be appropriate to apply different processes depending on the nature of the relief sought,[86] there is no need to put litigants to the task of deciding which form to use to initiate a proceeding.

The point of entry will be a standard form (the "**Claim Form**") that we expect will be available as a fillable, online form, though different formats will be made available for those with accessibility challenges.

The Claim Form will guide prospective claimants through a series of questions to gather information necessary to populate it. Once completed, the fillable form will generate what will be known as the Notice of Claim[87] thereby commencing a "**claim**" or a "**proceeding**."

To summarize the proposed terminology:

- the Claim Form refers to the online fillable form;

[86] Although there will be no formal distinction between applications and actions, the existing process governing applications will remain largely intact (as described in Sections VI(K)(2) and VI(L)(6) below).

[87] See for example how this is done in British Columbia through the Notice of Claim (Form 1 (Rule 3-1(1))), which can be found at Supreme Court Civil Rules forms - Province of British Columbia.

- the Notice of Claim refers to the document generated from that form; and
- the claim or the proceeding refers to the matter as it progresses through the Court.

Experienced drafters may choose to draft the Notice of Claim directly and, thus, bypass the question-and-answer process involved in the online form. They will, however, be responsible for ensuring that all required information is included in it.

The Claim Form will consist of two sections: (a) the body of the Notice of Claim and (b) Appendix "A." These are addressed, in turn, below.

The body of the Notice of Claim will include much of the same information included in a Statement of Claim or Notice of Application under the current Rules. For instance, it will include (a) information concerning the parties, (b) the relief sought (but where there is more than one defendant, it will now specify the defendant against whom particular relief is sought), (c) a statement of material facts, (d) information required to serve a defendant outside of Ontario, (e) a list of statutes on which the claimant is relying, and, (f) unless the case is proceeding on the Application Track, a list of the specific causes of action being pleaded, as is done in cases filed in the United States Federal Courts.[88]

To be consistent with the Representations Rule, the material facts pleaded in the Notice of Claim will either need to be within a party's direct knowledge, or the party will need to have a reasonably held belief that the facts may be capable of proof through the discovery or trial process.

In its submissions, Lawyers' Professional Indemnity Company ("**LawPro**") cautioned that requiring parties to expressly plead causes of action could result in claims becoming time-barred if the proper causes are not identified at the outset.[89] To address this concern, we propose that the Rules clarify that, as they are now, limitation periods be determined in reference to the underlying facts, rather than the specific causes of action, pleaded. This will ensure that amendments adding new causes of action arising from the same facts are not later time-barred.

Appendix "A" will capture information for case management purposes. Parties will be required to indicate: (a) the presumptive process track applicable to the claim; (b) the legal nature of the proceeding (using a check box format similar to current Form 14F); (iii) a brief overview of the proceeding (in 250 words or less); (iv) whether a PLP applies and whether the parties have complied with it; and (v) in claims against the provincial Crown, whether advance notice has been served as required by s. 18 of the *CLPA*.

Although not a perfect solution, it is hoped that guiding litigants, particularly those who are self-represented, through a question-and-answer format will:

(i) Simplify the process of initiating a proceeding and streaming it to the appropriate track;

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[88] See Rule 10 of the *Federal Rules of Civil Procedure* of the United States.

[89] Submission of LawPro, p. 8.

(ii) Reduce the need to convert proceedings from one form to another, thereby saving party and judicial resources;

(iii) Provide guidance on the information to include in the Notice of Claim by presenting a clear, step-by-step question-and-answer process;

(iv) Ensure that essential information is included in every Notice of Claim, which will assist the Court in understanding the fundamentals of the case during future case conferences; and

(v) Enhance the Court's ability to collect and analyze case-related data, which will aid future reform efforts.

A similar online, fillable form will be developed for other types of pleadings, such as a statement of defence, a third-party claim, and others.

3. Consultation Feedback

The proposal to create a single point of entry to the civil justice system enjoyed fairly broad support among Consultees. Those in support of the proposal tended to praise its ability to reduce confusion, simplify the process of starting a proceeding, and facilitate access to justice, particularly for self-represented litigants.[90]

Pro Bono Ontario ("**PBO**"), for instance, noted in its submission that "[a] simplified form would increase access to justice, avoid unnecessary delay, and reduce the hurdles our clients face." Similarly, the OBA noted that the proposal "strongly aligns with past OBA efforts to simplify legal processes and enhance the accessibility of the civil justice system, particularly for self-represented individuals."

The Osgoode Investor Protection Clinic ("**OIPC**") concluded in its submission that:[91]

> [C]lient data shows that the complexity of initiating a civil claim is a barrier for many retail investors to even begin the process of recovering lost funds. An accessible online platform that prompts claimants to supply relevant details and generates a usable claim document could streamline this process, reduce the likelihood of incomplete or defective pleadings, and accelerate claimants' ability to pursue timely redress. In short, the proposed Claim Form could mean the difference between advancing a meritorious claim and abandoning it at the outset. By simplifying the initial filing process and prompting users to input relevant information in a structured and accessible manner (both showing them what is needed and giving them a structure to express it), the proposed reform could reduce procedural errors, lower costs, and increase the

[90] See, for example, the submissions of Pro Bono Ontario ("**PBO**"), p. 5; OBA, p. 8; and TAS, p. 15.

[91] Osgoode Investor Protection Clinic ("**OIPC**") is a clinic providing *pro bono* legal advice and representing low- to middle-income investors who have suffered harm arising from investment industry misconduct.

likelihood of meritorious claims being pursued, particularly by those who might otherwise be deterred by the complexity of court filings.

Concerns about the proposal were relatively limited. Several Consultees urged the Working Group to ensure that the Claim Form is accessible to parties who do not have access to an internet-enabled digital device. For instance, OIPC recommended that "[t]o maintain equitable access, alternative methods of filing or dedicated support services, such as telephone assistance, in-person help centers, or printed materials…remain available to accommodate all [claimants]…, regardless of digital literacy." We agree and, thus, propose that paper-based forms should be available for those without digital access.

In the context of the Family Court, Family Law Information Centres, conventionally referred to as "FLIC offices" are located in family court offices throughout the province. They offer free information and referrals, as well as guidance to help litigants understand the court process and associated forms. Although outside of our mandate, we recommend that equivalent offices—Civil Law Information Centres—should be established with similar purposes in mind. Presumably, they will be able to share facilities with FLIC offices.

There were mixed responses to the proposal that claimants be required to plead specific causes of action. In addition to concerns about potential limitation period implications (addressed above), some Consultees noted that such a requirement could pose challenges for self-represented claimants.[92] To mitigate these concerns, we propose that the Claim Form will include a list of the most common causes of action from which claimants may select. To ensure litigants understand that the list is not exhaustive, the form will clearly state as much and will provide an "other" box that claimants may complete with any additional cause(s) of action they wish to plead.

4. Recommendations

1. The Working Group recommends eliminating the distinction between the forms used to commence legal proceedings (i.e., currently the Notice of Action and Notice of Application) and replacing them with a single originating process—a Notice of Claim—as the entry point to the civil justice system for all claims.

2. We recommend creating the Claim Form as an online, fillable form that, once completed, will generate a Notice of Claim, which will be comprised of the main body (setting out the substance of the allegations) and an Appendix "A" (setting out data helpful for case management and data collection purposes).

3. Although outside of our mandate, we further recommend establishing Civil Law Information Centres in court locations across the province, similar to the FLIC office program.

[92] See, for example, the submissions of OTLA, p. 20.

D. TIMELINES FOR SERVICE

One of the central goals of the proposed reforms is to reduce delays between the commencement of proceedings and their completion. The target, following a reasonable transition period, is for most cases involving only claimant(s) and defendant(s) to reach a dispositive hearing within two years of the "**Close of Pleadings,**" meaning (a) the date the last statement of defence is filed with no indication of an intention to add a subsequent party (the "**Final Defence**") or (b) the date the time for filing pleadings has otherwise expired. Cases involving subsequent parties will target a slightly longer timeline.

The goal of reducing delays can be very quickly undermined if parties do not focus on the timely completion and service of pleadings. For that reason, we propose to introduce an aggressive, but in our view reasonable, timetable for the delivery of pleadings.

Parties will still be permitted to enter into tolling agreements before litigation begins to suspend the running of a limitation period.

1. Claims

The current Rules allow six months to serve a statement of claim. That is unnecessarily long and tends to contribute to a culture of delay. We propose requiring claimants to serve their Notice of Claim within 45 days of issuance.

We recognize that service is not always straightforward. Some defendants may not be easily located. Others may actively attempt to evade service. To mitigate the potential harshness of the 45-day service window, we believe there must be a mechanism to provide relief where genuine service issues arise.

We propose that if a claimant is unable to complete service within the 45-day window despite making reasonable efforts, they may obtain a one-time, automatic 45-day extension by filing an affidavit of attempted service or one containing a declaration that the failure to serve within the initial period was inadvertent.

Given that the extension is automatic, one might reasonably question why it would be required at all. In other words, why not just provide for a 90-day window for service in all cases? There are two related answers. First, the goal is to encourage service of a claim within 45 days. Requiring parties to prepare and file an affidavit to obtain a 45-day extension has a nuisance value. That nuisance value will be enhanced if there is a modest filing fee levied at the time the request is filed. Avoiding the nuisance is a small means of encouraging prompt service. Second, for those cases where service has not been completed within 45 days, the Extension Rules (defined below) will serve to focus a claimant's attention on the need to complete service as promptly as possible, given that the automatic extension will be available only once.

If the claimant is unable to effect service within the 90-day period, the claimant will be required, before the expiry of the 90-day period, to seek a direction:

(i) extending the time for service by demonstrating that (a) reasonable efforts were made to serve the defendant and (b) an extension of time is likely to result in successful service; or

(ii) validating service, permitting substituted service, or dispensing with service (i.e., because an extension of time is not likely to result in successful service).

Collectively, we will refer to the 45-day extension and the 90-day directions as the "**Extension Rules.**"

If a claimant fails to serve the claim within 45 days and fails to comply with the Extension Rules, the claim will be automatically stayed. On any subsequent motion to lift the stay, the Court may: (a) strike the claim; (b) lift the stay and provide directions for service, substituted service, or dispensing with service; or (c) give any further or other directions as the Court considers just.

We recommend that the factors set out in *Tookenay v O'Mahony Estate*[93] guide whether the stay should be lifted.

In order to deter claimants from ignoring the service deadlines, however, we strongly recommend that consideration be given to increasing the filing fee associated with a motion to lift the stay to $2,500.

2. Application Track

For matters proceeding on the Application Track, the Court will assign a Directions Conference date after the filing of the Notice of Claim. The claimant will be required to serve a document providing notice of the Directions Conference (the "**Notice of Directions Conference**") simultaneously with its Notice of Claim.

Notice of Intent: A defendant will have 20 days from the service of the Notice of Claim to serve and file a "**Notice of Intent**," on which they will indicate whether they intend to (a) defend the claim; (b) submit their rights to the Court but with notice of future hearings in the proceeding; or (c) submit their rights to the Court without requiring notice of future hearings. The Notice of Intent will not be an optional form, as a Notice of Intent to Defend is now.

Defendants will not automatically be required to file a statement of defence.

Claims on the Application Track will proceed to the Directions Conference, at which the Court will schedule any steps to be completed before the dispositive hearing, including determining whether any of the defendants are required to file a statement of defence. Where no party has filed a Notice of Intent, the presiding DC Judge may dispose of the claim at the Directions Conference or provide directions for it to be disposed of on a default basis.

We recognize that some matters streamed to the Application Track will proceed *ex parte*, for instance a claim to expunge a long-expired mortgage from title where the mortgagees are deceased

[93] *Tookenay v O'Mahony Estate,* 2024 ONSC 709 at ¶ 32.

or cannot be located. Such matters may be filed as "over the counter" proceedings and will proceed in writing in the same way as basket motions currently do.

3. Defences In Matters on the Summary Track and Trial Track

Defending proceedings on the Summary and Trial Tracks involves two steps: (a) the service and filing of a Notice of Intent and (b) the service and filing of a statement of defence.

Notice of Intent: A defendant will have 20 days from the service of the Notice of Claim to serve and file a Notice of Intent.

In addition to the information set out above, a Notice of Intent will also include a section for a defendant to indicate whether it is requesting an early Directions Conference and the reason for the request (e.g., where the defendant intends to bring a motion to strike the claim).

The filing and service of a Notice of Intent that requests an early Directions Conference and expressly states that the defendant is contesting jurisdiction or bringing a motion to strike the claim shall not constitute attornment to the Court's jurisdiction. Moreover, the defendant seeking an early Directions Conference will not be required to file a further pleading pending the directions of the Court and cannot be noted in default during that period. This will protect against claimants improperly noting defendants in default where an early motion is being brought challenging jurisdiction, seeking to strike a claim, or seeking similar relief.

If a defendant fails to file a Notice of Intent within 20 days of service of the Notice of Claim, a claimant may proceed with the steps necessary to obtain default judgment.

Statement of Defence: A defendant will have 45 days from the service of the Notice of Claim to serve and file a statement of defence, a statement of defence and counterclaim, or a statement of defence and crossclaim. All parties will have 45 days to file a reply and/or statements of defence to the counterclaims or crossclaims. The Extension Rules will apply to counterclaims against parties who are added to the proceeding (for example, as defendants by issued counterclaim).

By requiring defendants to file a Notice of Intent within 20 days of service of the Notice of Claim, and allowing 45 days from service of the Notice of Claim to file a statement of defence, defendants are afforded additional preparation time, while claimants retain the ability to note a defendant in default after 20 days if the defendant does not intend to defend the claim. This responds to feedback from the debt recovery bar that many debt collection cases proceed by default judgment and a 45-day period is too long to wait to begin the process.

Subsequent Party Pleadings: We propose that subsequent party pleadings (i.e. third party claims, fourth party claims, and so on) be governed by the following rules:

(i) A defendant will have 45 days from the service of the Notice of Claim to advise the claimant that it intends to file a third party claim by serving a "**Notice of Intent to Issue Third Party Claim**." The defendant will have an additional 45 days from service of that notice to issue and serve the third party claim on all parties, subject to the application of the Extension Rules;

(ii) The third party will have 20 days from the service of the third party claim to serve and file a Notice of Intent, with respect to the third party claim;

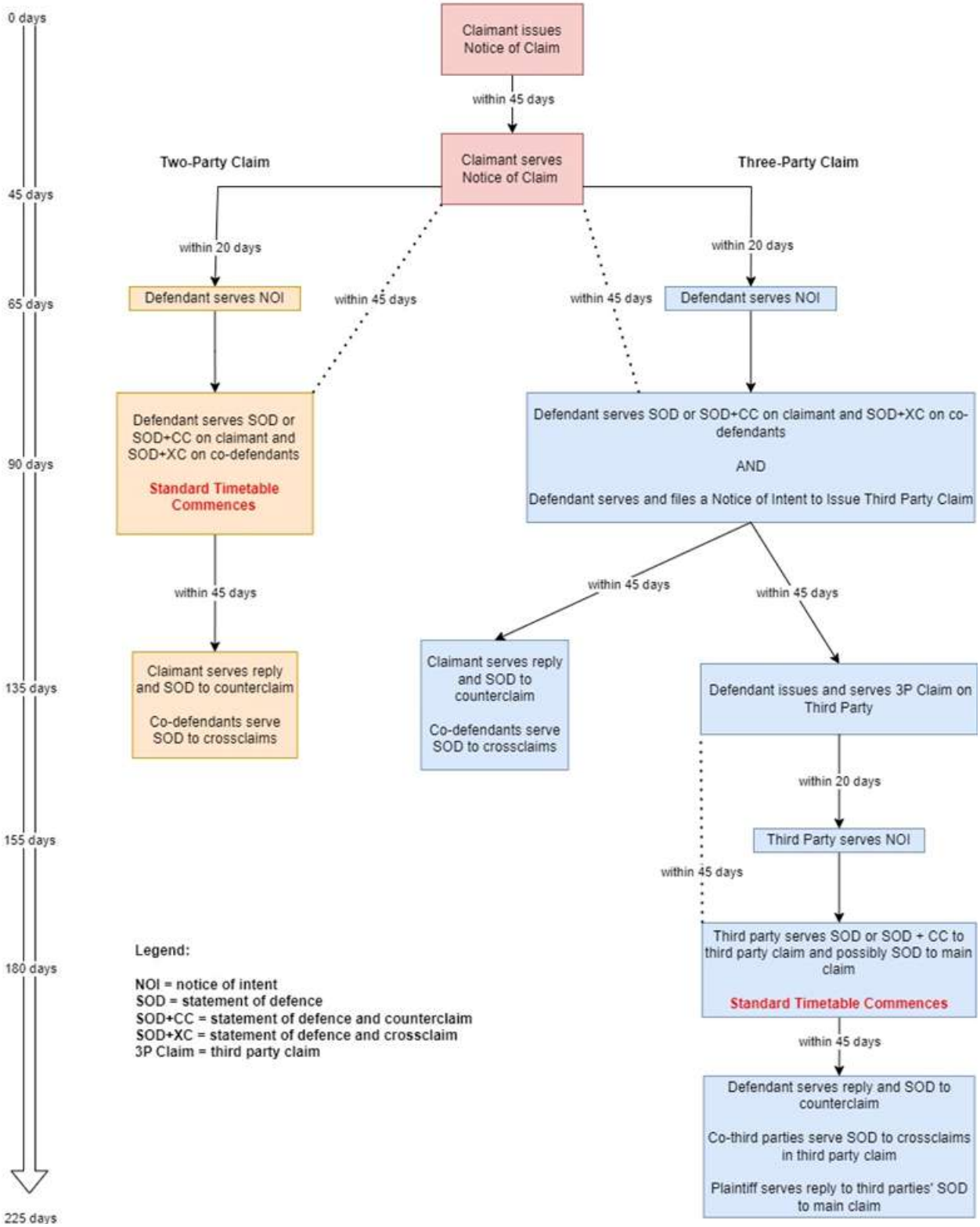
(iii) The third party will have 45 days from the service of the third party claim to defend the third party claim (and/or the main action) and to serve and file a "**Notice of Intent to Issue a Fourth Party Claim**." The third party will have an additional 45 days to issue and serve the fourth party claim on all parties, subject to the application of the Extension Rules;

(iv) The same timelines will hold true for any subsequent claims.

A party will require leave of the Court to issue a third party or subsequent party claim outside of the prescribed timelines. Absent exceptional circumstances warranting an adjournment of the trial date (if one has been set), leave will only be granted if the existing trial date can be preserved (if one has been set) and all necessary steps can be completed without prejudice to any party.

The flowchart on the following page outlines the proposed deadlines to serve pleadings in a "**Two-Party Claim**" (i.e., a claim involving claimant(s) and defendant(s)) and a "**Three-Party Claim**" (i.e., a claim involving claimant(s), defendant(s), and third parties) in matters proceeding on the Summary Track or Trial Track.

Pleadings Flowchart for Summary and Trial Track Matters



4. Recommendations

1. The Working Group recommends prescribing the timelines for service of pleadings as set out above and adopting the proposed Extension Rules.

2. We further recommend that the prescribed deadline to file a statement of defence not apply to defendants in matters proceeding on the Application Track. Instead, defendants will serve and file Notices of Intent and those matters will otherwise proceed to a Directions Conference, at which the Court will determine whether a responsive pleading is required and, if so, set an appropriate deadline.

E. METHODS OF SERVICE

Aligned with our proposal to compress the timelines for service of pleadings are three proposed reforms that we expect will modernize the process of serving materials and meaningfully reduce the burden and costs associated with serving an originating process.

1. A Duty to Prevent Unnecessary Expense and Delay Related to Service

Proposal: We propose to adopt a new rule that establishes a duty on defendants to prevent unnecessary expense and delay related to service. We also propose to introduce a rule stating that a defendant who breaches this service-related duty will be liable to pay costs to the claimant in an amount equal to the higher of: (a) the claimant's costs of service or (b) $2,500. In other words, these proposed new rules will expressly impose upon defendants a duty not to intentionally evade service and a significant cost consequence for doing so.

The costs relief would be available to the claimant at their first court appearance in which other relief was being sought. A claimant could not attend solely to seek the costs of service.

Consultation Feedback: In our Consultation Paper, we proposed a more onerous duty: requiring defendants to confirm acceptance of service whenever a Notice of Claim comes to their attention. We have since narrowed the scope of this duty, in large part due to Consultees' feedback that (a) it may be unclear when a Notice of Claim comes to the attention of certain defendants (e.g., a municipality or corporation) and (b) it may be unfair to self-represented parties, who may not understand the obligation to confirm service, or how to do so.[94]

2. Service by Email

Proposal: Most Canadians have a digital presence, as do almost all businesses and public institutions. The digital age presents opportunities to simplify the service of documents, including originating processes.

[94] See, for example, the submissions of the Community Advocacy and Legal Centre ("**Community Advocacy**"), p. 2 and the City of Toronto, p. 3.

We propose to permit service of a Notice of Claim by email on an individual, municipality, or business (whether a corporation, partnership, or sole proprietorship) as an alternative to personal service.

To serve an individual by email, we proposed that the claimant will be required to:

(i) send the Notice of Claim to the defendant's last known email address, provided it was used by the defendant within the past 12 months and there is no reason to believe service will not come to the defendant's attention;[95] and

(ii) send a copy of the document by ordinary mail to the defendant's last known address.

For a corporate defendant, (a) the email must be sent to an officer, director, agent, a person who appears to control or manage the corporation, or to an email address the corporation designates on its website as appropriate for service and (b) the mailed copy must be sent to the defendant's registered office address. As the OBA suggested in their submission, service on a generic email address such as "info@" or other forms of generic email addresses will not suffice, unless the corporation's website specifically directs that service of claims be made to that address.

For unincorporated businesses (i.e., partnerships or sole proprietorships), the email must be sent to the email address listed on the firm's website for service of claims. Absent an identified email address for service, for a partnership, the email must be sent to a partner. For a sole proprietorship, the email must be sent to the sole proprietor or someone who appears to control or manage the business. The mailed copy of the Notice of Claim must be sent to the address from which the partnership or sole proprietorship operates or identified as their address on a government mandated filing.

For a municipality, the email must be sent to the email address listed on its website for service of claims or to the chief legal officer or chief administrative officer. The mailed copy must be addressed to the chief legal officer or chief administrative officer and mailed to the municipality's head office.[96]

For the Crown, the email must be sent to the email address of the appropriate office listed on the website of the federal Department of Justice (for claims against the federal Crown)[97] or the Ontario Ministry of the Attorney General (for claims against the provincial Crown).[98]

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[95] The requirement to use an active email address is based on feedback from Consultees. See for instance the submission of TAS, p. 16 (though they recommended the email having been actively used within the last six months).

[96] As per the submission of the City of Toronto, pp. 4-5.

[97] For service by email on the federal Crown, see https://www.justice.gc.ca/eng/contact/comm3.html.

[98] For service by email on the provincial Crown, see https://www.ontario.ca/page/serving-documents-crown-civil-case.

In all cases, we propose that the email serving the Notice of Claim be required to include the following language in the subject line "SERVICE OF CLAIM UPON YOU."[99] To mitigate cyber risks, we also propose that the service email be required to include a notice warning recipients of the risk of fraud in opening attachments, and directing them to either verify the Notice of Claim through the publicly-available Court Case Search Tool or by contacting the Court to confirm the validity of the Notice of Claim.

An affidavit of service for the Notice of Claim must include evidence that (a) the recipient is an appropriate person for service (i.e., director, officer, agent, or a person who appears to control or manage the corporation if the defendant is a corporation); (b) the email address is active, including, but not limited to, evidence that it was used by the recipient within the past 12 months and, where possible, a delivery receipt from the sending email server; and (c) the reason(s) to believe that a party resides at, or carries on business at, the purported last known address.

To our knowledge, Ontario will be the first Canadian jurisdiction to permit service of an originating process via email without some type of consent from the defendant. This change, however, is desirable because email, when combined with physical mail, is likely to be as effective as the various alternatives to personal service outlined in Rule 16.03, but less costly and time-consuming. For instance, the new rule will bear some conceptual similarity to the existing Rule 16.03(5), which permits service by leaving a copy of the document at the defendant's place of residence with anyone who appears to be an adult member of the same household and mailing another copy to the defendant's attention at the place of residence.

Many Consultees cautioned the Working Group that service on foreign defendants by email would contravene the provisions of the *Hague Convention* and submitted that service of a Notice of Claim by email should only apply to service within Canada. We agree with that submission and, thus, are not proposing any changes to the Rules regarding service of a Notice of Claim on a foreign defendant.

Consultation Feedback: On balance, there was reasonably strong support for creating a path for service of an originating process by email.[100] The most common concerns expressed were about the possibility that the Notice of Claim would not actually come to the defendant's attention if served by email. That concern led some Consultees to suggest that service of a Notice of Claim by email should not be permitted.[101] Others suggested adopting provisions that hedged against the concern. Healthcare Insurance Reciprocal of Canada ("**HIROC**"), for instance, suggested that service of a Notice of Claim by email should only be permitted where there is clear consent. Others submitted that there should be a requirement of confirmation, perhaps by proof that the email was

[99] As per the recommendation of Pro-Demnity Insurance Company ("**Pro-Demnity**") at p. 9 of its submission. Pro-Demnity is the mandatory professional liability insurer for architects and is involved in every litigated case involving architects in Ontario.

[100] Consultees who support service by email include, but are not limited to, PBO, OBA, CCLA, TAS, and the Association of Municipalities of Ontario.

[101] See, for example, the submission of Aviva, p. 3.

both "delivered" and "read."[102] Some Consultees noted that other common law jurisdictions do not permit service of an originating process by email.[103]

The Working Group understands the concerns raised about the reliability of service of a Notice of Claim by email. We believe those concerns are attenuated somewhat by the additional requirement of service by regular mail, which supplements the email service. That said, we recommend that the Court monitor the number of successful motions to set aside default judgments on the basis that the defendant did not receive the Notice of Claim when service occurred by email. This will help determine whether the rule requires future adjustment.

3. Service on a Lawyer

Our third proposed service-related reform has to do with the obligation of lawyers who have been representing parties in pre-litigation discussions or negotiations. This is particularly significant given our proposal to introduce pre-litigation protocols. We expect that, in many cases, counsel will be retained on both sides of a dispute before litigation is commenced. What we aim to avoid are circumstances in which retained counsel refuse to accept service of a Notice of Claim, forcing claimants to incur time and expense in arranging for personal service or an alternative to personal service.

Initial Proposal: In our Consultation Paper, we proposed allowing service of a Notice of Claim on a lawyer who has been communicating with the claimant (or the claimant's counsel) regarding the issue that is the subject of, or gave rise to, the litigation. That lawyer, whether retained to defend the litigation or not, would have an obligation to provide the Notice of Claim to their client and confirm to the claimant that they had done so.

Consultation Feedback: The initial proposal was very controversial. Concerns were raised that the proposal may discourage lawyers from engaging in pre-litigation settlement discussions[104] and/or providing early or limited advice,[105] create professional liability risks,[106] or result in service on lawyers who are not formally retained, essentially shifting the obligation to effect service to the unretained counsel.

Having considered the consultation feedback, we agree that the initial proposal may create more problems than it would solve. In the result, we have narrowed our proposal.

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[102] Submissions of Beard, p. 1; CLHIA, p. 3; and the CMPA, p. 7.

[103] See, for example, the submission of the CMPA, p. 7, noting that service by email is not permitted in South Australia.

[104] Submission of the OBA, p. 10.

[105] PBO, for instance, raised the concern that permitting service on a lawyer who has been communicating on behalf of a client may inadvertently negatively impact lawyers providing limited services and those that rely on them: submission of PBO, pp. 7-8.

[106] TAS, for instance, expressed concern that the proposed rule could place lawyers in conflict with their clients, risk breaching solicitor-client privilege, and potentially conflict with their duties of confidentiality and loyalty: submission of TAS, pp. 15-16.

Revised Proposal: We propose introducing a rule providing that, if a lawyer refuses to accept service and later represents the defendant in the same proceeding, this will be deemed a breach of the defendant's duty to avoid unnecessary expense and delay related to service. A lawyer who accepts service of a Notice of Claim on behalf of a defendant will not be "on the record" for that defendant in the proceeding.

The revised proposal makes it risky not to instruct pre-litigation counsel to accept service of a Notice of Claim, as failing to do so may result in cost consequences.

4. Other Service-Related Issues

Service on an Insurance Company: We heard feedback during the consultation process from plaintiff-side personal injury lawyers that permitting service of a Notice of Claim on a defendant's insurer would significantly ease the burden of service on claimants in personal injury cases.

The Consultation Paper did not include a proposal that service be permitted on insurers in personal injury cases, so we canvassed the issue with a group representing insurers. It was very much against it. It submitted that (a) the insured and insurer occupy different positions, (b) the insurer is not the insured's agent, (c) an insurer who is required to defend a claim without the involvement of its insured is put at a disadvantage in terms of gathering evidence to respond to the claim, and (d) there may be coverage issues that would limit the insurer's liability, or claims above the policy limits, which would require that the insured be made personally aware of the claim.

We accept these submissions and do not recommend a provision that permits service of a Notice of Claim on an insured party through service on his, her, or its insurer.

Affidavits of Service: In her submission, Hui Ling Li, a self-represented litigant, noted that:

> [U]nder the current Rule 16.09, the three types of proof of service accepted at the Superior Court are the sworn affidavit of service, lawyer's certificate of service or lawyer's written admission or acceptance of service. For self-represented litigants like me, the opposing counsel constantly refuse to provide the lawyer's written admission or acceptance of service no matter whether it is personal service or service by email. The court is only open from 9-11 am and 2-4 pm; self-represented litigants like me have to take time off work to go to court during those times to get an affidavit of service commissioned. I hope that the practice at the Court of Appeal that filing documents with the court by email copying the opposing counsel/opposite party serves as "proof of service" can be codified in the new Rules to reduce these costs/burden to all litigants and facilitate access to justice by self-represented litigants.[107]

Similarly, another Consultee submitted that Affidavits and Certificates of Service should be eliminated altogether and that, instead, the *Rules* should stipulate that, by filing a document that needs to have been served, the filing party represents that it was in fact properly served. In short, proof of service should only be necessary where service is contested.[108]

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[107] Submission of Hui Ling Li, p. 1.

[108] Submission of Gabriel Latner ("**Latner**"), p. 24.

The Working Group understands and is sympathetic to the concern that Hui Ling Li raised, but we are not prepared to adopt the proposed solution, though there is certainly something to be said for it. There are many instances in which the Court will be anxious to see the certificate or affidavit of service, particularly in matters that are proceeding on a default or unopposed basis.

Our understanding is that the Ontario Courts Public Portal (the platform being introduced through the Courts Digital Transformation) will, in the future, likely present an opportunity to adopt service rules to ease the burden of service and of proof of service. For instance, it may become possible that documents filed through the portal are automatically pushed to all opposing parties, such that the filing of a document simultaneously effects service. This function is not currently available, but we recommend that it be made possible.

5. Recommendations

The Working Group recommends amending Rule 16 to:

a. Include a general duty on parties to prevent unnecessary expense and delay related to service, including intentionally evading service;

b. Include a penalty provision for breach of the general duty;

c. Permit, as an alternative to personal service, service by email (within Canada); and

d. Create cost consequences on parties who fail to instruct pre-litigation counsel to accept service of a Notice of Claim.

F. AMENDING PLEADINGS

1. The Need for Change

As more fully described in Section VI(L)(1) below, a central theme of the proposed reforms is adherence to fixed dispositive hearing dates. This is fundamental to our proposal to aggressively reduce delay and increase the pace of litigation.

Pleading amendments are common, and the existing Rules are generous in allowing them. Indeed, permission to amend is generally permitted under the Rules. The only restriction on amendments to pleadings (after the close of pleadings and in connection with those that do not require the addition, deletion, or substitution of a party) is if the amendment would cause prejudice that cannot be compensated by costs or an adjournment.[109] Under current practice, even late-breaking amendments are rarely found to cause prejudice that cannot be cured by costs or an adjournment.

In our view, the current Rules are overly permissive in terms of amendments leading to adjournments. They put insufficient weight on the prejudice inherent in delays caused by

[109] Rule 26.

adjournments. At the same time, we recognize that we must not allow justice and fairness to be sacrificed at the altar of pace. Our proposals, therefore, seek to balance the rules governing amendments of pleadings with goal of adhering to fixed dispositive hearing dates.

2. Consultation Feedback

The feedback we received concerning amendments to pleadings reflected a wide range of views. Overall, Consultees tended to eschew rigidity and favoured rules that were flexible and made amendments easier to obtain. The OBA, for instance, favoured allowing amendments as of right up to the point that a dispositive hearing date is set.[110] Weir Foulds LLP submitted that leave should not be required to add, delete, or substitute parties before a Notice of Claim has been served.[111] On the other hand, TAS favoured allowing amendments as of right until the close of pleadings.[112]

3. The Proposals

After considering all submissions, the Working Group believes the following proposals strike a reasonable balance between facilitating amendments where necessary and promoting adherence to deadlines, particularly to fixed dispositive hearing dates.

Amendments as of right: Under our proposed reforms, any party will be able to amend its pleading as of right until the date it delivers its witness statements and Reliance Documents—meaning those documents upon which the party intends to rely to prove its case (discussed in Section VI(K) below).[113] The delivery of witness statements and Reliance Documents triggers a significant amount of work for opposing parties. The requirement for leave after that exchange allows the Court to maintain control over the efficient progress of the claim as well as the issue of costs resulting from an amendment.

Amendments on consent: Once a party has delivered its witness statements and documents, the party shall be entitled to amend its pleading at any time if (a) it is on consent of all parties, (b) the amendment will not require an adjournment of the dispositive hearing date (if one has been set), and (c) the parties agree on a timetable for the further exchange of evidence required as a result of the amendment.

Amendments with leave: If a proposed amendment is opposed and cannot be made as of right, a party shall still be entitled to amend its pleading with leave of the Court, which shall be granted if (a) the amendment will not require an adjournment of the dispositive hearing date (if one has been set), (b) the amendment does not materially prejudice another party's ability to prepare for the dispositive hearing, and (c) the amending party pays all reasonable costs thrown away on a full indemnity basis, unless the amendment arises from the opposing party’s conduct.

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[110] Submission of the OBA, p. 12.

[111] Submission of WeirFoulds LLP, p. 2.

[112] Submission of TAS, p. 17.

[113] For matters proceeding on the Application Track, an amendment may be made as of right up until the first Directions Conference. Thereafter, the process for making any amendments to pleadings will be fixed by the DC Judge.

An order granting leave to amend shall set a timetable for any additional steps necessitated by the amendment (e.g., exchange of additional witness statements).

In exceptional circumstances, leave to amend may also be granted despite the fact that the amendment may result in the adjournment of a dispositive hearing. As we will outline in Section VI(R)(2)(a) below, adjournments of fixed dispositive hearing dates may generally only be granted by the Regional Senior Justice (or his or her designate). An exception to that general requirement will arise where the granting of an amendment necessitates an adjournment of a dispositive hearing to avoid significant prejudice to any party.

When determining whether exceptional circumstances justify granting leave to amend that would require adjourning a dispositive hearing, we propose that the Court have regard to the following factors:

(i) The importance of maintaining fixed hearing dates to achieving the Goals and maintaining the reputation of the civil justice system as one capable of delivering expeditious and cost-efficient results;

(ii) Whether the request for leave to amend is grounded in the requesting party's own conduct, which will generally not be sufficient grounds;

(iii) Whether the reason for the amendment was reasonably foreseeable at an earlier time;

(iv) Whether and how the integrity of the trial process might be impacted by a denial of the request and whether the amendment is necessary to do justice between the parties; and

(v) The prejudice to be occasioned to any party if leave to amend is granted or denied.

Amendments that include or require the addition or substitution of a party: These amendments will be as of right until the Notice of Claim has been served. Thereafter, parties will be able to consent to such relief if the amendment will not require an adjournment of the dispositive hearing date (if one has been set) and the parties agree on a timetable for the further exchange of evidence required as a result of the amendment. Otherwise, the claimant will be required to seek leave of the Court, which will be governed by the same test as set out in the preceding paragraph.

Misnomer: To the extent not otherwise addressed during the PLP process, we propose imposing a positive obligation on parties to advise, within seven days, if they believe they have been improperly named in a Notice of Claim on the basis of misnomer and to identify, if known, the correct party. The claimant would then have seven days to amend the pleading as of right, without leave of the Court. This includes cases where the wrong party has been named as a defendant, or where a party's name has been misspelled or is deficient in some other way (for instance where a corporate name has been wrongly set out).

4. Recommendations

The Working Group recommends amending Rule 26 in accordance with the proposal set out above.

G. DISCONTINUANCE AND DISMISSAL OF PROCEEDINGS

1. Need for Change

Pursuant to the existing Rule 23.01, a plaintiff may discontinue all or part of an action against any defendant at any time before the close of pleadings or at any other time by filing the consent of the parties. In all other scenarios, the plaintiff must obtain leave of the Court.

We believe that requiring leave or consent to discontinue a claim discourages claimants from doing so, leading to more cases languishing in the system.

A discontinuance with prejudice is functionally equivalent to a basic dismissal order. Nonetheless, in the context of a settlement, some counsel/parties insist that a dismissal order be obtained instead of a discontinuance even though doing so requires a motion, which consumes judicial resources, causes delay, and requires the parties to incur additional costs.

CCLA recommended making a discontinuance the default mechanism for concluding claims and that it specify whether it is being filed (a) with or without prejudice, (b) with or without costs, and (c) with or without consent.[114] We agree. Consent dismissal motions are, to put it bluntly, a waste of time, money, and resources.

2. Proposals

Subject to the exception set out below, we propose that a claimant will have the right to discontinue all or part of a claim at any time, subject to the defendant's ability to seek costs.

The exception: A dismissal order, obtained on motion, will be required where (a) ancillary relief is sought (e.g., an order discharging a lien) or (b) the Court's approval is required under Rule 7 for a party under a disability or where otherwise by required by law.

This approach eliminates the need for a motion after the Close of Pleadings in cases where one or more parties cannot be reached or disagree on the terms of the discontinuance. Instead, a claimant will be permitted to discontinue all or part of a claim at any time by delivering a Notice of Discontinuance, while the substance of rules 23.02 to 23.04 will continue to apply with minor modifications. A defendant will continue to be entitled to seek its costs as currently permitted under rule 23.05.

3. Recommendations

The Working Group recommends amending the Rules to:

a. Provide a claimant with the right to discontinue all or part of a claim at any time, subject to the defendant's ability to seek costs, by filing a "Notice of Discontinuance;"

[114] Submission of the CCLA, p. 11.

b. Provide a defendant with the right to file a "Notice of Withdrawal" at any time, subject to the claimant's ability to seek costs;

c. Eliminate the requirement for leave to file a "Notice of Discontinuance," or, in the case of a defendant, a "Notice of Withdrawal;" and

d. Replace motions for consent dismissal orders with "Notices of Discontinuance" as the default procedure to end a claim except where (i) ancillary relief is sought or (ii) the Court's approval is required under Rule 7 or where otherwise required by law.

H. DEFAULT PROCEEDINGS

1. The Need for Change

The Working Group has identified two interrelated issues with the current default proceedings process that would benefit from reform. The first issue is a growing conflict in the jurisprudence as to whether a defaulting defendant should be served with a motion for default judgment. The second is the perception that motions to set aside default judgments are brought too frequently and granted too readily, minimizing the consequences of non-compliance and, in the process, wasting litigant and Court resources.

Service of the Motion for Default Judgment: Under the current system, a defendant who fails to respond to a claim can be noted in default. Thereafter, the defendant does not have a right under the Rules to receive notice that (a) it has been noted in default or (b) the claimant is seeking default judgment. The current Rules, thus, permit a default judgment to be ordered against a defendant who has only failed to properly engage with the system on one occasion (i.e., by failing to respond to the claim). Due to this potentially overly harsh framework, some Courts have mandated that motions for default judgment be served on a defendant who has been noted in default (sometimes by means of personal service), even though the Rules do not mandate such service.[115] Litigants would benefit from clarity in this area.

The Ease of Setting Aside a Default Judgment: The harshness of the current default rules may explain why the tests to set aside a noting in default and/or default judgment are not particularly onerous.

When deciding whether to exercise its discretion to set aside a noting in default under rule 19.03(1), the Court of Appeal in *Intact Insurance Company v. Kisel*[116] held that the Court should "assess the context and factual situation of the case." It explained that when doing so, the Court should consider the following non-exhaustive list of factors: the behaviour of the plaintiff and the defendant, the length of the defendant's delay, the reasons for the delay, and the complexity and

[115] See, for example, *Madison Homes Cornell Rouge Limited v. Ng*, 2021 ONSC 3104 at ¶¶ 7-13.

[116] *Intact Insurance Company v. Kisel*, 2015 ONCA 205 at ¶ 13.

value of the claim. It further held that requiring a defendant to demonstrate an arguable defence on the merits is warranted only in "extreme circumstances."

As for setting aside a default judgment, in *Mountain View Farms Ltd. v. McQueen* ("***Mountain View***"), the Court of Appeal held that when setting one aside under rule 19.03(1), the Court's ultimate task "is to determine whether the interests of justice favour granting the order." To do so, the Court must assess the specific circumstances of the case to determine whether it is just to relieve the defendant from the consequences of their default, paying particular attention to the following factors, which should not be rigidly applied: (a) whether the motion was brought promptly; (b) whether there is a plausible excuse for the defendant's default; (c) whether the defendant has an arguable defence on the merits; (d) the potential prejudice to the parties arising from the decision made on the motion; and (e) the effect the order may make on the integrity of the administration of justice. [117]

In *Mountain View*, the Court of Appeal emphasized that the existence of an arguable defence on the merits may justify setting aside a default judgment, even if the other factors are only partially or not satisfied at all. In that case, the Court set aside the default judgment despite findings of "inexplicable delay" causing resulting prejudice, concluding that the strength of the defendant's arguable defence outweighed the other factors.[118]

Ultimately, if a defendant can show an arguable defence on the merits, which is not particularly hard to establish, their delay, even if inexplicable, is often of little consequence. This dynamic erodes incentives for compliance.

2. Proposed Reforms

The following reforms apply only to cases proceeding on the Summary Track and the Trial Track. The process to be followed where a defendant fails to file a Notice of Intent in response to the service of a Notice of Claim on the Application Track was discussed in Section VI(D)(2) above.

The Working Group proposes to amend Rule 19 to achieve two objectives: (a) to resolve inconsistencies in the case law regarding the requirement to serve a notice of motion for default judgment; and (b) to make the test for setting aside a default judgment more stringent.

We propose that a defaulting defendant be afforded two opportunities to respond to a claim: first, upon service of the Notice of Claim, and second, upon service of a Notice of Default if a timely response is not filed. Under the proposed reforms, a defaulting defendant would not be entitled to further notice through service of a motion for default judgment.

A flowchart describing the new proposed default judgment process is set out below:

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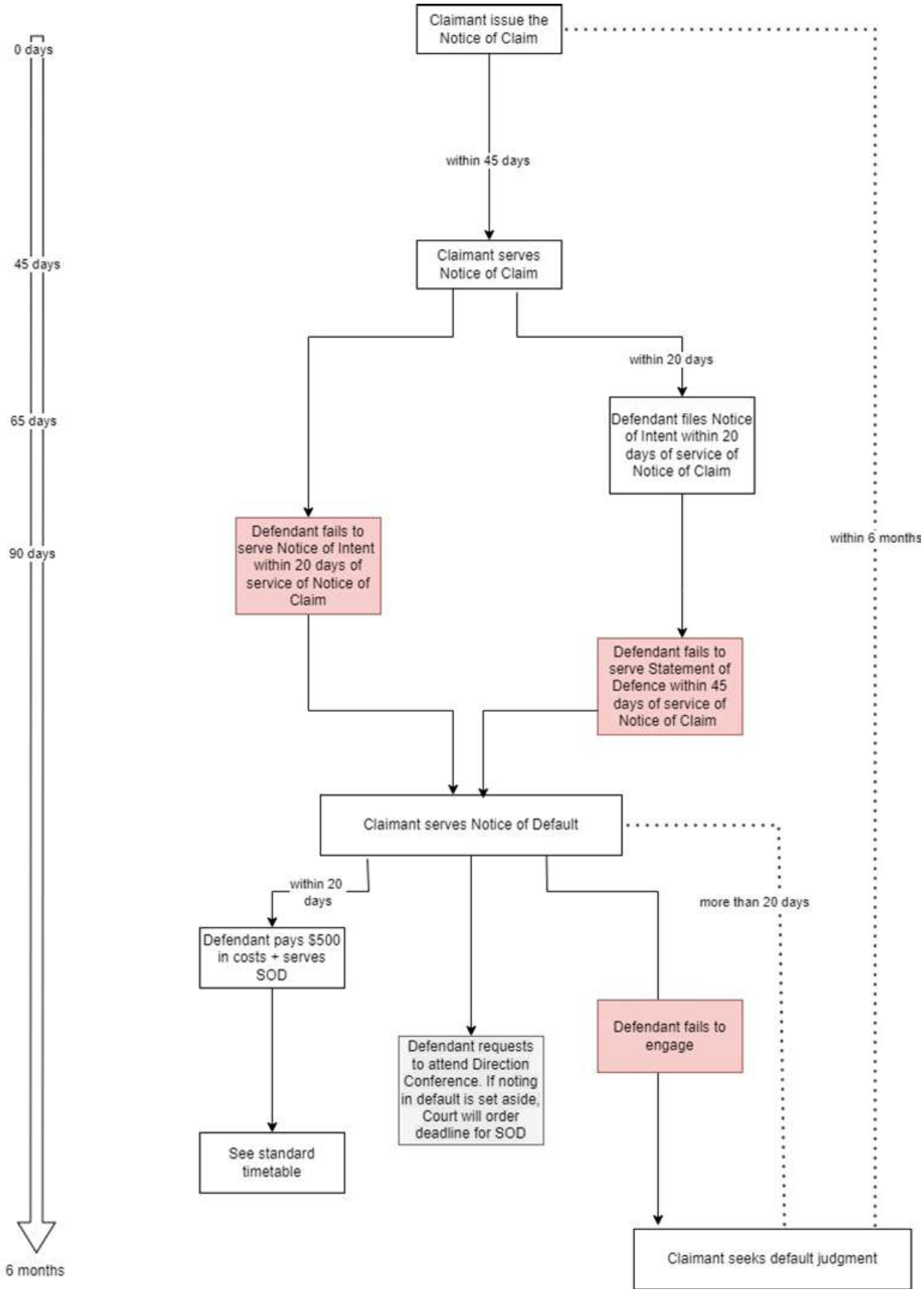
[117] *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194 at ¶¶ 47-51; see also *Kantor v. Grewal et al.*, 2025 ONSC 1542 at ¶¶ 32-34.

[118] *Mountain View, Ibid* at ¶ 54.


0 days
45 days
65 days
90 days
6 months
Claimant issue the Notice of Claim
within 45 days
Claimant serves Notice of Claim
within 20 days
Defendant files Notice of Intent within 20 days of service of Notice of Claim
Defendant fails to serve Notice of Intent within 20 days of service of Notice of Claim
Defendant fails to serve Statement of Defence within 45 days of service of Notice of Claim
within 6 months
Claimant serves Notice of Default
within 20 days
more than 20 days
Defendant pays $500 in costs + serves SOD
See standard timetable
Defendant requests to attend Direction Conference. If noting in default is set aside, Court will order deadline for SOD
Defendant fails to engage
Claimant seeks default judgment

Process: We propose that the new default judgment process be as described below.

Step 1: The claimant serves the Notice of Claim on the defendant and indicates in Appendix "A" that the matter is to proceed on the Summary Track or Trial Track.

Step 2: The claimant may note the defendant in default if the defendant (a) fails to serve a Notice of Intent within 20 days of being served with the Notice of Claim or (b) fails to serve its statement of defence within 45 days of being served with the Notice of Claim.

To do so, the claimant must serve a Notice of Default on the defendant personally or by an alternative to personal service and file it. While this arguably introduces additional costs, the proposed reforms to recognize service by email and mail should help reduce the overall burden and make the process more efficient.

Step 3: The defendant will be entitled to set aside the Notice of Default if:

(i) within 20 days of being served with the Notice of Default, the defendant pays the claimant $500 in costs and serves and files its statement of defence;

(ii) the claimant consents to the filing of the statement of defence; or

(iii) the defendant can demonstrate at a Directions Conference, scheduled at any time before default judgment is granted, that there are compelling reasons for failing to defend the proceeding within the prescribed timelines, in which case it will not be required to pay costs. Examples of compelling reasons include illness, non-receipt of the Notice of Claim, etc. In such a case, the Court shall order a new deadline for the defendant to file a statement of defence, which shall be made on a peremptory basis.

As recommended by PBO,[119] we propose that the Notice of Default specify the steps a defendant must take to cure the default.

Our proposed approach effectively gives the defaulting defendant a one-time opportunity to rectify the default within 20 days by paying $500 in costs. The payment is designed to deter parties from ignoring the process and recognizes the inherent costs of delay, while the opportunity to easily correct the default ensures fairness. Beyond that 20-day window, a compelling explanation will be required before the noting in default will be set aside. By this stage, the defendant will have already been served with two documents (or more if the claimant engaged in a PLP), whether personally or by an approved alternative, making it difficult to argue that the process has been unfair.

Step 4: If a defendant has not cured the default within 20 days, or scheduled a Directions Conference to address the default, the claimant will be able to seek default judgment without providing further notice to the defendant.

A requisition or motion for default judgment must be supported by affidavit evidence confirming that (a) the Notice of Claim was properly served; (b) the Notice of Default was served at least 20

[119] Submission of PBO, p. 12.

days earlier; and (c) the defendant failed to cure the default within that 20-day period or schedule a Directions Conference before the date on which the affidavit is sworn.

The requirement to serve a Notice of Default on a non-responsive defendant obviates the need to serve any ensuing motion for default judgment.

Step 5: To successfully set aside a default judgment (and the underlying Notice of Default), the defendant will need to satisfy a two-part test. More specifically, it will need to demonstrate (a) a compelling explanation for the failure to defend and to set aside the Notice of Default within the prescribed timelines; and (b) an arguable defence on the merits. The proposed test is conjunctive, not a balancing exercise.

We propose that where a default judgment (and, thus, the underlying Notice of Default) is set aside, the Court shall impose a new peremptory deadline for the defendant to file a statement of defence. If the defendant fails to meet that deadline, the claimant may proceed through the default process described above. In rare circumstances, the Court may set aside a second noting in default, or default judgment, where there are exceptional circumstances that adequately explain the missed peremptory deadline (e.g. a car accident).

Since a claimant will only be able to seek default judgment after a defendant has had two opportunities to respond (and potentially more), we are proposing that the standard for setting it aside be made more stringent. A defendant who fails to engage with the system at least twice should be required to provide a compelling explanation for their non-compliance and proof they have an arguable defence on the merits.

The proposed changes will not apply to proceedings governed by legislation that prescribes a specific default judgment regime (e.g., the *CLPA*). In those cases, the legislation will govern.

Deadline to obtain default judgment: We considered whether default judgment proceedings should be subject to a time bar. On one hand, if both parties choose not to defend and initiate the default judgment process while exploring a potential resolution (for instance), it is not immediately clear why the Court should intervene.

On the other hand, we recognize that the integrity and public perception of the justice system depend in part on cases progressing in a timely manner. Delay in resolving claims, even by mutual inaction, can undermine confidence in the system. Moreover, it is essential to ensure that clients—particularly those with limited leverage over their legal counsel, such as in contingency fee arrangements—can rely on procedural safeguards that promote timely progress.

In light of the above, we propose that a claimant be required to take the steps necessary to obtain default judgment within six months of the issuance of the Notice of Claim, unless the matter is a Trial Track case and has been placed on the Inactive List (see Section VI(L)(8)(d)). The consequences for failing to do so are explained in Sections VI(L)(7)(b) and VI(L)(8)(a) below.

3. Consultation Feedback

In our Consultation Paper, we proposed a different default judgment framework, under which a defendant served with a Notice of Default would be required to seek a Directions Conference to set it aside. Consultees raised a variety of concerns regarding that proposal which generally fall into three categories.

First, Consultees raised concerns about the monetary and temporal costs of personally serving a defaulting defendant with a Notice of Default. For example, one Consultee that specializes in debt recovery litigation, and with whom the Working Group's Co-Chairs consulted, expressed the concern that adding the requirement to serve a Notice of Default will increase costs to both creditors and, in turn, borrowers, and will reward those who seek to delay or evade payment.[120]

In our view, the Notice of Default will add little delay to a claim. Although this may create some additional expense, the cost will be offset by the benefits of a more stringent test for setting aside default judgments, which will reduce both the frequency with which they are overturned and the time wasted as a result. Moreover, with the proposed allowance for service by email, the additional expense in many cases will be nominal. We note as well that the trend in the jurisprudence appears to be towards a requirement to serve a defaulting defendant with a motion to obtain default judgment. As a result, the costs and delays we are proposing simply replace the similar costs and delays currently incurred in serving default judgment materials

Second, Consultees raised concerns about the stringency of the test to set aside a default judgment. PBO and the Advocacy Centre for the Elderly noted the difficulties faced by low-income litigants in accessing legal advice. For many, they said, default may not reflect disinterest in the proceedings but rather an inability to obtain the resources needed to respond.[121] They urged the Working Group to incorporate greater flexibility into the test for setting aside a default.

In response to these concerns, we now propose a simpler process: a defendant may set aside a Noting of Default within 20 days by paying $500 to the claimant and filing a statement of defence.

As for the test to set aside a default judgment, our proposal is undoubtedly more stringent than the current one, as it requires a compelling explanation for the failure to respond *and* an arguable defence on the merits. At the same time, however, it preserves the opportunity for a party with an arguable defence on the merits and a legitimate explanation for the default to have the judgment set aside and be permitted to defend the claim. If the Court finds that a self-represented litigant acted reasonably but was unable to obtain the advice needed to respond, despite taking reasonable and timely steps to do so, that may constitute a compelling explanation for the default.

Third, Consultees raised concerns about the costs payable for setting aside a default judgment. In our Consultation Paper, we proposed that a defendant seeking to set aside a noting in default or default judgment would be presumptively liable for the claimant's reasonable Full Indemnity Costs (as defined below) arising from the default. In response, LawPro highlighted various scenarios in which default judgment may be improperly obtained—such as when a defence is served but not

[120] Submission of FIJ Law LLP and Agueci Calabretta Barristers and Solicitors, p. 1.

[121] Submissions of PBO, p. 11 and Advocacy Centre for the Elderly, pp. 5-6.

filed due to oversight—and noted that some vexatious litigants misuse the default process.[122] In light of these concerns, we are no longer proposing a cost presumption in connection with default proceedings.

4. Recommendations

1. The Working Group recommends reforming Rule 19 by:

   a. Introducing the requirement to serve a defaulting defendant personally, or by an alternative to personal service, with a Notice of Default, as a pre-requisite to seeking default judgment;

   b. Providing a defendant who has been noted in default with three options to set it aside:

      i. on consent of the claimant;

      ii. within 20 days, pay $500 in costs and file a statement of defence; or

      iii. schedule a Directions Conference, at any time before default judgment is granted, at which the presiding judge may set aside the noting in default, on such terms as are just, if the defendant is able to provide a compelling explanation for the failure to file a statement of defence;

   c. Providing that if a defaulting defendant does not pay $500 in costs and file a statement of defence within 20 days or otherwise schedule a Directions Conference, the claimant may requisition or move for default judgment; and,

   d. Providing that a default judgment may be set aside, on such terms as are just, if the defaulting defendant (i) provides a compelling explanation for the failure to file a statement of defence and set aside the Notice of Default by the prescribed deadlines *and* (ii) establishes an arguable defence on the merits.

   As set out above, we are not proposing that these reforms will apply to proceedings governed by legislation that prescribes a specific default judgment process. In those cases, the legislation will govern.

2. The Working Group further proposes requiring claimants to obtain default judgment within six months of issuing a Notice of Claim, to prevent cases from languishing in the system

[122] Submission of LawPro, p. 9.

I. CONFERENCES

In the sections that follow, we address the proposed new discovery process and the model for requests for interlocutory relief. Both frameworks rely on different types of court conferences. For ease of reference, we first describe the various types of conferences in our proposed model.

1. Scheduling Conferences

"**Scheduling Conferences**" will be brief court appearances, typically lasting 15 minutes or less. They will be used exclusively to address scheduling issues. They will be similar to what is currently known as Civil Practice Court appearances in Toronto or Triage Court appearances in Newmarket. The hope is that Scheduling Conference lists will run **at least** twice per week in each judicial region.

2. Directions Conferences

Directions Conferences will address procedural issues of a more substantive nature, many of which are currently dealt with through motions. These conferences will undoubtedly vary in length but should presumptively be scheduled for one hour. Where the matter requires a motion, the judge presiding over the Directions Conference ("**DC Judge**" or, plural, "**DC Judges**") will not determine the matter but, instead, will set the parameters for the motion, including setting a timetable for the delivery of materials (described in Section VI(N)(4)(b) below). The model will be similar to the existing conferencing regime in Toronto and on the Commercial List.

DC Judges will have broad jurisdiction to give any directions or make any orders to facilitate the just, proportionate, expeditious, and cost-effective determination of every case and interlocutory dispute in a manner consistent with the Goals, including, without limitation, the jurisdiction to do the following:

(i) Determine any interlocutory dispute in a summary manner (i.e., at the Directions Conference itself), where doing so is fair and just and consistent with the Goals;

(ii) Provide directions for the hearing of any motion, reference, binding judicial dispute resolution hearing (described in Section VI(O)(2) below), or other settlement conference, including with respect to how evidence may be adduced;

(iii) Adapt any presumptive processes or make any protective order necessary to protect the confidentiality of any evidence, or to minimize the potential for traumatization, re-traumatization, or vicarious traumatization to any person involved in the proceeding;

(iv) Schedule any interlocutory or dispositive hearing;

(v) Establish or amend timetables for the delivery of any materials or the completion of any steps in relation to any proceeding, regardless of its procedural track;

(vi) Transfer any proceeding between the Summary Track and Trial Tracks where necessary to ensure the fair and just determination of the live issues, or where desirable in the interests of furthering the Goals;

(vii) Direct that any party comply with the terms of a pre-litigation protocol, as described in Section VI(B)(1) above;

(viii) Place any proceeding on the Inactive List (defined and discussed in Section VI (L)(8)(d) below), with or without terms, for a period of up to one year, or extend the evidence exchange period from one year to two years (as discussed in Section VI (L)(8)(d) below) keeping in mind that such requests should presumptively be made at a Scheduling Conference;

(ix) Vacate a party's obligation to prepare a chronology; and

(x) Award costs of the Directions Conference and costs resulting from a breach of any prior direction, order, or the Rules more generally.

3. Trial Management Conferences

Trial Management Conferences ("**TMC**") will replace pre-trials in the existing system. Their sole purpose will be to manage the trial process, and, for that reason, they will not include a judicial settlement component. As discussed in Section VI(O)(1) below, the Court will retain discretion to order a judicial settlement conference, but such conferences will be scheduled separately and will depend on the availability of Court resources at the time.

4. Case Management Officers

Many Consultees expressed concerns that the Court does not have sufficient judicial resources to provide adequate conference dates, whether Scheduling Conferences or Directions Conferences.

The presumptive timelines referenced throughout this Report, indeed the overarching goal of significant delay reduction, will be substantially hindered if conference dates cannot be provided within reasonable timeframes.

One possible means of addressing resourcing challenges is for the Court to leverage the assistance of senior members of the bar. The Family Court already does this through a program that employs Dispute Resolution Officers ("**DROs**"). DROs are senior family lawyers appointed by Regional Senior Justices whose role is to conduct select case conferences. They assist in providing evaluative assessments of variation applications, narrowing issues in dispute, facilitating settlement, and generally moving cases forward.

The Working Group recommends that a similar program be initiated for civil proceedings. We propose that senior members of the bar be engaged as "**Case Management Officers**" (or, singular, "**Case Management Officer**") to conduct select conferences, which would include evaluative assessments of interlocutory proceedings, facilitating settlement of proceedings on both an interlocutory and final basis, timetabling interlocutory and dispositive proceedings, and generally moving cases forward.

5. Recommendations

1. The Working Group recommends establishing a conferencing system to support its proposed process models. This system would include Scheduling Conferences, Directions Conferences, and TMCs.

2. We recommend that DC Judges be provided with broad jurisdiction to make any orders or give any directions that will facilitate the just, proportionate, expeditious, and cost-efficient disposition of every case and interlocutory dispute in a manner consistent with the Goals.

3. We further recommend establishing a Case Management Officer program to ease resourcing pressures created by the proposed conferencing system.

J. DISCOVERY REIMAGINED: THE UP-FRONT EVIDENCE MODEL

1. Introduction

There are five well known principles of natural justice, which include:

(i) the right to notice of a proceeding;

(ii) the right to know the case to be met;

(iii) the right to be heard;

(iv) the right to an impartial decision-maker; and

(v) the right to a reasoned decision.

Of these five principles, the second—the right to know the case to be met—is the most onerous to fulfil. It is the central focus of the discovery process in our current process model. Discovery consumes substantial time and financial resources. Putting aside systemic resourcing issues, the discovery process may be the single greatest driver of expense and delay in the civil justice system. If we are to better manage costs and delay, we must reconsider how this second principle of natural justice can be fulfilled in a more pragmatic manner that still ensures procedural fairness. This reimagining has been a central focus of the Working Group's work.

This core section of our policy proposals will begin with an explanation of why we believe that substantial reform to the current discovery regime is necessary if we are to reduce delays and costs in the civil justice system. We will then provide a brief overview of the discovery reforms we proposed in the Consultation Paper, followed by a detailed summary of the feedback we received from Consultees. We will set out our responses to some of the common concerns expressed through the consultation process, then explain why we continue to support the introduction of an up-front evidence model despite significant resistance to it. Finally, we will describe our revised process model based significantly on consultation feedback, which envisions a three-track model.

2. The Rationale for Change: A More Pragmatic Discovery Model

Our desire to find a more pragmatic means of fulfilling discovery is grounded in two factors: (a) the onerous burden, in both time and expense, imposed by our current model of complete discovery and (b) the inefficiencies associated with what we describe as "delayed case theory". We will examine both factors in turn.

a) The Burden of Complete Discovery

While our current process model's roots run much deeper, the complete discovery model[123] was introduced in 1985. It requires parties to locate, list, produce, and review all non-privileged documents in their possession, control, or power that are relevant to any live issue in the proceedings. They must then attend oral examinations for discovery that may include cross-examination on the live issues, other than on questions of credibility.

Documentary Discovery: In 1985, documentary discovery was undoubtedly far less burdensome. The World Wide Web had not yet been invented and, thus, neither had email or social media. The explosion in digital documentation that has occurred post-1990 has profoundly increased the scope and burden of documentary discovery.

Concerns about the burden of documentary discovery are not new. In 1995, the Civil Justice Review team raised a concern about its breadth. As set out above, in their First Report, the team highlighted that, while the 1985 amendments to the Rules, which expanded the scope of discovery, aimed to eliminate "trial by ambush," they may have instead resulted in "trial by information landslide."[124] They observed that the explosion of information and data driven by technological growth had resulted in a corresponding expanse of discoverable material, making it increasingly difficult to manage the discovery process in an economical way. The problem has grown exponentially in the ensuing three decades. Although the burden of discovery has changed substantially, the Rules that govern discovery, in particular documentary disclosure, have undergone only modest reforms.

Since 1985, the most significant attempt to limit documentary discovery was an amendment to the Rules in 2010 that replaced the broad "semblance of relevance" standard—previously read into the term "relating to" in Rule 30.02(1)—with a slightly stricter "relevance" standard. Proportionality was also introduced as an overarching policy (see Rule 1.04(1.1)) and, specifically,

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[123] For the most part, our discovery model can be traced back to what are conventionally referred to as the Middleton Rules of Practice introduced in 1913. Before 1985, however, parties had to serve a notice on their opponents requiring disclosure by affidavit of all documents relating to matters in question in the action. Post-1985, the obligation to make disclosure of all documents having a semblance of relevance to the issues in question of the action became automatic. The definition of "documents" was expanded to include videotapes and other information stored digitally. The scope of oral discovery was also expanded to permit discovery of evidence and cross-examination of deponents, other than on questions of credibility. See the Report of the Task Force on the Discovery Process in Ontario, pp. 21-22. The Court of Appeal described this discovery paradigm as a model of "complete discovery" in *General Accident Assurance Co. v. Chrusz*, (1999), 45 O.R. (3d) 321 at ¶ 25, and it continues to be just that.

[124] Civil Justice Review, First Report, 1995, p. 236.

in the context of discovery (see Rule 29.2). These changes were intended to narrow the scope of production and curb "fishing expeditions" for documents of limited value. We agree, however, with Professor Erik Knutsen's observation that these changes did not resolve the "over-discovery problem."[125]

Based on our discussions with lawyers during the consultation process, we believe that parties are often producing as much as 10-to-100-times-more documents under the relevance standard than what ultimately forms part of the evidentiary record at trial. There is no reason why parties should be required to produce, review, digest, and electronically store thousands—and sometimes tens or hundreds of thousands—of documents, only to have just a small fraction of them form part of the trial record. But exponential over-production is an inevitable consequence of a model that compels parties to locate, list, produce, and review documents before they have a clear understanding of whether these documents are probative in any meaningful way of the live issues in dispute. The efficient functioning of the civil justice system would be enhanced by focusing on the documents that *actually* matter to the determination of the dispute. For that reason, we are recommending a transition to reliance-based disclosure obligations.

One Consultee suggested that the Working Group had not accounted for recent advances in document review technology, arguing that generative artificial intelligence will soon radically improve discovery efficiency. The suggestion was that the Working Group should "skate where the puck is going" and not be so concerned about the discovery demands associated with document-heavy cases.[126]

We agree that AI will facilitate the task of identifying and categorizing relevant documents. AI, however, will not result in the disclosure of fewer documents. Recipients of large volumes of documents will still have to review substantial data often with little, if any, probative value. Although AI will likely aid in that exercise, the net result will still be time spent working with masses of documents that have little, if any, bearing on the outcome of the case. That time, effort, and expense can be largely avoided through a transition to a reliance-based production threshold. In other words, we believe it makes more sense to address the root cause of the problem than to rely on technological solutions that merely lessen its burden.

We also agree with and adopt the following observation that TAS made:[127]

> While technological tools now allow for the collection and review of vast volumes of documents, the costs of these tools remain significant. These tools still require substantial time and labour to use effectively, and the technology itself can be prohibitively expensive. In addition, the ever-increasing proliferation of electronic documents and modes of communication expand exponentially the scope of production on the current model.

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[125] Submission of Prof. Knutsen, p. 1.

[126] Submission of Scott Matheson, Field Law, p. 2.

[127] Submission of TAS, p. 23.

Finally, we note that relying on technology to alleviate the burden of the problem, rather than addressing its root cause, risks creating asymmetry by leaving litigants of limited means—who cannot afford or access the necessary technology—at a serious disadvantage.

Oral Examinations: Oral examinations are the second pillar of the complete discovery model. While they can assist in gathering information, testing credibility, and securing admissions, they come at a significant cost. The 2001 Discovery Task Force found that there was great dissatisfaction with the costs of discovery. Research they conducted reflected that the overall percentage of billings, across the province, for discovery-related activity (including motions) was approximately:[128]

- 25% or less of total billings in 32% of cases;
- 26% to 50% of total billings in 44% of cases; and
- over 50% of total billings in 23% of cases.

While that data is now more than 20 years old, there is no reason to believe that discovery has become cheaper over the last two decades, or that it now consumes a lower proportion of litigation costs.

Discoveries can also be the source of significant delay in civil proceedings. Scheduling oral discoveries can be a major challenge. Counsel or parties are often unavailable for extended periods, making it difficult to secure a date that is not a few, or many, months away.[129] Once scheduled, cancellations due to illness or other issues can lead to further delays.

Examinations for discovery are also resource intensive. They require counsel and parties to:

(i) prepare for and attend up to seven hours of examination per party (during working hours);

(ii) obtain costly transcripts;

(iii) address undertakings and refusals;

(iv) deal with motions arising from examinations, which have been widely recognized as also straining, if not overwhelming, limited court resources; and

(v) review lengthy transcripts before trial, often hundreds of pages long and frequently containing a significant amount of irrelevant material.

The burden of examinations on litigants is also often overlooked. Attending discoveries can mean missing work or time away from running a business. The emotional toll can be significant,

[128] Report of the Task Force on the Discovery Process in Ontario, November 2003, p. 57.

[129] See for example, the submission of Oakley & Oakley, p. 15.

particularly for injured parties, who may be forced to relive traumatic events under intense and often distressing questioning.

Examinations are an inherently adversarial method of exchanging information before trial. A less adversarial method may more effectively promote the objectives of the discovery process, namely, ensuring trial readiness while encouraging settlement.

Change is Required: Ultimately, we agree with TAS' observation that:[130]

> [d]espite prior efforts to improve the system—such as changing the standard for production/disclosure from "semblance of relevance" to "relevance," introducing discovery plans, and imposing time limits on examinations for discovery—these reforms have not meaningfully reduced the complexity, cost, or length of the discovery process. In some instances, they have had the opposite effect.

In our view, pragmatism, together with a real effort to achieve proportionality in the discovery process, call for a fundamental shift away from a model focused on complete discovery and toward one that better facilitates the just, most expeditious, and least expensive determination of cases.

As we noted, the burden of complete discovery, in terms of time and resources, is one of two principal drivers of the need for change to the existing discovery model. The other is the way the current system facilitates, if not encourages, the delayed development and crystallization of the parties' case theories. We turn to that second issue now.

b) Delayed Case Theory

Since at least the current version of the Rules was introduced in 1985, litigation counsel have understood that they need not finalize their theory of the case until just before trial. The current Rules incentivize parties to plead their claims as broadly as possible, thereby maximizing the scope of discovery. This enables them to obtain vast quantities of documents and pursue wide-ranging oral examinations, all in an effort to sift through a broad universe of facts to construct the version of the case that ultimately proceeds to trial. By that stage, the theory advanced at trial may bear little resemblance to the original grievance that triggered the proceedings years earlier. The relative ease of amending pleadings late in the process further enables this backend loading of strategic thinking.

Delayed case theory is problematic for several reasons. First, given that it can take years for a party's theory of the case to crystallize, it is unsurprising that many cases settle late in the arc of a lawsuit, often after significant time and resources have already been spent by both the parties and the Court. Any measure that accelerates settlement is therefore beneficial to all involved.

Second, the delayed case theory dynamic allows plaintiffs to pursue weak claims with low prospects of success in the hope of securing early settlement, as the up-front cost and effort to advance such claims are minimal relative to the potential return. Defendants, aware that even meritless claims can be expensive and time-consuming to defend, are often compelled to settle

[130] Submission of TAS, p. 23.

these "nuisance claims" unless they are prepared to litigate on principle alone. We do not believe that "nuisance claims" should be brought or allowed to burden the system.

Third, in personal injury cases, the ability to delay case development is detrimental to the injured plaintiff, even though it may serve the strategic interests of both plaintiffs' counsel and insurer defendants. Insurers, knowing that most cases will settle, set reserves once a claim is served and aim to minimize defence costs (such as those incurred to prepare expert reports) to preserve those reserves. They also benefit from holding funds that will eventually be paid to the plaintiff for as long as possible.[131] Plaintiffs' lawyers, typically working on contingency fees, face conflicting incentives. While early settlement improves their cash flow, they are also inclined to avoid trial risk and defer out-of-pocket expenses and time-intensive case development. They benefit from managing a high volume of files at a pace that suits their practice. As a result, the injured plaintiff—who has the greatest need for timely resolution—is often the only party with little control over the pace of the litigation.

3. The Initial Proposal: Introducing the Up-Front Evidence Model

The Consultation Paper included a proposal for significant reform to our current model of civil justice by replacing the existing discovery process with what we described as an up-front evidence model. As we described it, the proposed model would achieve discovery through a series of steps, including initial disclosure, primary disclosure, the exchange of expert witness schedules, and supplementary disclosure.[132] These steps were described in the Consultation Paper as set out below.

a) Documentary Disclosure

Initial Disclosure: The initial disclosure obligation would require each party to produce, at the time a pleading is served, all non-publicly available documents referred to in the pleading[133] that are in the party's possession, control, or power.

Primary Disclosure: Primary disclosure would be achieved through the following three principal features:

(i) *Reliance and Known Adverse Documents:* Following the Close of Pleadings and in accordance with a detailed schedule, parties would be required to prepare and serve all of the documents upon which they intend to rely to prove their case, including those documents they provided as part of their initial disclosure, as well as any known adverse

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[131] See Section VI(X)(4) for a discussion of the concerns raised by Consultees regarding pre-judgment interest rates.

[132] We did not propose that the changes outlined in this section apply to proceedings required or authorized to proceed by way of application under statute or Rule 14.05(3)(a)–(g.1), as these proceedings are already summary in nature and generally require minimal court resources. Instead, we continue to propose that such proceedings proceed directly to a Directions Conference after service of the Notice of Claim, at which the Court will schedule the exchange of materials (as necessary) and set a date for a Summary Hearing.

[133] Documents "referred to" in the pleadings are those that are specifically identified in the pleading.

documents (i.e., documents that would either undermine the party's case or support an opposing party's case);

(ii) *Sworn Witness Statements:* Together with their document bundles, the parties would exchange sworn witness statements[134] for all witnesses on whom they intend to rely to prove their case. For corporate parties, this would include statements from all individuals who would give evidence on the corporation's behalf; and

(iii) *Expert Evidence Schedule:* Together with their witness statements and Reliance Documents, parties would be required to exchange a schedule for the delivery of any expert reports upon which they intend to rely. We proposed that there would be an ongoing obligation to update the expert timetable as circumstances change.

Supplementary Disclosure: We proposed that if a party was not satisfied with the disclosure provided through the initial and primary disclosure steps, it would be entitled to seek supplementary disclosure through specific document requests and limited written interrogatories in accordance with the timetable set out in the Consultation Paper. We proposed using a schedule commonly used in arbitrations known as a "Redfern Schedule."

b) The Elimination of Oral Examinations for Discovery

Finally, we proposed to eliminate oral examinations for discovery. We recognized that discoveries can be helpful in generating additional information, assisting in credibility assessments, and producing helpful admissions. We posited, however, that the up-front evidence model could deliver the commonly cited benefits of oral examinations: namely, understanding the facts, testing credibility, fostering settlement, obtaining admissions, and narrowing issues.

We also noted that there were significant costs associated with oral examinations (and, thus, significant efficiencies to be gained by eliminating them), including:

(i) delays caused by the logistical challenges of scheduling oral examinations, as well as the extensive follow-up work they generate;

(ii) the costs associated with preparing for and attending examinations, reviewing transcripts, and responding to undertakings and questions taken under advisement—which often lead to further examinations; and

(iii) the costs and delays associated with motions arising from examinations.

Ultimately, we concluded that discoveries are unnecessary in the context of the up-front evidence model, and the limited benefits they retain are outweighed by the costs and delays they engender.

We also expressed concern that keeping oral discoveries while adding the up-front evidence model would increase process and expense—the opposite of our mandate.

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[134] All references in this Report to "sworn" witness statements are intended to include statements that are either sworn or affirmed.

4. Consultation Feedback

Our proposed reforms to the discovery process—the introduction of the up-front evidence model and the elimination of oral examinations for discovery—generated the most, and strongest, feedback.

We will review that feedback in some detail, given that it tends to inform several significant modifications we are proposing to the process model described in the Consultation Paper. We will organize the feedback into the following categories: (a) documentary disclosure; (b) witness statements; (c) written interrogatories; and (d) the elimination of oral discoveries.

a) Documentary Disclosure

Initial Disclosure: Most Consultees supported the initial disclosure obligation to produce all documents referred to in the pleadings.[135] Some, however, suggested that clarity is required as to whether the obligation includes both expressly referenced documents and those referenced by implication. Some advocated for production of both express and implied documents,[136] while others cautioned that requiring implied documents in large-scale cases spanning long timeframes could create a significant production burden.[137] Disparate views were also expressed as to whether publicly available documents should[138] or should not[139] be covered by the requirement.

Primary Documentary Disclosure and "Known Adverse Documents": Consultees were divided in their responses to the modified reliance-based standard for documentary disclosure. Some Consultees supported the proposal on the basis that it would reduce costs, prevent costly fishing expeditions, and reduce the potential for document dumps.[140]

In the context of self-represented litigants, PBO noted that "the current model of discovery can be overwhelming for self-represented litigants in terms of both the volume of documentary discovery and the process generally." Indeed, PBO explained that many of its clients "already assume documentary discovery is about the documents they intend to rely upon in the case and/or the documents and evidence they have referred to in their pleading."[141]

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[135] See, for example, the submissions of TAS, p. 24 and OTLA p. 22.

[136] See, for example, the submission of OTLA, p. 23.

[137] For example, Justice Canada argued that such an obligation would be too broad for Indigenous land title claims and those involving fiduciary duties and the honour of the Crown because such claims reference broad categories of documents. Submission of Justice Canada, p. 7.

[138] See, for example, the submission of OTLA, p. 23.

[139] See, for example, the submission of Justice Canada, p. 7.

[140] See, for example, the submissions of the South Asian Bar Association ("**SABA**"), p. 3; Pro-Demnity, p. 4; and Latner, p. 21.

[141] Submission of PBO, p. 8.

Others viewed the proposed shift as heightening the risk of selective disclosure, thereby making it more difficult for parties to obtain the documents they need to prove their case; potentially increasing disputes; and placing additional strain on judicial resources.[142]

Some Consultees suggested that we should consider adopting a "materiality" standard for production. We do not believe, however, that a materiality standard is different from the existing relevance standard. Materiality simply ties the relevance standard to the live issues in the proceeding. That said, we believe that what was intended was to import an element of probity into the disclosure regime. In our view, the reliance standard does just that.

Many Consultees expressed concern about the requirement to produce "known adverse documents." For instance, OTLA remarked that "the 'known adverse documents' standard is inherently subjective and vulnerable to misuse, as parties may rationalize non-disclosure by claiming ignorance or a different interpretation of what is adverse, leaving the opposing side with no recourse to know of and therefore challenge incomplete productions."[143]

The OBA commented that "[t]he word 'known' should be removed as it makes it too easy to hide documents [and] … also raises questions, e.g., in a corporation, who must know about the document?"[144]

Other Consultees took the position that a party should not be required to describe a document as "adverse" even if it is being produced.[145]

Supplementary Disclosure (Requests for Additional Documents): The responses to the proposed use of supplementary document requests to facilitate disclosure was also varied. Many Consultees expressed skepticism about the effectiveness of the process outside of the commercial arbitration context.[146] Some expressed concern that the Redfern process simply repackages existing undertakings and refusals motions.[147] Some argued that the process would increase the administrative workload[148] and add complexity for plaintiffs and self-represented parties who will

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[142] See, for example, submissions of Bird Construction Inc., Appendix A, p. 1; City of Toronto, p. 5; Siskinds, pp. 3-4; David MacDonald p. 7; Dentons, p. 2; Gillian Hnatiw & Co., p. 3; and Blaney, p. 4.

[143] Submission of OTLA, p. 23.

[144] Submission of the OBA, p. 13.

[145] See, for example, the Collaborative Submissions of Toronto Firms, Appendix A, p. 2.

[146] See, for example, the submission of Gary Michael Caplan, pp. 1-2.

[147] See, for example, the submission of CDL, p. 2 and TAS, p. 26.

[148] See, for example, the submissions of the HLA, p. 3 and Digital Evidence and E-Discovery, pp. 3-4 ("[a] document could be viewed to find 'reliance' documents, then to answer document requests from other parties, and for a third time to answer the planned interrogatories under the Upfront Evidence Model. In the current relevance-based system, documents are typically only examined once for production to see if they are relevant.").

not know how to make a "focused, narrow and specific" request without knowing what documents the opposing party possesses.[149]

Suggested modifications and alternative proposals included:

(i) Permitting requests at any time in the discovery process;[150]

(ii) Permitting a short cross-examination on affidavits of documents or allowing an opportunity to cross-examine witnesses on their witness statements;[151]

(iii) Permitting parties to choose the format of disclosure chart[152] or requiring that the process of determining discovery disputes be managed by trained experienced roster mediators and not judges;[153]

(iv) Imposing a materiality standard to avoid document dumps and focus on requests for genuinely important evidence;[154]

(v) Imposing a presumptive adverse inference where a party objects to producing a document (other than on the ground of privilege);[155] and

(vi) Requiring that all disclosure steps be accompanied by an affidavit attesting to steps taken to search for producible documents.[156]

b) Witness Statements

There was mixed feedback on the requirement to produce witness statements early in the litigation process.

Some Consultees supported the proposed model on the grounds that it would streamline and accelerate litigation, promote early settlement,[157] improve timeliness and efficiency without

[149] See, for example, the submissions of the Advocacy Centre for the Elderly, p. 4; Phillips Barristers Professional Corporation, p. 3; and Samfiru Tumarkin LLP, p. 3.

[150] Submission of the OBA, p. 15.

[151] Submission of CLHIA, p. 8.

[152] Submission of Dmitry Shniger, p. 2.

[153] Submission of Gary Michael Caplan, p. 2.

[154] Submission of TAS, p. 26.

[155] Submissions of TAS, p. 26 and Pilkington, p. 7.

[156] Collaborative Submissions of Toronto Firms, Appendix A, p. 2.

[157] Submission of the Water Works Association, p. 3.

compromising fairness or quality,[158] and would allow lawyers to better educate their clients and manage their expectations from the outset.[159]

We agree with the comments made by one Consultee, a lawyer who primarily represents individuals and small businesses, who described the proposed up-front model as follows:[160]

> [It] … addresses the biggest issues I've seen, namely the sheer amount of time and fees spent on pursuing ungodly amounts of documents and information that add nothing to the litigation except cost and delay. I strongly appreciate how the goal seems to be to frontload the litigation process, moving much more of the meat of a lawsuit to the start. This fits well with how I've experienced litigation playing out in practice. At the start, there is a flurry of activity and interest, and memories are the strongest. Inevitably, after pleadings are exchanged, nearly every lawsuit then promptly bogs down in the morass of discoveries. Part of the problem is it is relatively cheap to start a lawsuit, and yet only results in a relatively ill-defined legal action, which the parties and lawyers only really begin to understand during the much more expensive discoveries phase. I was incredibly happy to see the up-front evidence model proposed, as this tackles the real problem. While I'm sure it will have its own issues, and there will need to be refinements once put into practice, I strongly hope the proposed changes are implemented very closely to the proposal.

Likewise, a Consultee from the insurance industry indicated support for the objectives underlying the up-front evidence model and pre-litigation protocols. It noted that early communication and timely disclosure often lay the groundwork for swift resolution, and that, if effectively enforced, these changes could lead to fewer lawsuits and earlier settlements.

The Ontario Chamber of Commerce supported the proposal but cautioned that:[161]

> [T]he proposed shift towards up-front evidence disclosure and simplified procedures for lower-value claims could help alleviate delay and cost, as long as implementation is carefully managed and does not inadvertently increase the burden on smaller litigants. … [W]e strongly recommend that any implementation of the proposed reforms be accompanied by a commitment from government to invest in judicial capacity, court infrastructure, and digital modernization to improve access to justice in communities across the province. The long-term success of these reforms will not only depend on rule changes but also on the system's capacity to absorb them.

Other Consultees opposed the up-front evidence model on the grounds that, among other things:

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[158] Submission of Timely Justice (Geoff Cowper), p. 1.

[159] Submission of John A. Tamming, p. 1.

[160] Submission of Benjamin Waterman, p. 1.

[161] Submission of the Ontario Chamber of Commerce, p. 1.

(i) preparing witness statements will entail significant costs, thereby front-loading the expense of litigation and potentially creating a barrier to access to justice;[162]

(ii) litigants and counsel may not know the identity of all their witnesses up front (i.e. they may not appreciate the entire evidentiary record required);[163]

(iii) witness statements may be excessively long;[164]

(iv) witness statements may reflect the voice of the lawyer and not the witness;[165]

(v) not all necessary witnesses will be prepared to swear or affirm a written statement;[166]

(vi) in matters in which contingency fees are common, counsel may become more selective in the cases they agree to accept;[167] and

(vii) factual development and access to third-party evidence routinely occur well into litigation and early witness statements may need constant revision.[168]

c) Written Interrogatories

While some Consultees see a limited role for written interrogatories,[169] the broad consensus is that written interrogatories are less efficient and more costly than a short oral examination.[170] Consultees emphasized that written questions allow for lawyer-crafted, strategic, and sometimes evasive answers; pose a challenge for self-represented litigants; lack spontaneity; and do not permit real-time follow-up or clarification (leading to inefficiencies).[171]

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[162] See, for example, the submissions of FOLA, pp. 3-4; OTLA, pp. 4, 11, 16; Thunder Bay Chamber of Commerce, p. 1; Bennett, p. 2; Canadian Federation of Independent Business, p. 1; and CDL, p. 26.

[163] See, for example, the submissions of the Advocacy Centre for the Elderly, p. 4; Beard, p. 3; OTLA, p. 26; Bennett, p. 5.

[164] Submission of OTLA, p. 26.

[165] See, for example, the submissions of Ann E. Shelton, p. 2; Bennett, p. 5; CDL, p. 26.

[166] See, for example, the submissions of Blaney, p. 4; CDL, pp. 13, 50.

[167] Collaborative Submissions of Toronto Firms, p. 4.

[168] See, for example, the submissions of the City of Toronto, p. 8; Justice Canada, p. 3; OTLA, p. 27; Pro-Demnity; Thunder Bay Chamber of Commerce; and Pilkington, p. 9.

[169] See, for example, the submission of the OBA, pp. 29-31.

[170] See, for example, the submissions of MLA, p. 9; CDL, pp. 2, 26, 31; LawPro pp. 7-8; OTLA, pp. 9, 28-29, 33; and TAS, p. 26.

[171] See, for example, the submissions of Justice Canada, p. 4; MLA, p. 9; and OTLA, pp. 9, 28-29, 33.

d) The Elimination of Oral Examinations for Discovery

While some support emerged for our proposed elimination of oral discoveries, including from some prominent members of the Bar, criticism was widespread across a cross-section of legal organizations and stakeholders.[172]

Those in favour of complete elimination noted that examinations for discovery are extremely costly, time-consuming, inefficient, disproportionate to the purpose of discovery, and re-traumatizing for individuals who have undergone traumatic experiences.[173] They commented that their removal would make the system more accessible and supportive[174] and would help to avoid discovery-related delay.[175]

In its submission, PBO highlighted the benefits of eliminating examinations for discovery for self-represented litigants, explaining that self-represented litigants:[176]

> struggle to understand the purpose of oral examinations, … struggle to understand why examinations take place out of court and how to book [them], [struggle with] the out-of-pocket costs of examinations …, even without paying for the services of a lawyer, … struggle with the process to fix a date, … seek to postpone dates because they did not participate meaningful in fixing a convenient date, … do not know what questions they should ask, nor are they sure which questions to refuse to answer, … worry about inadvertently disclosing information, or failing to raise relevant objections, [and] … do not understand how to compel answers to undertakings or refusals.

Some Consultees expressed a more ambivalent view, acknowledging both the potential benefits and drawbacks of the proposed model. For example, Professor Gerrard Kennedy remarked that:[177]

> … much of the criticism of the proposed reforms has concentrated on the elimination of oral discovery and the serious restrictions on documentary discovery. This is akin to practice in many arbitral contexts and the Small Claims Court. This should belie any argument that the current iteration of Ontario discovery is a necessary corollary of parties' rights to procedural fairness. Justice Huscroft has recently underscored that discovery is not a constitutional requirement of the right to access s. 96 courts. *Poorkid Investments Inc v Ontario (Solicitor General)*, 2023 ONCA 172.

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[172] See https://store.lso.ca/civil-rules-review-a-deeper-dive-into-the-proposed-changes for a copy of the May 12, 2025 CRR Phase 2 Consultation information session sponsored by the Law Society of Ontario, including remarks from Chris Paliare, Tom Curry, Sarit Batner, Alexander Gay, Samantha Green, Scott McMahon, Stephen Morrison, Anthony Gatensby, and David MacDonald.

[173] See, for example, the submissions of the Water Works Association, p. 2; Eric Zadro, p. 1; John Tamming, p. 1; SABA, p. 2; and FAIR, p. 2.

[174] Submissions of SABA, p. 2-3.

[175] *Ibid*, p. 3.

[176] Submission of PBO, p. 8

[177] Submission of Prof. Kennedy, pp. 1-3.

> … I am skeptical of arguments that suggest that greater discovery will generally facilitate access to justice, or at least not without significant (and disproportionate) cost. My own experience as a civil litigator is becoming dated, but I found that discovery usually was not the best way to facilitate informed settlement. But I am equally confident that the discovery process was indispensable in individual cases. This, of course, is only my impression.
>
> … I wonder what data there is that discovery is a significant source of unnecessary delay and expense. The fact that the access to justice crisis appears to have worsened over the past forty years—and is much less prevalent in arbitration and courts without discovery—means that it is reasonable to query whether discovery is, in the main, "worth the costs" in at least many cases, particularly in an era of prolific online documentation. While power imbalances are certainly a matter of concern, one can equally query the appropriateness of a plaintiff commencing a claim hoping that discovery will prove their claim's merit. But we cannot deny that the discovery process works in individual cases. …
>
> It is obviously a purpose of civil procedure to facilitate the "right" result. But it is also to ensure that matters proceed with reasonable timeliness and at reasonable cost. Chief Justice McEachern (as he then was) noted the trade-offs in this regard 36 years ago discussing the summary trial regime in British Columbia:
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> > The procedure prescribed by R. 18A may not furnish perfect justice in every case, but that elusive and unattainable goal cannot always be assured even after a conventional trial and I believe the safeguards furnished by the rule and the common sense of the chambers judge are sufficient for the attainment of justice in any case likely to be found suitable for this procedure.
>
> Where the proposed reforms to discovery fall onto this continuum is a matter of reasonable debate, but it is at least worth querying whether we could substitute "conventional trial" for "traditional discovery" and "R. 18A" for "proposed new discovery reforms". The civil litigation system must be there to ensure that parties can have their claims adjudicated with basic procedural fairness—but that means that the public civil litigation system must also be accessible. These reforms seek to improve the latter at the arguable expense of the former. There is reason to suspect that some areas of law (e.g., employment) will be better served than others (e.g., personal injury).
>
> This is the most radical reform proposed by the CRR Working Group. It may be its best. It may be its worst …

A large majority of Consultees, however, opposed the complete elimination of examinations for discovery. The most commonly raised concerns were as follows: (a) parties will lose a significant and valuable means of understanding the facts of the case; (b) parties will lose an important means of testing the opposing party's credibility, which will hinder their ability to settle; (c) parties will lose an opportunity to obtain admissions; (d) parties will lose an opportunity to discuss resolution and narrow the issues in dispute; and (e) it will negatively impact survivors of sexual assault and

other gender-based traumas. By way of a small sampling, the Working Group received the following submissions:

(i) A collaborative of ten Toronto litigation firms urged the Working Group to keep oral discoveries in the process model, arguing that oral examinations are the only way for parties to understand their opponent's case and to meaningfully explore settlement. Eliminating them would mean fewer cases would reach timely resolution, trials would be less efficient, Ontario's viability as a forum of choice for cross-border litigation would be impaired, and there would be a chilling effect on the development of the common law;[178]

(ii) The Better Civil Rules Collaborative, an *ad hoc* group of experienced personal injury and insurance lawyers, expressed the view that there is a need to preserve some right of oral discovery, as an essential element of fair disclosure.[179] They recommended three hours of oral discovery per witness, to be exercised within nine months of the filing of the last statement of defence;

(iii) Bennett Jones (Ontario Litigation Group) submitted that oral discoveries are the most important and productive element of our civil litigation process. They likened the proposal to eliminate discoveries in an effort to eliminate motions arising from them to the employment of a "misdirected sledgehammer;"[180]

(iv) OTLA submitted that eliminating oral discoveries places expediency above justice. They argued that eliminating oral discoveries will severely curtail the ability of parties to assess risk, gain admissions, and analyze their cases, thereby leading to an increase in trials;[181]

(v) Canadian Defence Lawyers argued that oral discoveries are necessary in personal injury proceedings for many reasons including assessing limitations defences, grappling with vicarious liability issues, and determining potential intersection with the provisions of the Workplace Safety and Insurance Act;[182]

(vi) LawPro expressed mixed views about the elimination of oral discovery and thought that it may empower dishonest litigants;[183]

(vii) The MLA opposed what they described as "reckless, underfunded, top-down experimentation." They urged the Working Group to consider maintaining oral

[178] Collaborative Submissions of Toronto Firms, p. 2.

[179] Submission of the BCRC, p. 1.

[180] Submission Bennett, p. 4.

[181] Submission of OTLA, p. 28.

[182] Submission of CDL, p. 1.

[183] Submission of LawPro, p. 8.

discoveries in certain types of cases, including those involving abuse, personal injury, fraud, self-represented litigants, and cases with complex facts;[184]

(viii) Plaintiff medical malpractice lawyers shared the view that eliminating oral discoveries would impair access to justice, as it would be very difficult in many cases to make out a claim against a physician absent the ability to question that physician under oath before trial;[185] and

(ix) Consultees who represent or support victims of gender-based violence, suggested that examinations for discovery offer a safe forum in which vulnerable parties can tell their stories.[186]

Notwithstanding the strong opposition to the elimination of oral examinations altogether, there was broad agreement that oral discoveries could be more limited and that motions arising from discoveries should be curtailed. Many Consultees recommended preserving oral discovery with significantly reduced time limits (e.g., 2-3 hours) and strict scheduling requirements to ensure that scheduling of discoveries does not contribute to delay.[187]

In discussions with the Co-Chairs, several Consultees suggested that in personal injury proceedings it is not so much credibility as *likeability* that is being assessed at an examination for discovery. In other words, the purpose of discovery, at least in personal injury cases, is to get a sense of whether the plaintiff will be a sympathetic witness, a determination that can generally be made in short order.

Others suggested various mechanisms to limit or eliminate motions arising from oral discovery, such as requiring that all questions be answered (except if scandalous or privileged), prohibiting evidence at trial on topics refused at discovery or creating a presumptive adverse inference arising from refusals, imposing costs for improper refusals motions, or making requests for undertakings impermissible.[188]

5. Responses to the Consultation Feedback

We will not attempt to respond to all the feedback we received about the up-front evidence model and the proposed elimination of oral discoveries. We do believe it important, however, to address several of the concerns we heard, particularly where those concerns have led us to modify our proposals.

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[184] Submission of the MLA, p. 1.

[185] Submission of The Holland Group pp. 2-3.

[186] See, for example, the submission of Gillian Hnatiw & Co., pp. 1-2.

[187] See, for example, the submissions of TAS, pp. 26-27; OTLA, p. 3; and HIROC, p. 4.

[188] See, for example, the submission of TAS, p. 27, which submitted that under the Redfern process, undertakings should no longer be necessary.

a) Initial Disclosure

We accept that some clarification would be helpful in terms of the requirement surrounding production (or non-production) of publicly available documents referred to in a pleading. OTLA expressed the concern that "[e]liminating publicly available documents from initial disclosure disproportionately burdens plaintiffs, who lack institutional defendants' resources or knowledge of what is publicly available, to locate such documents, undermining fairness."[189]

In response to that concern, we propose that, for publicly available documents, a party will be required to provide (a) a link to the document if the document is available online or (b) a copy of the document if the document is publicly available, but not accessible online.

b) Known Adverse Documents

Based on the numerous objections raised by Consultees, we have concluded that the concept of "known adverse documents" is too problematic to retain for several reasons, including that:

(i) it is unclear what qualifies as an adverse document, as counsel can often craft arguments to explain why an apparently problematic document is not truly adverse to their case; and

(ii) it is difficult to define how a corporation would have "knowledge" of a document without effectively requiring a full search—an approach that would be duplicative and inefficient, given the more targeted searches already contemplated during the supplementary disclosure phase.

Ultimately, as discussed in Section VI(K), we propose to adopt a document disclosure model that requires production of Reliance Documents, with the opportunity to request specific categories of additional documents thereafter. Any impact of eliminating the requirement to disclose known adverse documents will be attenuated by the availability of out-of-court examinations in one form or another in all cases (as described in Section VI(L) below).

c) The Content of Witness Statements

Consultees raised concerns about the length of witness statements and the costs associated with their preparation. We intend to prescribe the content of witness statements, which should assist in controlling the cost of their preparation.

A witness statement should be a concise statement of a party's evidence. It should not contain submissions, lengthy references to the contents of documents, opinions, or other inadmissible evidence.

The prohibition of lengthy references to the contents of documents has generated concern among some litigators who view it as the witness's role to explain the documentary record. It is important to recognize, however, that witness statements and Reliance Documents constitute the core of a party's disclosure. Most documents speak for themselves. It is unnecessary, as a matter of

[189] Submission of OTLA, p. 23.

disclosure, for parties to produce their documents, then comment on them extensively. It should only be necessary to refer to documents in a witness statement if necessary to provide a coherent narrative or if a document does not "speak for itself" and requires explanation. This is especially so in Trial Track cases, where parties will give oral evidence at trial and may testify about the content of documents provided they have been disclosed.

Some Consultees expressed the concern that they may not know, at the outset of the case, the identity of all the witnesses they need.[190] We note that the proposed reforms are driven by the need to change our litigation culture. The reality is that parties and their counsel will have to adopt a new approach to litigating civil claims. More work will have to be done up-front to understand with some precision the case being brought. That should be encouraged and accepted.

That said, the proposed rule change is not an attempt to limit the evidence a party may adduce. Litigation is a dynamic exercise. For that reason, a mechanism will exist to supplement witness statements in circumstances where warranted. This mechanism will help alleviate concerns that facts and third-party evidence may emerge later in the litigation process, necessitating the supplementation of witness statements.

Other Consultees expressed the concern that witness statements may reflect the voice of the lawyer, not the party.[191] We believe this concern is overblown. Where a party is represented by counsel, one would expect counsel to prepare the party's witness statements. Competent counsel will ensure, as they do now with affidavits, that witness statements accurately reflect the witnesses' evidence (i.e. their own observations) before they are sworn. This is consistent with a lawyer's role as an officer of the Court. Moreover, our proposal is that, at least in Trial Track cases, party witnesses will testify at trial. The presumption is that party witnesses will provide their evidence-in-chief orally, subject to the restriction that they remain within the "four corners" of their disclosure.[192] All witnesses, party and non-party, will be cross-examined at trial. Their voices will be heard. In Summary Track cases, all witnesses will be subject to cross-examination. Again, their voices will be heard.

d) The Front-Loading of Costs

A significant number of Consultees expressed concern that the proposed up-front evidence model will front-load costs, sharply increase retainer demands, and put unsustainable pressure on small firms to meet the resulting workload. All these features, they worry, will impede access to justice.

We make two comments in response.

First, we believe that the concepts of "front loading of costs" and "compression of costs" are being conflated. There is broad consensus that litigation currently takes too long and that its duration should be reduced. Any effort to shorten that duration, however, whether under the existing model or a new one, will necessarily compress the timeframe in which litigation costs are incurred. For

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[190] See, for example, the submission of Sean McGarry, p. 1.

[191] See, for example, the submission of Bennett, p. 5.

[192] The "four corners" of a party's disclosure includes the content of their witness statement, the content of the documents disclosed, and any evidence adduced through their focused examination (described below).

instance, reducing the length of a proceeding from five years to two will naturally result in higher expenses in years one and two regardless of the model adopted. If litigation is to proceed more quickly, it must also be accepted that fees will be compressed and incurred earlier in the process.

Second, we disagree that the proposed up-front evidence model is more costly than the existing process, both in the first year and overall. We will elaborate.

Costs in the first year: If it were possible to compress our existing process model into a two-year timeline, the first year would likely be devoted to the existing discovery process. The proper comparison, then, is between the discovery processes under each model.

Unsurprisingly, there is no research directly comparing the average cost of discovery under the current model with that of the proposed model. Nevertheless, our view is that there are sound reasons to believe that the up-front evidence model will reduce discovery costs. While the preparation of witness statements will undoubtedly involve costs, those must be weighed against the anticipated savings in other aspects of the discovery process resulting from:

(i) the shift from a relevance-based standard of discovery to the significantly less costly reliance-based standard;

(ii) the narrowing of issues early in the litigation process, which is expected to reduce the volume and complexity of interlocutory steps; and

(iii) the elimination (or significant narrowing) of examinations and the extensive work they generate, including the costs and delays associated with preparation and attendance, answering undertakings, addressing refusals motions, reattending for further examination, and obtaining and reviewing transcripts.

Costs Overall: Again, while there is no research directly comparing the average cost of a proceeding from start to finish under the existing model with that under the up-front evidence model, we believe that the up-front evidence model will reduce the overall cost of litigation for two reasons.

First, by requiring parties to disclose their witness statements shortly after the Close of Pleadings, the model is designed to streamline proceedings, narrow the issues in dispute, and reduce disputes regarding marginal or irrelevant issues. Not only will this alone reduce costs, but it will also accelerate the path to a dispositive hearing. Since we believe that delay and cost are closely linked, we believe that shorter timelines are also likely to result in lower average litigation costs.

Second, the exchange of all witness statements will streamline and shorten the dispositive hearing. Fewer witnesses will need to lead their evidence-in-chief, as it will be taken as read. Cross-examinations will be more efficient as they will be prepared in advance rather than hastily over a lunch break after hearing the evidence-in-chief for the first time in the morning. In judge-alone cases, prior review of witness statements will also help the trial judge understand the context of the evidence, enabling more efficient mid-trial rulings. In addition, the trial will be more focused overall because all parties will have had ample time to understand and engage with the real issues in dispute.

The cost of preparing witness statements should not be viewed as a barrier to access to justice. In our view, it is less costly than undertaking discovery in the current system and leads to lower overall litigation costs. The real concern is whether litigants will experience sticker shock when confronted with the true cost of the discovery process. Still, if a litigant cannot afford the process, it is far better that they reach that conclusion early—before committing significant resources to a process that often yields little of substantive value.

Finally, some Consultees noted that front-loading costs could cause some counsel (especially those working on a contingency fee basis) to be more selective in the matters they accept. This, they argued, may prevent certain cases from moving forward and, in turn, hinder access to justice.[193]

As set out in Section VI(J)(2)(b) above, we agree that there is currently little disincentive to commencing unmeritorious litigation. In its Phase 2 submission, Aviva noted that:[194]

> Approximately 50% of our litigation claims close without payment to the plaintiff ... There is little disincentive for commencing unmeritorious litigation. Costs can only be awarded by a judge. Many judges are reluctant to order costs if the plaintiff agrees to a dismissal of their action and most personal injury lawyers purchase adverse costs insurance. These cases drive up the cost of insurance and clog the court system.

We see no issue with requiring a party who initiates a claim to clearly articulate their case and commit to it early in the process. To the extent this deters the pursuit of unmeritorious claims, we consider that a positive outcome.

Having said all of that, we appreciate that the up-front evidence model involves significant work, right from the outset of the case. It is still a relatively process-heavy model. The costs associated with compliance will be of particularly acute concern in lower-value cases.

Therefore, in response to the many concerns that Consultees raised, we have revised our proposal to one that envisions three separate procedural tracks: the Application Track, the Summary Track, and the Trial Track. Each track engages somewhat different mechanisms to control costs and delays. We will review the revised proposal and the features of each track in a moment. First, we will briefly set out our response to Consultees' concerns about eliminating oral discovery. Then we will explain in some detail why we continue to promote the up-front evidence model as a core aspect of our proposed reforms.

e) The Elimination of Oral Examinations for Discovery

The Consultation Paper anticipated and addressed most of the concerns that Consultees raised concerning the proposed elimination of oral discoveries. After reviewing and considering the feedback—overwhelmingly opposed to their elimination—we remain of the view that oral discoveries are unnecessary under the up-front evidence model and that, in this context, their limited benefits are outweighed by the expense and delay they introduce. We remain concerned that incorporating oral examinations into the up-front evidence model would increase, rather than

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[193] See, for example, the submission of TAS, p. 27.

[194] Submission of Aviva, p. 4.

reduce, procedural complexity and costs. We had hoped to be more persuasive on this aspect of our proposals.

It is impossible not to recognize, however, that the overwhelming view of a cross-section of stakeholders, including some members of the Working Group itself, is that oral discovery remains a critical component of Ontario's civil justice system. Considering the strength and consistency of these objections, we have concluded that complete elimination of oral examinations is not a viable proposal at this time. Implementation of reforms of the magnitude that we are proposing will present many challenges. Those challenges are likely to be substantially eased where there is reasonable stakeholder buy-in. Accordingly, we believe that, at this stage, it is necessary that at least some limited access to oral examinations be maintained.

6. The Benefits of the Up-Front Evidence Model

Notwithstanding concerns expressed by Consultees, the Working Group continues to support the introduction of the up-front evidence model. Overall, the model is designed to promote cost efficiency and reduce delay. In our view, it has many salutary features, including the following:

(i) It ensures that parties know the case they must meet and eliminates any risk of trial by ambush. In other words, it satisfies the second principle of natural justice. Indeed, it serves all the needs of the adversarial system;

(ii) It promotes leaner, more focused documentary production;

(iii) It compels parties to disclose their case-in-chief up-front, which helps them focus on the real issues in dispute, thereby promoting earlier settlement, streamlining the process, and discouraging nuisance claims;

(iv) It ensures that witnesses' evidence will be memorialized at a time when it is freshest;

(v) It provides optimal value for fees incurred; and

(vi) It eliminates (or at least significantly curtails) the need for oral examinations for discovery, along with the motions, costs, and delays arising therefrom.

We will take a moment to unpack these identified benefits.

a) Serving the Needs of the Adversarial System

The discovery process has several key objectives, all of which support the adversarial system of justice, including: (a) facilitating evidence gathering and assessment; (b) avoiding trial by ambush; and (c) facilitating settlement.

Based on the up-front evidence model's design and the experiences of other jurisdictions using it, we believe that the model will meet each of the three key objectives. At the same time, the up-front evidence model promises greater cost-efficiency and ensures that parties become trial-ready more quickly than under the current system, thereby reducing delays.

Facilitating evidence gathering and assessment*:* Our current discovery model produces relevant and helpful information but also generates large volumes of material with little or no probative value. Efficiency would be better served by focusing on the evidence that actually enables parties to prepare their cases.

By contrast, under the up-front evidence model, each party gains access to their opponent's case-in-chief long before the dispositive hearing. This shifts the information-gathering process from sifting through a mountain of material to find what is useful to, instead, being presented with the actual case that needs to be addressed, including the materials that support it and, thereafter, seeking to fill in the gaps in the story presented. The real issues in dispute will quickly become narrowed. The resulting efficiency better serves the needs of the adversarial system than a model that requires disclosing both significant materials and, in many cases, a large volume of irrelevant or insignificant material.

Avoiding trial by ambush: Under the up-front-evidence model, litigants will have a complete understanding of their opponent's case when heading into a dispositive hearing, effectively eliminating the risk of trial by ambush. Moreover, litigants and counsel are arguably better positioned to prepare for cross-examination at trial, as they will have had their opponent's evidence-in-chief for a significantly longer period.

Facilitating settlement: Settlement rates in civil proceedings in Ontario have historically been very high. Still, too many cases settle only on the proverbial eve of trial, by which point they have taken too long, consumed too many Court resources, and incurred unnecessary cost.

Experience in jurisdictions that use the up-front evidence model demonstrates that, as under our current system, most cases settle before trial. More importantly, we believe that the earlier litigants are provided with the tools and information they need to resolve their disputes, the earlier they will be able to do so. Accordingly, we are of the view that the up-front evidence model will facilitate earlier settlement.

If there is one type of settlement that the up-front model is likely to reduce, it is those driven solely by a party's inability to continue to fund their litigation or to wait for a hearing to obtain payment. Given our belief that such settlements are inherently unjust, reducing their occurrence necessarily increases access to justice.

In our view, the proposed up-front evidence model better reconciles the needs of the adversarial system with the objectives of achieving the just, most expeditious, and least expensive determination of a matter.

b) Leaner, Targeted Document Production

The volume of documents profoundly impacts the time and cost involved in litigating a claim. For instance, in its submission, Pro-Demnity Insurance Company ("**Pro-Demnity**") noted that: "[t]he single greatest consideration in which files must be referred to external counsel is not the

complexity of the case, liability, or even number of parties, but the anticipated volume of documents."[195]

We propose replacing the current, inefficient "leave no stone unturned" relevance-based approach to documentary disclosure with a requirement to exchange only those documents that truly matter to the live issues as defined by the pleadings and sworn witness statements. By adopting a narrower, reliance-based standard, the disclosure process will become more economical and timelier, focusing on materially relevant documents and avoiding unproductive "document dumps." We share SABA's view, expressed in its submission, that:[196]

> [a]dopting the reliance versus relevance standard for document production enhances procedural efficiency by focusing on documents that directly impact the issues in dispute. This targeted approach reduces unnecessary disclosure and associated costs, streamlining the litigation process. … [T]his means less complexity and a more manageable process, which ultimately supports fairer and more accessible justice.

c) Up-Front Focus

Under the current disclosure model, parties and their counsel often gain meaningful insight only during examinations for discovery, and a comprehensive understanding only at trial—often many years after the litigation began.

By contrast, under the up-front evidence model, that understanding is achieved early in the litigation through the exchange of party witness statements. Parties will no longer be incentivized to plead their cases as broadly as possible or to delay developing their case theory until the eve of trial. Instead, they will be required to produce their witness statements early in the process, thereby identifying and focusing on the real issues in dispute. This will effectively reverse the current back-end-loaded model of civil justice and yield numerous benefits.

First, the proposed approach allows parties to better understand each other's cases early in the proceeding. This will enable parties to engage in meaningful settlement discussions earlier in the process. Indeed, they will be incentivized to do so, as they will no longer be able to defer costs in the way the current system allows.

Second, earlier identification of the issues in dispute will promote efficiency by directing parties' efforts to genuinely contested matters and reducing time spent on those that are not, resulting in a shorter path to trial. It will also allow for the earlier setting of a trial date, which we believe is key to encouraging earlier settlement and significantly accelerating the process.

Third, the early exchange of party witness statements and a focus on the issues in dispute will also streamline the trial itself.

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[195] Submission of Pro-Demnity, p. 4.

[196] Submission of SABA, p. 3.

Fourth, requiring the early disclosure of witness statements and the earlier investment of resources will help discourage nuisance claims.

d) Memorializing Evidence at its Freshest

Witnesses provide evidence based on their recalled observations. Recollections are generally freshest early in the process.

In the current system, party evidence given during examinations for discovery is often provided years after the events in question, thereby reducing its reliability. Evidence from non-party witnesses is typically not presented until trial—sometimes five to ten years after the events in question occurred—when memories may have faded even further.

By contrast, in the proposed up-front evidence model, witness statements will be provided early in the process, when memories are fresher. Witness statements will also preserve the evidence of witnesses who may leave a corporate party by recording their testimony while they are still available to provide it. Moreover, requiring witness statements to be prepared up-front will increase the odds that they will reflect only the witnesses' personal observations, rather than being shaped by arguments that evolve over the course of the proceedings. In this way, they are likely to involve less advocacy and maintain a stronger focus on the witnesses' actual observations.

c) Fees Incurred vs. Value Gained

It is important to evaluate litigation costs in terms of the value they deliver. Preparing witness statements is essential work because they form the basis of each party's evidence-in-chief. While this process undoubtedly involves costs, parties can be confident that their litigation dollars are being directed toward substantive matters that advance the resolution of the dispute, rather than toward procedural skirmishes or the production of documents with minimal evidentiary value.

More than one Consultee raised an objection to producing up-front witness statements on the basis that, in many cases, they are a wasted expense because they are never required. In other words, a case may settle short of a trial, and the witness statements may never be used. We make two comments in response:

(i) We propose to introduce PLPs to encourage resolution discussions before a claim is commenced, whether through direct negotiation or early mediation. There will be opportunities to settle before engaging in the exchange of witness statements; and

(ii) The expressed concern amounts to a promotion of the status quo. The suggestion that a case might settle without the need to exchange witness statements implies that there will be some alternative means by which parties can learn about the strengths and weaknesses of their cases and those of their opponents, thereby enabling them to settle the matter. The unstated means of information sharing is presumably documentary production based on a relevance standard and examinations for discovery, with all their attendant costs and delays. In our view, however, the status quo is not working.

f) Reducing the Need for Oral Examinations

As we outline in the next section, oral examinations will remain available in the Trial Track (i.e., for higher value or more complex cases). The disclosure achieved through the up-front evidence model will make it possible to significantly focus and shorten examinations. Shortening examinations has significant benefits. For example, the current Rules permit seven hours of oral examinations per party. In a four-party case, counsel would need to find four mutually agreeable dates for their examinations, which can be a real challenge and lead to significant delay. If examinations are capped at 90 minutes, as we propose, all four parties' examinations could be completed in a single day.

Examinations limited to 90 minutes will also generate fewer undertakings, fewer disputes, and far shorter transcripts than seven-hour examinations.

Significantly shorter examinations, combined with other proposed safeguards, are necessary to ensure that—if examinations are retained—the model does not simply add more process to the existing system.

In the next section, we will briefly describe the proposed three-track process model we are recommending, and we will examine how the up-front evidence model will work within that model.

K. DISCOVERY IN THE THREE-TRACK PROCESS MODEL: THE UP-FRONT EVIDENCE MODEL

1. Overview of the Three-Track Process Model

The feedback we received during the consultation process has led us to design a process model that involves three distinct tracts, each with its own procedures. They are the Application Track, the Summary Track, and the Trial Track. A high-level overview of each track is set out below, with a more detailed explanation provided in the next section.

The decision to propose separate tracks, distinguished in certain respects by the amount at stake in the proceeding, was driven by concerns that Consultees raised. The Working Group's discussions were most influenced by the following considerations:

(i) The CRR's objectives to reduce costs and delays and improve access to justice;

(ii) The overwhelming view of Consultees that some limited form of out-of-court examination is essential to achieving procedural and substantive justice;

(iii) Recognition that adding even limited examinations to the up-front evidence model introduces additional process and expense. Accordingly, focused examinations should be reserved for cases where their costs are proportionate to the amounts at stake;

(iv) Concerns about cost pressures arising from the compressed timelines envisioned for civil proceedings under the up-front evidence model, and the need to reduce the overall costs of obtaining an adjudicative decision, particularly in lower-value and less complex cases;

(v) The need to reduce the workload associated with producing witness statements and the demands placed on non-parties, including medical professionals; and

(vi) The reality that conventional trials are disproportionately expensive for lower-value cases and effectively out of reach for most Canadians—making the existing "right to trial" in many cases more illusory than real.

The Application Track: Despite supporting a transition to a single originating process as an entry point into the civil justice system, the Working Group has consistently maintained that the existing application process should remain a feature of any civil justice process model going forward. It is streamlined and generally an efficient, cost-effective means of obtaining an adjudication on the merits.

The Application Track will be limited to those cases that would currently proceed by application pursuant to a statute or under Rule 14.05(3), excluding the catch-all category at 14.05(3)(h), which presently permits applications in any case where it is unlikely that there will be any material facts in dispute requiring a trial.

The Application Track will involve a summary process, described in greater detail in Sections VI(K)(2) and VI(L)(6) below. At a high level, the process is meant to more or less track the existing application process and will include:

(i) The issuance and service of a Notice of Claim along with a Notice of Directions Conference;

(ii) The filing of a Notice of Intent by any defendant who intends on participating in the proceeding;

(iii) Attendance at an early Directions Conference at which the DC Judge will set a timetable for the proceeding;

(iv) Delivery of a statement of defence if required;

(v) Exchange of witness statements and expert reports, if appropriate given the nature of the proceeding;

(vi) Out-of-court cross-examinations, if appropriate given the nature of the proceeding;

(vii) Attendance at a mediation, if ordered or agreed upon;

(viii) The exchange of factums; and

(ix) A dispositive "**Summary Hearing**," conducted under the "**Paper Record+ Process**," meaning a hearing based primarily on a paper record, but with discretion for the hearing judge to permit oral evidence from one or more witnesses, with or without time limits, to ensure that all information necessary for a final determination of the issues is before the Court—hence the "+" in "Paper Record+ Process".

The Summary Track and Trial Track: The Working Group proposes that proceedings that would otherwise be brought by way of an action in the existing system, will proceed along one of two alternate tracks: the Summary Track or the Trial Track.

Although we propose that both tracks implement the up-front evidence model, they will differ in other respects. The Summary Track will employ processes similar to the Application Track and culminate, absent settlement, in a Summary Hearing. The Trial Track will employ processes that include "focused examinations" and culminate, absent settlement, in a conventional trial.

Cases that will presumptively proceed by way of the Summary Track include: (a) claims exclusively for money or personal property, where the total of the amount of money claimed or the fair market value of any property (as at the date the claim is commenced) is greater than the Small Claims Court ceiling (currently set at $50,000) but less than $500,000, exclusive of interest and costs; (b) claims for less than $500,000, exclusive of interest and costs, that are outside the jurisdiction of the Small Claims Court (e.g., claims for real property where the fair market value of the property is less than $500,000); (c) mortgage enforcement proceedings, regardless of the amount claimed; (d) claims exclusively for liquidated damages, regardless of the amounts claimed; (e) construction lien claims; and (f) contested estate claims.

As described in greater detail in Sections VI(K)(3) and VI(L)(7) below, Summary Track cases will follow a process similar to that applied to the Application Track. At a high level, it will include:

(i) The exchange of pleadings;

(ii) Scheduling an early Directions Conference after the Close of Pleadings;

(iii) Setting a timetable at the Directions Conference for all steps in the proceeding, guided by the default timetables;

(iv) Adherence to the requirements of the up-front evidence model, tailored to the Summary Track;

(v) Out-of-court cross-examinations;

(vi) Attendance at a mediation, unless the Court dispenses with the requirement;

(vii) The exchange of factums; and

(viii) A dispositive Summary Hearing, conducted under the Paper Record+ Process.

Trial Track cases will consist of any cases not presumptively streamed to the Application Track or Summary Track. Cases on this track will follow a process described in greater detail in Sections VI(K)(4) and VI(L)(8) below. At a high level, the process will include:

(i) The exchange of pleadings;

(ii) Scheduling of the "**One-Year Scheduling Conference**" after the Close of Pleadings (or one year after the Notice of Claim is issued if no defence has been filed and the claimant has not obtained default judgment);

(iii) Adherence to the requirements of the up-front evidence model, tailored to the Trial Track;

(iv) Focused examinations;

(v) Attendance at a One-Year Scheduling Conference at which time dates will be fixed for a trial management conference, mediation (unless one has already occurred or the Court dispenses with the requirement), and trial;

(vi) The completion of the exchange of any expert evidence;

(vii) Attendance at a mediation (unless the Court directs otherwise);

(viii) Attendance at a TMC; and

(ix) A conventional trial.

The Court will retain discretion to transfer cases between the Summary Track and Trial Track in certain circumstances. By contrast, there will be no discretion to transfer an Application Track matter to another track.

A more detailed consideration of the discovery obligations in all three tracks follows, while a fuller discussion of the processes governing those tracks is set out in Section VI(L).

Discovery is accomplished in all three proposed tracks through the application of the up-front evidence model tailored to the requirements of each track. We will consider each track in turn.

2. Discovery in Application Track Cases

Application Track cases will be varied in terms of the nature of the relief sought and the processes required to complete them.[197] As a result, we recommend that bespoke processes be established at an early Directions Conference in Application Track matters.

These matters are intended to generally follow the existing application process model, which does not involve extensive disclosure obligations. Subject to any statutory requirements governing the

[197] Some Application Track proceedings will not require extensive process orders (e.g., judicial reviews and appeals of arbitration awards). Judicial Reviews are addressed in Section VI(L)(6) below.

application, parties on the Application Track will be required to provide claim-based disclosure, primary disclosure, and supplementary disclosure, each of which, as described below, closely aligns with current requirements. For further edification, although the disclosure requirements use up-front evidence model terminology, we are not proposing to introduce broader disclosure obligations in Application Track cases than presently apply to applications under the current Rules.

Claim-Based Disclosure: As described above, the Consultation Paper referred to an obligation to make "initial disclosure" at the time of pleading. Going forward, we will refer to initial disclosure as "claim-based disclosure" to avoid confusion with the obligation of "primary disclosure."

Consistent with the proposal outlined in the Consultation Paper, the claim-based disclosure obligation will require each party to produce, at the time a pleading is served, all non-publicly available documents referred to in the pleading[198] that are in the party's possession, control, or power.

For publicly available documents, a party will be required to (a) provide a link to the document if the document is available online or (b) provide a copy of the document if the document is publicly available, but not accessible online.

Primary Disclosure: Primary disclosure in Application Track cases will consist of the exchange of Reliance Documents, witness statements, and expert reports, in accordance with directions provided by the Court at an early Directions Conference.

Reliance Documents: The parties will be required to serve and file their Reliance Documents. A party should not include in its bundle of Reliance Documents any document already produced by another party.

Witness Statements: The parties will be required to serve and file their sworn witness statements from **each witness** on whom the party intends to rely, referring to the party's Reliance Documents. If another party has already produced a document as part of its Reliance Documents, a party's witness statement may refer to that document without reproducing it.

Again, while we are proposing to update terminology for consistency across the new system, the production of witness statements and Reliance Documents in the Application Track remains substantively identical to the current requirement that parties must file *all evidence on which they intend to rely*, including affidavits and any documents attached as exhibits to those affidavits. To be clear, we are not expanding the scope of disclosure for Application Track matters. If a party does not intend to rely on witness statements or Reliance Documents, there is no obligation to file them. The requirement remains limited to disclosing the evidence on which a party intends to rely.

In exceptional circumstances, a party may seek a direction from the Court requiring the production of documents in advance of the deadline to serve its witness statements and Reliance Documents. For example, this may be appropriate in an oppression remedy proceeding where a director has been locked out of the business and no longer has access to critical records (e.g., the director's

[198] Again, documents "referred to" in the pleadings are those that are specifically identified in the pleading.

own emails), which would be necessary to prepare witness statements and compile Reliance Documents.

Expert Reports: The parties will be required to deliver all expert reports on which they intend to rely.

Supplementary Disclosure: As set out in Section VI(L)(6) below, once primary disclosure has been exchanged, parties will be permitted to conduct out-of-court cross-examinations on the witness statements and experts' reports. During those examinations, parties may seek the production of additional documents, as is currently permitted. The cross-examinations will be governed by the rules set out in Section VI(M) below.

3. Discovery in Summary Track Cases

Claim-Based Disclosure: The parties will have the same claim-based disclosure obligations as in the other tracks, as set out in Section VI(K)(2) above.

Primary Disclosure: Primary disclosure in Summary Track cases will be achieved through the exchange of Reliance Documents, witness statements, and expert reports. Primary disclosure obligations will be governed by the same rules described in Section VI(K)(2) above. Sworn witness statements will be required from **each witness** on whom the party intends to rely.

Supplementary Disclosure: A party that is not satisfied with the disclosure provided through the claim-based and primary disclosure steps may request that an opposing party produce additional documents provided that:

(i) the documents are relevant to the issues raised in the pleadings;

(ii) the request is focused and specific;

a. "Focused" addresses the breadth of the request and means it is directed at a particular issue or objective and appropriately narrow in scope;

b. "Specific" addresses how well-defined the request is and means it is clearly articulated and precise in its description or criteria;

c. The requisite level of focus and specificity will depend on the nature of the case. For example, in a fraud case, a somewhat broader or less specific request may be appropriate, whereas a more focused and specific request would be expected in a straightforward contract dispute;

(iii) the documents are not in the requesting party's possession, control, or power;

(iv) the documents are within the possession, control, or power of the requested party; and

(v) the request is consistent with the Goals, and in particular with the goal of ensuring that proceedings are cost-effective and proportionate to (i) the nature of the proceeding and

its importance to the parties; (ii) the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises; and (iii) the amount or value of the claim.

The proposed new standard is aimed at significantly reducing the volume of documents subject to production.

A party may object to the disclosure of the requested document(s) on the basis that (a) the document is privileged; or (b) the request does not satisfy one or more of the criteria set out above.

Requests for specific additional disclosure will be made under Part A of a "**Discovery Request Chart**,"[199] which will include standardized columns to help the parties track requests for documents, undertakings, and refusals (and responses thereto). A copy of a proposed Discovery Request Chart is attached as **Appendix "D."** The timing of requests and responses will be prescribed, according to the timetable set out in Section VI(L)(7) below.

4. Discovery in Trial Track Cases

Claim-Based Disclosure: The parties will have the same initial disclosure obligations as in the other tracks, as set out in Section VI(K)(2) above.

Primary Disclosure: Primary disclosure in Trial Track cases will be achieved through the exchange of (a) Reliance Documents, (b) witness statements for party witnesses, (c) will-say statements for non-party witnesses, and (d) schedules for focused examinations and the delivery of expert reports.

Reliance Documents: The parties will be required to produce their Reliance Documents as described in Section VI(K)(2) above.

Witness Statements for Party Witnesses and Will-Say Statements for Non-Party Witnesses: In our Consultation Paper, we proposed that parties be required to exchange sworn witness statements for all witnesses on whom they intend to rely (not just those of the parties' themselves), thereby disclosing the entirety of their case-in-chief.

As discussed above, however, many Consultees objected, citing concerns about front-loaded costs, the limited time available to prepare these materials early in the proceeding, and the burden on non-party witnesses who are medical or technical professionals.

To address these concerns at least in part, and in line with a suggestion that Pro-Demnity made,[200] we propose that parties will be required to produce the following in Trial Track cases:

(i) *Party witness statements*: Sworn witness statements from each party witness on whom the party intends to rely, referring to the party's Reliance Documents (or those of another

[199] The Consultation Paper proposed using a "Redfern Schedule" for supplemental production requests. While our model is structurally similar, we have given it a more intuitive name and have intentionally avoided importing any of the legal commentary, conventions, or writing requirements associated with Redfern Schedules.

[200] Submission of Pro-Demnity, p. 8.

party). Parties that are not individuals (e.g., corporations, partnerships, municipalities) will be required to produce, as part of their "party witness statements," witness statements of all individuals currently or previously employed or otherwise controlled by the party who will give evidence on the party's behalf. If a former employee is not prepared to provide a witness statement, a will-say statement must be provided; and

(ii) *Non-party will-say statements*:

a. For all other non-party witnesses, only a will-say statement will be required at this stage, referring to the party's Reliance Documents (or those of another party). Will-say statements will be high-level summaries of the evidence expected to be given by the witness;

b. For treating physicians, the production of the doctor's clinical notes and records will meet the requirement to produce a will-say statement for that witness, unless the doctor is expected to testify about matters beyond the content of the notes and records, in which case a will-say statement will be required; and

c. As described below, full witness statements for non-party witnesses will be exchanged later in the life of the proceeding if it does not settle. This exchange will be scheduled at the One-Year Scheduling Conference.

We recognize that not all witnesses are keen to testify. If a non-party witness refuses to provide a witness statement, the party intending to call that witness will be able to rely on the previously produced will-say statement, along with evidence of the witness's refusal, and seek leave of the trial judge to adduce the witness's oral testimony at trial.[201] The witness's attendance at trial may be compelled through a Summons to Witness.

Schedule of Expert Reports and Focused Examinations: Too often, the timing of the delivery of expert reports disrupts scheduled steps in a proceeding, particularly pre-trials and trials. As proposed in the Consultation Report, parties will be required to exchange proposed timetables for the delivery of any expert reports on which they intend to rely. This requirement is intended to ensure a more orderly and predictable exchange of expert reports. To address situations where the need for an expert or the expected timing of a report is uncertain, parties will have an ongoing obligation to update their proposed expert schedules as circumstances evolve.

The parties will also be required to agree upon dates for "focused examinations." As part of this process, the plaintiff must propose five dates for the examinations, all within the timeframe set out in the timetable in Section VI(L)(8) below. The other parties must select one of the proposed dates or provide five alternative dates within the same timeframe. If the parties cannot agree on examination date(s), they must attend a Scheduling Conference.

[201] This is in line with a recommendation made by TAS at p. 24 of its submission.

Supplementary Disclosure: As in the Summary Track, a party may request the production of additional documents if it is not satisfied with the disclosure provided through the claim-based and primary disclosure steps. The same process will apply as set out in Section VI(K)(3) above.

Focused Examinations: For the reasons outlined above, we propose to introduce, in Trial Track Cases only, focused examinations limited to 90 minutes.

We refer to these examinations as "*focused examinations*" rather than "*examinations for discovery*" because much of the discovery will already have occurred through the up-front evidence model. In light of that disclosure, the examinations are expected to be more targeted than traditional examinations for discovery under the current system.

Focused examinations will be governed by the following provisions:

(i) Timing

a. Each party—or, where multiple parties are represented by the same counsel, the group collectively—may conduct up to 90 minutes of examination of the opposing parties (regardless of the number of opposing parties), within the timeframe established in Section VI(L)(8) below;

b. Each time a new party (e.g., third or fourth party) is added and defends a claim above, all existing sides receive an additional 30 minutes of examination time;

c. Example of allocation of examination time:

Configuration of parties	**Allocation per side (or group represented by same counsel)**	**Total combined examination time**
Plaintiff(s) and defendant(s) only	90 minutes each	3 hours total (1.5 hrs per side)
Plaintiff(s), defendant(s), and third party(ies) – where third party defends the main claim	120 minutes each (original 90 + 30)	6 hours total (2 hrs per side x 3 sides)
Plaintiff(s), defendant(s), third party(ies), and fourth party(ies) – where third and fourth party defends claims above	150 minutes each (original 90 + 30 + 30)	10 hours total (2.5 hrs per side x 4 sides)

(ii) Examinations must be scheduled concurrently with the exchange of expert evidence schedules;

(iii) Examinations will be conducted in accordance with the rules governing out-of-court examinations (see Section VI(M) below);

(iv) Undertakings must be answered within 30 days of the examinations;

(v) Disputes arising from the examination will be addressed as set out in Section VI(N)(4)(e)(3) below; and

(vi) Re-examinations will not be permitted, except in exceptional circumstances (i.e., where a party's conduct in the discovery process is wholly unreasonable and the failure to produce documents or answer questions has rendered the initial examination of practically no utility).

As an alternative to conducting a focused examination, a party may seek further disclosure through written interrogatories. These will be limited to 50 questions, including all sub-questions, each addressing only one factual issue (i.e., no compound questions requiring multiple answers). Responses must be provided within 30 days by way of affidavit. Objections will be governed by the same rules that apply to out-of-court examinations generally (see Section VI(M) below).

Parties may consent to answering written interrogatories or extending examination time beyond the limits set out in the Rules, but they do so at their own risk. The examination transcript must indicate when the permitted time has expired. The Court will not resolve any disputes arising from questions that go beyond the prescribed limits. Instead, parties must rely on the adverse inference that arises from a failure to answer proper questions (discussed in Section VI(K)(9) below).

We further recommend that Court data be tracked over a two-year period to assess whether focused examinations result in a significant number of interlocutory disputes. If so, future reformers should consider this data when evaluating whether the elimination of examinations should be revisited.

Reply Witness Statements: Working Group members agree that parties should have an opportunity to deliver reply witness statements after receiving their opponent's statements. The debate, however, concerns the timing of those replies. Some members favour requiring reply statements before focused examinations, so their content can be tested during the examination. Others prefer allowing reply statements after focused examinations, so parties can address all of the opponent's evidence, including evidence elicited during the examination.

There are arguments for and against both positions. Delivering reply statements before examinations will facilitate broader examination but will not allow a party to respond to the evidence adduced on examination unless a second round of reply witness statements is permitted, which is undesirable.

Delivering reply statements after examinations will facilitate reply to a broader scope of an opponent's evidence but will not allow a party to examine on the reply evidence, unless a second round of examinations is permitted, which is undesirable.

On balance, we favour the latter approach. Reply witness statements should be relatively limited in scope. Given the procedural fairness already achieved through the up-front evidence model, further examinations on reply statements are unnecessary. Allowing their delivery after focused examinations will enable parties to respond to the complete record of their opponent's evidence and eliminate concerns that a party may be precluded from adducing reply evidence at trial because it was not included in an earlier witness statement.

As a final matter, we note that this issue arises from the continued inclusion of out-of-court oral examinations in the process. Examinations have the potential to create an endless cycle—materials prompting examinations, which in turn generate further materials and the perceived need for additional examinations. This loop of escalating process and cost would be eliminated entirely if examinations were removed from the model.

5. Supplementary Witness Statements in Summary and Trial Track Cases

A party may file a supplementary witness statement or a witness statement from a new witness if (a) it is on consent of all parties, (b) the filing of the supplementary witness statement will not require an adjournment of the dispositive hearing date (if one has been set), and (c) the parties agree on a timetable for the further exchange of evidence, if required as a result of the filing.

If the request is opposed, a party shall still be entitled to file a supplementary witness statement or a witness statement from a new witness with leave of the court, which shall be granted if:

(i) the filing will not require an adjournment of the dispositive hearing date (if one has been set), the filing does not materially prejudice another party's ability to prepare for the dispositive hearing, and the filing party pays all reasonable costs thrown away on a full indemnity basis, if any such costs exist; or

(ii) the only prejudice to the other parties is that arising from delay, the delay prejudice can only be cured through an adjournment of the hearing date (if one has been set), and the filing party is able to obtain such an adjournment from the Regional Senior Justice (or his or her designate) as described in Section VI(R)(2)(a) below.

An order granting leave to file the witness statement shall set a timetable for any additional steps necessitated by the filing.

6. Use of Witness Statements at Trial

Non-Jury Trials: The role of witness statements will depend on whether the witness is a party or a non-party.

Party witnesses: Subject to the discretion of the trial judge, the presumption will be that a party's evidence-in-chief will be given orally but limited to the four corners of that party's disclosure—that is, their sworn witness statements, including any reply or supplementary statements, the content of their Reliance Documents, and the content of any evidence provided during their focused examination.

For parties that are not individuals (e.g., corporations, partnerships, or municipalities), this presumption will apply to all witnesses currently or previously employed by, or otherwise under the control of, the party. It is expected that the principal witnesses for each party will testify orally, while ancillary witnesses may be directed to have their witness statements taken as read.

Non-party witnesses: The opposite presumption will apply to non-party witnesses, whose witness statements will be taken as read.

Jury Trials: No distinction will be drawn between the two types of witnesses in jury trials, where all witnesses will give oral evidence-in-chief subject to the limitations referred to above.

7. Minimum Standard of Document Production

We propose to establish a minimum standard for document production, which will apply to all productions of documents (e.g., exhibits to an affidavit, Reliance Documents, etc.) unless the parties agree to a different standard or a party demonstrates a valid reason for non-compliance. The proposed minimum standard is as follows:

(i) Numbering: Each document shall be identified with a unique number. For instance:

  a. C1, C2, C3, etc. for the complainant's documents; and

  b. D1, D2, D3, etc. for the defendants' documents;

(ii) All documents shall be produced in .pdf format, however, parties must make documents available in their native format upon request;

(iii) If being produced in .pdf format:

  a. the documents should be compiled into one single .pdf document, bookmarked to each individual document;

  b. the production numbers shall correspond to an excel spreadsheet that contains for all non-email documents, the following information: "Document Number"; "Document description"; "Date"; "From"; "To"; "Author";

(iv) If being produced in native format:

  a. All documents shall also be listed in a chart that contains the following information: "Document Number"; "Document description"; "Date"; "From"; "To"; "cc"; "Author"; "Subject", "Document Number of Attachment(s);"

  b. To the extent possible, all emails shall be produced as part of a single .pst file;

(v) Original versions of hard copy documents shall be produced upon request; and

(vi) Documents shall be produced electronically (e.g., by delivering them on a USB stick or by Dropbox other file-sharing tool, etc.) without cost.

Some productions may contain confidential information. Where parties are unable to agree on the terms of a confidentiality agreement or protective order, they may seek the Court's direction at a Directions Conference before producing the documents in question. The Court shall address any resulting changes to the timetable. In the meantime, parties must take all reasonable steps to avoid delay by producing all non-confidential documents pending resolution of the confidentiality issue.

8. Content of Witness Statements

We propose to model the guidelines for the content of witness statements off the models used in jurisdictions such as Singapore, New Zealand, and England and Wales. In particular, that:

(i) They are to be in the witness's own words, while recognizing that the statements will be drafted by lawyers when the parties are represented by counsel;

(ii) They must include only admissible evidence;[202]

(iii) They should include footnote references to Reliance Documents. To minimize duplication, all witness statements should refer to a set of Reliance Documents rather than attaching separate exhibits;

(iv) They must include a certification that every Reliance Document referred to is authentic; and

(v) They are not to include commentary, opinion, or disguised submissions, or the lengthy review and characterization of documents.

Each party's witness statement must include a list of the names and mailing addresses of all individuals reasonably expected to have knowledge of the live issues in the litigation, unless the Court orders otherwise.[203] For parties that are entities (e.g., a corporation), only one witness statement need include this information.

Witness statements will be subject to the deemed undertaking rule until they are filed with the Court.

9. Disputes Concerning the Discovery Process

If a dispute arises concerning (a) the non-production of a requested document or (b) a refusal to answer a question during an out-of-court examination or by way of a written interrogatory, then (c) a party will have two options for addressing it:

> **Option 1:** A party may seek a court determination of the dispute. As more fully described in Section VI(N)(4)(e)(3) below, the dispute will be resolved in writing; or
>
> **Option 2:** Instead of seeking a court determination, the party may instead ask the Court to draw an adverse inference arising from the refusal to answer a proper question or produce a properly requested document.[204]

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[202] To be admissible, evidence must be relevant, material, not subject to a rule of exclusion (such as hearsay, opinion, or prior consistent statements), and its probative value must exceed its prejudicial effects. See *R. v. Calnen*, 2019 SCC 6, at ¶ 107, per Martin J. in dissent, but not on this point.

[203] We recommend this in part based on the submission of CLHIA, p. 7.

[204] Submission of TAS, at pp. 26-27.

10. Third Party Records

At times, relevant and material documents are in the possession of third parties. The Working Group does not propose to alter the third party record regime currently provided for in Rule 30.10, other than in relation to *Wagg* Motions (discussed in Section VI(N)(4)(e)(4) below).

11. Recommendations

The Working Group recommends replacing the current discovery regime with an up-front evidence model in all cases. The model will include:

a. Claim-based, primary, and supplemental disclosure requirements in Application Track matters (subject to any statutory direction governing the application) as set out above;

b. Claim-based, primary, and supplemental disclosure requirements in Summary Track matters as set out above. These will require parties to produce, among other things, Reliance Documents, expert reports, and sworn witness statements for all witnesses on whom the party intends to rely;

c. Claim-based, primary, and supplemental disclosure requirements in Trial Track matters as set out above. These will require parties to produce, among other things, Reliance Documents, sworn witness statements for all party witnesses, will-say statements for all non-party witnesses, and an agreed-upon schedule for the delivery of expert reports and the conduct of focused examinations. Witness statements for all non-party witnesses are to be delivered after the One-Year Scheduling Conference. The production of a treating physician's clinical notes and records will satisfy the requirement for a will-say statement;

d. A provision for up to 90 minutes of focused examinations in Trial Track cases;

e. A provision for supplementary witness statements in Summary and Trial Track cases;

f. A provision concerning the use of witness statements at trial;

g. A provision for the minimum standard of document production;

h. Guidelines for the contents of witness statements; and

i. A provision allowing a party, where a dispute arises over a refusal to produce a document or answer a question, to either seek a written Court determination or request that the Court draw an adverse inference from the refusal.

L. THE PROCEDURAL FRAMEWORK FOR ALL MATTERS

In developing a new procedural framework for civil litigation in Ontario, the Working Group was guided by its core mandate to reduce costs and delays and improve accessibility. Meeting these

objectives requires several imperatives: setting early dispositive hearing dates, increasing case management, adopting shorter presumptive timelines, and eliminating failed summary judgment motions. We begin with brief comments on these imperatives, then summarize the feedback received on the process model set out in the Consultation Paper, and finally provide a detailed description of the proposed three-track procedural framework.

1. The Need to Set Early Dispositive Hearing Date

We have heard from many individuals (both within and outside Ontario) that the most effective way to focus the parties' attention and encourage settlement is to set a firm date for a dispositive hearing and adhere to that date. Few things concentrate the mind and promote compromise like the prospect of a dispositive hearing. As The Honourable Regional Senior Judge Paul R. Sweeny ("**RSJ Sweeny**") said in his submission:[205]

> The imminent trial leads to the parties putting their best offers forward. It is not until that last moment that the parties feel they are getting the best deal possible. Given this reality, the focus should be on providing a trial date.

2. The Need for Increased Case Management and Shorter Timetables

The current iteration of the Rules reflects a party-driven model. Parties are generally required to adhere to the procedural steps mandated by the Rules but can do so at their own pace, which is often unduly slow.

One might reasonably ask why a claimant should be forced to proceed with their case faster than desired? More importantly, why require a case to proceed faster when all parties are content to wait many years—sometimes five, six, or more—for their case to reach trial?

The answer is that when delay becomes pervasive and is treated as a normal and inevitable feature of litigation, it undermines public confidence in the administration of justice and fosters a perception that the legal system is inefficient, unresponsive, and incapable of delivering real justice. Delay must be treated as an exception, not an accepted norm.

In addition, while many defendants may tolerate or even prefer delays, many do not. Prolonged litigation imposes financial, emotional, and practical burdens on defendants, many of whom would prefer timely resolution over continued uncertainty. It is unfair to give claimants the power to decide when and how quickly to proceed with a matter. It is equally unfair to require defendants to bear the burden of moving a case forward, especially when that responsibility should lie with the claimant.

Finally, while both sets of opposing counsel may be amenable to a prolonged process, the system must include safeguards for clients—particularly those who have less leverage over their counsel, such as those involved in contingency-fee arrangements.

In jurisdictions the Working Group examined where civil justice reforms have been successfully implemented, each has transitioned to a more court-managed process, viewing that shift as an

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[205] Submission of The Honourable Regional Senior Judge Paul R. Sweeny ("**RSJ Sweeny**"), p. 2.

essential element of reducing delay. The jurisdictions most closely studied include England and Wales, New South Wales Australia, New Zealand, and Singapore, all of which employ process models that share key similarities with the one we are proposing. Each of these jurisdictions also incorporates early case conferences in every matter to assess the case's needs and to provide directions designed to manage those needs efficiently.

The Consultation Paper included a proposal that Ontario follow suit and transition to a more court-managed system. Better case management will help keep cases on track, ensure process targets are met, and limit the ability of parties to frustrate and delay the progress of a case.

We are mindful that the Court lacks sufficient resources to employ the same level of case management used in the other jurisdictions we studied. Given that we do not believe it is feasible to conduct early case management in every civil case commenced in this province, we propose to use "light touch" case management as much as possible. As set out below, however, we propose to implement sufficient case management to ensure that cases do not languish in the system.

As discussed in more detail at Section VI(L)(11) below, some Consultees were uncomfortable with the idea of a court-managed system and urged the Working Group to maintain the party-driven model.[206] Some of their concerns stem from doubts about whether the Court has sufficient resources to engage in more case management. Given the current shortage of judicial resources, those doubts are not unreasonable. That said, while resourcing falls outside our mandate—and we rely on others to determine whether our proposals can be implemented within existing constraints—we believe that, if implemented properly, the proposed model will not require additional resources but will instead reallocate existing resources to more effective functions.

We also recognize that, as the proposed system is implemented, refinements will likely be necessary to address unforeseen issues and close any gaps that emerge.

3. The Need to Eliminate Failed Summary Judgment Motions

Summary judgment motions under the existing Rule 20 provide a streamlined process for resolving claims. For the most part, they involve the exchange of affidavits, cross-examinations on those affidavits, the exchange of factums, and the attendance at an oral hearing. Although they are typically decided based on a paper record (i.e., they do not involve live witnesses), the hearing judge has discretion, under Rule 20.04(2.2) to "order that oral evidence be presented by one or more parties, with or without time limits on its presentation."

Ultimately, however, pursuant to rule 20.04(2), summary judgment can only be granted if (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence or (b) both parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to do so.

Although there is a significant body of case law concerning the test to be applied on a summary judgment motion, it is not always apparent when summary judgment is appropriate. Litigants often wish to proceed by way of a summary judgment motion because it offers a faster and more

[206] See, for example, the submission of OTLA, p. 63.

proportionate way to have a matter decided on its merits. As a result, some litigants roll the dice and take their chances, hoping for a favourable outcome. This has created a large graveyard of failed summary judgment motions.

Summary judgment motions consume significant resources of both the parties and the Court. They require comprehensive briefing of the facts and law and place a significant burden on the Court by requiring it to review materials, preside over hearings, and draft decisions. When a summary judgment motion fails, this effort is effectively for naught, as the case must then proceed to trial (or through the discovery process and then trial), where the same factual and legal issues must be revisited. This redundancy wastes not only the time and resources of the parties and the Court, but it also delays the case's final resolution, often by more than a year.

4. The Two-Track System Proposed in the Consultation Paper

The Initial Proposal: In the Consultation Paper, we essentially proposed a two-track system. We proposed introducing a single originating process. Recognizing the importance of preserving a streamlined procedure for matters that currently proceed as applications pursuant to Rule 14.05(3), we developed a summary process for such cases.

We proposed that claimants would identify on Appendix "A" of the claim whether the claim qualified as a "**Presumptive Summary Proceeding**" (or plural "**Presumptive Summary Proceedings**"), meaning that it would presumptively be decided by way of a Summary Hearing. If so, the matter would proceed directly to a Directions Conference upon the claim's issuance. At that Directions Conference, the DC Judge would confirm whether the matter was suitable to be decided by way of a Summary Hearing and, if so, would give directions for the exchange of evidence and cross-examinations, and set a dispositive date for the Summary Hearing. We proposed that the Summary Hearing would be conducted based primarily on a paper record, with a discretion to permit oral evidence from one or more witnesses, with or without time limits.

We proposed that Presumptive Summary Proceedings would include all proceedings commenced under a statute that permits or requires initiation by application, or a claim for certain types of relief largely consistent with the list of permitted applications under Rule 14.05(3).

According to our initial proposal, all non-Presumptive Summary Proceedings would follow standard procedures that included the up-front evidence model.

We also proposed allowing a party in a non-Presumptive Summary Proceeding to request a Directions Conference to ask that the matter proceed by way of a Summary Hearing. We noted that this mechanism would replace the existing Rule 20 summary judgment process, with the key distinction being that there would no longer be any failed summary judgment motions. We proposed that once a matter was directed to proceed by way of a Summary Hearing, that hearing would constitute the final adjudication of the case.

Consultation Feedback: There was generally strong support for a summary process for both application-like proceedings and for what are effectively summary judgment motions. Several Consultees recognized that this process would retain the current benefits of applications and

summary judgment motions and eliminate the inefficiencies and wasted resources often associated with summary judgment motions.[207]

Many Consultees asserted that the summary process should play a more prominent role and some suggested additional matters that should be treated as Presumptive Summary Proceedings.[208] Some Consultees, however, argued that matters involving credibility assessments should not be Presumptive Summary Proceedings,[209] with several warning that eliminating oral evidence could lead to unfairness.[210]

Some Consultees expressed concern about a "one size fits all" process that could lead to more and longer Directions Conferences.[211] One Consultee suggested that a DC Judge should be permitted to decide the process so that certain proceedings benefit from a shorter or longer timetable, with at least one Consultee recommending that a list of factors should be created for judges to consider.[212]

Numerous Consultees stated that cases subject to the Summary Hearing process should also be subject to mandatory mediation.[213]

In light of the feedback on the proposed two-track system, concerns about cost implications, and the need to include oral examinations in some form, our model evolved into a three-track system.

5. The Revised Proposal: A Three Track System

In Section VI(K) we discussed the three-track process model in the context of disclosure through the use of the up-front evidence model. In the sections that follow, we will take a more detailed look at the proposed three track system comprised of the Application Track, the Summary Track, and the Trial Track.

We propose that two of these tracks—the Application Track and the Summary Track—will culminate in a Summary Hearing.

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[207] See, for example, the submissions of CCLA, p. 49; Prof. Semple (second response), at pp. 1-3; and the Perells, at pp. 24-26.

[208] See footnotes 216-221 below. There were also questions about whether certain estate matters would be presumptive or non-presumptive. See the submission of Rintoul, pp. 1-2.

[209] See the submissions of Rintoul, pp. 1-2 (will validity matters); PGT, pp. 5-6 (guardianship applications); The PGT submitted that only *Substitute Decisions Act* applications that meet the requirements for the summary disposition process under the *SDA* should be subject to the paper record + process (p. 6); OBA, pp. 38-39 (guardianship applications) and 40 (dependent support applications); OTLA, p. 35 (personal injury); and MLA, p. 12 (oral hearings should be guaranteed where credibility is in issue).

[210] See for example, the submission of Bennett, p. 6.

[211] Collaborative Submissions of Toronto Firms, Appendix "A", p. 7 and the submission of the HLA, p. 4.

[212] Submission of TAS, p. 33.

[213] See for example, the submissions of CCLA, p. 56; TAS, p. 34; and ADR Institute of Ontario, p. 2.

The Summary Hearing will be conducted in accordance with a Paper Record+ Process. As set out above, this is a hearing based primarily on a paper record, but with discretion for the hearing judge to permit oral evidence from one or more witnesses, with or without time limits, to ensure that all information necessary for a final determination of the issues is before the Court.

The discretion to permit oral evidence from one or more witnesses, however, is expected to be exercised only in rare cases where the additional cost and scheduling implications required are proportionate to a fair hearing process. For example, a judge might exercise this discretion where it is necessary to ensure fairness to a self-represented litigant who was treated unfairly during an out-of-court cross-examination. We do not expect this discretion to be exercised frequently, particularly in light of our proposal (described in Section VI(M) below) that all out-of-court examinations be videotaped, thereby enabling hearing judges to assess credibility by watching the recording. This approach aims to provide hearing judges with the information necessary to render a fair and final decision while maintaining the efficiency of a predominantly paper-based process.

Although the discretion will remain available until the hearing judge renders a decision, we propose that the question of whether oral evidence is required should be raised at the Directions Conference, when all other procedural steps are discussed.

6. The Proposed New Application Track

We remain of the view that there should be a summary process for cases currently proceeding as applications. We propose, however, a slightly modified process from that set out in the Consultation Paper: we now propose an Application Track that will be separate and distinct from a Summary Track. While cases on both tracks will result in a Summary Hearing based on a Paper Record+ Process, each track will follow a slightly different procedural path.

As noted, we propose to define Application Track cases as all proceedings authorized by statute to proceed as applications and all proceedings seeking the relief currently set out at Rule 14.05(3)(a) to (g.1).

Parties will be required to identify the track applicable to their case on Appendix "A" of the Notice of Claim. When an Application Track matter is issued, the claimant will be required to obtain a Directions Conference date and serve a Notice of Directions Conference together with the Notice of Claim. Save in cases of urgency, defendants should receive at least 10 days' notice of the Directions Conference date. Defendants who wish to participate in the proceedings will be required to serve and file a Notice of Intent, as described above, before the Directions Conference.

Judicial review proceedings, which are governed by the *Judicial Review Procedure Act*,[214] will continue to proceed in the Divisional Court. The initial Directions Conference will be scheduled with a Divisional Court judge and will be subject to the practice directions of the Divisional Court. Judicial review proceedings will continue to be subject to Rule 68, with appropriate amendments. For instance, the originating process will be referred to as the Notice of Claim, consistent with the single entry point we propose to establish for all civil proceedings in Ontario.

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[214] *Judicial Review Procedure Act*, R.S.O, 1990, c. J.1.

Otherwise, in all other Application Track cases, the DC Judge will, subject to any statutory direction as to the conduct of the particular application:

(i) Dispose of the claim at the Directions Conference or provide directions for it to be disposed of on a default basis where no party has filed a Notice of Intent;

(ii) Confirm whether the claim is suitable to proceed on the Application Track;

(iii) Set a Summary Hearing date and allocate the amount of time being reserved for it;

(iv) Fix a timetable, addressing:

a. the exchange of any further pleadings (if appropriate and as discussed below);

b. the up-front exchange of evidence—namely, the exchange of witness statements, Reliance Documents, and expert reports as described in Section VI(K)(2) above (if appropriate);

c. cross-examinations (if necessary);

d. a mediation (if appropriate); and

e. the exchange of factums.

Given the wide variation in the relief sought in these matters, we propose establishing a bespoke process as early as possible. As such, these cases will not be subject to a default timetable; rather, they will be shepherded through the system by the DC Judge, who will have broad discretion to tailor the process to the case, subject to any legislative requirements.[215] We expect that in many cases, parties will be able to craft an appropriate process model on consent.

Although the current application process does not require the filing of a statement of defence, we propose that the DC Judge consider whether a substantive responsive pleading would assist in the matter. In many applications (e.g., an oppression application), there is no reason the complainant should have to wait until it receives the responding factum to understand the defendant's position. We recognize, however, that in cases with numerous parties put on notice, some of whom never take a substantive position (e.g., certain bankruptcy applications or *in rem* proceedings), requiring such a pleading may be impractical.

If the matter proceeds to a Summary Hearing, it will be heard under the Paper Record+ Process: namely, on a paper record, with the judge retaining discretion to permit oral evidence in exceptional cases.

[215] Certain matters that are authorized under statute to proceed as an application are also directed under statute to follow a particular process that may exclude some or all of these steps. The amendments to the Rules cannot override statutory authority as to the conduct of a proceeding.

7. The Proposed New Summary Track

As previously noted, some Consultees recommended that the summary process we envisioned in the Consultation Paper be used more expansively to presumptively include other types of claims including liquidated debt claims on bills of exchange or written instruments,[216] mortgage proceedings,[217] simple contract cases,[218] wrongful dismissal proceedings,[219] and applications to pass accounts and motions listed in rule 74.15.[220] Some Consultees even recommended that the Summary Hearing procedure should be the default model for *all* cases.[221]

We carefully considered how to mitigate concerns about the front-end costs of the up-front evidence model, together with feedback on the Summary Hearing process and recommendations for its expanded use. We were also mindful that our proposals set out in the Consultation Paper would have eliminated Rule 76 and the simplified procedure that it established.

Ultimately, we agree that the Summary Hearing procedure is appropriate in many cases. We have concluded that it should be the presumptive default model for lower-value cases and less factually complex cases, regardless of the amounts at stake. The creation of the Summary Track reflects the recognition that a single procedural model should not govern all cases, regardless of value or complexity. As outlined below, the Summary Track provides a more proportionate, timely, and accessible process for cases that warrant it.

Our conclusion is aligned with the culture shift called for by the Supreme Court in *Hryniak.* That call is worth repeating:

> [23] … Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.
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> [24] However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes. The cost and delay associated with the traditional process means that … the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative. …

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[216] Collaborative Submissions of Toronto Firms, Appendix "A", p. 7; and the submissions of Pilkington, p. 4 and Glenn E. Cohen ("**Cohen**"), p. 3.

[217] Submission of Cohen, p. 1-2.

[218] *Ibid*., p. 3.

[219] *Ibid.*

[220] Submission of the OCL, pp. 5-6.

[221] Submissions of Latner, p. 9 and Desa, p. 7. Others, including Cohen, pp. 1-4 and Definity, p. 7 advocated substantial expansion of its availability.

> [27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. *This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.*
>
> [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
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> [29] There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.
> …
>
> [33] ….The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

a) Presumptive Summary Proceedings

As noted above, the Working Group now proposes that Presumptive Summary Proceedings will include the following types of claims:

(i) Where the claim[222] is exclusively for money or personal property, and where the total of the following amounts is greater than the Small Claims Court ceiling (currently set at $50,000) but less than $500,000, exclusive of interest and costs:

   a. the amount of money claimed, if any; and

   b. the fair market value of any personal property, as at the date the claim is commenced;

(ii) Claims for less than $500,000, exclusive of interest and costs, that are outside the jurisdiction of the Small Claims Court (e.g., claims for real property where the fair

[222] We propose to adopt a similar standard concerning counterclaims, crossclaims, and third party claims as set out in the existing Rule 76.02(5)(c).

market value of the real property is less than $500,000 as at the date the claim is commenced);

(iii) All mortgage enforcement proceedings, regardless of the amount claimed;

(iv) All claims exclusively for liquidated damages, regardless of the amounts claimed;

(v) Construction lien claims; and

(vi) Contested estate claims.

Presumptive Summary Proceedings will not include claims for mixed relief (e.g., a claim seeking damages of $400,000 and declaratory relief).

We propose that a DC Judge shall, on request, also direct that the Summary Track apply to a case presumptively on the Trial Track case where:

(i) all parties consent;

(ii) the matter involves claims for mixed relief where the real value of the issues in dispute is below $500,000 (e.g., where a party seeks a declaration that a property transfer was a fraudulent conveyance, but where judgment or equity in the property is less than $500,000); or

(iii) having regard to the Goals, the DC Judge decides that the matter is capable of a fair and just determination by Summary Hearing (discussed further in Section VI(L)(9) below).

The Working Group settled on $500,000 as the upper threshold for Summary Track cases for two main reasons.

First, we sought to identify a monetary threshold below which it is generally uneconomical to litigate a claim through to a one-week trial. We recognize that reasonable people may differ on where that threshold lies. Lawyers in smaller communities, for example, may charge significantly lower hourly rates than those in larger centres such as Toronto, making cases under $500,000 more economically viable to pursue through trial—though still disproportionately costly. Looking at the province as a whole, however, we believe that, while perhaps somewhat aggressive, a threshold value of $500,000 reasonably represents the point below which process must be reduced to achieve any reasonable measure of proportionality.

Second, the reduced process model can only meaningfully improve access to justice if it applies to a sufficiently broad range of cases. According to the data that we examined, cases with less than $500,000 at stake (excluding those commenced in Small Claims Court) represented roughly one-half of all civil cases commenced in the Superior Court in 2023.

We also propose including mortgage enforcement claims and claims exclusively for liquidated damages as Presumptive Summary Proceedings given their suitability for resolution by Summary Hearing. These cases rarely involve complex factual disputes and frequently proceed by way of summary judgment motions.

Finally, the summary hearing model is aligned with the summary process envisioned by the *Construction Act* for construction cases. And it is, in our view, the most suitable process for contested estates cases.

In our view, most Presumptive Summary Proceedings are capable of being resolved justly and fairly by way of a Summary Hearing. As described in Section VI(L)(9) below, however, we propose that a DC Judge maintain the discretion to transfer any matter from the Summary Track to the Trial Track (and vice versa) when appropriate to do so.

Placing all claims of $500,000 or less, together with all mortgage proceedings, liquidated damages claims, construction claims, and contested estates proceedings on the Summary Track aligns with the principles articulated in *Hryniak* and with the Working Group's mandate. Under this proposal, more than half of all civil cases in the Superior Court will proceed to a dispositive hearing using reduced processes. Reducing the process and replacing conventional trials with one- or two-day Summary Hearings, will reduce costs and delays. Significantly more parties will be able to afford and obtain timely dispositive hearings—the essence of a meaningful expansion of access to justice.

In addition, creating a process where a dispositive hearing is a realistic option will, as the Supreme Court noted in *Hryniak*, improve the fairness of settlements. Litigants will no longer feel pressured to settle at a discount because they cannot afford a trial, and parties will approach mediation more seriously knowing an adjudicative hearing is a genuine alternative.

Finally, we propose that the $500,000 threshold be reviewed periodically to ensure it continues to capture roughly 50% of cases and is not eroded by inflation.

b) The Summary Track Process

We propose that the Summary Track process will involve the following steps:

(i) A claimant will commence a claim in the manner described in Section VI(C)(2) above, noting, on Appendix "A" of the Notice of Claim, that the claim is a Presumptive Summary Proceeding because it falls into one of the enumerated categories;

(ii) Following the Close of Pleadings, the claimant will schedule a Directions Conference. If a claimant fails to schedule a Directions Conference within 10 days of the Close of Pleadings, any other party may schedule the conference. If the claimant has not obtained default judgment against all defendants and the parties have not scheduled a Directions Conference within six months of the Notice of Claim, the Court will automatically schedule one to ensure that cases do not languish;

(iii) At the Directions Conference, the DC Judge will:

a. dispose of the claim at the Directions Conference, or provide directions for it to be disposed of on a default basis where the defendants have failed to defend and the claimant has not yet obtained default judgment;

b. address any request seeking to transfer the matter to the Trial Track (discussed in Section VI(L)(9) below); and

c. if the matter is ordered to proceed on the Summary Track, the DC judge will:

i. set a date for the Summary Hearing and allocate the amount of time being reserved for it;[223]

ii. fix a timetable for the following steps, guided by the default timetable set out in Section VI(L)(7)(c) below:

1. the up-front exchange of evidence including primary disclosure and supplementary disclosure (described in Section VI(K)(3) above);

2. the out-of-court cross-examinations of all witness statements and experts' reports;

3. a mediation (outsourced and/or judicial);[224]

4. the conferencing of experts if ordered by the DC Judge (see Section VI(Q)(4)(e) below); and

5. the exchange of factums;

d. set limits on the volume of evidence (e.g., page limits) and the length of cross-examinations where appropriate; and

e. otherwise establish proportionate procedures for the proceeding in accordance with the Goals.

(iv) The dispositive Summary Hearing will follow the Paper Record+ Process.

This approach recognizes that lower-value and less complex cases benefit most from case conferencing and the development of proportionate procedures. Although guided by the default timetable set out below, the Court will retain discretion to design a tailored, proportionate process.

c) Default Timetables

We propose to establish the following default timetables to govern Summary Track matters in Two-Party Claims and Three-Party Claims. While many of our other proposals set presumptive rules that parties are required to rebut to achieve a different outcome, these default timetables are intended simply to apply where no other scheduling arrangements are made. We recognize that cases may require different timetables for a wide variety of reasons. These are not presumptive

[223] The time allocated for the hearing is to include a reasonable provision for judicial reading time.

[224] The DC Judge, in consultation with the parties, will assess the optimal timing of the mediation. In some cases, it may be preferable for mediation to occur prior to the time and expense involved in cross-examinations. In other cases, the court may determine that meaningful settlement discussions cannot occur without cross-examinations having first been conducted.

timetables, and we are not proposing that a party be required to meet a high threshold to obtain an alternative schedule where appropriate.

Two-Party Claims:

	Deadline (from date of Directions Conference)	**Approximate Deadline from Issuance of Notice of Claim**
Court orders parties to abide by standard timetable at a Directions Conference.	Day 0	By Month 3
Claimant delivers its witness statements, Reliance Documents, and expert report(s).	By month 2	By month 5
Defendant delivers its responding witness statements, Reliance Documents, and expert report(s)	By month 5	By month 8
If counterclaim or crossclaim(s) advanced: Claimant and co-defendants deliver responding witness statement, Reliance Documents, and expert report(s)	By month 7	By month 10
All parties serve one another with their supplementary document requests.	By month 8	By month 11
All parties respond to the supplementary requests for documents.	By month 10	By month 13
All parties simultaneously serve their final witness statements and any responding expert report(s).	By month 11	By month 14
Cross-examinations (to be videotaped).	By month 13	By month 16
Answers to undertakings.	By month 14	By month 17
Any requests for directions concerning the discovery process.	By month 14	By month 17
Claimant serves factum (assuming no discovery disputes arise).	By months 16	By month 119
Defendant serves factum (assuming no discovery disputes arise).	By month 18	By month 21

Three-Party Claims:

	Deadline (from date of Directions Conference)	**Approximate Deadline from issuance of Notice of Claim**
Court orders parties to abide by standard timetable at a Directions Conference.	Day 0	By month 6
Claimant delivers its witness statements, Reliance Documents, and expert report(s)	By month 2	By month 8
Defendant delivers its witness statements, Reliance Documents, and expert report(s)	By month 5	By month 11
Third party delivers its witness statements, Reliance Documents, and expert report(s)	By month 7	By month 13

If counterclaim(s) or crossclaim(s) advanced: parties deliver responding witness statement, Reliance Documents, and expert report(s)	By month 9	By month 15
All parties serve one another with their supplementary document requests.	By month 10	By month 16
All parties respond to the supplementary requests for documents.	By month 11	By month 17
All parties simultaneously serve (a) their final witness statements and (b) any responding expert report(s).	By month 12	By month 18
Cross-examinations (to be videotaped).	By month 13	By month 19
Answers to undertakings.	By month 14	By month 20
Any requests for directions concerning the discovery process.	By month 14	By month 20
Claimant serves factum (assuming no discovery disputes arise).	By month 16	By month 22
Defendant serves factum (assuming no discovery disputes arise).	By month 17	By month 23
Third party serves factum (assuming no discovery disputes arise).	By month 19	By month 24

In cases involving subsequent claims beyond third parties, it will be necessary for the parties to agree on a timetable. If they are unable to agree, the timetable will be fixed at the first Directions Conference.

d) Summary Judgment Motions and Simplified Procedure

As in our Consultation Paper, the Working Group proposes eliminating Rule 20 and Rule 76 and replacing them with the Summary Track process.

Although strikingly similar, the Summary Track process differs from the existing summary judgment process under Rule 20 in two ways.

First, where a matter is presumptively streamed to the Trial Track, a party seeking summary judgment will have to persuade a DC Judge that the case is reasonably suitable for determination on the Summary Track.

Second, unlike the existing model in which summary judgment motions may be dismissed on the basis that there is a genuine issue requiring a trial, our proposed model will require the presiding judge to issue a final decision at the conclusion of the Summary Hearing. Importantly, there will be no option to direct that the matter proceed to trial. Put differently, once the DC Judge determines that a matter (or issue) will be resolved by way of a Summary Hearing, that process will be the mechanism by which the entire case (or issue) is dispensed with on a final basis. This will effectively eliminate failed summary judgment motions.

As for partial summary judgments, many counsel and trial judges told the Working Group they are frustrated by the difficulty in interpreting and applying the common law limits on such motions. We propose to identify one type of partial summary judgment expressly permitted by the Rules.

As we will discuss in Section VI(N)(4)(e) below, we propose an early "off-ramp" in Trial Track matters—for example, where a defendant in a multi-party case believes no sustainable claim has been advanced against them, or where a defendant seeks dismissal on the basis that the claim has already been released. In such cases, the DC Judge may, where appropriate, bifurcate the proceeding and direct a Summary Hearing on an issue.

e) Distinguishing Between the Application and Summary Tracks

There are unquestionably many similarities between the Application and Summary Tracks. There are also important differences.

The Application Track allows for more bespoke process design, given the wide variety of matters that can proceed as applications and their differing process requirements. The Application Track also involves less extensive disclosure than the Summary Track, consistent with the current application model. Finally, outsourced mediation will be mandatory in Summary Track cases whereas it will be optional in Application Track cases.

That said, we acknowledge that, by design, the Summary Track establishes a process model that more closely resembles the former "application" model than the traditional "action" model.

f) No Costs Cap in Summary Hearing Matters

We considered imposing cost caps on Summary Track cases, similar to those under existing Rule 76.12.1. Cost capping would represent an attempt to limit costs to amounts deemed proportionate to Summary Track cases. We ultimately decided against such caps at this time, for three reasons:

(i) The amount at stake in Summary Track cases may vary widely, from $50,001 to millions of dollars if the claim is, for instance, a mortgage proceeding or one for liquidated damages. It is difficult, if not impossible, to settle on a cap that would reflect the upper limit of proportionate costs in all cases;

(ii) Cases on the Summary Track may vary widely in terms of complexity. Capping costs may unfairly prejudice those parties who must necessarily incur greater costs to pursue particularly complex claims; and

(iii) If cost caps do not reflect the market reality of legal costs, they undermine access to justice by rendering many cases economically irrational to pursue.

Cost capping is an issue, however, that may warrant further examination in the future.

g) Addressing Concerns about the Summary Track

There will undoubtedly be concerns raised with respect to the Summary Track proposal. We will address what we perceive to be the two most significant.

The Loss of Oral Evidence in Court: It is peculiar that, although the Rules state they are to be applied to secure the just, most expeditious, and least expensive determination of civil cases on their merits, the current default process remains the action, with all its attendant steps culminating

in a conventional trial.[225] For most cases, this means the most expensive and least expeditious process is applied by default. The default is explained by the tenacious view that a hearing with oral evidence is necessary to achieve fair and just results, particularly where there are significant contested facts or where credibility determinations are necessary.

The Supreme Court challenged that view in *Hryniak* declaring that alternative models of adjudication are no less legitimate than the conventional trial. We agree. We believe that most cases that default to the Summary Track will be capable of a fair and just disposition at a Summary Hearing.

Although reliable data is limited, it is widely accepted that an extremely high percentage of cases settle before reaching a dispositive hearing. As a result, the absence of a conventional trial in Summary Track matters is likely to only affect a small fraction of cases in the system, since most never proceed to trial in any event.

Some parties may be concerned that they have effectively lost their day in court. Our belief is that our proposals will provide the opposite: a faster route to a more proportionate hearing. Parties can still adduce their evidence through their witness statements. They will have the opportunity to challenge their opponents' evidence through cross-examination. And they will have an opportunity to make submissions to a judge at a dispositive hearing. In short, they will have all the salient elements of their day in court.

Others may be concerned about the hearing judge's ability to make credibility findings on a paper record. In our view, not all credibility determinations require that oral evidence be given in the presence of the hearing judge. Having said that, two features of the proposed process model attenuate concerns about fact-finding on a paper record. First, we propose that all out-of-court examinations be video-recorded. The hearing judge will therefore have the option to watch a witness's video-recorded cross-examination if it is necessary to aid in the assessment of that witness's credibility. Second, in rare cases where that does not suffice, the hearing judge will have the discretion to require oral evidence from one or more witnesses if he or she believes it necessary.

If a party believes their presumptive Summary Track case may nonetheless require oral evidence to ensure a just and fair disposition, they may ask a DC Judge to transfer the matter to the Trial Track.

Pressure on Judges: If our proposals are adopted, we expect that more cases under $500,000 will proceed to a dispositive hearing. This outcome naturally follows from a significant reduction in the cost of such hearings. As the Supreme Court noted in *Hryniak*, the requirement of a conventional trial effectively denies many Ontarians access to justice. Expanding that access lies at the core of the Working Group's mandate. Accordingly, if more parties can realistically pursue a dispositive hearing under the proposed model, it will mark an improvement in access to justice—even if it places additional pressure on judicial resources.

[225] See Rule 14.02.

It is impossible to know how many more cases will proceed to a dispositive hearing under the proposed model. Pressures on judicial resources will accordingly need to be carefully monitored.

Regardless, changing the hearing model for cases presumptively addressed by way of a Summary Hearing will necessitate adjustments to judicial scheduling. Hearings based on written records require judges to have sufficient time to review materials in advance. Although judicial scheduling lies outside our mandate, we recommend changes to ensure judges have adequate preparation time. Without such adjustments, the model's efficiency will be undermined by insufficient preparation before hearings, and judicial concerns about workload and wellness arising from the Summary Track will be well-founded.

8. The Proposed New Trial Track

The Working Group proposes that all cases not presumptively streamed to the Application Track or the Summary Track will proceed on the Trial Track.

a) Assignment of the One-Year Scheduling Conference

A core feature of the Trial Track is a light case management touch point we refer to as the One-Year Scheduling Conference.

The One-Year Scheduling Conference has been envisioned as a touchpoint with the Court at roughly the halfway point in the life of a Trial Track proceeding. It is the point at which the Court will set a trial date and confirm that all steps necessary to achieve trial readiness are addressed.

Initially, the Working Group contemplated that the One-Year Scheduling Conference would be scheduled shortly after the Notice of Claim was issued. Upon further reflection, however, we recognized that it is difficult at that early stage to predict how long it will take to complete the pleadings, given the potential for subsequent claims, delays in service, and default judgments that may ultimately render the scheduling of a One-Year Scheduling Conference unnecessary.

In the result, we elected to proceed on the basis that the One-Year Scheduling Conference will be scheduled after the Close of Pleadings. The problem with this idea, however, is that the Court will not know when the Close of Pleadings occurs without having to undertake considerable investigation, which is unfeasible. Accordingly, the onus will be on the claimant to schedule the One-Year Scheduling Conference within 10 days of the Close of Pleadings. If the claimant has not scheduled the One-Year Scheduling Conference within those 10 days, any other party may do so.

Where the parties schedule the One-Year Scheduling Conference, as described, the conference will be scheduled to occur approximately one year from the Close of Pleadings. Before the conference, the parties will be expected to have completed the up-front exchange of evidence.

As set out in the following section, the standard timetable in Two-Party Claims provides the parties with approximately 15 months to complete the up-front exchange of evidence—comprised of up to three months before the Final Defence is filed plus the 12-month period leading up to the One-Year Scheduling Conference. In cases with subsequent parties, the proceeding's overall length will inevitably be longer, given the additional time requirements associated with pleadings and the subsequent exchange of evidence.

At the One-Year Scheduling Conference, the presiding judge will, among other things, fix a trial date, which—following a transition period—will typically be set for approximately one year later. As a result, we expect most Two-Party Claims to proceed to trial within two years after the Final Defence is filed.

To prevent cases from languishing due to inaction, if, within one year of the issuance of the Notice of Claim, a One-Year Scheduling Conference has not been scheduled or default judgment has not been obtained against all defendants, the Court will automatically schedule a "**Default Scheduling Conference**." Where the Court is forced to schedule a Default Scheduling Conference, it will be fixed at the earliest available date after the one-year mark. At the Default Scheduling Conference, the Court will assess the status of the matter and issue directions to promote its timely progress, with the goal of scheduling the One-Year Scheduling Conference within one year.

Any party that has failed to comply with its obligations under the Rules—for example, a claimant who has not met service requirements or the default-judgment timeline, or a defendant who has failed to defend—will be barred from requesting that the matter be placed on the Inactive List (as defined below) or from seeking to extend the one-year timeline for the up-front exchange of evidence described in Section VI(L)(8)(d).

b) Trial Track Processes

The proposed Trial Track process that culminates in a conventional trial will be as follows:

(i) A claimant will commence a claim in the manner described in Section VI(C)(2) above, noting, on Appendix "A" of the Notice of Claim, that the claim will presumptively proceed on the Trial Track;

(ii) Pleadings will be completed;

(iii) The One-Year Scheduling Conference will be scheduled following the Close of Pleadings, as set out in the preceding section;

(iv) The parties will engage in the up-front evidence model (described in Section VI(K)(4) above in accordance with the default timetables set out in the following section);

(v) Assuming the parties are not seeking any interlocutory relief requiring a court appearance, the parties will attend the One-Year Scheduling Conference as scheduled. At the conference, the presiding judge will schedule a trial date and all other steps necessary to ensure trial readiness;

(vi) In the absence of a settlement, the dispositive hearing will be by way of a conventional trial.

c) Default Timetables

We propose to establish the default timetables set out below to govern Trial Track matters in Two-Party Claims and Three-Party Claims. Where there are subsequent claims beyond the third party claim, the parties will have to either agree to an appropriate timetable, or seek a Scheduling Conference to fix a timetable.

Two-Party Claims:

	Deadline (from the date on which the One-Year Scheduling Conference is set)	**Approximate Deadline from issuance of Notice of Claim**
One-Year Scheduling Conference is set after the Close of Pleadings.	Day 0	By month 3
Claimant delivers its witness and will-say statements, Reliance Documents, expert evidence timetable, and focused examination timetable.	By month 2	By month 5
Response from all defendants to the Claimant's expert evidence and focused examination timetables.	By month 3	By month 6
Defendant delivers its witness and will-say statements and Reliance Documents.	By month 5	By month 8
If counterclaim or crossclaim(s) advanced: Claimant and co-defendants deliver responding witness statement, Reliance Documents, and expert report(s)	By month 6	By month 9
All parties serve one another with their supplementary document requests (and written interrogatories if not conducting focused examinations).	By month 7	By month 10
All parties respond to the supplementary requests for documents (and written interrogatories, if any).	By month 9	By month 12
Focused Examinations.	By month 10	By month 13
Answers to undertakings.	By month 11	By month 14
Any requests for directions concerning the discovery process.	By month 12	By month 15
All parties simultaneously deliver reply witness statements and any supplementary Reliance Documents (assuming no discovery disputes arise).	By month 12	By month 15
One-Year Scheduling Conference	Month 12	Month 15

Three-Party Claims:

	Deadline (from the date on which the One-Year Scheduling Conference is set)	**Approximate Deadline from issuance of Notice of Claim**
One-Year Scheduling Conference is set following the Close of Pleadings.	Day 0	By month 6
Claimant delivers its witness and will-say statements, Reliance Documents, expert evidence timetable, and focused examination timetable.	By month 2	By month 8
Response from all defendants to the Claimant's expert evidence and focused examination timetables	By month 3	By month 9
Defendant delivers its witness and will-say statements and Reliance Documents.	By month 5	By month 11
Third party delivers its witness and will-say statements and Reliance Documents.	By month 7	By month 13
If counterclaim or crossclaim(s) advanced: parties deliver responding witness statement, Reliance Documents, and expert report(s)	By month 8	By month 14
All parties serve one another with their supplementary requests for documents (and written interrogatories if not conducting focused examinations).	By month 9	By month 15
All parties respond to the supplementary requests for documents (and written interrogatories, if any).	By month 11	By month 17
Focused Examinations.	By month 12	By month 18
Answers to undertakings.	By month 13	By month 19
Any requests for directions concerning the discovery process.	By month 14	By month 20
All parties simultaneously deliver reply witness statements and any supplementary reliance documents (assuming no discovery disputes arise).	By month 14	By month 20
One-Year Scheduling Conference	Month 14	Month 20

d) Departures from the Standard Timetable and Early Scheduling Conferences

If one or more parties anticipates having issues completing the up-front evidence exchange in accordance with the default timetable or otherwise being ready for trial in approximately two years from the Close of Pleadings, they have two options to try to address the issue.

On Consent:[226] The parties will have a one-time right to consent to an order rescheduling the One-Year Scheduling Conference to:

(i) an earlier available date, if the parties can complete the evidence exchange ahead of schedule; or

(ii) a date up to one year later, for the purpose of either:

a. placing the case on an inactive list (the "**Inactive List**") for up to one year, during which no steps in the litigation will be taken, unless by agreement of the parties; or

b. extending the evidence exchange period from one year up to a maximum of two years.[227]

With Leave: If a request to extend the One-Year Scheduling Conference is opposed, the requesting party may bring the matter to an early Scheduling Conference. Unless exceptional circumstances arise, this must be done within 30 days of receiving the One-Year Scheduling Conference date.

At the early Scheduling Conference, the Court will have discretion to take any of the following actions, bearing in mind that, following a reasonable transition period, one of the Goals is for most cases to be heard within two years of the Close of Pleadings:

(i) Reduce the evidence exchange period and reschedule the One-Year Scheduling Conference to an earlier date if it is in the interests of justice and is consistent with the Goals;[228]

(ii) In cases where damages have not yet crystallized, an injury in a personal injury claim has not yet stabilized to the point where it is reasonable to proceed, or where it is otherwise in the interests of justice (for example, where the claimant demonstrates that proceeding under the default timetable would cause re-traumatization):

a. place the case on the Inactive List for up to one year (or longer, in the case of minors, if required);

b. order the parties to exchange evidence concerning liability but defer the exchange of evidence supporting damages; or

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[226] For the purpose of this provision, any party who is not opposed to the relief requested will be deemed to be consenting to it.

[227] This change was included in response to a recommendation made by OTLA at p. 34 of its submission.

[228] This was added to reflect a suggestion made by Geoff Cowper at p. 2 of his submission where he said, "I would encourage you to permit a party to apply for a trial date early in the process and to make that trial date difficult to adjourn."

c. order the parties to exchange evidence on both liability and existing damages, then place the matter on the Inactive List for up to one year, and require further damages evidence to be exchanged only once the injury has stabilized;[229] or

(iii) Extend the evidence exchange period from one year to two years and, thus, reschedule the One-Year Scheduling Conference to the two-year mark in the following circumstances:

a. during the transition period to allow lawyers to better manage their caseloads while existing cases proceed;[230]

b. where the case involves a significant number of documents;

c. where a party is a large organization (e.g., the federal government) and establishes that it requires additional time to, for instance, coordinate internally across multiple departments;[231] or

d. where it is otherwise in the interests of justice and consistent with the Goals (e.g., where an amendment to the default timetable is consistent with a trauma-informed approach to the litigation).

During the one-year period in which a case is placed on the Inactive List, a party may request an earlier Scheduling Conference if they wish to have the case removed from the Inactive List.

The intent is to ensure that, by default, witness statements are prepared at the outset, when recollections are freshest, and that this practice becomes standard.

The proposed model permits the evidence exchange period to be extended from one to two years, either on consent or with leave of the Court. This change responds to some Consultees' recommendations that there be a mechanism to extend the evidence exchange period in appropriate cases.[232] We recommend that this be reviewed in two years and, if delay continues to pose a problem, that the removal of one or both exceptions be considered. This will allow the system to adapt incrementally while monitoring the impact of the reform.

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[229] As proposed by Definity at p. 5 of its submission.

[230] This option was added to address a concern raised by LawPro at pp. 5-6 of its submission, that "[i]n moving to the new approach, lawyers who are handling numerous active files at the same time may struggle to meet the new shorter deadlines. This may especially be a concern and could create a lot of stress for sole practitioners and lawyers at small firms who do not have support from other lawyers who can fill in for them as needed."

[231] This option was added to address the concerns raised by Justice Canada at p. 2 of its submission, where it said it would be "very challenging, and in many cases impossible, for Justice Canada to identify, obtain, collect, review for privilege and public interest immunities, and disclose documents within 6 to 9 months."

[232] For instance, LawPro recommended at p. 5 of its submission, that it "may be more balanced to aim to have matters proceed to trial in 3 or 4 years rather than 2 years," in order to provide "at least some balance between expediency and the need to ensure that litigants have sufficient time to prepare and/or settle their cases." Justice Canada recommended that an extension on consent or with leave be granted.

The option to do these two things will be lost if the parties fail to take appropriate steps and therefore are required to attend a Default One-Year Scheduling Conference,

e) The Substance of the One-Year Scheduling Conference

If the parties complete the up-front exchange of evidence and are not seeking any interlocutory relief requiring a Court appearance, they will proceed directly to the One-Year Scheduling Conference.

As we alluded to earlier, the purpose of the One-Year Scheduling Conference is to provide a touchpoint with the Court to ensure that the matter is progressing as it should and will be ready for a dispositive hearing within (approximately) one additional year. We anticipate that in many cases, parties will be able to agree on a timetable to complete any necessary steps.

The judge presiding over the One-Year Scheduling Conference will:

(i) confirm that all steps required by the up-front evidence model have been completed and, if not, address any breached Interim Deadlines (defined below), and impose a fixed timetable for their completion;

(ii) ensure the parties have agreed on a reasonable schedule for the exchange of expert reports or address any disputes concerning the scheduling of expert reports and formalize the schedule into a court order;

(iii) schedule an outsourced mediation if one has not already taken place;

(iv) if requested and on consent, schedule a Binding Judicial Dispute Resolution hearing;

(v) where appropriate, facilitate settlement discussions and, if advisable, order a judicial settlement conference;

(vi) fix a TMC date;

(vii) fix a timetable for the delivery of sworn witness statements for all witnesses who have provided only will-say statements to date; and

(viii) fix a trial date, with a target of it occurring within twelve months of the One-Year Scheduling Conference.

If it serves the interests of justice, the Court may in rare circumstances schedule the dispositive hearing for a date that is more than approximately one year after the One-Year Scheduling Conference. In determining whether a later dispositive hearing date is justified, the Court will balance the goal of having all cases heard within roughly two years of the Close of Pleadings (for Two-Party Claims) with the specific needs of the individual case. This may include factors such as the parties' consent to the delay (e.g., if parties seek additional time to settle the case **and** a specific event must occur before a settlement can be reached), damages that have still not crystallized, an injury that has still not stabilized, a large number of expert reports that cannot be completed within the next year, or other similar circumstances.

After attending the One-Year Scheduling Conference, the parties will be required to abide by the now Court-ordered timetable. Consequences for failing to do so are addressed in Section VI(R) below.

f) Attending a Directions Conference Instead of the One-Year Scheduling Conference

Parties will be required to attend a Directions Conference instead of the One-Year Scheduling Conference if:

(i) A party requests that the matter be transferred to the Summary Track; or

(ii) A party seeks any form of interlocutory relief requiring a Court attendance that relates to more than scheduling.

During a Directions Conference occurring within 60 days of a scheduled One-Year Scheduling Conference, parties can expect the Court to:

(i) Address the interlocutory disputes requiring the Court appearance (discussed in Section VI(N) below);

(ii) Address all matters that would otherwise have been dealt with at the One-Year Scheduling Conference; and

(iii) Vacate the One-Year Scheduling Conference.

9. Transferring Between Tracks

In our view, most cases presumptively placed on the Summary Track can be resolved justly and fairly through that process and, as such, the presumption that a matter should proceed on the Summary Track is intended to be robust. We recognize, however, that some cases in this category may be particularly complex or raise non-monetary issues that may not be well-suited to a Summary Hearing. In such circumstances, the DC Judge will have discretion to transfer the case to the Trial Track.

Conversely, some cases presumptively assigned to the Trial Track may be better addressed through a Summary Hearing. A party seeking an order transferring a matter to the Summary Track will seek a Directions Conference for that purpose. Engagement with the up-front evidence model will be suspended pending completion of the Directions Conference.

As set out above, a DC Judge shall direct that the Summary Track apply to a case presumptively on the Trial Track where:

(i) all parties consent;

(ii) the real value of the issues in dispute is below $500,000; or

(iii) having regard to the Goals, the DC Judge decides that the matter is capable of a fair and just determination by Summary Hearing.

In either of the second two transfer scenarios, the determination of whether a matter should proceed by way of a Summary Hearing will require the DC judge to decide whether the case can be justly and fairly disposed of, in whole or in part, through that process. This assessment is not intended to revert to the existing "issue requiring a trial" test. Credibility disputes, on their own, will not be determinative. Rather, the Court should consider the Goals—particularly proportionality and timeliness to a dispositive hearing—and direct matters to or maintain matters on the Trial Track only where a summary process would be unsuitable. For example, if the number of witnesses or the extent of competing expert evidence is such that the judge could not fairly understand and determine the case on a paper-driven record, the matter should proceed to trial.

If a matter is transferred from one track to another, the DC Judge issuing the direction must set a timetable for all remaining steps up to the next major milestone (i.e., the Summary Hearing for matters on the Summary Track, or the One-Year Scheduling Conference or trial for matters on the Trial Track).

Finally, we propose that there be no right of appeal from a DC Judge's decision directing which track a matter should proceed on. We further propose that the Rules clearly specify that the intention is to promote proportionality and reduce the expenditure of resources on matters of limited value. Implementing this may require an amendment to the *CJA*.

10. Consequences for Pleading to the Improper Track

We recognize that some claimants may improperly plead to the Trial Track to obtain its enhanced processes, notwithstanding that the actual damages in issue are properly within the Summary Track limits.

If a defendant believes that a Claimant has pleaded to the wrong track, which may occur before or after the up-front exchange of evidence, he or she may seek a Directions Conference where the Court will determine if the case should be transferred. Costs may, of course, be awarded in the event the claim is transferred.

We also propose introducing a rule somewhat similar to existing Rules 57.05(1) and 76.13(3). It would provide that if a claimant proceeds under the Trial Track but obtains a result that would have made the Summary Track appropriate, the Court shall (a) order no costs unless it was reasonable to proceed under the Trial Track or (b) reduce any cost award to reflect the unnecessary process generated by proceeding under the Trial Track rather than the Summary Track.

11. Consultation Feedback

The proposed three track framework differs somewhat from that which we set out in the Consultation Paper. That said, with respect to the non-summary framework outlined in the Consultation Paper which now informs our proposed Trial Track, some Consultees supported it on the basis that tightened timelines promote timely dispute resolution and, in turn, enhance access to

justice.[233] They noted that active judicial management is beneficial and that the One-Year Scheduling Conference is likely to help keep litigation on track; reduce the prevalence of "placeholder" actions filed by plaintiffs with no intention of actively pursuing them; limit opportunities for defendants to cause undue delay; and allow the Court to address issues that may affect the litigation's schedule. They posited that, insofar as it helps accomplish these ends, the One-Year Scheduling Conference may actually reduce the need for subsequent Directions Conferences and motions, ultimately conserving judicial resources.[234] Some Consultees also emphasized that greater structure and predictability would be beneficial to parties and could reduce the emotional toll of prolonged litigation, particularly for vulnerable claimants seeking timely closure.[235]

Several Consultees, however, opposed the timeline proposed in our Consultation Paper on the basis that it was too tight and there was not sufficient flexibility.[236] We have addressed this concern in our revised proposal above by making it easier to extend the evidence exchange period from one year to two years.

Finally, many Consultees criticized the proposed reforms on the basis that there are insufficient judicial resources to implement them, particularly the One-Year Scheduling Conference.[237]

12. Recommendations

1. The Working Group recommends eliminating Rule 20 and 76 and adopting a new three track civil process model comprised of an Application Track, a Summary Track, and a Trial Track.

    a. The Application Track will be the applicable process for all cases that are authorized by statute to proceed by application and all cases that are presently authorized to proceed by application by Rule 14.05(3)(a) to (g.1).

    b. The Summary Track will be the presumptive process for:

        i. all claims exclusively for money or personal property, where the total of the amount of money claimed or the fair market value of any property (as at the date the claim is commenced) is greater than the Small Claims Court ceiling but less than $500,000, exclusive of interest and costs;

        ii. all claims for less than $500,000, exclusive of interest and costs, that are outside the jurisdiction of the Small Claims Court (e.g., claims for real property where the fair market value of the property is less than $500,000);

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[233] Submission of SABA, p. 2.

[234] Submission of Pro-Demnity, p. 4.

[235] Submission of OIPC, pp. 7-8.

[236] See, for example, the submissions of Justice Canada and LawPro, *supra*, fn. 230-232.

[237] See, for example, the submission of FOLA, p. 4.

iii. all mortgage enforcement proceedings, regardless of the amount claimed;

iv. all claims exclusively for liquidated damages, regardless of the amounts claimed;

v. construction lien claims; and

vi. contested estate claims.

c. The Trial Track will be the applicable process for all other cases.

2. The Working Group further recommends:

a. Setting early dispositive hearing dates, with adjournments permitted only by the Regional Senior Justice or their designate;

b. Establishing the specific processes applicable to each track as set out above;

c. Establishing standard timelines for the completion of all discovery steps as set out above;

d. Making provisions for extending the One-Year Scheduling Conference on consent or with leave as set out above;

e. Allowing for the transfer of cases between tracks as appropriate; and

f. Setting out the consequences for pleading to the improper track.

M. EXAMINATIONS OUT OF COURT

1. Proposals

The proposed reforms identify six circumstances in which out-of-court examinations will be permitted:

(i) Cross-examinations in Application Track cases;

(ii) Cross-examinations in Summary Track cases;

(iii) Focused examinations in Trial Track cases;

(iv) Cross-examinations on motions;

(v) Examinations of non-parties on motions; and

(vi) Examinations to preserve evidence (formerly known as examinations *de bene esse*), pursuant to existing Rule 36.01.

Out-of-court examinations do not directly use Court resources. Nevertheless, litigants will benefit from guidance regarding how examinations are to be conducted. Moreover, motions arising from out-of-court examinations *do* engage Court resources and often contribute to the kind of costly and time-consuming interlocutory disputes we seek to reduce.

Presently, the conduct of out-of-court oral examinations is governed by Rule 34. Although much of that rule remains useful under our proposed reforms, we recommend the following amendments:

(i) Out-of-court examinations shall be conducted remotely unless a party demonstrates valid reasons preventing remote attendance (e.g., no access to appropriate technology);

(ii) In cases involving allegations of violence, the alleged abuser may not conduct the examination of an alleged survivor and may not be present on screen during the examination of the alleged survivor.[238] The examination on behalf of the alleged abuser must be conducted by counsel or such other person approved by the Court at a Directions Conference;

(iii) A party being examined may only refuse to answer a question on the grounds that:

a. the question seeks privileged information;

b. the question is scandalous (i.e., both (1) irrelevant and (2) of a highly confidential, proprietary, or disgraceful nature); or

c. the question is so misleading or beyond the scope of what is discoverable that it is not fair or appropriate to ask it;

(iv) A request for an undertaking may also be refused on the grounds that fulfilling it would require the party to spend a disproportionate amount of time or money relative to the significance of the evidence sought;

(v) Objections to questions on any other grounds should be briefly stated on the record, with an answer to the question provided; and

(vi) Parties may no longer take questions "under advisement."

Some Consultees suggested that the grounds on which questions could be refused at a cross-examination should be expanded[239] or that the standard of "scandalous" was too high.[240] While we largely stand by our original recommendation, we have modestly broadened the scope of permissible refusals. Ultimately, we maintain that the grounds for refusing a question should remain very narrow, with their precise contours to be developed through practice.

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[238] The alleged abuser may be present virtually during the examination but must have his or her camera turned off to not be visually present.

[239] Submission of the OSC, p. 3.

[240] Submission of Justice Canada, p. 9.

We additionally recommend that all out-of-court examinations be both video and audio recorded. Many, if not most, out-of-court examinations are now conducted over the Zoom platform, which makes video recording easily achievable. Digital video recording devices capable of recording in-person examinations are also readily available and relatively inexpensive. The time has come that all out-of-court examinations intended to be used as evidence in civil proceedings should be both video- and audio-recorded. There are at least two salient reasons for such a requirement:

(i) Behaviour modification: when counsel and parties understand that the examinations will create both a paper and a video/audio record, the result is likely to be greater adherence to the Rules, less over-reaching, and fewer histrionics; and

(ii) A judge conducting a Summary Hearing who has a concern about assessing the credibility of one or more witnesses on a paper record will have the option of watching the witness's cross-examination, or any part thereof, rather than requiring the witness to attend to give oral evidence in court. The availability of an audio/video recording of every cross-examination should help hearing judges with credibility assessments and reduce the need for oral testimony in court.

Undertakings and Refusals: Undertakings and refusals are the bane of the discovery process. They eat up resources, frequently result in interlocutory skirmishing, and delay matters.

Limiting the types of questions that a party may refuse to answer will go a long way to reducing the number of disputes about whether a question must be answered.

To attenuate potential delays associated with following up on undertakings and refusals, we propose to impose a firm and aggressive schedule.

In Section VI(K)(3) above, we introduced a form called the Discovery Request Chart. We propose that when an out-of-court examination is complete, the person conducting the examination must complete Parts C and D of the Discovery Request Chart, which will track undertakings and refusals.

We propose that the examiner be required to provide its portion of the completed Discovery Request Chart to the examined party within 15 days of the examination, and the examined party shall complete the balance of the chart within 15 days of receipt and return it to the examiner. These timelines are subject to different deadlines being ordered by the Court or agreed-upon by the parties (provided that any revised deadline(s) do not require the adjournment of a motion date or dispositive hearing date).

We recognize that some may think these turnaround times are too short. Several factors, however, should alleviate those concerns:

(i) Although transcript turnaround time typically averages two to three weeks, parties will have access to the video recording of the examination, which they may use to complete the Discovery Request Chart;[241]

(ii) With respect to cross-examinations on motions or Application Track matters, parties may address these deadlines at the Directions Conference when the matter is being scheduled;

(iii) With respect to examinations in matters proceeding on the Summary Track or Trial Track, parties will already have had the opportunity to request and produce supplementary documents before examinations, resulting in fewer additional requests for documents by way of undertakings during the examination; and

(iv) Focused examinations are significantly shorter than existing examinations for discovery, which will reduce the number of undertakings to answer.

The management of disputes arising from out-of-court examinations is addressed in Section VI(N)(4)(e)(3) below.

2. Recommendations

The Working Group recommends amending Rule 34 (Procedure on Oral Examinations) to provide that:

a. All out-of-court examinations will presumptively take place remotely, unless the parties consent to conduct them in person;

b. All out-of-court examinations are to be both video and audio recorded;

c. In cases involving allegations of violence, the alleged abuser may not conduct, or be visually present on screen during, an examination of an alleged survivor;

d. The right to refuse to answer a question posed during the examination shall be curtailed in the following ways:

i. Each question must be answered unless it intrudes on a sustainable assertion of privilege, the question asked is scandalous (i.e., both (a) irrelevant and (b) of a highly confidential, proprietary, or disgraceful nature), or the question is so misleading or beyond the scope of what is discoverable that it is not fair or appropriate to ask it;

[241] The Working Group is concerned about the prohibitively high cost of transcripts. We recommend that a group be struck to consider how AI might be leveraged to substantially reduce the costs of transcripts from examinations, while still ensuring the integrity of the record through an official version that cannot be altered by any party.

ii. A request for an undertaking may also be challenged on the grounds that the time or money required to fulfill the undertaking is disproportionate to the significance of the evidence sought;

iii. Objections to questions on any other grounds should be stated on the record, with an answer to the question provided; and

iv. Parties may no longer take questions "under advisement;"

e. Unless circumstances make an advance ruling necessary and consistent with the Goals, the admissibility of any evidence given under objection will be determined by the dispositive hearing judge; and

f. Subject to different deadlines set by the Court or agreed-upon by the parties, the examining party must, within 15 days of the completion of the examination, serve on the examined party a Discovery Request Chart with Parts C and D completed. The examined party must return a completed Discovery Request Chart within 15 days.

N. MOTIONS PRACTICE

1. The Need for Change

Motions Culture: In this section, we tackle the long-standing problem of the existing "motions culture," meaning the culture enabled by the current Rules that fosters heavy reliance on formal motions to resolve procedural disputes.

Motions have become a significant driver of inefficiency, cost, and delay. Rather than litigating the actual substantive dispute, the system allows litigants to become entangled in endless battles over the process that will govern how the dispute will be litigated. Retired Justice David Brown described the problem in a speech he made to the 2014 Annual Meeting of the CCLA:[242]

> Interlocutory motions are killing our civil justice system; they stand as one of the major obstacles to securing access to civil justice. Procedural rights accorded by our *Rules of Civil Procedure* with the laudable goal of securing a fair hearing have morphed into a system-killing creature worthy of a painting akin to Francisco Goya's Saturn Devouring his Son, which depicted the Greek myth of the Titan Cronus, or Saturn, who ate his children upon their birth fearing that he would be overthrown by them. So, too, civil motions now risk devouring the civil justice system by causing unacceptable delays and increased costs, for litigants.

[242] David M. Brown, *A 5-Point Action Plan to Get the Civil Justice System Moving Back in the Direction of Achieving its Fundamental Goal - The Fair, Timely and Cost-Effective Determinations of Civil Cases on their Merits,* 2014 34th Annual Civil Litigation Conference 12A, 2014 CanLIIDocs 33405, at ¶ 28.

As set out in Section IV(E) above, Court data shows that there were 36,034 motion events (not including case conferences) in 2024, an undeniable burden on the civil justice system by any measure. There was a similar number in 2023.

Some Consultees contend that the current motions culture is confined to Toronto.[243] As set out in Section IV(E) above, however, the data demonstrates that it extends across most judicial regions in the province.

Motions can significantly increase litigation costs, with a single contested motion sometimes exceeding $100,000 in costs by the time it is resolved. Litigants with deep pockets can leverage motions practice to increase legal costs, which can, in certain circumstances, drain their opponents' resources.

Moreover, with long wait times for both short and long motion dates across the province's judicial regions, motions practice also leads to substantial delays. This too can be exploited for strategic advantage. Presently, a party can delay litigation by over a year just by bringing a single motion.

We believe that motions consume disproportionate time, expense, and systemic resources relative to their value in resolving disputes. They are clogging up the system. The focus should be on resolving substantive disputes, not procedural ones. Although many attempts have been made to curb the motions culture, more needs to be done.

We have heard from judges, associate judges, and lawyers that discovery-related motions, in particular, can be very time-consuming and, in many cases, provide little benefit relative to the costs, time, and resources they consume. Reducing and streamlining these motions would generate substantial time and cost saving for both litigants and the Court.

That said, it is important to recognize that not all motions are equal. While some motions do little to advance a dispute to resolution, others play a crucial role by narrowing the number (or scope) of issues in dispute, eliminating meritless claims at an early stage, or otherwise promoting a fair and proportionate resolution of the substantive dispute. Treating all motions equally is at odds with the Goals and does a disservice to both litigants and the Court.

We believe that a more bespoke process, supported by less formal procedures and early judicial intervention, will help to ensure that motions are addressed in a manner proportionate to the significance of the issues in dispute. In this vein, we echo the American College of Trial Lawyers in its 2016 report entitled, "*Working Smarter but not Harder In Canada: The Development Of A Unified Approach to Case Management in Civil Litigation:*"[244]

> The use of informal procedures to resolve interlocutory disputes or issues can be highly beneficial in reducing the expense and delays associated with civil litigation. These procedures range from judges making themselves available to discuss matters by phone, to meeting with counsel in Chambers at the beginning or end of

[243] Submissions of the CCLA, p. 49.

[244] American College of Trial Lawyers, "*Working Smarter but not Harder In Canada: The Development Of A Unified Approach to Case Management in Civil Litigation*", at pg. 15.

> judicial days, to insisting that no formal motions concerning interlocutory disputes be filed until the matters in question have been discussed first with the case management judge on an informal basis. Formal contested motions are treated as an exceptional procedure of last resort and are only permitted where absolutely necessary. When they are brought, they are generally decided quickly using brief written endorsements rather than lengthy judicial decisions.

After the COVID-19 pandemic, Courts in Toronto began deciding some motions at case conferences, noting that "[c]ase conferences that offer relief on a much more limited set of materials are, in the words of the Supreme Court of Canada in *Hryniak*, a more proportional procedure that is tailored to the needs of the particular case that is nevertheless fair and just."[245] As Justice Myers recently observed, the summary resolution of interlocutory motions at case conferences offers a meaningful way to curb the use of procedural motions as a tactic to increase costs and delay litigation.[246] A similar approach has been adopted on the Commercial List in Toronto.[247]

Using case conferences in this way is not unique to Ontario. In Manitoba, the *Court of King's Bench Rules* were amended in January 2018 to introduce an opt-in, one-judge case management model. Under this model, a judge may, at a case conference and without the need for formal motion materials, make any order or give any direction necessary to secure a claim's just, most expeditious, and least costly resolution. Reflecting the principle of proportionality, this rule effectively means that parties no longer have an automatic right to litigate every procedural issue and, thus, that judges may decline to permit interlocutory motions that are unnecessary or disproportionate. According to members of the Manitoba judiciary, the result is that proceeding with a formal contested motion has become the exception rather than the norm. They further noted that the recent amendments have nearly eliminated their previous "motions culture," though it is unclear how much of that change is attributable to the one-judge aspect of the model, as opposed to the conferencing model more generally.

Motion Materials: We are also of the view that under the current Rules, motion materials, including notices of motion, unconstrained affidavits, factums, and compendiums can be unnecessarily repetitive and lengthy.

The volume of motion materials filed has noticeably increased since motion materials began to be filed digitally. Parties are no longer restrained by the cost and time required to assemble long paper records in multiple copies.

That said, even digital motion records, when long and voluminous, are time-consuming and costly to prepare. They are also time-intensive to review and, thus, place significant demands on court resources.

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[245] *Miller v. Ledra*, 2023 ONSC 4656 at ¶ 30 (citing *Hryniak*); see also *Plaxiy v. Fedun*, 2023 ONSC 6459 at ¶ 5.

[246] *Country Wide Homes Upper Thornhill Estates Inc. v. Su*, 2022 ONSC 4998 at ¶ 16.

[247] See Consolidated Practice Direction Concerning the Commercial List, Part G.10: Chambers Matters, effective October 14, 2025.

2. The Initial Proposals

The Consultation Paper included a suite of proposed reforms to motions practice.

The Working Group proposed to introduce what might be best described as a screening process, whereby most contested motions would be subject to case management through a Directions Conference prior to the motion proceeding.

We identified several exclusions from this screening process, including consent, unopposed, and without notice basket motions; contested motions in writing; and urgent, without notice motions. All other motions would be subject to a preliminary Directions Conference.

We proposed that the DC Judge would determine how the motion would proceed, whether that be by way of the Directions Conference itself, a motion in writing, or a motion with an oral hearing. In the latter two cases, the DC Judge would give directions on what materials were to be filed.

We also proposed that, before the Directions Conference, the parties would file limited materials. In particular, we proposed that the parties would be able to file a five-page "Directions Conference Submission," which would include an attestation signed by the party, such that the DC Judge would have at least a minimal evidentiary record on which to base a decision.

We contemplated that most procedural motions would be addressed at the Directions Conference itself, based on the limited materials filed. Suggestions were made as to which types of motions should be presumptively decided at the Directions Conference and which should presumptively proceed as oral motions.

For more complicated matters directed to proceed to a formal motion, we proposed to streamline motion materials through the use of a "one-document" approach that would see affidavits and factums essentially combined into a single document.

Finally, on a more granular level, we made proposals to consolidate several different rules relating to pleadings motions and to simplify the process by which lawyers can remove themselves as counsel of record.

3. Consultation Feedback

Submissions regarding the reform of motions practice were many and varied.

Several Consultees took issue with the Working Group's premise that there is a "motions culture" that requires reform. Some said their jurisdictions did not have a motions culture, or that certain practice areas did not generate significant motions work.[248]

There was a broad consensus among Consultees, however, that interlocutory motions tend to consume disproportionate time and resources in the life of many civil proceedings, and that they

[248] See, for example, the submissions of the HLA, p. 4; the Frontenac Law Association, p. 7; MLA, p. 12; CCLA, p. 49; Mark Wainberg, p. 3; and OTLA, p. 36-37.

present resource challenges for the Court.[249] Several Consultees observed that discovery-related motions are particularly problematic in terms of resource consumption.[250]

Many Consultees supported the use of Directions Conferences to reduce the number of formal motions brought,[251] although some concerns were raised about the apparent lack of precedential value of orders made at a Directions Conference.[252] A collaborative of downtown Toronto litigation firms voiced the concern that, as it appeared to them, the Working Group was trying to eliminate most formal motions. This, they thought, would negatively impact both the development of the common law and the ability of parties to effectively resolve important interlocutory disputes.[253] Others took the contrasting view that formal motions should be a means of "last resort."[254]

Strong support was voiced for conducting as many motions as reasonably possible in writing as opposed to orally.[255] Some Consultees suggested that local Registrars might be able to issue simple procedural orders. The Better Civil Rules Collaborative, for instance, submitted that non-dispositive motions required by statute or convention ought to be handled administratively.[256] Working Group members heard from many personal injury litigators that the current *Wagg* Motion regime—the means by which counsel obtain police records or Crown briefs—needs to be simplified. Additionally, many other Consultees urged the Working Group to simplify how lawyers might remove themselves as counsel of record.[257]

There was support for streamlining the documents to be filed in support of motions, but Consultees did not generally support the Working Group's one-document approach.[258] Some Consultees raised concerns about the complexity of cross-examining on a single "facts document."[259] One

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[249] Submissions of the Perells, p. 26 and OBA, p. 16.

[250] See, for example, the Collaborative Submissions of Toronto Firms, p. 2 and the submission of Robert S. Harrison, p. 2.

[251] Submissions of Dr. King, p. 5; A. Shelton, p. 3, LawPro, p. 5; FAIR, p. 4; OTLA, p. 35 et. seq.; and the Perells, p. 27.

[252] Collaborative Submissions of Toronto Firms, p. 3.

[253] *Ibid.*

[254] Submission of the Perells, p. 27.

[255] Submissions of Latner, p. 26; Allan L. Rachlin, p. 3; Sean Simeson, p. 1; Wade Morris, p. 4; Waterloo Region Law Association, p. 8; and Beard, p. 5.

[256] Submission of the BCRC, p. 10.

[257] See, for example, the submissions of TAS, p. 32; Ilia Sumner, p. 1; and OTLA, p. 37.

[258] See, for example, the submissions of the OBA, p. 17, who expressed that as lawyers and judges are adapting to a new set of rules, continuity of key documents will help foster stability and familiarity and generate less friction.

[259] Collaborative Submissions of Toronto Firms, Appendix "A" p. 7; and the submissions of the CCLA, p. 52; OBA, p. 17; and the Perells, p. 28-29.

Consultee argued, for example, that a one-document approach merging the evidence of two or more witnesses would all but guarantee witness contamination.[260]

One response from a former Superior Court Judge noted that the recommended changes to motion materials would introduce more procedure to the civil litigation process and "feed the monster of maximalization, aggravate the problem of delay and substantially increase the costs of litigation."[261]

4. The Final Proposals: A New Model for Interlocutory Relief

Although we have tweaked our proposals in response to the feedback we received, we continue to propose a suite of new rules that will govern interlocutory matters, streamline how certain types of requests for interlocutory relief are handled, reduce the pervasive motions culture, and simplify materials filed. More specifically, we propose to:

(i) subject most motions to a screening mechanism using Directions Conferences;

(ii) streamline and shorten materials filed when requesting interlocutory relief;

(iii) consolidate pleadings motions;

(iv) address the recurring cycle of motions to strike, followed by leave to amend, leading to further motions to strike; and

(v) streamline several common motions, including dismissal motions; removal of counsel of record motions; discovery-related motions; and *Wagg* Motions.

We will review each proposal in turn.

a) The Directions Conference Model

(1) Pre-Screening through Directions Conferences

The Working Group's proposals surrounding motions practice are central to the overall attempt to reduce delays and costs in the civil justice system. At their core, the reforms envision a shift from an "open motions market" to a "managed motions market." This model reflects a preference for resolving most procedural disputes through orders or directions given at conferences rather than orders following formal motions—the latter requiring and compounding process, the former streamlining and reducing it.

We believe that judges must serve as gatekeepers, ensuring that the system's limited resources are used effectively and allocated equitably. This is particularly important in the context of procedural

[260] Submission of Latner, p. 18.

[261] Submission of the Perells, p. 29.

motions, which often contribute little to advancing a case yet consume significant time and expense, representing an inefficient use of resources.

The Working Group proposes that all requests for interlocutory relief will be subject to a Directions Conference except:

(i) Requests for interlocutory relief in writing;

(ii) Urgent requests for interlocutory relief (addressed below);

(iii) Motions under Rule 2.2.03 seeking a vexatious litigant order; and

(iv) Any request for relief that may be granted by the Registrar.

In line with current practice, we propose that requests for relief that are on consent, unopposed, or proceeding without notice (except where the motion is urgent and counsel requests an oral hearing) shall proceed in writing, as "basket motions".

Urgent requests for interlocutory relief, brought on a with-notice basis (or without notice where a hearing is requested), will continue to be scheduled in accordance with local practices. The first judge to address the request will have broad discretion to determine the appropriate next step, including granting interim interlocutory relief, directing that the matter proceed to a Directions Conference on notice on an urgent or non-urgent basis, or scheduling a formal motion on an urgent or non-urgent basis.

Certain Consultees recommended expanding the types of contested motions that would be heard in writing.[262] We agree that this is a sound approach and believe that implementing it will help conserve judicial resources. We have adopted many of the recommendations we received regarding which types of motions should proceed in writing. We propose to establish, by rule, that the following types of contested motions be presumptively addressed in writing:

(i) transfer or transmission of interest (current Rule 11);

(ii) request for intervenor status (current Rule 13);

(iii) transfer of venue (current Rule 13.1);

(iv) extending time for service, validating service (current rule 16.08), permitting substituted service or dispensing with service (current Rule 16.04);

(v) inspection of property (current Rule 21);

(vi) productions from non-parties (current rule 30.10); and

[262] *Supra*, fn. 255.

(vii) any other contested requests for interlocutory relief, provided all parties whose interests are engaged in the motion consent to having it heard in writing.

The Working Group does not propose to make any amendments to Rule 2.2.03, which outlines the procedures specific to addressing vexatious litigants and proceedings. We believe those should remain intact.

(2) Early Directions Conferences

Parties seeking any of the following relief must do so by requesting an early Directions Conference in their Notice of Intent:

(i) contesting jurisdiction, capacity, or venue;

(ii) staying a proceeding in favour of arbitration or until completion of another proceeding;

(iii) seeking to strike a claim on the basis that it discloses no reasonable cause of action; or

(iv) consolidating pleadings with another existing claim.

The filing of a Statement of Defence will extinguish the right to bring such a motion.

(3) Scope of Directions Conferences

To support the transition to a directions-weighted process, we proposed that the Rules distinguish between two different types of relief:

(i) Relief affecting the way in which a case proceeds through the system, which will be presumptively determined at a Directions Conference. Examples include, but are not limited to, requests to bifurcate, add parties, amend pleadings, and transfer between process tracks; and

(ii) Relief requiring a more extensive evidentiary record or legal submissions, which will be presumptively decided at a formal motion, unless the parties agree that the relief can be granted at a Directions Conference. Examples include, but are not limited to, requests for security for costs, requests for injunctions, requests to strike claims on the basis that they contain no reasonable cause of action, and contested requests for a certificate of pending litigation.

In our Consultation Paper, we proposed introducing a third category of relief to which no presumption would apply. Upon further reflection, we decided to simplify the framework by retaining only two categories, each governed by a distinct rebuttable presumption.

The purpose of identifying the rebuttable presumption associated with each request for interlocutory relief is to provide parties with a better sense of whether their dispute is likely to result in an order made at the conference or be scheduled for a formal motion. That information will aid parties in preparing their written submissions for the Directions Conference.

(4) Powers of the DC Judge

Consistent with the broad jurisdiction we envision for DC Judges, they will have the power to:

(i) make attempts to settle the interlocutory dispute (or the proceeding if deemed appropriate);

(ii) take one of the following actions:

a. decide the interlocutory dispute at the Directions Conference, including the issue of costs, and issue a resulting order;

b. order the parties to attend a further Directions Conference and, if necessary, exchange additional materials before the conference, with the Court setting any appropriate limits on the scope of those materials; or

c. schedule a formal motion (with the goal of having it heard within two months) and, if so:

i. determine whether the motion will be heard orally or in writing;

ii. impose a timetable that will govern the exchange of evidence and factums in connection with the motion;

iii. limit the amount of evidence to be exchanged, including page or word limits on affidavits;

iv. limit the number of hours of cross-examination if appropriate;

v. impose page or word limits on the length of the parties' factums; and

vi. order interim relief before the hearing of the motion;

(iii) prohibit a party from making further requests for interlocutory relief in the proceeding without leave (i.e., maintaining the rights that currently exist under Rule 37.16);

(iv) make any other order that will facilitate the expeditious and proportionate resolution of the request for interlocutory relief or the proceeding; and

(v) amend an existing timetable that would be affected by the hearing of the interlocutory dispute. In doing so, the Court must remain mindful of the Goals and, in particular, the goal of having most cases heard within roughly two years of the Close of Pleadings, as well as the rule that dispositive hearing dates may not be adjourned without the consent of the Regional Senior Justice (or his or her designate).

Although the DC judge will have discretion to determine the appropriate process (such as deciding the issue at the Directions Conference or directing that it proceed by formal motion), he or she will be guided by the presumptions set out in the new Rules, namely:

(i) Relief that is presumptively to be addressed at a Directions Conference will be heard at that conference, unless there is a compelling reason to believe that, having regard to the Goals, the interests of justice require the consideration of substantial evidence or argument; and

(ii) Relief that is presumptively to be heard at a motion will be heard at a motion, unless there is a compelling reason to believe that, having regard to the Goals, the interests of justice do not require the consideration of substantial evidence or argument.

(5) The Need for Timely Access to Directions Conferences and Decisions

Directions Conferences are designed to offer a faster, more proportionate, and less resource-intensive means of resolving procedural issues. They reflect a shift in the justice system toward placing greater emphasis on substance over process.

We agree with TAS's observation that the success of moving to a directions-conferencing framework depends on the ability to book conferences quickly.[263] In addition to quick access, there is also a need for prompt decisions. Significantly reducing the time judges spend writing reasons concerning procedural disputes would meaningfully support this objective. For example, trial dates cannot be set early and with certainty if it takes four months to schedule a Directions Conference and three months to release lengthy reasons on a procedural matter such as a bifurcation request.

Accordingly, although this falls outside our mandate and is not prescribed in the Rules, we recommend that the Court set targets that: (a) Directions Conferences be available within two months, and (b) reasons for Directions be concise—capped at five pages—and released within a month. Shorter reasons will expedite decision-making, and help matters proceed without undue delay.

As a number of Consultees recommended,[264] we also suggest (though it lies outside our mandate) that Directions Conference endorsements be made publicly available as much as possible. This will allow litigants to evaluate trends, increase predictability and transparency, and make it easier for lawyers to advise their clients.

We propose that the Rules provide that a DC Judge's decision regarding the process for determining an interlocutory issue (e.g., whether it is to be addressed at the Directions Conference or by formal motion) and any limits on the materials to be exchanged will be non-appealable. We further propose that the Rules specify that this is intended to promote proportionality and reduce the expenditure of resources on matters of limited value. Implementing this may require an amendment to the *CJA*.

Finally, we note the many concerns we heard from judges and lawyers during the consultation process regarding the Court's ability to resource Directions Conferences. Adequate resourcing of

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[263] Submission of TAS, p. 21.

[264] See, for example, the submissions of TAS, p. 22; OTLA, p. 40; and CCLA, p. 52.

Directions Conferences, such that they remain available within modest wait times, is crucial to the success of the proposed reforms.

(6) Increased Judicial Continuity

The Working Group believes that the proposed interlocutory relief process will work optimally if, subject to available resources, the same DC Judge is able to preside over any subsequent Directions Conference, formal motion, or a Summary Hearing if one is ordered.

Greater judicial continuity is beneficial for many reasons. First, it fosters a stronger sense of ownership over the matter. As one Consultee noted in her submission,[265] "[a] judge who remains seized of a case, or who faces transparency measures, has more incentive to manage its development than a judge who will not remain involved."

Second, it enables the judge to determine what materials they wish to receive and in what format, allowing them to design their own efficient decision-making process. Ultimately, all proceedings involve the conveyance of information from the parties to the decision-maker. In a judge-alone proceeding, the judge is best positioned to decide how they want the information conveyed to them.

Third, it improves efficiency by avoiding the need for a new judge to spend time familiarizing themselves with the file. Both the parties and the Court can forgo spending time on background (e.g., what the case is about, who the parties are, procedural history, etc.) and focus immediately on the issue at hand.

Fourth, it promotes discipline among the parties, who are more likely to be prepared and to conduct themselves appropriately when they know they will appear before the same judge.

b) Streamlining Interlocutory Relief Materials

The Working Group maintains the view, largely supported by Consultees, that the materials filed on motions (and, in particular, procedural motions) tend to be excessive and unnecessarily increase costs. As such, we propose to streamline the materials that will be filed before the following types of court proceedings:

(i) Motions in writing, including those on consent, unopposed, or contested;

(ii) Directions Conferences; and

(iii) Formal motions.

Before we detail those materials, it is necessary to define a new form, known as an "**Interlocutory Relief Form**,**"** which we propose will replace the existing Notice of Motion. The Interlocutory Relief Form will identify, among other things:

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[265] Submission of Dr. King, p. 5.

(i) Administrative information about the matter (e.g., names of parties and counsel);

(ii) Whether the interlocutory relief is urgent;

(iii) Whether the relief is sought in writing or requires a Court attendance. If the relief is sought in writing, the basis on which it is proceeding in writing;

(iv) The relief sought;

(v) The Rules and/or legislation relied upon in support of the relief sought;

(vi) Any process presumption that applies; and

(vii) If opposed, a certification that the requesting party has consulted with the opposing parties and that the matter could not be resolved.

(1) Materials to be Filed before a Directions Conference

Before attending a Directions Conference, we propose that the parties will be required to file the documents set out below.

Seven days before the Directions Conference, the requesting party shall file:

(i) An Interlocutory Relief Form with the requesting party's portion completed; and

(ii) A written submission of no more than ten pages[266] (the "**Written Submission**") setting out the evidence on which the party intends to rely and its legal submissions, with supporting documents attached as a Schedule. If the Written Submission includes factual information (that does not relate to procedural steps taken in the case), the party will be required to sign an attestation clause, confirming the truth of its contents, whether through direct knowledge or on the basis of information and belief. By requiring an attestation, the Written Submission will constitute a modest evidentiary record on which orders may be made at Directions Conferences.

Three days before the Directions Conference, any opposing party shall file:

(i) The completed version of the Interlocutory Relief Form; and

(ii) Its responding Written Submission of no more than ten pages.

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[266] We increased the length of the Written Submissions from 5 to 10 pages given the number of different procedural issues that will be presumptively addressed at a Directions Conference. We propose to transition to a model where word limits are substituted for page limits, largely for the reasons set out in the persuasive paper of Jeremy Opolsky and Jake Babad, *The word is in: Factums without (page) limits*, (Spring 2023) 41 Advocates' Soc. J. 36-38. It was agreed, however, to continue to refer to page limits in this Report for the sole reason that they are easier for readers to conceptualize.

(2) Materials to be Filed before a Formal Motion

We propose that the parties will file the following materials and take the following steps in advance of a formal motion, subject to any governing practice directions and directions that DC Judge makes:

(i) The requesting party shall file a record containing:

a. the previously completed Interlocutory Relief Form;

b. any affidavits on which it intends to rely; and

c. any relevant correspondence between counsel (or between counsel and a self-represented party) and/or the Court, which do not need to be attached to an affidavit.

(ii) The responding party shall file a record containing:

a. any affidavits on which it intends to rely; and

b. any relevant correspondence between the parties (or their counsel) and/or the Court, which do not need to be attached to an affidavit.

(iii) The requesting party shall file a reply record containing any additional affidavits on which it intends to rely;

(iv) Cross-examinations may occur following the exchange of affidavits;

(v) The requesting party shall file a factum not to exceed 20 pages;

(vi) The responding party shall file a factum not to exceed 20 pages; and

(vii) The requesting party may file a reply factum, not to exceed 10 pages in length, if permitted by the DC Judge;

(viii) All parties will file compendiums if directed by the DC Judge one day before the hearing of the motion.

Standards for Affidavits and Exhibits: To improve readability, affidavits should cite documents in footnotes rather than in the body of the affidavit. Parties should group documents into a single exhibit, using separate exhibits only where necessary, and divide documents within each exhibit into numbered tabs. For example, all standard documents should be included as Tabs 1 to 10 of Exhibit A, while an Excel spreadsheet might be included as Exhibit B.

As set out above, to avoid unnecessary duplication, affiants should not include in their exhibits any documents already contained in another party's materials; instead, they should simply cite to those materials.

(3) Materials to be Filed on Motions in Writing

For consent or unopposed basket motions, the requesting party shall be required to file:

(i) an Interlocutory Relief Form;

(ii) a consent signed by all parties whose interests are engaged by the requested relief stating that they consent to the relief, or alternatively, written confirmation from the respondent(s) confirming that the requested relief is unopposed, along with a certification that the relief sought will not require an adjournment of any scheduled motion or dispositive hearing date;

(iii) a brief affidavit, only where the relief sought, despite being on consent, requires the provision of evidence, such as a copy of a title abstract where the relief sought is to discharge a claim for lien under the *Construction Act*; and

(iv) a draft order, including a revised timetable if the relief sought involves modifying one or more existing deadlines.

For motions filed without notice, the requesting party shall be required to file an Interlocutory Relief Form, any affidavits on which the requesting party intends to rely, a factum of no more than 20 pages, and a draft Order.

For contested motions in writing, we propose that the filed materials should be reduced to align with those filed for a Directions Conference. Accordingly, the requesting party shall file:

(i) an Interlocutory Relief Form with the requesting party's portion completed;

(ii) a Written Submission of no more than ten pages;

(iii) a draft order.

The responding party shall file the following materials seven days later:

(i) a fully completed Interlocutory Relief Form; and

(ii) its responding Written Submission of no more than ten pages.

In any case, where the Court requires further evidence, legal argument, or the attendance of a party, it may make an order accordingly.

c) Grouping Pleadings Rules and Pleadings Motions

The concept of "pleadings motions" under the existing Rules covers a lot of ground. Pleadings (and related) motions can take various forms and may involve, among other things, disputes over particulars or requests to amend; assertions that a claim is legally untenable or insufficiently pleaded; or requests to consolidate or, alternatively, bifurcate issues.

The Working Group has identified several aspects of the Rules relating to pleadings, that, in our view, warrant reform, to make them easier to understand and apply. Our proposals were set out in the Consultation Paper at pages 56-58. These proposals were not generally viewed as controversial by Consultees.

Having said that, other than with respect to the concept of bifurcation, which we discuss below, we view the grouping and consolidation of pleadings rules as a housekeeping matter more than a policy matter. We propose therefore to make recommendations regarding these matters by way of separate drafting instructions for the legislative drafters.

Consolidating Rules Concerning Bifurcation and Determination of an Issue: On their face, rules 6.1.01 and 21.01(1)(a) have much in common. In particular:

(i) The existing rule 6.1.01 addresses bifurcation and allows the court to "order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages, (a) on a party's motion, with or without the consent of the other parties; or (b) at a conference under Rule 50, with the consent of the parties;" and

(ii) The existing rule 21.01(1)(a) allows a party to move before a judge for the determination of a question of law raised by a pleading in an action.

Many cases—and their potential settlement—often hinge on a single significant issue. For example, where a limitation period is seriously in dispute, settlement is far more likely if the parties can have that issue decided in advance.[267] Similarly, in some cases, resolving liability first would allow the parties to settle damages.

In the current system, however, it is difficult to have a single issue decided early, despite recent changes to the bifurcation rule that have made it somewhat easier. This difficulty arises for two main reasons.

First, Ontario courts have effectively added a further threshold to rule 21.01(1)(a) by importing the "plain and obvious" test traditionally applied under rule 21.01(1)(b) into motions brought under rule 21.01(1)(a).[268]

Second, while a party could previously seek a determination of an issue through partial summary judgment under Rule 20, recent case law has made obtaining partial summary judgment exceptionally difficult.[269] It has also made it effectively impossible for a party with no real liability to be removed from an action. As a result, such defendants are often forced to settle simply to avoid being dragged through the entire process. This, in turn, creates little downside for plaintiffs

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[267] See, for example, the submissions of the City of Toronto, in which it asserted, at p. 13, that "[t]he early dismissal of claims that are commenced out of time would avoid unnecessary expense being incurred by parties and make court resources available for other matters."

[268] See Justice Sossin and Nora Parker in *Rules of Civil Procedure Chapters, Disposition without Trial, Rule 21 – Determination of an Issue Before Trial, 1st ed*; see also *MacDonald v. Ontario Hydro*, 1995 CanLII 10628 (ON SC) and, more recently, *Alafi v. Lindenbach*, 2023 ONSC 831.

[269] See, for example, *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369.

to cast the net broadly when deciding whom to sue, as they know there is no realistic early way out for those defendants, who may ultimately contribute to a settlement.

In light of this, we propose a new rule consolidating Rules 6.1.01 and 21.01(1)(a) to make it simpler and more accessible. We also propose that the new rule lower the threshold for bifurcating and deciding an issue (or issues) at an earlier stage, where doing so could remove a party from the claim or resolve a major point in dispute, and where this approach would make the proceeding more efficient and cost-effective and is otherwise consistent with the Goals. We further propose that the rule specify that bifurcated issues be determined under the common law "balance of convenience" standard, with any such determination being binding at future dispositive hearings. Finally, we propose that any appeal from the determination of the bifurcated issue(s) be required to run its course before further steps in the litigation on the remaining issue(s) may proceed.

d) Motions to Strike Pleadings and Leave to Amend

There is a perception that the Rules too readily facilitate leave to amend pleadings that have been struck for one deficiency or another. The result, at times, is a series of motions to strike several different iterations of the same claim, resulting in significant costs and delay. The Working Group has heard numerous complaints about the frustration, delay, and costs resulting from parties who are given leave to amend following a successful motion to strike only to then deliver another deficient pleading requiring a further motion to strike.

The Working Group proposes to amend the Rules in such a way as to ensure that parties have a fair opportunity to amend impugned pleadings, but to otherwise avoid the frustration, costs, and delay associated with repeated opportunities to address defective pleadings.

More particularly, we propose that, where a party seeks to strike another party's claim or defence due to an identified deficiency, the responding party will have an opportunity to provide a proposed amended pleading as an attachment to its Written Submission.

The DC Judge—or the judge hearing the motion if the matter is directed to proceed to a formal motion with a different judge—will have four available options:

(i) Dismiss the request for relief if the original pleading is not deficient;

(ii) Grant leave to amend the pleading in accordance with the filed draft amended pleading, if the original pleading is found deficient, but the proposed amended pleading is not;

(iii) If both the original and draft amended pleadings are found to be deficient, but the presiding judge is able to discern one or more legally tenable issues for trial, he or she may yet decline to strike the pleading but direct an adjudication of the legally discernable issues and provide ancillary directions for the fair and efficient conduct of the proceedings (an option particularly helpful for self-represented litigants); or

(iv) Grant the motion and strike out the pleading without leave to amend where both the original and draft amended pleading are deficient and the presiding judge is not able to discern one or more legally tenable issues for adjudication from the material filed.

e) Streamlining Common Requests for Interlocutory Relief

We have identified certain types of requests for interlocutory relief that can be streamlined or otherwise improved to reduce their time, cost, and/or use of resources.

(1) Dismissal Motions

One of the most common basket motions is for an order dismissing a proceeding on consent, following a settlement. The Working Group believes that motions of this nature are an unnecessary expenditure of time and expense.

As set out in Section VI(G)(2) above, we propose that Notices of Discontinuance replace dismissal orders as the standard means of finally disposing of a proceeding, except where ancillary relief is required (e.g., an order discharging a lien). The Notice of Discontinuance will specify whether it is on consent or unopposed, whether it is with or without prejudice, and whether it is with or without costs.

(2) Removing Oneself as Counsel of Record

Pursuant to rule 15.04, a lawyer must bring a motion to remove themselves as counsel of record. The process can be complicated as it involves preparing redacted materials that are served and filed with the Court, and non-redacted materials that are filed with the judge presiding over the motion. The Working Group has heard from several judges and associate judges that motions to remove counsel and other associated motions are cluttering their dockets.

The bar has also expressed concerns about the time and resources spent on this type of motion, which is almost invariably granted, as well as the deterrent effect that the onerous process of removing oneself as counsel of record can have on agreeing to represent a client in the first place.

A review of the jurisprudence of rule 15.04 demonstrates that very few counsel removal motions are refused. As Lauwers J.A. recently noted, "[t]here is relatively sparse law on when the Court should exercise its discretion to refuse to take a law firm off the record."[270] In deciding whether to grant the relief, the Court will consider the following factors: (a) the reason counsel is seeking to get off the record; (b) the *Rules of Professional Conduct* (which are informative, but not binding on the Court); (c) whether the civil claim is of the type where it is feasible for the client to be self-represented; (d) whether the removal of counsel is done well in advance of a significant step in the litigation so as to permit the client to obtain new representation; (e) whether the removal of counsel will cause a delay in the proceeding or an adjournment that will prejudice other parties; and (f) whether removal of counsel will cause serious harm to the administration of justice.[271]

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[270] *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, 2023 ONCA 196 at ¶ 13.

[271] *R. v. Cunningham*, 2010 SCC 10 at ¶¶ 45-50; *Konstan v. Berkovits*, 2019 ONSC 306, *Todd Family Holdings Inc. v Gardine*r, 2015 ONSC 6590; *Baradaran v. Alexanian*, 2020 ONSC 4759 at ¶ 6; *Brown v. Williams*, 2023 ONCA 730, at ¶¶ 2-3; *Correct Group Inc. v. Cameron*, 2024 ONSC 3367 at ¶¶ 8-9; *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, 2023 ONCA 196 at ¶ 13; *25162116 Ontario Ltd. (Numbrs) v. Abledocs Inc.*, 2023 ONCA 727 at ¶ 7; and *Cengic v. Castro*, 2020 ONSC 986 (CanLII) at ¶ 17.

It appears that the principal concern is ensuring that the client can obtain new counsel without being prejudiced. Serious prejudice militates strongly against permitting withdrawal, consistent with Rule 3.7-3 of the *Rules of Professional Conduct*, which provides that a lawyer is not permitted to withdraw if serious prejudice would result to the client.

To simplify the process of getting off the record, while being careful to avoid serous prejudice to a litigant, the Working Group proposes the following:

(i) A lawyer who wishes to get off the record may serve his or her client (by personal service or an alternative to personal service) and all other parties with a "**Notice of Withdrawal of Counsel**," a form of which will be included in the Rules. The notice must include, for future service purposes, the client's mailing address, email address, and telephone number. It will also outline any steps the client must take and confirm that, as a result of the notice, the client is now self-represented;

(ii) If the lawyer knows or believes their client is under a disability and no one is acting as litigation guardian, the lawyer may not serve a Notice of Withdrawal of Counsel until the lawyer moves to appoint a litigation guardian under rule 7.03.1(1). Once a litigation guardian has been appointed, the Notice of Withdrawal of Counsel should be served on the litigation guardian, as well as the Public Guardian and Trustee (if the party is not a minor) or the Children's Lawyer (if the party is a minor);

(iii) The lawyer then files the Notice of Withdrawal of Counsel;

(iv) The Notice of Withdrawal of Counsel takes effect 30 days after service on the client. Until then, the lawyer remains on the record and is responsible for taking all necessary steps on the client's behalf;

(v) After 30 days, an individual client is deemed to be a self-represented litigant. There will be no need for that party to serve and file a "Notice of Intention to Act in Person" as is currently done. This deeming provision will eliminate motions to dismiss proceedings on the basis that an unrepresented individual party has failed to file a Notice of Intention to Act in Person;[272]

(vi) Any party may seek the directions of the Court at a Directions Conference if (a) a party is under a disability or is a claimant in a class proceeding and (b) the party has not appointed new counsel within 30 days of service of the Notice of Withdrawal of Counsel;

(vii) If a corporate defendant has not appointed new counsel within 30 days of service of the Notice of Withdrawal of Counsel (or initiated a motion for leave for a non-lawyer to represent the company), any opposing party may move to strike the corporate defendant's pleadings (consistent with the existing rule 15.04);

[272] Currently permitted by Rule 15.04(17).

(viii) *The prejudice-based exception*: A lawyer may not serve and file a Notice of Withdrawal of Counsel within (a) 30 days of a scheduled motion or (b) 120 days of a scheduled dispositive hearing. In such cases, the lawyer must bring a motion to withdraw. This exception reflects the importance of preserving scheduled motion and dispositive hearing dates within the proposed process model. Late withdrawals risk compromising those dates and should be subject to careful judicial scrutiny.

We believe that this proposal provides for an efficient and cost-effective process that does not unduly monopolize Court time while recognizing a lawyer's responsibility to his or her client, other parties, and the administration of justice. Of course, a lawyer that seeks to remove themselves as counsel of record must continue to adhere to the *Rules of Professional Conduct*.

While Consultees strongly supported reforms that would make getting off the record easier,[273] we had proposed a different solution to these types of motions in our Consultation Paper and, thus, Consultees did not comment on the new proposed solution.

(3) Disputes Arising from Documentary Discovery and Examinations

We acknowledge that the proposed discovery process offers several areas of possible dispute, including disputes arising from requests for supplementary documents, written interrogatories, unanswered undertakings, and/or refusals.

We propose to create a new form called a Discovery Dispute Chart ("**Discovery Dispute Chart**") and to utilize a streamlined written motion process to resolve discovery-related disputes.

Discovery Dispute Chart: The Discovery Dispute Chart (a sample of which is attached as **Appendix "E"**) will have two main sections:

(i) Section 1 will list only the disputed items, following the structure of Parts A, B, C, and D of the Discovery Request Chart; and

(ii) Section 2 will set out the Court's decision on each disputed item, also organized under Parts A, B, C, and D.

Timing for Discovery Disputes Arising on Motions: Subject to any timetable set by a DC Judge, we propose that all disputes arising from the cross-examinations on a motion shall be addressed through a single written process within 30 days of the date on which responses to Parts C and D of the Discovery Request Chart are due.

Timing for Discovery Disputes Arising Outside the Context of a Motion: Subject to any timetable set by a DC Judge, we propose that all disputes arising from the discovery and examination processes (not relating to motions) shall be addressed through a single written process within 30 days of the later of: (a) the date on which responses to Parts A and B of the Discovery Request Chart are due where no cross-examinations or focused examinations are scheduled to

[273] *Supra,* fn. 257.

occur and (b) the date on which responses to Parts C and D of the Discovery Request Chart are due (i.e., where cross-examinations or focused examinations have occurred).

Materials Filed: When filing a discovery dispute, the requesting party shall be required to serve and file:

(i) an Interlocutory Relief Form, with the requesting party's portion filled out;

(ii) a Discovery Dispute Chart listing only disputed items, with supporting documents attached as separate tabs to one Schedule and cited in footnotes (e.g., See Tab 1 of Schedule "A"). Schedule "A" will, thus, comprise all of the documents to which the requesting party refers; and

(iii) when necessary, a factum not exceeding 15 pages.

The responding party shall file, within 15 days of receiving the requesting party's materials:

(i) a fully completed Interlocutory Relief Form, filled out by the responding party;

(ii) a fully completed Discovery Dispute Chart with supporting documents attached as separate tabs to a single Schedule and cited in footnotes (e.g., See Tab 1 of Schedule "B"). Schedule "B" shall contain only the documents to which the responding party refers and shall not duplicate any documents in Schedule "A". Said otherwise, if a document has already been included in Schedule "A", the responding party may simply refer to it; and

(iii) when necessary, a factum not exceeding 15 pages.

Parties should endeavour to confine their written arguments to the boxes provided in the Discovery Dispute Chart. To keep the chart manageable, each entry will be limited to 200 words. Where necessary, or where it is more efficient to address multiple issues together, a factum may be filed.

Requiring that these disputes be addressed in writing with minimal supporting materials is intended to reduce the costs and time associated with them.

Decisions: The Discovery Dispute Chart will attach a standard endorsement sheet which will be used to record the Court's determinations. It will contain checkboxes for the Court to indicate whether each request is granted or dismissed, as well as the following checkboxes specifying the reasons for any denial:

☐ Requested documents/information are not relevant and material

☐ Request is not focused and specific

☐ Requested documents/information are in the possession, control, or power of the requesting party

☐ Requested documents/information are not in the possession, control, or power of the requested party

☐ The request is not consistent with the Goals

☐ The requested documents/information are privileged for the reasons that are attached to this schedule.

☐ Other reasons for dismissing the request:

We propose that the relevant rule specify that, to minimize time and resources spent on discovery-related disputes and to allow greater focus on substantive matters, the Court shall not provide further written reasons for its decisions unless:

(i) the request is dismissed for "Other Reasons", in which case brief reasons shall be provided; or

(ii) the dispute involves a claim of privilege, in which case more fulsome reasons shall be provided.

The proposal to limit written reasons and use checkboxes instead is also grounded in the principle that judges should spend less time drafting decisions on these types of procedural issues. These proposals reflect a broader commitment to prioritizing substance over process, ensuring that time and resources of both the parties and the Court are directed toward addressing the substantive issues in dispute rather than procedural matters.

Costs: Costs relating to a discovery or examination dispute will be addressed at the bottom of the Discovery Dispute Chart.

The Court shall presumptively award costs on an issue-by-issue basis, payable to the party successful on that issue. Costs will be calculated at a fixed rate of $500 per disputed issue, plus a base rate of $4,000 to the party who prevails on the majority of issues.

If the dispute concerns the failure to properly answer an undertaking, the fixed rate shall be $1,000 per issue.

Example: If a party seeks production of 10 categories of documents and the court grants only 3, the requesting party will be ordered to pay the responding party $6,000 (calculated as $4,000 base + $3,500 for 7 unsuccessful requests – $1,500 for 3 successful requests).

Where the dispute concerns a small number of significant issues (e.g., privilege), the Court may instead award costs on the ordinary scale.

While awarding costs on a per-issue basis would help, it is not sufficient on its own. In the current system, discovery-related motions often address numerous requests. Once a party decides to proceed on one request, there is little disincentive not to pursue many others.

If a party succeeds on 30 requests but loses on 30, no costs may be awarded, yet the Court will have spent significant resources considering all 60. For some parties, even where costs are awarded, the amounts may be too small to deter such behaviour.

We propose that if a party loses more than 15 requests, the costs otherwise payable pursuant to the formula described above will be quadrupled. This significant escalation of costs reflects a recognition that the party has failed to conduct the litigation in accordance with the Goals and has breached its duty to cooperate in the discovery process. It is intended to discourage unreasonable conduct in bringing excessive requests and to encourage parties to focus on those that genuinely require a ruling, relying on adverse inferences for the remainder.

The Court will retain the discretion to depart from the presumptive costs model in exceptional circumstances.

(4) *Wagg* Motions

The term "***Wagg* Motion**" conventionally refers to a motion seeking production of police or Crown Brief documents in a civil case. Under the current Rules, a party must bring such a motion under Rule 30.10 to obtain an order to compel the production of these documents.

Although not addressed in our Consultation Paper, the Working Group has received consistent feedback from a striking number of lawyers and judges that *Wagg* Motions result in significant time, cost, and delay. For example, in its consultation response, Aviva reported that 20% of all of the motions brought across all of its litigation files are *Wagg* Motions.[274] Likewise, in its submissions, OTLA cited a 2020 Canadian Defence Lawyers' report indicating that the Ministry of the Attorney General processed approximately 2,000 *Wagg* Motions in 2019.[275] This volume may inform the delays experienced by litigants in obtaining *Wagg* disclosure. OTLA submitted that it can take 12 to 18 months to obtain a Crown file.[276] Similarly, the Frontenac Law Association observed, "parties can wait in excess of a year for productions of certain files," a delay that is especially hard to accept when "[b]oth plaintiffs and defendants generally want access to these records, yet neither controls the timelines for obtaining them."[277] OTLA added that only after receiving these documents "can plaintiffs' counsel identify potential parties, witnesses, and details needed to assess the validity of a claim, the evidence, and to move the case along."[278]

Overall, Consultees expressed strong support for addressing this issue and for reducing the resources required to obtain a *Wagg* order.[279]

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[274] Submission of Aviva, p. 2.

[275] Submission of OTLA, p. 43, citing CDL, *Report on Wagg Motions in Ontario*, June 9, 2020, www.cdlawyers.org/files/Wagg%20motions%20Report.pdf.

[276] *Ibid.,* p. 41.

[277] Submission of FLA, p. 3

[278] Submission of OTLA, p. 44.

[279] See, for example, the submissions of OTLA, pp. 43-44; CCLA, p. 93; and FOLA, p. 7.

Section 261(1)68 of the *Community Safety and Policing Act, 2019*[280] provides that the Lieutenant Governor in Council may make regulations authorizing the production of police records, including regulations prescribing the process and any applicable fees for obtaining them. Although it would not involve a change to the Rules and, therefore, is not strictly within our mandate, we very strongly recommend that consideration be given to enacting regulations pursuant to this provision. Doing so would eliminate the need for *Wagg* Motions at least with respect to police records. This would reduce the delays faced by litigants in obtaining police records. This would also reduce the burden on our court system in processing such motions and, as such, would be consistent with the overarching goal of making the civil justice system more efficient.

(5) Motions to Strike Out Portions of Affidavits or Witness Statements

Disputes about the admissibility of evidence in witness statements or affidavits are inevitable. Such motions, however, risk overwhelming the Court's limited resources. Moreover, because only a small percentage of cases proceed to a dispositive hearing, rulings on the admissibility of evidence intended for use at such hearings are unnecessary in most instances.

For the foregoing reasons, unless circumstances make an advance ruling necessary and such a ruling is consistent with the Goals, motions to strike out portions of affidavits or witness statements, whether on admissibility grounds or otherwise, must be made returnable at the outset of the dispositive hearing. Early determinations may be appropriate, for example, where a ruling could materially affect an expert report, create significant cost consequences, or where issues such as AI-generated deepfakes could cause substantial prejudice if left to the dispositive hearing judge.

5. Recommendations

1. The Working Group recommends a complete overhaul of the rules relating to motions practice. Such an overhaul will broadly include:

    a. Mandating pre-screening of interlocutory disputes at Directions Conferences as set out above;

    b. Prescribing the form and length of materials to be filed in support of various types of requests for interlocutory relief;

    c. Grouping rules concerning pleadings and pleadings (and related) motions, together with a consolidation of certain of those rules;

    d. Consolidating Rules 6.1.01 and 21.01(1)(a) to simplify the process, and introduce complementary reforms to (i) lower the threshold for early determination of key issues where doing so is efficient and consistent with the Goals; (ii) require that such issues be decided under the common law "balance of convenience" standard, with the result binding at future dispositive hearings; and (iii) require that any appeal from

[280] *Community Safety and Policing Act, 2019,* S.O. 2019, c 1, Sched 1.

the determination of the bifurcated issue(s) be required to run its course before further steps in the litigation on the remaining issue(s) may proceed;

e. Revising Rule 15.04 to permit lawyers, with limited exceptions, to remove themselves from the record by serving and filing a Notice of Withdrawal of Counsel; and

f. Introducing a streamlined mechanism for addressing interlocutory disputes involving documentary disclosure, written interrogatories, refusals made during cross-examinations or focused examinations, and contentious aspects of witness statements.

2. The Working Group further recommends considering regulatory amendments, pursuant to Section 261(1)68 of the *Community Safety and Policing Act, 2019*, to simplify the process of obtaining policy records, thereby eliminating the need for *Wagg* Motions.

O. PRE-TRIAL PROCEDURES

In this section, we propose two fundamental reforms to the pre-trial process. The first is to expand the existing mandatory mediation program province-wide, while, at the same time, eliminating mandatory judicial pre-trials. The second is to adopt the same model of binding judicial dispute resolution recently introduced in the *Family Law Rules*.[281]

1. Mandatory Mediation and Changes to Pre-Trial Conferences

a) The Need for Change

Resolving disputes without the need for a dispositive hearing offers numerous benefits, including faster resolution, lower costs for litigants, reduced strain on limited court resources, and greater party control over the outcome. Given these benefits, we believe it is important to encourage resolution as much as possible.

The current system offers one, and in some instances two, opportunities to participate in a formal resolution discussion. First, in certain judicial centres, parties must engage in mandatory mediation with a private mediator at their own expense. Second, in all cases, parties are required to attend a pretrial conference before a judge, during which efforts are made to settle the matter. Where settlement remains elusive, the balance of the pretrial conference is devoted to trial management. In practice, much more time is typically spent on settlement discussions than on trial management.

We have identified three problems related to mediations and pre-trials that we propose to reform. We outline them here.

[281] *Family Law Rules*, O. Reg. 114/99.

The Problem with Mandatory Mediation: The problem with mandatory mediation is not that it has been unsuccessful. Quite the opposite. The problem is that it needs to be expanded from the limited jurisdictions in which it is currently imposed.

Mandatory mediation was introduced for some cases in Toronto and Ottawa in 1999, and in Windsor in 2002, to promote the earlier resolution of disputes. An evaluation of the Ontario mandatory mediation program, submitted to the Civil Rules Committee in 2001, found that mandatory mediation significantly reduced the time to resolve cases, lowered litigation costs, and led to early settlement in roughly 40% of cases. Litigants and lawyers expressed high satisfaction with the program, and the benefits were observed across different case types in both Ottawa and Toronto. In 2010, as part of broader amendments to the Rules, mandatory mediation was, with limited exceptions, expanded to all cases commenced in Ottawa, Toronto, and the County of Essex.[282]

In a 2019 Ontario Bar Association survey, respondents overwhelmingly supported expanding the program province-wide, though, to be fair, there was a low response rate to the survey.[283]

The program has never been expanded beyond Ottawa, Toronto, and the County of Essex.

The Problem with Roster Rates: As the OBA and other Consultees observed,[284] the roster rates for mandatory mediation were set in 1999—26 years ago—and have not been updated since. The fees range from $600 to $825 plus HST, depending on the number of parties, and cover one-half hour of preparation time per party and up to three hours of mediation, with costs shared equally by the parties.[285] These rates are far below current market pricing for legal services, resulting in limited incentive for individuals to serve as roster mediators. Moreover, as one Consultee noted, there is no compensation for last-minute cancellations, making the role even less attractive to mediators.[286]

The Problem with Pre-Trial Conferences: We recognize that pre-trial conferences play a significant role in the life of many proceedings and contribute to the consistently high rate of settlements before trial year over year.[287] That said, we are of the view that the effectiveness of judicial-led settlement discussions during pre-trial conferences can vary, meaning that, in some cases, this stage may not represent the most efficient use of judicial time.

The more pressing problem, however, is that limited judicial resources have created unacceptable backlogs in some regions, leading to lengthy delays in obtaining pre-trial dates and, consequently,

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[282] https://cfcj-fcjc.org/inventory-of-reforms/ontario-mandatory-mediation-program-rules-24-1-and-75-1/

[283] See Jennifer L. Egsgard, "*Mandatory Mediation in Ontario: Taking Stock after 20 Years*", Ontario Bar Association (July 16 2020).

[284] Submissions of the OBA, p. 27 and Bruce Ally ("**Ally**"), p. 6.

[285] O. Reg. 43/05 MEDIATORS' FEES (RULE 75.1, RULES OF CIVIL PROCEDURE) | ontario.ca

[286] Submission of Ally, p. 7.

[287] Interestingly, in regions that have both mandatory mediation and pre-trial conferences, it remains unclear due to an absence of empirical study, whether having a "second kick at the can" reduces the effectiveness of mediations, given that parties know they will inevitably get another chance at resolution closer to trial.

extended wait times for trial dates once matters are trial-ready. Without a significant increase in resources, alleviating the pre-trial bottleneck will remain a challenge, making it necessary to consider other neutral venues for facilitating settlement between litigants.

Finally, we believe that because most pre-trial time is spent on settlement discussions, insufficient attention is given to trial management. We believe that greater focus on trial management could streamline the trial process and shorten trials.

b) Proposed Reforms

Province-Wide Mandatory Mediation: The Working Group proposes to expand mandatory mediation province-wide in all cases except:

(i) Cases on the Application Track, where it will remain discretionary, except in certain estates, trusts, and *Substitute Decisions Act* cases (as per the existing Rule 75.1);

(ii) Cases where a mediation has already been conducted before the One-Year Scheduling Conference;

(iii) Proceedings under the *Construction Act* or the *Bankruptcy and Insolvency Act;*

(iv) Proceedings under the *Class Proceedings Act*, except where certification is denied and a claim proceeds as a regular claim; and

(v) Cases involving allegations of physical, mental, or emotional abuse, where it will remain discretionary.

In our Consultation Paper, we proposed that mandatory mediation would not apply to Summary Hearing matters (now Summary Track proceedings). We agree, however, with many Consultees who argued that these cases should also be subject to mandatory mediation.[288] As Consultees noted, mediation can be especially beneficial for individuals who are more likely to be involved in Summary Track proceedings and who are often least able to bear the costs of litigation. For instance, employment disputes frequently involve claims under $500,000 and would therefore be streamed to the Summary Track. These cases can have significant personal and financial impacts for claimants and, according to several Consultees, are particularly well-suited to mandatory mediation.[289]

The Court will retain discretion to exempt parties from mandatory mediation in appropriate cases. For example, it may do so where mediation is unsuitable because there is no realistic prospect of resolution without judicial involvement (such as in some cases involving allegations of fraud,

[288] See, for example the submissions of CCLA, pp. 56-57; Ally, p. 3; and TAS, p. 34.

[289] Submissions of Ally, p. 3; and Barry Fisher, p. 2. Moreover, the Employment Lawyers Association of Ontario made the following submission (at p. 545): "The experience of Employment lawyers is that in our area about eighty percent of cases that go to mediation settle, even if one (or both) of the parties feel, or even outright say, in advance of mediation that they do not believe the case will settle."

abuse, or a significant power imbalance), or where a party demonstrates that it cannot afford private mediation.[290]

With respect to Application Track matters, certain types of proceedings are not suitable for mandatory mediation (e.g., bankruptcy proceedings requiring court orders), whereas others that are more analogous to existing actions (e.g., oppression claims) may be suitable and could benefit from mediation. Accordingly, for all matters on the Application Track, mediation will be ordered only where appropriate, as determined by the DC Judge.

In Trial Track cases, parties may choose the timing of mediation that best suits their needs. If, however, mediation has not occurred before the One-Year Scheduling Conference, the Court will order one at that conference (or at a Directions Conference held in its place). Parties attending a One-Year Scheduling Conference must have discussed mediation timing and agreed on a mediator. If not, the Court will set a deadline and appoint a mediator from the roster.

Roster Rates and Other Recommendations: To give mandatory mediation the greatest chance of success, attract qualified individuals to serve as mediators, and ensure that mediators possess the specific skills required for effective mediation, we propose the following:

(i) Establish a province-wide roster of mediators, enabled by virtual mediation, which eliminates geographic constraints and ensures consistent access to mediators across Ontario;[291]

(ii) Establish a task force to update the roster rates to reflect current market conditions; and

(iii) Create continuing professional development standards for roster mediators for quality assurance purposes.

Pre-Trial Conferences: Given our recommendation to expand Ontario's mandatory mediation program and to help reduce the backlog in scheduling judicial pre-trials, we propose that courts no longer routinely engage in settlement discussions as part of pre-trial conferences. Instead, we recommend that judicial pre-trials retain only the trial management component. This would be delivered through a dedicated TMC, supported by prescribed forms and attendance requirements to promote efficiency and make TMCs significantly less time-consuming than current settlement-focused pre-trials. TMCs are discussed in greater detail in the next section.

Although we propose to eliminate the settlement component from TMCs, we recognize the value of hearing directly from a judge for settlement purposes. We therefore propose that the Court retain the discretion to order a judicial settlement conference in appropriate circumstances, and as resources permit. This will enable the Court to allocate resources where they are available and where such a conference is likely to assist in resolving the matter before trial.

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[290] This is in response to comments that the Advocacy Centre for the Elderly made in its submission, at p. 7, that "[i]f mandatory mediation is implemented, there should be a fee-waiver option for low-income litigants, similar to the existing waiver for filing."

[291] In line with a recommendation by the CCLA, p. 57.

Parties will not know in advance whether a judicial settlement conference will be ordered. In the result, they will be incentivized to treat the mandatory mediation seriously and make genuine efforts to settle at that stage.

c) Consultation Feedback

Consultees expressed strong support for expanding mandatory mediation across the province, emphasizing its potential to save costs, foster early resolution, and conserve judicial resources.[292] Many Consultees also recommended reconsidering the current roster rates.[293]

Some Consultees, however, raised concerns regarding our proposals.

The Financial Burden of Mediation: Some Consultees were concerned that expanding mandatory mediation province-wide would increase costs, particularly for impecunious parties.[294]

There is no doubt that mandatory mediation adds an expense to most proceedings. We make several observations in response. First, our proposal is to expand the current mandatory mediation program with its rostered mediators and fixed schedule of fees. For those parties that can afford off-roster mediators, that option will exist. For those who cannot, we believe the roster fees (even if increased to better reflect current market rates) are reasonable and proportionate to cases commenced in the Superior Court of Justice. Second, it is expected that, apart from the mediator's fee, the costs of preparing for and attending a mediation will be comparable to the costs of preparing for and attending a judicial settlement pre-trial. In other words, the preparation costs will be largely neutral. Third, the experience in jurisdictions where mandatory mediation is currently in place appears to be positive. Settlement rates appear to justify the cost.[295]

Timing Issues: Some Consultees expressed concern that making mediation mandatory may lead parties with little interest in resolution to serve *pro forma* briefs and not seriously engage in the dispute resolution process. They argued that this could waste time and resources and risk lowering settlement rates, as judicial pre-trials would no longer be automatically available under the proposed model.[296]

The Working Group agrees that the timing of a mediation can significantly impact its likelihood of success. As we heard, even from within the Working Group, mediation will only succeed in many cases when it is conducted close to the trial date. In the proposed model, parties will have considerable flexibility in determining when mediation takes place. Those who wish to mediate before the up-front exchange of evidence may do so. At the same time, the up-front evidence model will ensure that parties can meaningfully assess the strengths and weaknesses of their case early in the litigation, enabling more informed and productive settlement discussions at an earlier stage.

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[292] Submissions of Ally, p. 6; Barry Fisher, p. 2; TAS, p. 34; OBA, p. 25; and CCLA, p. 53.

[293] See, for example, the submissions of Ally, p. 6-7; OBA, p. 27; ADRIO, p. 2; and CCLA, p. 58.

[294] See, for example, the submission of the Advocacy Centre for the Elderly, p. 7.

[295] See Graeme Mew and Sophie Kassel, *Compelling Parties to Attempt Mediation: The Ontario Experience*, (September 1, 2022), unpublished, presented at the Commonwealth Magistrates' and Judges' Association conference in Accra, Ghana in September 2022.

[296] See, for example, the submission of the HLA, pp. 50-53.

For Trial Track cases in which mediation has not been scheduled before the One-Year Scheduling Conference (or a corresponding Directions Conference), a mediation date or deadline will be fixed at that conference.

Some Parties Just Need to Hear From a Judge: Consultees who made submissions on the elimination of the settlement portion of judicial pre-trials tended to oppose the idea. As we anticipated, they expressed the concern that, as the saying goes, some parties "just need to see the sash." Some Consultees fear that settlement opportunities will be lost if judicial settlement pre-trials are eliminated.[297]

The Working Group acknowledges the significant value of judicial settlement conferences, though their effectiveness often depends on the judicial officer conducting them. They also come at a significant cost. In some regions, the wait time for a pre-trial conference is a year or more. We have concluded that, on balance, it is preferable to reduce delays by outsourcing the settlement aspect of judicial pre-trials. Ontario's mandatory mediation program has been in place for some 25 years, and a robust mediation industry has developed, making it easier to find qualified mediators. Parties should now have little difficulty accessing mediators with case-specific expertise. Additionally, with most mediations being conducted virtually, litigants across the province can access mediators of their choice, regardless of their location.

Litigation involves a significant amount of risk-management. Parties may not always have the benefit of a judge's pre-trial evaluation of their case, but they will have the benefit of an alternative neutral venue in which to fully explore resolution. They will be able to meaningfully manage their litigation risks through that venue.

As set out above, the court will also retain a discretion to order a judicial settlement conference in circumstances that warrant it and where resources permit it.

Evaluative Mediation: The Consultation Paper sought Consultees' views about whether a form of evaluative mediation should be introduced. The process of evaluative mediation involves the mediator providing, at some point in the process, an opinion as to the merits of the case and a recommendation for settlement. While parties would not be obligated to accept the mediator's opinion, it would be documented in writing, sealed, and filed with the court for the trial judge's consideration when evaluating trial costs. Adverse cost consequences would result where a party failed to accept a mediator's recommendation and ultimately achieved a less favourable result at trial.[298]

Consultees strongly opposed this proposal.[299] Their concerns centred largely on what the introduction of an evaluative aspect would do to mediation culture. More specifically, the concern was that the process would become more adversarial, leading to more posturing and fewer

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[297] See, for example, CDL, p. 37; City of Toronto, p. 7; David Bierstone, p. 3; Frontenac Law Association, p. 3; and Wallach Lawyers, p. 2.

[298] See Bill Hourigan, Michael Willson, and Preston Jordan Lim, *A Modest and Principled Proposal for Civil Justice Reform in Ontario* (March 6, 2025).

[299] See, for example, the submissions of the OBA, p. 25; CDL, p. 36; TAS, p. 34; Blaney, p. 6; and CLHIA, p. 7.

resolutions. Ultimately, we concluded that, while adding an evaluative element to the mediation process might encourage litigants to take it more seriously, it could also increase costs—by prompting parties to invest significant effort in persuading the mediator of their position—and foster a more adversarial tone, potentially undermining the collaborative purpose of mediation. We are therefore not proposing to implement evaluative mediation.

2. Binding Judicial Dispute Resolution

Several years ago, the Family Court in the Central East Region began piloting a model of binding judicial dispute resolution ("**JDR**") for relatively straightforward family disputes. Under that model, where the parties consent, a judge will mediate their dispute failing which the judge will adjudicate the outstanding issues. The model proved successful and has been taken up in other family courts around the province. In fact, the *Family Law Rules* were recently amened to codify binding JDR.[300]

Binding JDR allows the parties to choose a summary process as an alternative to a trial. It envisions a single, one-day hearing which begins with a judicial mediation and, if that proves unsuccessful, a summary determination of the parties' dispute. The entire proceeding is conducted under oath or affirmation. Each party files a short affidavit before the hearing. The presiding judge may express his or her views on the issues as the day proceeds. At the outset, the judge seeks to settle issues on consent. If there are issues that do not settle, he or she will hear brief submissions and render a decision on the merits. He or she may rely on anything said during the hearing day in reaching that decision on the merits. Alternatively, the presiding judge may determine that the matter is not suitable for a summary determination, in which case the hearing is treated as a case conference.

This process is suitable to cases in which there are relatively narrow issues in dispute, no significant credibility issues, no oral evidence required from a non-party witness, and where it is reasonable to expect that the issues can be resolved or determined in a summary manner. Similar models are used in several other Canadian jurisdictions including Alberta, Saskatchewan, Quebec (Family Court – Conciliation and Summary Hearing), New Brunswick, Nova Scotia (Family Court), Newfoundland & Labrador (Family Court Rules).[301] A similar model is also employed in New Zealand by their Civil Disputes Tribunal for cases up to $30,000.[302]

The Working Group proposes introducing a similar model of binding JDR for straightforward civil cases, where the parties consent and the Court agrees that binding JDR is appropriate for the type of case. The decision to proceed with binding JDR would be made at a Directions Conference.

A significant number of Consultees who responded to the Phase 1 consultation paper supported the idea of implementing binding JDR, on consent, in civil cases. Perhaps because many Consultees had already expressed this view earlier, there was very little mention of this proposed reform in submissions made to the Phase 2 Consultation Paper. CCLA generally supported the

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[300] https://www.ontario.ca/laws/regulation/r25009

[301] Alta Reg. 124/2010, r. 4.18; Saskatchewan Kings Bench Rules, Rule 4.21.1; The Court of King's Bench of New Brunswick, PD 2024-09; Newfoundland and Labrador Supreme Court Family Rules, r. F25.05; Nova Scotia Civil Procedure Rules, r. 59A.

[302] Disputes Tribunal of New Zealand

idea, provided the process is on consent and restricted to simple cases with limited issues.[303] OTLA generally supported it as well, though expects it will not have much uptake in personal injury cases, which tend to be too complex for the JDR model.[304] On the other hand, the OBA rejected the idea, largely based on concerns that the introduction of binding JDR would put additional pressure on scarce judicial resources and, moreover, essentially ask judges to engage in a process in which they have little training or expertise.[305]

In our view, there is little downside to introducing binding JDR for civil cases on consent. It offers an opportunity for a fair and prompt disposition of straightforward cases with limited issues. More broadly, cases resolved through binding JDR will consume less court resources in the long run.

To the extent that binding JDR places demands on the judiciary, one might consider these demands to be an indicator of its success as a reform initiative.

3. Recommendations

The Working Group recommends:

a. Expanding mandatory mediation province-wide as set out above;

b. Eliminating the judicial settlement aspect of pre-trial conferences, while retaining a discretion to schedule judicial settlement conferences where appropriate and where resources permit;

c. Adopting the Binding Judicial Dispute Resolution model of the Family Law Rules (Rule 43) for civil cases.

P. TRIAL MANAGEMENT CONFERENCES

1. The Need for Change

The orderly and efficient management of trials is essential to the proposed new system. Too often in our current system, trial management is inconsistent, dependent upon the availability of scarce judicial resources, or, in certain cases, a performative exercise resulting in a completed checklist at the end of a pre-trial conference. The result is that trial judges often end up saddled with having to conduct *ad hoc* trial management at the outset of trial, or during the trial itself, to address issues and procedures that ought to have been addressed long before. Significantly greater efforts are directed at trial management in criminal proceedings and family proceedings.

The absence of effective trial management in civil cases can result in valuable trial time being wasted on undisputed or irrelevant issues, inefficient document handling, poorly ordered

[303] Submission of the CCLA, p. 61.

[304] Submissions of OTLA, p. 48.

[305] Submissions of the OBA, p. 26.

witnesses, oral openings that could have been provided in writing, addressing technology issues, and insufficient attention to time constraints.

2. Proposed Reforms

Our view is that the best way to improve trial efficiency is to provide enhanced trial management at the pre-trial stage. As a result, we propose that a TMC be established as a standard event in Trial Track cases. TMCs will occur before every trial, during which the litigants, counsel, and the Court will address the orderly presentation of evidence and resolve any other issues that can be dealt with before trial. This will help ensure that the matter is not only ready to proceed to trial, but that the trial will unfold efficiently.

Optimally, a TMC will occur four to five weeks before the trial's scheduled commencement. If resources permit, we strongly urge that the assigned trial judge preside over the TMC. Serving as the trial judge will incentivize the TMC judge to invest the time and effort needed to manage the trial efficiently and to shape the presentation of evidence in a manner consistent with how they wish to receive it.

We propose that guidelines be prescribed to ensure consistency of trial management and trial practice across the province. A TMC checklist will require parties and the Court to consider:

(i) How opening statements are to be provided, with a presumption that they will be delivered in writing before the trial date, except in jury trials;

(ii) The filing of chronologies and, where possible, an Agreed Chronology, as described and defined below;

(iii) The filing of a joint book of documents, as described below;

(iv) The filing of an agreed glossary of definitions, as described below;

(v) The identification of any anticipated motions, including motions to strike the content of a witness statement on the ground that it contains inadmissible evidence;

(vi) The use of technology;

(vii) The anticipated length of trial, including whether the parties' presentation of evidence and/or legal submissions will be subject to "chess clock" time limits; and

(viii) The manner of the presentation of evidence:

a. The presumption, subject to the presiding judge's discretion, will be that a party's evidence in-chief will be provided orally, though limited to the "four corners" of their disclosure, including their witness statements, the content of their Reliance Documents, and the substance of any evidence given on their focused examination. The opposite presumption will apply to non-party witnesses, whose witness statements will be taken as read, save in jury trials when they, too, will provide oral evidence in-chief;

b. The presentation of expert evidence will be addressed, in accordance with the process described in Section VI(Q)(4) below.

Trial judges will ultimately retain the discretion to determine what, if any, new evidence is permitted at trial.[306] We propose that the exercise of the discretion be guided by a slightly modified *Palmer*[307] test, requiring that the new evidence (a) was unobtainable with the exercise of due diligence; (b) is relevant to a decisive or potentially decisive issue; (c) is credible, in the sense that it is reasonably capable of belief; and (d) is likely to materially affect the outcome of the trial if permitted.[308] The trial judge will also have the discretion to make any order necessary to attenuate any prejudice that may arise due to the admission of new evidence at trial.

Certain aspects of the proposed new process for trial management require further explanation.

Chronologies: The Working Group proposes replacing the current permissive approach to "Requests to Admit" with a mandatory requirement that parties (a) exchange chronologies of key facts before the TMC; (b) review each another's chronologies and indicate whether they admit, deny, or have no knowledge of each fact before the TMC; and, when ordered at the TMC to do so, (c) create an "**Agreed Chronology**" comprising only those facts to which all parties agree. We believe that an Agreed Chronology, when ordered to be produced, will help narrow the issues in dispute and streamline the trial process.

Chronologies will follow a prescribed format and set out relevant facts in chart form. The appropriate level of detail will develop through practice. For each fact, the chronology should include:

(i) a relevant date;

(ii) a brief description of the fact in neutral terms, free of argument, opinion, hyperbole, or adjectives that often undermine the usefulness of "Requests to Admit;"

(iii) a reference to the evidence supporting it; and

(iv) a column for opposing parties to indicate whether they agree, disagree, or have no knowledge of the fact.

Chronologies will be exchanged according to the following presumptive timetable, which may be varied by consent or by court order at the One-Year Scheduling Conference (or an equivalent Directions Conference):

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[306] "New evidence" means evidence not previously referred to in a party's Reliance Documents, their witness statement(s), or during their focused examination.

[307] *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

[308] The slight modification we propose to the *Palmer* test relates to factor (d). In appeals, the factor is considered retrospectively (i.e. the fresh evidence likely would have affected the outcome of the trial) whereas at trial it will be considered prospectively.

(i) *60 days before the TMC*: All parties will serve their chronologies on one another;

(ii) *30 days before the TMC*: All parties will complete the columns indicating whether they agree, disagree, or have no knowledge of the facts set out in the other parties' chronologies.

At the TMC, the judge will determine whether it is appropriate for the parties to prepare an Agreed Chronology setting out only those facts on which all parties agree. If so, the judge will designate who will prepare it (presumptively the claimant, unless the claimant is self-represented) and set a deadline for its completion. Any facts included in the Agreed Chronology will be deemed admitted at trial.

In our Consultation Paper, we proposed that all parties contribute to a single shared chronology setting out all facts advanced by each party and indicating which facts were agreed to, and by whom. We were concerned, however, that this approach could result in an unwieldy document and provoke unnecessary disputes. The revised model retains the principal benefits of the chronology process—requiring each party to prepare its own chronology, to consider the evidentiary foundation of its case in advance of trial, to review the chronologies of opposing parties, and to identify areas of agreement—while constraining the final step of preparing an Agreed Chronology, a process that may provide fertile ground for disputes. An Agreed Chronology will be prepared only where appropriate (and by the party that the Court designates) and will serve as the foundational record of facts agreed upon by all parties, forming the basis upon which the trial judge or jury can understand each party's version of the disputed facts.

We propose that, after a period of use, the time and cost of preparing and responding to chronologies—and their usefulness at trial—be reviewed to assess the process's effectiveness and guide any necessary refinements.

Joint Books of Documents: We propose that parties be required to prepare two joint books of documents ("**JBDs**" or, singular, "**JBD**"), each with a corresponding index: the first containing all documents that the parties agree are authentic and admissible, and the second containing all documents for which at least one party disputes authenticity or other grounds of admissibility.

This requirement follows the guidance of the Ontario Court of Appeal in *Girao v. Cunningham*[309] and expanded upon in *Bruno v. Dacosta*.[310] Since those decisions, trial courts have consistently emphasized that JBDs are expected and strongly encouraged. Their use, however, is neither mandatory nor enforced, and no standardized process exists for their preparation. The proposed reforms will make JBDs mandatory and will prescribe the practice for their creation.

The presumptive timetable, which may be varied by consent or by court order at the One-Year Scheduling Conference (or its equivalent Directions Conference), will be as follows:

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[309] *Girao v. Cunningham*, 2020 ONCA 260.

[310] *Bruno v. Dacosta*, 2020 ONCA 602.

(i) *90 days before the TMC*: the claimant will serve all defendants and any subsequent party defending the main claim with a proposed JBD index in a prescribed form;

(ii) *60 days before the TMC*: each defendant and any subsequent party defending the main claim will serve the claimant, all other defendants, and any other subsequent parties defending the main claim with a response using the claimant's JBD index as a base and identifying two things:

a. any additional documents the defendant or subsequent party wants included in the JBD index; and

b. any objections the defendant or subsequent party is making on the basis that any document listed (a) is not authentic, (b) is otherwise inadmissible, or (c) should not be admitted for the truth of its contents;

(iii) *30 days before the TMC*: The claimant, each defendant, and any subsequent party defending the main claim will serve all other parties with their responses to any additional documents proposed by other defendants or subsequent parties. The response must indicate whether the party objects to any newly listed document on the grounds that it (a) is not authentic, (b) is otherwise inadmissible, or (c) should not be admitted for the truth of its contents.

In all cases, unless otherwise noted, when including a document in the JBD index, the party will be deemed to be submitting it as authentic and admitted for the truth of its contents. In all cases, the failure to object will be deemed to be an acceptance that the documents listed on the JBD index are authentic and will be admitted for the truth of their contents.

At the TMC, the judge will designate the party responsible for preparing the final JBD indices and corresponding JBDs (presumptively the claimant, unless the claimant is self-represented) and will set a deadline for their completion. Two final JBD indices and corresponding JBDs will be prepared.

(i) *The agreed JBD and index* will include all documents to which no party has objected on the grounds of authenticity or admissibility. The index will also identify any documents that are **not** being admitted for the truth of their contents. This will serve as the parties' agreement regarding the admissibility and use of the documents set out therein; and

(ii) *The disputed JBD and index* will include all documents to which an objection has been raised on the grounds of authenticity or admissibility. The index will specify which party seeks to have each document admitted and what the grounds of objection are.

The JBD indices will also serve as a party's notice of intention to rely on any documents in the JBD for purposes of compliance with any notice requirements contained in the *Evidence Act*[311] (and in particular ss. 35 and 52 thereof).

[311] R.S.O. 1990, Chapter E.23.

The following table illustrates the timelines for the exchange of chronologies and JBDs before a TMC.

Time to TMC	**Required Steps**
90 days	Claimant serves all parties with its JBD index. All parties serve their chronologies on one another.
60 days	Using the claimant's forms as a base, all defendants and subsequent parties defending the main claim serve one another and the claimant with their responses to the JBD index and indicate any additions they wish to make to each form.
30 days	The claimant, each defendant, and any subsequent party defending the main claim will serve all other parties with their responses to any additional documents proposed by other defendants or subsequent parties.

Where a subsequent party does not defend the main claim, two separate chronology and JBD processes will occur. For instance, in a Three-Party Claim where the third party does not defend the main claim, one chronology and JBD process will take place between the claimant and the defendant, and another between the defendant and third party.

Agreed Glossary of Definitions: We also propose to introduce a requirement that the judge presiding at the TMC canvass whether an agreed list of definitions of certain terms would be beneficial to the trial judge's understanding of the evidence and, if so, direct that the parties jointly compile one. We anticipate that this may be helpful in a case involving medical, scientific, engineering, or other technical issues.

Fixed Trial Times and "Chess Clocks": Several Consultees suggested that time limits be imposed on trials.[312]

RSJ Sweeny, for instance, submitted that it is imperative that time limits be imposed, and templates be developed for the time allocations for trials. He asserted that fixed time limits would require the parties to streamline the process and focus their advocacy. In his view, while there may be pushback, the reality of the Court's limited resources must come into play and be considered.[313]

Professor Erik Knutsen supported this view and emphasized the need to consider firm time limits in personal injury trials. In his submission, he noted that judicial resources are limited and should be used wisely. He observed that many personal injury and insurance cases proceed in similar fashion and involve recurring issues, and only a few truly contentious points ultimately determine the outcome. Despite this, such trials can extend to four, six, or even eight weeks over basic

[312] See, for example, the submissions of Prof. Knustsen, p. 8; and RSJ Sweeny, p. 3.

[313] Submission of RSJ Sweeny, p. 3.

liability or damages questions. He argued that entitlement to trial time should be limited and fairly distributed, rather than reserved for a fortunate few, while others, as he put it, "rot in an interminable line."[314]

The Working Group has not had sufficient time to follow up on the suggestions of imposing fixed trial caps in certain types of cases. We believe it is a worthwhile consideration and accordingly recommend that a committee be established to conduct industry-specific consultations with a view to establishing the sort of templates for which RSJ Sweeny advocated.

3. Consultation Feedback

Relatively few Consultees engaged substantively with our TMC-related proposals. Most supported, at least in principle, the concept of more focused trial management, recognizing its potential to sharpen issues and police time estimates.[315] Some Consultees, however, expressed concerns about the sufficiency of judicial resources to staff TMCs, the difficulty in ensuring that the trial judge be assigned to conduct the TMC, and the breadth of our proposed checklist, which some thought may amount to micromanaging.[316]

There was generally good support for the introduction of mandatory JBDs, though some Consultees wondered whether their production will be practical in cases involving self-represented litigants.[317]

A common refrain, however, was that requiring parties to work co-operatively, whether it be to create a JBD or an Agreed Chronology, also creates fertile ground for tension and disputes. Some Consultees expressed the fear that these proposals could simply lead to further litigation, wiping out any efficiencies they may otherwise offer to the trial process.[318]

In response, we note that the requirement to prepare chronologies and JBDs will apply only to matters on the Trial Track and, thus, will be limited in scope given that more than half of civil cases will proceed on the Summary Track. The proposed JBD requirement is not new; it merely codifies directions already issued by the Court of Appeal. As for chronologies, we refined our proposal to require an Agreed Chronology only where the Court considers it appropriate.

4. Recommendations

1. The Working Group recommends establishing a requirement for parties to participate in a TMC before trial in matters proceeding on the Trial Track.

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[314] Submission of Prof. Knutsen, p. 8.

[315] See, for example, the submissions of the BCRC, p. 9; TAS, p. 37; CMPA, p. 2; The Holland Group, p. 8; MLA, p. 12; and CCLA, p. 61.

[316] Submission of the Perells, p. 32.

[317] See, for example, the submissions of TAS, p. 37; City of Toronto, p. 8; and CCLA, p. 62.

[318] See, for example, the submissions of Mark Wainberg, p. 6 and the Perells, p. 32.

2. The Working Group further recommends creating (a) a new TMC form which will have to be filed by the parties in advance of the TMC and (b) a TMC checklist to be completed by the presiding TMC judge.

3. The Working Group further recommends requiring parties to engage in the JBD and chronology process in accordance with the provisions and timelines set out above.

Q. EXPERT EVIDENCE

1. The Need for Change

The proliferation of expert evidence continues to present serious challenges, in terms of costs, delays, and risks posed to the truth-seeking function of the litigation process.

Recent amendments to Rule 53.03 established firm deadlines for the exchange of expert reports before pre-trial conferences and imposed significant sanctions for non-compliance. These amendments have had a positive impact by reducing delays caused by late-breaking expert reports. Nevertheless, there remain other outstanding issues with respect to expert evidence that we seek to address. These include:

(i) A lack of clarity as to the roles played by different types of experts in the litigation process;

(ii) The number of experts being engaged;

(iii) The timing of the delivery of expert reports;

(iv) Expert bias and concerns about "hired guns" (i.e., purportedly independent experts who are, in fact, lobbyists for a cause);

(v) The length of trials with expert evidence; and

(vi) The presentation of expert evidence in a manner that can make it more difficult to understand.

2. The Initial Proposals

In the Consultation Paper, we proposed a variety of reforms aimed at the issues listed in the previous section, including the following:

(i) Expressly defining in the Rules the roles of treating, participant, and litigation experts;

(ii) Codifying the *White Burgess*[319] requirements for admissibility of expert evidence to make them more accessible to litigants;

(iii) Expanding the use of joint experts to reduce the number of experts testifying at trial and to tackle the issue of expert bias;

(iv) Strengthening the expert's acknowledgement of their duty to the Court;

(v) Introducing a standard format for expert reports;

(vi) Introducing a requirement that opposing experts conference (commonly known as "hot tubbing") before trial to identify areas of agreement and disagreement, with a view to narrowing disputes and streamlining expert evidence at trial. The joint report would be filed with the Court and, subject to the trial judge's discretion to direct otherwise, expert evidence at trial would generally be confined to the areas of identified disagreement;

(vii) Re-sequencing the presentation of evidence at trial, such that all factual witnesses on both sides will testify first, followed by the introduction of expert evidence on an issue-by-issue basis. In our view, this approach would assist the trial judge in situating the expert evidence within the broader context of the case, in understanding the positions of both parties, and in appreciating the distinctions between the expert opinions.

3. Consultation Feedback

The proposed reforms to the Rules surrounding expert evidence generated significant feedback.

There was generally strong support for clarifying the roles played by different types of experts and codifying the conditions for admission of expert evidence.[320]

Few Consultees supported the compelled use of joint experts and many Consultees strongly opposed such an imposition.[321] Some expressed fear that it could lead to greater delay and expense if one party felt aggrieved by the joint expert report or that it may lead to the development of a "shadow expert" industry.[322] Others expressed concern that the joint expert would effectively usurp the role of the trial judge.[323] There was, however, support for joint experts in limited circumstances, such as the quantification of pecuniary losses in personal injury matters.[324]

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[319] *White, Burgess, Langille, Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

[320] See, for example, the submissions of the Perells, pp. 33 and 41.

[321] See, for example, the submissions of OTLA, p. 53; OBA, p. 32; CCLA, p. 68; CDL, p. 41; TAS, p. 36; Aviva, p. 3; MEA Forensic, p. 1; Medico-Legal, p. 7; Ontario Psychological Association ("**OPA**"), pp. 3-4; Shelton Associates, p. 3; Siskinds LLP, pp. 5-6; and the CMPA, p. 9.

[322] See, for example, the submission of the Chartered Business Valuators Institute, p. 8.

[323] See, for example, the submissions of Aviva, p. 4; CCLA, p. 8; and OTLA, p. 53.

[324] Submission of McKeating Actuarial Services, p. 1.

There was strong opposition to the proposal for expert conferencing ("hot-tubbing"),[325] though some Consultees proposed that it be optional.[326] Consultees expressed concerns that expert conferencing could increase costs,[327] limit counsel's ability to control the process, and create a risk that a more forceful expert might unduly influence an expert with a less assertive personality. [328] Interestingly, however, the Chartered Business Valuators of Canada expressed support for expert conferencing.[329]

The proposal to re-sequence expert evidence in the trial process was also received relatively poorly, though, to be fair, relatively few Consultees addressed the issue.[330] One Consultee expressed concern that re-sequencing expert evidence would be unfair to defendants, who should be entitled to know the case they have to meet before they begin presenting their case.[331] This concern is answered by the core elements of the up-front evidence model, which ensure that each party knows the case they have to meet before the trial even commences.

Another concern raised was that re-sequencing expert evidence would effectively eliminate a defendant's ability to bring a motion for non-suit at the close of the claimant's case.[332] In our view, this is not a compelling objection, as motions for non-suit are, in practice, exceedingly rare. Moreover, where a defendant anticipates bringing such a motion—having reviewed the claimant's evidence in chief—it may advance that as a basis for the trial judge to exercise their discretion not to adopt that sequencing.

Other Consultees thought the sequencing of evidence should be left to a trial judge's discretion to be exercised on a case-by-case basis.[333] We disagree with this suggestion, though do agree that the trial judge should retain the discretion to deviate from the presumptive model proposed.

4. The Revised Proposals

After reading the feedback and being mindful of the significant impact that expert evidence can have on the litigation process, we continue to largely support the initiatives that we proposed in the Consultation Paper. As explained below, however, our thinking has evolved.

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[325] See, for example, the submissions of OTLA, p. 54; CCLA, pp. 70-71; Aviva, p. 4; CDL, p. 42; CMPA, p. 10; and The Holland Group, p. 7-8.

[326] See, for example, the submission of TAS, p. 37 and the Collaborative Submissions of Toronto Firms,, Appendix "A", p. 9.

[327] See, for example, the submissions of Aviva, p. 4; HIROC, p. 4; Medico-Legal, p. 8; Thunder Bay Law Association, p. 3; and the Waterloo Region Law Association, p. 7.

[328] Submissions of the OPA, p. 4 and TLA, p. 37.

[329] Submission of the Chartered Business Valuators Institute, p. 3.

[330] Submission of the OBA, p. 33.

[331] Collaborative Submissions of Toronto Firms, Appendix "A", p. 9; and the submission of Waterloo Region Law Association, p. 7.

[332] Collaborative Submissions of Toronto Firms, Appendix "A", p. 9.

[333] Submission of the Perells, p. 34.

a) Defining the Roles of Treating, Participant, and Litigation Experts and Codifying the *White Burgess* Requirements

To enhance clarity and improve accessibility—particularly for self-represented litigants—we propose to add definitions in the Rules for the following terms in accordance with those set out in *Westerhof v. Gee,*[334] (and similar to r. 20.2(1) of the *Family Law Rules*):

(i) "**litigation experts**" are experts who are engaged by or on behalf of a party to provide opinion evidence in relation to a proceeding;

(ii) "**participant experts**" are experts who form opinions based on their participation in the underlying events rather than because they were engaged by a party to the litigation to form an opinion (e.g., a treating physician); and

(iii) "**non-party experts**" are experts retained by a non-party to the litigation who form opinions based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation (e.g., statutory accident benefits insurers).

For similar reasons, we propose enacting a rule codifying the common law requirements governing the admissibility of expert evidence, as articulated in *White Burgess Langille Inman v. Abbott and Haliburton Co.*[335] Specifically, expert opinion evidence should not be admissible in any proceeding unless the party tendering it establishes that:

(i) The evidence is relevant;

(ii) The evidence is material;

(iii) The evidence is necessary to assist the trier of fact;

(iv) The evidence is not subject to an applicable rule of exclusion;

(v) Where the expert's opinion is based on novel or contested science, or science used for a novel purpose, that the underlying science is reliable for that purpose; and

(vi) The opinion evidence is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from it.

b) Joint Experts and Court Appointed Experts

In light of the strong negative feedback regarding compelled joint experts, we propose a reduced list of categories in which, except in limited circumstances, the use of a joint litigation expert will be presumptive. Specifically, we propose that joint experts be presumptively required if opining on "financial issues," defined to include:

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[334] *Westerhof v. Gee,* 2015 ONCA 206, at ¶ 6.

[335] *Supra,* fn. 319.

(i) Quantification of past and future economic loss in personal injury matters;

(ii) Quantification of care costs in personal injury matters; and

(iii) Real estate and property valuations where the property consists primarily of developed land.

We propose that this list be reviewed periodically as experience with, and confidence in, joint experts hopefully grow.

For all other issues, parties shall be required to consider the use of a jointly retained litigation expert. This issue and any disputes concerning it will be canvassed at a Directions Conference or the One-Year Scheduling Conference.

In deciding whether to order the use of a joint expert, the presiding Judge may consider the following factors:

(i) Whether a joint litigation expert is presumed according to the Rules;

(ii) Whether a joint litigation expert is likely to save time or expense;

(iii) Whether a party has already retained an individual expert and incurred significant costs in relation to that expert;

(iv) The ability of the parties to pay an expert witness;

(v) The Goals and, in particular, the goal that the costs of litigation be proportionate;

(vi) Whether individual experts are required to ensure the parties have a fair opportunity to present their case;

(vii) The complexity of the issues requiring litigation expert evidence and the importance of the issue to the determination of the proceeding;

(viii) The extent to which the expert's opinion depends on areas of factual disagreement between the parties;

(ix) Any disagreement with respect to the methodology to be used by the litigation expert and whether that disagreement can be resolved by a joint litigation expert preparing different scenarios; and

(x) Any other matter relevant to the issue of litigation expert evidence.

We further propose that the following procedures will apply where parties jointly retain a litigation expert:

(i) The expert shall be retained by all relevant parties. Unless ordered otherwise, the instructing parties will be jointly and severally liable for the payment of the joint

litigation expert's fees and expenses. If requested by one or more of the parties, the Court may limit the fees and expenses that can be paid to a joint litigation expert;

(ii) If the parties are unable to agree on the selection of a joint litigation expert, the Court may (a) select the expert from a list that the parties prepare or (b) specify another manner in which the expert is to be selected;

(iii) Each party may give instructions to the joint litigation expert, but they must, at the same time, serve a copy of the instructions on all other instructing parties. No party may communicate with the joint litigation expert, or anyone affiliated with the expert, regarding the case without the other instructing parties being present or copied (if done by electronic means). Where parties provide inconsistent instructions to the expert, and he or she is unable to reconcile them, the issue may be addressed at a Directions Conference;

(iv) The parties shall co-operate to ensure the joint litigation expert has all relevant documents for the purposes of the expert report. If the expert is of the view that additional documents are required, the expert shall advise the parties before completing the report;

(v) The Court may give directions regarding the payment of the joint litigation expert's fees and expenses, the documents to be produced to the joint litigation expert, any inspection or examination that the joint expert will conduct, and the instructions to be given to the joint litigation expert;

(vi) A joint litigation expert shall provide a copy of his or her report, along with a sworn Attestation of Expert Duty, to all instructing parties at the same time;

(vii) After receiving a report from a joint litigation expert, the instructing parties may each seek clarification of any aspect of the report or make submissions on aspects they believe to be incorrect, but any such request or submissions must be copied to all other instructing parties at the same time it is sent to the joint litigation expert. The joint litigation expert shall send a copy of his or her response to any requests for clarification or other submissions to all instructing parties; and

(viii) All parties may exercise the right to cross-examine a jointly retained expert, and where a jointly retained expert is to be cross-examined, the instructing parties shall be jointly and severally responsible to summons and pay for the attendance of the expert, but the costs of such summons and attendance may be included as an assessable disbursement for the purposes of seeking costs.

With respect to Court-appointed litigation experts, we propose that the Rules provide that such appointments remain permissible on the Court's initiative. Alternatively, parties will be able to identify the potential need for a Court-appointed expert by completing a prescribed form to be filed in advance of a Directions Conference or the One-Year Scheduling Conference, at which the issue would be addressed.

c) Strengthening the Expert's Acknowledgement of their Duty to the Court

We propose that the Rules should continue to require that litigation experts provide an acknowledgement of their duties to the Court (currently Form 53) but this duty should take the form of a sworn attestation which will include, as attachments, the expert's *curriculum vitae* and his or her report.

We further propose that the litigation expert's duties to the Court should be expanded to include a duty to exercise independent, impartial, and objective judgment on the issues addressed at any expert conference (discussed in Section VI(Q)(4)(e) below) and to identify points on which the competing experts agree and those on which they disagree.

Finally, although not specifically addressed in our Consultation Paper, we propose to introduce a "two-strikes-you're-out" rule for litigation experts whom the Court finds to have breached one or more of their duties to the Court. It would apply as follows:

(i) The Court would be required to provide a written decision in any case in which it determined that a litigation expert breached its duty to the Court. The decision would be provided to the litigation expert, along with the parties in the case; and

(ii) Any expert who is found to have breached its duty to the Court on two occasions would be prohibited from providing expert evidence in any further Superior Court of Justice proceeding.

To ensure fairness, we propose creating a mechanism to permit an impugned expert to appeal the finding against him or her.

Although not essential, we recommend establishing a central registry to record all decisions in which an expert has been found to have breached its duty, similar to the existing registry for vexatious litigants. The registry would list experts who have been found in breach, together with the number of such findings. This registry would be publicly accessible to assist parties in selecting appropriate experts and to assist the Court in determining whether an expert should be permitted to testify or be qualified to give expert evidence.

d) Standard Format for Expert Reports and Default Deadlines

We propose that, subject to the discretion of the Court to order otherwise, a litigation expert's report should be required to follow a standardized format and contain:

(i) a summary of the expert's qualifications and a clearly delineated proposed scope of expertise;

(ii) background facts (with references to the evidence) or assumptions that the expert relied upon in forming his or her opinion(s);

(iii) a list of the specific questions the expert has been asked to answer;

(iv) the expert's analysis and opinions (i.e., answers to the specific questions posed); and

(v) the following appendices:

a. the source of any factual assumptions, including whether the assumptions were provided by instructing counsel;

b. a list of all documents provided to the expert, regardless of whether they were relied upon;

c. a copy of (or links to) any documents relied upon by the expert if not previously produced (i.e. scientific articles, journals, research, etc.);

d. particulars of any aspect of the expert's relationship with a party, or their representatives in, the proceeding, or the subject matter of the proposed evidence that might affect the perception of the expert's duty to the Court; and

e. a signed statement certifying that the expert is satisfied with the authenticity of every authority or other document referenced in the report, subject to the caveats presently found in rule 53.03(2.1)(6.1).

We propose that, subject to the discretion of the Court to order otherwise, the default timelines for delivery of litigation expert reports in Trial Track cases currently set out at Rule 53.03(1) to (3) should be amended to require service of litigation expert reports as follows:

(i) A party seeking to rely on expert testimony shall serve its expert report no later than 180 days before the earlier of (a) the TMC or (b) a Court-ordered mediation, unless the parties agree that the TMC will serve as the deadline;[336]

(ii) A responding expert report shall be served be served no later than 60 days before the earlier of (a) the TMC or (b) a Court-ordered mediation, unless the parties agree that the TMC will serve as the deadline; and

(iii) A reply report, if any, shall be served no later than 30 days before the earlier of (a) the TMC or (b) a Court-ordered mediation, unless the parties agree that the TMC will serve as the deadline.

A failure to comply with timelines for the delivery of expert reports are addressed in Section VI(R)(2) below. As set out in that section, barring exceptional circumstances, trial dates will not be adjourned to accommodate late delivery, or non-delivery, of experts' reports.

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[336] To accommodate concerns raised by Consultees, we propose to extend the timelines for delivery of reports to give defendants four months to respond to any plaintiff expert reports. We propose to link the delivery of expert reports to the earlier of (a) a Court-ordered mediation (to ensure the mediation is productive) or, if the parties consent, (b) the TMC (to ensure the parties are trial ready). In addition, parties will have the option of participating in mediation before the One-Year Scheduling Conference at any time without having exchanged expert reports.

e) Expert Conferencing

Despite significant opposition to the proposal, we continue to support the introduction of a presumptive expert conferencing model in Trial Track cases. In our view, such a model provides a compelling mechanism to narrow and clarify the key differences between expert opinions, thereby enhancing both trial efficiency and an understanding of the expert reports. It also serves as a valuable reminder that an expert's primary duty is to the Court—to provide fair, objective, and non-partisan assistance.

We agree with the feedback received from several Consultees[337] that in some cases an expert conference may be unhelpful or may result in disproportionate cost or delay (for example, where the experts' reports are based on entirely different factual assumptions). Accordingly, we propose that expert conferencing be presumptively required only in Trial Track cases. This approach will mitigate concerns about disproportionate cost in lower-value matters, as conferencing will largely occur in higher-value cases. In addition, we propose that the Court retain discretion to dispense with the presumption and to order all experts, some experts, or none to participate in a pre-trial conference, as appropriate.

More specifically, we propose to introduce a new rule presumptively requiring opposing experts in Trial Track cases to meet and confer before trial, with the following procedures to apply:

(i) The expert conference will take place outside the presence of the parties or their counsel, but the parties or their counsel may set the agenda for the conference;[338]

(ii) The experts will be required to prepare a joint report that summarizes the areas upon which they agree and those upon which they disagree, along with a brief summary for the reasons for any disagreement. The joint report will be admissible in evidence;

(iii) On consent, a transcriptionist may be hired to assist with the conference and preparation of the experts' joint report; and

(iv) Except in jury trials, and subject to the discretion of the trial judge to require testimony on any issue that would assist in understanding the evidence, experts' trial testimony will focus on the areas of disagreement and provide only brief evidence on areas of agreement.

The Court will also retain the discretion to order an expert conference in Summary Track cases; however, it will not be a presumptive requirement.

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[337] *Supra,* fn. 327.

[338] Some Consultees objected to this proposed requirement. See, for example, the Collaborative Submissions of Toronto Firms, Appendix "A", p. 9. Consultations with other jurisdictions, however, suggest this requirement is essential to curb posturing and highlight the real differences between expert opinions.

f) Resequencing of Evidence and Use of Expert Evidence at Trial

Similarly, while our proposal to re-sequence expert evidence was not warmly received, we continue to believe it is worthwhile. More specifically, we propose that, subject to the trial judge's discretion, trial evidence will be presumptively re-sequenced so that the fact witnesses for all parties are presented first, followed by the expert evidence from all parties, as follows:

(i) the claimant(s) will present their fact witnesses, including any participant and non-party experts;

(ii) the defendant(s) will present their fact witnesses, including any participant and non-party experts; and

(iii) the parties' litigation expert evidence will then be presented sequentially on each issue.

We believe the re-sequencing of expert evidence will enhance the trier of fact's comprehension of that evidence. It will also make it more apparent where the experts disagree and why.

As noted above, the design of the up-front evidence model ensures that parties will know the case they have to meet well before trial. Accordingly, there should be no unfairness to defendants if expert evidence is re-sequenced in the manner proposed.

We further propose that, subject to any admissibility objections and the Court's discretion to order otherwise, a litigation expert's report will be presumptively taken as read for the purpose of the expert's examination-in-chief, and that, as set out above, the expert's trial testimony will focus on the areas of disagreement between the experts and provide only brief evidence on the areas of agreement.

g) A Possible Technological Solution

We recommend that a working group be established to consider the development of a computer program that would allow parties to perform basic calculations and present them as evidence without the need for expert testimony on matters such as past and future income loss, the quantification of future care costs, and life expectancy. The goal would be to have the program generate a printout that parties could introduce as evidence at trial, similar to the use of DivorceMate calculations in Family Court.

5. Recommendations

The Working Group recommends creating a suite of rules governing the exchange and use of expert evidence in the litigation process, as set out above, including:

a. *General Rules*: Rules defining the terms "litigation expert," "non-party expert," and "participant expert," and codifying the common law admissibility requirements for expert evidence;

b. *Joint Experts*

i. A rule presumptively mandating the use of joint experts for "financial issues," as defined above;

ii. A rule requiring parties to consider the use of a joint expert in respect of other issues;

iii. A rule describing the factors to be considered when the Court is determining whether the use of a joint expert is appropriate; and

iv. A rule setting out the procedures that apply to joint experts as described above;

c. *Expert's Duty to the Court*: Rules strengthening the expert's acknowledgment of their duty to the Court, including the adoption of a "two-strikes-you're-out" rule, and consideration of the creation of a central registry recording all decisions in which an expert has been found to have breached that duty;

d. *Format and Timetable for Expert Reports*: Rules prescribing a standard format for expert reports and establishing default timetables, as set out above;

e. *Expert Conferencing*: Rules creating a presumption that experts will meet and confer before trial in matters on the Trial Track, while preserving the Court's discretion to order all experts, some experts, or none to participate in a pre-trial conference. The Rules will also govern the process to be followed at such conferences;

f. *Sequencing of Evidence at Trial*: A rule presumptively re-sequencing the presentation of evidence at trial so that, unless otherwise ordered, the fact witnesses for all parties are presented first, followed by the expert evidence from all parties;

g. *Presentation of Expert Evidence at Trial*: A rule providing that, subject to any admissibility objections and the Court's discretion to order otherwise, a litigation expert's report will be presumptively taken as read for the purpose of the expert's examination-in-chief in non-jury trials, and that the expert's trial testimony will focus on the areas of disagreement between experts, providing only brief evidence on the areas of agreement.

R. DELAYS

1. The Need for Change

Delay is a defining characteristic of the current civil justice system. Delays, of course, are problematic for many reasons, including:

(i) Delays prolong the resolution that the parties are seeking—in some instances, desperately;

(ii) Delays lead to increased costs. A delay in a matter forces the lawyers to pause their work and, when the case resumes, devote additional time to refamiliarizing themselves with its details. In addition, as time elapses, work often expands to fill the time;

(iii) Delays erode public confidence in the administration of justice and foster a perception that the legal system is inefficient, unresponsive, and incapable of delivering meaningful justice; and

(iv) Under the current iteration of the Rules, delays can lead to administrative dismissals under Rule 48.14, motions arising from administrative dismissals, and motions to dismiss for delay, all of which create expense and strain scarce judicial and administrative resources. Notably, Aviva reported that 21.5% of its motions across all files were motions to dismiss for delay.[339]

There are many reasons for delay. Some cases stall because claimants have no real intention of moving forward promptly and may, at times, be strategically slowing the process. Others do so simply because they are acting in accordance with what they perceive to be the prevailing culture of delay within the civil justice system. Some cases languish because claimants lack the resources to advance them or are preoccupied with other life circumstances. Others slow because lawyers are occupied with competing demands. Some are delayed because the factual record is still evolving. And, of course, delay also stems from a system that is itself under-resourced. Regardless of the cause, the longer cases languish, the greater the resulting backlog, and the more systemic delay comes to be viewed as an inherent feature of the system.

Although we cannot address resourcing issues, we *can* address features of the current Rules that enable persistent delay. We have identified three such features.

First, the current civil justice system is party-driven as opposed to Court-managed. This allows parties to proceed, for the most part, at their chosen pace. One of the core features of the proposed new model is a move towards a Court-managed process, which we believe is necessary to reduce delays and interlocutory wrangling.

Second, many of the existing Rules contemplate adjournments as a means of avoiding prejudice. Hearing dates are regularly adjourned for reasons that range from legitimate to trivial, with some adjournments amounting to an abuse of the Court's process. We agree with the submission of FAIR Association of Victims for Accident Insurance Reform that "[a]djournments add to the general angst of waiting for an end to what many consider to be a nightmare."[340] In our view, the Rules must recognize that delay is inherently prejudicial—to the parties, to other litigants waiting to access the system, and to the integrity of the system itself.

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[339] Submission of Aviva, p. 2.

[340] Submission of FAIR, p. 8.

Third, the existing Rules, and the way they are interpreted, tend to tolerate delay. In many cases, parties face few, if any, consequences for breaching timetables other than the imposition of new ones. Even after years of inactivity and repeated violations of the Rules, actions are very rarely dismissed for delay outside of administrative dismissals.

Participants in the legal system have come to accept, expect, and rely on delay. A change in litigation culture is required.

2. Proposed Reforms

a) Fixed Hearing Dates and Adjournments

The civil justice system is a public resource. Adjournments, whether on consent or not, waste that public resource, including both the time spent addressing adjournments and the Court time that can go unused because it is too late to backfill with other matters. Parties who wish to take advantage of this public resource must respect that it is a scarce and vital one.

During our consultations with stakeholders from other jurisdictions where civil justice reforms have succeeded in reducing delays,[341] several recurring themes emerged, one of which was to "fix hearing dates and stick to them." We propose to do just that. More specifically, we propose to fix dates for motions and dispositive hearings (i.e., trials and Summary Hearings) and significantly reduce the availability of adjournments of those fixed dates.

Except in the exceptional circumstances where a pleading amendment requires a judge to adjourn a dispositive hearing to avoid significant prejudice (see Section VI(F)(3)), we propose that all requests for adjournments of motions and dispositive hearings will need to be made to the Regional Senior Justice, or his or her designate, on notice to all other parties.[342] The purpose of directing such requests to a small group of senior judges is to foster consistency in how they are determined. The Court will need to consistently reinforce the message that fixed dates are expected to proceed as scheduled, save in exceptional circumstances.

We propose that the Court consider the following factors when deciding whether an adjournment request for a motion or dispositive hearing meets the "exceptional circumstances" standard:

(i) The importance of maintaining fixed hearing dates to achieving the Goals;

(ii) Whether the adjournment request is grounded in laches, lack of preparation, inadvertence, or inattention, which will generally be insufficient grounds;

(iii) Whether the reason for the adjournment was foreseeable and avoidable, and what efforts, if any, were made to avoid the reason for the adjournment;

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[341] These include Manitoba, Singapore, and Australia.

[342] Once a trial commences, however, any requests for an adjournment will be made to and addressed by the trial judge.

(iv) Whether the adjournment request arises from an unanticipated emergency involving the health or availability of a party, counsel, or a necessary witness;

(v) Whether and how the integrity of the trial process might be impacted by a denial of the adjournment request;

(vi) The prejudice to be occasioned to any party, or to the administration of justice, if the adjournment is granted, and whether there are means to attenuate the prejudice short of an adjournment; and

(vii) The prejudice to be occasioned to the requesting party if the adjournment is not granted, and whether there are means to attenuate the prejudice short of an adjournment.

The intent is not to be draconian, but rather to promote a culture in which motion and dispositive hearing dates are taken seriously. When given a fixed hearing date, parties should expect that the hearing will proceed as scheduled and prepare accordingly.

Moreover, parties who know that hearing dates are not likely to be adjourned are also incentivized to prepare in a timely and efficient manner and make attempts to resolve issues sooner. As a result, the proposed approach is expected to promote faster resolution. It will also create a clear and predictable timeline for the progression of a legal proceeding, help prevent matters from languishing indefinitely, and potentially reduce the number of touchpoints with the Court (e.g., requests for adjournments), thereby reducing the overall burden on the Court.

Finally, the proposal will all but eliminate a party's ability to delay a proceeding as a tactic of attrition. A party cannot delay a date that is (for the most part) set in stone. As a result, the proposal will obviate the need for administrative dismissals, motions arising from administrative dismissals, and motions to dismiss for delay, thereby saving judicial resources.

Consequences of Non-Attendance: We propose that, if a party fails to attend or proceed at a fixed hearing date, the Court shall strike the defaulting party's claim, defence, or other governing document (e.g., a motion record or responding record). The bar to set aside such a ruling will be very high, with relief only being granted in exceptional circumstances (e.g., an injury, accident, or illness making it impossible to attend).

Adjournments of Scheduling Conferences and Directions Conferences: In our Consultation Paper, we proposed extending the same strict regime to Scheduling Conferences and Directions Conferences. We agree, however, with the OBA's submissions that a distinction should be drawn between motions and dispositive hearing dates, on the one hand, and conferences, on the other.[343] While we do not want to see conferences routinely adjourned, we accept that they may be adjourned on consent, or where an adjournment would be consistent with the Goals and provided the benefits of the adjournment outweigh any prejudice that may be caused by it.

[343] Submission of the OBA, pp. 19-20.

b) Interim Deadlines

To ensure that parties can meet all fixed hearing dates for motions and dispositive hearings, all interim deadlines (be it a Court-ordered deadline, an agreed-upon deadline, or a deadline prescribed by the Rules) (an "**Interim Deadline**") must be strictly managed.

We believe that an effective sanctions rule must include the following attributes:

(i) *Immediacy:* Without an immediate consequence, the rule is less likely to have any real impact on behaviour. This is particularly true where any consequence is put off until after trial, given that the vast majority of civil cases settle before trial;

(ii) *Meaningful consequence:* The consequences must be meaningful, including for parties who are well-resourced;

(iii) *Automatic application:* Given the difficulty in securing court time and the desire to limit the strain on Court resources, the rule is unlikely to be effective if Court involvement is required each time a breach occurs; and

(iv) *Relief from consequences in exceptional circumstances:* An overly rigid rule risks unfairly penalizing parties facing exceptional circumstances (e.g., health issues or family emergencies), counsel who have made an honest mistake, or well-intentioned self-represented litigants struggling to navigate the system. The new Rules must be strict enough to ensure compliance in most cases, while still allowing for relief from sanctions in certain circumstances.

We propose a two-part sanctions rule:

(i) *Part 1*: The imposition of a delay penalty (the "**Delay Penalty**"); and

(ii) *Part 2:* Materials served or filed after an Interim Deadline ("**Late Materials**") shall be inadmissible in Court (i.e., a party will not be able to rely on them) without consent or leave of the Court.

The Delay Penalty: The Delay Penalty will provide that, subject to the notice requirement (described below), a party who fails to meet an Interim Deadline will be presumptively required to pay the non-defaulting party a monetary penalty for each day of default. In Application Track and Summary Track cases, the proposed penalty is $100 per day. In Trial Track cases, the proposed penalty is $250 per day. The Delay Penalty, if not paid voluntarily, will be ordered at the next Court appearance. This rule would satisfy the need for meaningful, immediate and automatic consequences.

In order to claim the Delay Penalty, however, the non-defaulting party will be required to provide notice to the defaulting party that (a) a deadline has been missed and (b) the non-defaulting party is seeking the Delay Penalty. This notice will initiate the counting of days for the purpose of the penalty, starting three days after the notice is served.[344] While this notice requirement places some

[344] We increased the notice period from two days (as proposed in our Consultation Paper) to three days to mitigate the rule's harshness and address concerns raised by certain Consultees.

burden on the non-defaulting party, it will help to ensure that inadvertent mistakes by counsel or self-represented parties (e.g., where a deadline has been mis-diarized) do not result in unduly harsh consequences. It also gives a party that has inadvertently missed or forgotten about a deadline an opportunity to bring themselves into compliance.

The Working Group considered whether a specific provision should be included to permit relief from the Delay Penalty in exceptional circumstances. On balance, the Working Group concluded that such a provision is warranted to prevent particularly harsh outcomes in certain cases. We also recognized, however, that the relief mechanism must not be invoked routinely, as doing so would undermine the effectiveness of the penalty. Moreover, like any penalty provision, it is important, for reasons of justice and fairness, and the appearance of justice and fairness, that it be applied consistently and predictably. In the result, we propose that a relief provision be available, but only where a delay has resulted from exceptional circumstances (e.g., health issue with counsel or a party, accident, etc.) or where the impact of the penalty would be so disproportionate as to be contrary to the interests of justice.

Late Materials are Inadmissible without Consent or Leave of the Court: Financially penalizing interim delays will not, of course, eliminate them altogether. Deadlines will undoubtedly be missed from time to time for a variety of reasons, some entirely legitimate and others perhaps less so.

In some cases, a missed Interim Deadline will not materially affect the prescribed timetable, and the parties will still be able to proceed to the scheduled motion or dispositive hearing date. At other times, a missed Interim Deadline may have more significant consequences. It may impact on a non-defaulting party's ability to meet its own Interim Deadlines, or it may impact on the viability of a fixed motion or dispositive hearing date.

We propose that the following framework will govern the requirement to obtain party consent or leave of the Court to rely on Late Materials.

Consent to Amending an Interim Deadline

(i) The parties may consent to amend any Interim Deadline if the new deadline does not require the adjournment of a scheduled motion or dispositive hearing. Any agreement to amend an Interim Deadline must in writing;

(ii) Even if the parties agree to a revised timetable, the non-defaulting party is still entitled to be paid the Delay Penalty if it has provided the requisite notice. If the defaulting party fails to pay the Delay Penalty, the non-defaulting party may seek an order for payment at the next court appearance.

Leave to Rely on Materials that were (or will be) Served After an Interim Deadline

(i) Where a party misses, or anticipates missing, an Interim Deadline and the non-defaulting party does not consent to a revised timetable, the defaulting party may seek leave of the Court at a Scheduling Conference to rely on the Late Materials. Alternatively, the defaulting party may wait and seek leave from the judge presiding on the motion or

dispositive hearing. If a defaulting party fails to seek leave, the non-defaulting party may also seek the Court's direction;

(ii) *No adjournment of a motion or dispositive hearing date required:*

a. The Court **shall** grant leave to rely on Late Materials if doing so will not require an adjournment of a motion or dispositive hearing to avoid prejudice to the non-defaulting party.

b. When granting leave, the Court shall (i) establish a new timetable; (ii) impose any applicable Delay Penalty (subject to relief in exceptional circumstances); and (iii) order the defaulting party to pay the non-defaulting party its reasonable costs thrown away, if any, on a full indemnity basis.

(iii) *Adjournment of a motion or dispositive hearing date is required*

a. Where a party misses, or anticipates missing, an Interim Deadline that will require the adjournment of a motion or dispositive hearing to prevent prejudice to the non-defaulting party, the defaulting party must seek an adjournment of the motion or dispositive hearing from the Regional Senior Justice, or his or her designate, (as described in the preceding section);

b. If the Court grants the adjournment, the Court shall also (i) grant leave to rely on the Late Materials; (ii) establish a new timetable; (iii) impose any applicable Delay Penalty (subject to relief in exceptional circumstances); and (iv) order the defaulting party to pay the non-defaulting party its reasonable costs thrown away, if any, on a full indemnity basis;

c. If the Court refuses to grant the adjournment, the Court shall (i) refuse to grant leave to rely on the Late Materials and (ii) award any reasonable costs thrown away to the non-defaulting party on a full indemnity basis. For example, if a responding party fails to serve its responding record in time to maintain a scheduled motion date, the motion shall proceed on the basis of the moving party's record alone. Similarly, if a claimant fails to serve its expert report in time to maintain a scheduled trial date, the claimant will be precluded from relying on it.

Duty to Cooperate: Some have questioned how the General Duty to Cooperate intersects with this framework. The answer lies in the notice provision and in the expectation that parties will cooperate to address scheduling difficulties.

- *With respect to the Delay Penalty***:** In effect, the framework incorporates a built-in duty to cooperate by requiring that a non-defaulting party provide notice of the missed deadline. Beyond the three-day grace period, non-defaulting parties have no prescribed obligation to tolerate uncompensated delays. That said, it is hoped that, in the best traditions of legal practice, counsel will work together to make reasonable accommodations where doing so is sensible, without resorting to the Delay Penalty, recognizing that counsel may require similar flexibility at a later stage in the proceeding;

- *Codified duty to cooperate on scheduling:* We also propose to codify a specific duty to cooperate with respect to scheduling issues. While a party need not tolerate uncompensated delays, parties will be required to work together to address scheduling conflicts and develop revised timetables that do not affect motion or dispositive hearing dates, where possible, without the Court's involvement. This duty will require parties to use reasonable efforts to agree on amended timetables where Interim Deadlines have been missed.

3. Consultation Feedback

Consultees strongly supported reducing delay in the civil justice system.[345]

Professor Gerrard Kennedy emphasized that one of the most promising proposals outlined in the Consultation Paper is the adoption of firm deadlines in litigation—and the consistent enforcement of those deadlines. He noted that:[346]

> Ontario's civil procedure rules have notoriously been "honoured in the breach" regarding deadlines. This emphasis on flexibility in procedural rules to achieve fairness, irrespective of the certainty in the law and the costs of determining what is fair, is very likely counterproductive to civil procedure's goals of predictability and efficiency. The Federal Court and Federal Court of Appeal are known to enforce their deadlines—and have significantly quicker litigation. No reasonable person thinks that there should not be flexibility for the exceptional case where enforcement of the deadline would work an injustice—but this must truly be exceptional, and not a matter of routine.

While few Consultees disputed that delay is a problem,[347] some cautioned that efforts to address it must not compromise fairness or truth-seeking.[348]

Many Consultees asserted that a lack of judicial resources and trial date availability were the primary causes of delay, [349] but this view was not universal.[350]

Some Consultees viewed the proposal to restrict adjournment requests as unwieldy[351] or potentially detrimental to equity-seeking groups, sole practitioners, and lawyers' mental health.[352]

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[345] See, for example, the submissions of Aviva, p. 1; BCRC, p. 1; CCLA, p. 6; Dentons Canada LLP, p. 1; Prof. Semple, p. 3; OCL, p. 1; and Ontario Chamber of Commerce, p. 1.

[346] Submission of Prof. Kennedy, p. 4.

[347] Submission of Hilborn & Konduros, p. 1.

[348] Submissions of FOLA, p. 2 and Prof. Semple, p. 3.

[349] See, for example, the submissions of CDL, pp. 27-28; CCLA, p. 7, 301; and OTLA, p. 4.

[350] Submissions of David Bierstone (who identifies lawyers' inertia as the principal cause of delay), p. 2; Oakley & Oakley (the law incentivizes delay), p. 16; and Philip Tyborski (documentary discovery is the principal driver of delay), p. 1.

[351] Submission of the OBA, p. 20.

[352] See, for example, the submissions of CDL, pp. 39-40; LawPro, p. 9; and OTLA, p. 61.

One Consultee suggested permitting adjournments on consent where parties are engaged in productive settlement discussions.[353] Others emphasized the importance of enforcing compliance with the Rules to reduce delay,[354] but urged that dismissing actions or striking pleadings be reserved for only the most exceptional circumstances. [355]

There were mixed views on the proposed Delay Penalty for missed interim deadlines (proposed at $500 per day in our Consultation Paper). Some Consultees supported such a measure as a means of increasing compliance with timelines.[356] Others expressed concern that the sanction would be unaffordable or unfair for low-income litigants, particularly those without the same resources or understanding of the Rules and noted that any such penalty should not apply to parties eligible for a fee waiver. They argued that some disadvantaged litigants could find themselves removed from the proceeding at an early stage solely because they are unable to afford an imposed Delay Penalty.[357] One Consultee suggested that responsibility for payment should rest with the lawyer responsible for the delay rather than the client, while another warned that the costs might ultimately be borne by lawyers regardless.[358] Additional concerns were raised about whether the system could ensure equitable and consistent application of the Delay Penalty,[359] and whether the rule might increase disputes between lawyers and their clients.[360]

As a result of the feedback we received, we made two significant changes to the proposals that we advanced in our Consultation Paper. The first, we have mentioned already: we have eased the test to be met for the adjournment of a conference. The second is implicit in the proposed reforms set out above: we have reduced the proposed per-day Delay Penalty from $500 per day to $250 per day in Trial Track cases and $100 per day in all other cases.

Ultimately, when assessing the fairness of the Delay Penalty, it is important to recognize that the penalty is triggered only after a party has missed a deadline, received notice of the default, and been afforded three additional days to comply, and where no extenuating circumstances excuse the delay.

The Working Group otherwise continues to promote the reforms detailed above. In our view, tackling delay begins with creating a culture in which delays are simply not tolerated, save in exceptional circumstances. The Rules must establish and reinforce that culture.

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[353] Submission of the OSC, p. 4.

[354] See, for example, the submissions of Desa, pp. 6-7; Latner, p. 5; and Justin Khorana-Medeiros, p. 1.

[355] Submission of LawPro, p. 9.

[356] See, for example, the submissions of Definity, p. 3-4.

[357] See, for example, the submissions of the Advocacy Centre for Tenants Ontario, p. 4; Advocacy Centre for the Elderly, p. 6; CDL, pp. 39-40; Community Advocacy, pp. 2-3; and Legal Aid Ontario, pp. 1-2.

[358] Submission of the OBA, p. 20.

[359] Submission of Association of Municipalities of Ontario, p. 2.

[360] Submission of Dmitry Shniger, p. 3.

4. Recommendations

1. The Working Group recommends deleting Rule 48 in its entirety. The proposed reforms will obviate the need to set a matter down for trial and make the consequences of setting a matter down irrelevant. Moreover, the strict timelines established by the proposed reforms render administrative dismissals and motions to dismiss for delay unnecessary.

2. The Working Group recommends drafting a new rule which will include the following features:

    a. an interpretive provision expressing the importance of adhering to fixed dates, as a means of honouring the Goals, controlling delay, and managing costs;

    b. the test for adjourning a fixed dispositive hearing, motions hearing, and conferences, as set out above;

    c. the consequences of failing to attend a fixed event;

    d. a two-part sanction to enforce compliance with Interim Deadlines, consisting of (i) the Delay Penalty; and (ii) a provision that materials served or filed after an Interim Deadline shall be inadmissible in Court without the consent of the opposing party or leave of the Court;

    e. the test setting out when consent or leave can be given to serve or file materials after an Interim Deadline has passed; and

    f. codifying a specific duty to cooperate to address scheduling issues.

S. COSTS

1. The Current Costs Regime

In the early to mid-2000s, a series of reviews and recommendations by the Civil Rules Committee and other *ad hoc* committees called for the replacement of the existing "costs grid" scheme. The costs grid had been widely criticized by members of the judiciary for failing to account for regional differences and for giving rise to lengthy costs hearings that too often consumed more time than hearings on the merits. These reforms culminated in the introduction of the current regime for costs awards, reflected in Rule 57.01, which came into effect in 2005. The current regime is a cost-shifting model, under which a successful party will generally receive a costs award requiring the unsuccessful party to pay a portion of the successful party's costs.

The Court's discretion to award costs is grounded in s. 131 of the *CJA*. Rule 57.01 sets out a list of factors to guide the exercise of that discretion, with the objective of achieving a fair and reasonable costs award. Parties are required to submit outlines of their costs, detailing their respective legal fees and disbursements. Although the presumptive award is on a "partial indemnity" scale, that scale is not defined by the Rules with any precision and, thus, can vary from

case to case. In practice, however, partial indemnity costs awards typically range between 40-60% of actual legal fees incurred, together with 100% of disbursements.

The Rules also permit elevated costs to be awarded in certain circumstances. More specifically, "substantial indemnity" costs are equal to an amount that is 1.5 times partial indemnity. "Full indemnity" costs are, as the name suggests, meant to reflect 100% of a party's fees and disbursements. Although case law has established the circumstances in which elevated costs awards are appropriate, the factors justifying an award of substantial versus full indemnity costs are not clearly defined.

2. The Need for Change

The Working Group has identified two main problems with the existing costs regime:

Problem 1: In many cases, costs determinations require judges to issue a second decision after having already released a decision on the merits. These costs decisions can take months to finalize. As a result, litigating the issue of costs adds another layer of expense and delay, straining the limited resources of both the Court and the parties. The Working Group is of the view that, to the extent possible, the costs rules should be streamlined to facilitate more efficient determinations of costs and to reduce the burden on the Court and litigants.

Problem 2: The highly discretionary nature of costs determinations creates uncertainty and unpredictability for litigants. Even the term "partial indemnity" is undefined and left to judicial interpretation. This can make it difficult for counsel to advise clients as to their potential costs exposure or recovery.

To address these issues, we believe that introducing more categorical rules, while preserving judicial discretion to depart from them in appropriate circumstances, will likely result in costs awards being made with greater efficiency, consistency, and predictability.

In considering proposed amendments, we have been mindful that any change to the current costs rules must balance competing considerations. We believe that a costs regime should, to the greatest extent possible, advance six desirable goals, while recognizing that trade-offs between them will inevitably arise:

(i) *Indemnification:* Costs rules should provide successful litigants with meaningful indemnification of their legal costs;

(ii) *Deterrence:* Costs rules should deter frivolous claims and defences, discourage improper or unnecessary litigation conduct, and promote compliance with and respect for Court rules, procedures, orders, and directions;

(iii) *Simplicity and Clarity:* Costs rules must be easy to understand and apply, especially for self-represented litigants;

(iv) *Encouragement of Settlement:* Costs rules should be structured in a manner that encourages settlement;

(v) *Access to Justice:* Costs rules should not impede access to justice; and

(vi) *Flexibility:* Costs rules should grant the Court some measure of discretion to ensure costs awards are appropriate and just in the circumstances.

3. Proposed Reforms

The following proposals were set out in the Consultation Paper. They maintain continuity with the existing costs regime, while seeking to address the two problems identified above.

a) Defined Terms

Streamlining the current cost-shifting regime and increasing consistency within it should begin with a transition to two easily defined cost tiers, which we propose defining as follows:

(i) "**Partial Indemnity Costs**": these should be defined as 60% of a party's actual legal fees, including those incurred to comply with any applicable PLP, plus 100% of disbursements, plus HST (where applicable); and

(ii) **"Full Indemnity Costs**": these should be defined as 100% of a party's actual legal fees, including those incurred to comply with any applicable PLP, plus 100% of disbursements, plus HST (where applicable).

We propose that a notional set of rates be established for salaried counsel[361] and counsel working on a contingency fee basis, which will be used to calculate "actual" costs.

At least two Consultees submitted that a similar set of notional rates should apply to self-represented litigants.[362] Although we recognize that self-represented litigants often devote a significant amount of time to conducting litigation on their own behalf, we believe it would be a slippery slope to begin awarding them notional hourly rates. Doing so could invite represented parties to claim compensation for the time they personally spend on the litigation, which can be considerable, beyond their counsel's fees. That said, we propose that self-represented litigants will continue to be entitled to recover disbursements and other out-of-pocket expenses, such as lost wages for days spent in examinations or in court, in accordance with the common law.

Ecojustice and the Canadian Environmental Law Association observed that, under the current regime, an imbalance arises that can create a windfall for represented parties when their opponents are self-represented (or represented *pro bono*). In such cases, a represented party may recover costs if successful but will not face the same financial consequence of losing, since the self-represented

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[361] Section 131(2) of the *CJA* provides that "…costs awarded to the Crown shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown…" See also *Campisi v. Ontario*, 2017 ONSC 4189, at ¶ 6. There may be other salaried lawyers who should not be barred from cost recovery on the same principle.

[362] Submissions of Hui Ling Li, p. 1 and Ecojustice, p. 6.

litigant has not incurred legal fees. This dynamic, it argued, undermines the behavioural-modification purpose that underpins the current cost-shifting model.[363]

While the Working Group agrees with this concern, the converse is also true: self-represented litigants would receive a windfall if they were "reimbursed" for costs they never incurred. Ultimately, the Working Group is not persuaded that there is a need to alter the current model, under which self-represented parties may claim only disbursements and other out-of-pocket expenses.

b) The Costs Presumptions

To simplify costs awards and promote predictability, the Working Group proposes codifying the existing presumption (the "**Partial Indemnity Presumption**") that the Court will order the unsuccessful party to pay to the successful party its Partial Indemnity Costs.

We further propose codifying a second presumption (the "**Full Indemnity Presumption**") that full indemnity costs will be awarded to the successful party where it is evident from the Court's reasons in the decision for which costs are sought that one or more of the following circumstances apply:

(i) the unsuccessful party failed to establish a serious issue to be tried on an interlocutory motion;

(ii) the unsuccessful party's pleading was struck in its entirety as being frivolous, vexatious or an abuse of process;

(iii) the proceeding, motion, or other request for relief was found to be frivolous, vexatious, or an abuse of process;

(iv) the unsuccessful party is found to have engaged in egregious conduct (either in the underlying conduct giving rise to the claim or in the litigation itself), such as fraud, deceiving the Court, or that is otherwise reprehensible, scandalous, or outrageous;

(v) the unsuccessful party breached the Representations Rule; or

(vi) the Rules otherwise specifically provide for the application of the Full Indemnity Presumption.

As discussed below, however, we also propose that provisions be included to permit departures from the Partial Indemnity Presumption and the Full Indemnity Presumption (collectively, the "**Costs Presumptions**") in certain circumstances.

Where no arguments are advanced to depart from the Costs Presumptions, the decision need only identify the applicable presumption and specify the resulting amount payable.

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[363] Submission of Ecojustice, pp. 5-6.

Departing from the Costs Presumptions: The Costs Presumptions are designed to be robust, but we propose that the Court may depart from them (whether by increasing or decreasing costs) where their application would result in an "injustice." The "injustice" threshold is intended to be high, though its contours will need to be developed through case law. Examples of situations where the "injustice" threshold may be met include:

(i) where the costs incurred by the successful party are grossly disproportionate relative to the costs incurred by the unsuccessful party for the same, or a similar set of tasks;

(ii) where a party substantially failed to conduct the litigation in accordance with the Goals;

(iii) where a party was successful, but only achieved nominal success;

(iv) where success is divided such that a no-costs or limited costs order is the appropriate and just outcome;

(v) where the imposition of a Costs Presumption would unduly penalize a party who acted in good faith in pursuing a novel or unsettled legal issue; or

(vi) where the imposition of a Costs Presumption would have a significantly deleterious impact on access to justice.

Where a party asserts in its costs submissions that applying a Costs Presumption would work an injustice, and the judge agrees, the judge will be empowered to exercise his or her discretion to determine a fair and reasonable costs award having regard to the circumstances of the case and an enumerated list of factors. These would include those set out in current Rule 57.01, as well as the following additional factors (collectively with the existing Rule 57.01 factors, the "**New Costs Factors**"):

(i) a party's failure to conduct the litigation in accordance with the Goals;

(ii) a party's breach of the Duty to Co-operate;

(iii) the advancement of a claim, defence, or interlocutory position without a reasonable basis; and

(iv) the public benefit of the litigation.

If, however, the judge is satisfied, upon reviewing the parties' costs outlines and submissions, that applying a Costs Presumption would not result in an "injustice," the judge will provide brief reasons for rejecting the injustice argument and simply award costs in accordance with the applicable Costs Presumption.

In our view, codifying the Costs Presumptions and introducing an "injustice" threshold—such that the presumptions will apply unless a party can establish that their application would result in an "injustice"—will make costs awards more efficient and predictable. Unless the injustice threshold is met, the Court will be able to apply the Costs Presumptions without providing detailed reasons, thereby easing the Court's workload and avoiding the need for a full analysis under Rule 57.01.

At the same time, the framework preserves flexibility by allowing judges to depart from the Costs Presumptions where necessary to prevent an unjust outcome.

c) Exception for Public Interest Litigation

"Public interest litigation" is litigation undertaken by a concerned individual or group not for their personal gain, but to address a broader public interest (e.g., environmental protection).

Access to justice issues take on heightened importance in public interest litigation. The Court must be able to exercise its discretion in public interest litigation to avoid the harshness that might otherwise result from the application of the Costs Presumptions. As the Supreme Court observed in *British Columbia (Minister of Forests) v. Okanagan Indian Band*,[364] maintaining this discretion will "help to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole."

In the result, we propose that the Costs Presumptions will not apply in public interest litigation. Instead, the Court will continue to maintain a wide discretion to award the costs of a public interest proceeding, or any step in that proceeding, based on the New Costs Factors.

d) Costs Outlines and Submissions: Motions and Summary Hearings

Fixing costs, whether by applying the Costs Presumptions or otherwise, will continue to require a review of costs outlines. At present, parties do not prepare these outlines consistently, nor are they always filed in a timely manner.

We therefore propose introducing a multi-pronged rule governing costs filings for motions and proceedings on the Application Track and Summary Track. The rule is intended to: (a) reinforce the practice of disclosing costs in advance of a hearing; (b) discourage unreasonable positions on costs; and (c) encourage the settlement of costs. The proposed rule will provide as follows:

(i) The parties will be required to confer or attempt to confer about costs in advance of the motion or Summary Hearing (for matters on the Application Track or Summary Track). This obligation will be a procedural requirement and, as such, will not require parties to reach an agreement. The hope is that this requirement, combined with the strong Costs Presumptions, will increase the likelihood that parties will reach an agreement on costs, thereby reducing the amount of time and resources spent addressing costs disputes;

(ii) If an agreement is reached, the moving party must file a standard form (the "**Agreed Costs Form**"), by no later than the day before the motion or Summary Hearing, setting out the agreed terms (e.g. "$X" to the successful party). If the responding party disputes the contents of the completed Agreed Costs Form, it must complete and file its own version of the form;

(iii) If the parties do not reach an agreement on costs, each party must file a costs outline that: (a) confirms that the party has conferred, or attempted to confer, with the opposing

[364] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71.

party regarding costs; (b) sets out the time claimed (including estimated hearing time); and (c) identifies the applicable rates. The costs outline will no longer include the sections on the current form addressing the Rule 57.01 factors. Each party must file its costs outline no later than the day before the motion or Summary Hearing; and

(iv) Parties who fail to file costs outlines, as required by the Rules, will not be entitled to make submissions regarding the quantum of costs being sought. This means that a successful party who fails to file a costs outline will be limited to the legal fees claimed by the unsuccessful party in its costs outline (but not the disbursements). An unsuccessful party who fails to file a costs outline will not be permitted to argue that the successful party's claimed costs are unreasonable. If neither party files a costs outline, no costs will be awarded.

We believe that requiring parties to file their costs outlines before a hearing, at a time when the outcome is uncertain, will encourage them to adopt more reasonable approaches to costs. Moreover, the proposed process—under which parties must first confer regarding costs, and file costs outlines only as a last resort if no agreement is reached—is designed to encourage resolution and reduce unnecessary disputes over costs. This approach was inspired by established practices in certain Courts (e.g. the Court of Appeal, the Divisional Court, and the Commercial List) where agreements on costs are more often the norm than the exception.

If the parties do not agree on costs, they shall, in addition to filing costs outlines before the hearing, file costs submissions after the decision is released, in accordance with the timelines and page limits set by the judge hearing the matter. In the absence of page limits prescribed by the judge, costs submissions shall not exceed 10 pages, and any documents relied upon must be attached to the submissions to substantiate the arguments made. A party may also update its costs outline filed with its costs submission, but only to (a) reflect the actual time spent on the day of the hearing, and (b) include the costs incurred in preparing the costs submissions.

e) Costs Outlines and Submissions: Trials

We recognize that it is often difficult to assess trial costs in advance of the trial and, thus, the costs of trial involve different considerations than costs of a motion or Summary Hearing. That said, there is still a strong rationale for requiring parties to disclose the costs they have incurred before trial. Exchanging costs outlines before trial may help facilitate settlement discussions, as it prompts parties to consider their expenses to date, their anticipated future costs, and their potential liabilities if they lose. As such, we propose that parties be required to file the following:

(i) 20 days before a trial begins: each party must file its respective costs outlines covering all costs incurred from the start of the case up to the date of submission (the "**Pre-Trial Costs Outline**"); and

(ii) Following the release of the judgment, each party may make costs submissions in accordance with the directions of the trial judge. They may also file an updated costs outline to reflect all costs incurred since the Pre-Trial Costs Outline was filed.

f) Costs at Conferences

Under our proposed new model, a significant number of interlocutory disputes are expected to be resolved at Directions Conferences. In keeping with the summary nature of that process, the Working Group proposes to introduce a correspondingly simple method of assessing costs for awards arising from those conferences. In particular, we propose a "baseball arbitration" model, under which each party will specify an amount for costs on the Interlocutory Relief Form. The presiding judge will then select from the parties' submissions, the amount that best reflects the fair and reasonable costs of the appearance and award that sum to the successful party, without providing reasons.

We propose that the same baseball arbitration model be employed for disputed Scheduling Conferences.

g) Rejection of a Tariff System or Costs Grid

The Working Group considered but rejected the possibility of reviving a tariff system or costs grid, with updated rates more closely resembling actual costs. The benefit of tariff systems or costs grids is that they tend to offer more predictability. Their drawbacks, however, are a lack of flexibility, the need for continual legislative upkeep, their inability to deter improper conduct, and, most importantly, their inability in many cases to provide successful litigants with meaningful indemnification.

h) Assessment of Costs

Rule 58 concerns the assessment of costs. We propose that, when addressing the costs of a motion, conference, Summary Hearing, or trial, the Court must always fix costs—no assessment should be required. While we have not fully considered all the ways in which Rule 58 is currently used, we recommend establishing a focus group to determine what functionality, if any, the rule would retain in light of the proposed requirement that the Court fix costs as described.

4. Consultation Feedback

The Working Group's proposed costs reforms were not a central feature of Consultees' concerns, although many did express their views about various parts of these proposals. Those views were as wide and varied as the Consultees themselves. No common themes emerged, save that those Consultees who advocate for self-represented and lower income litigants tended to express concerns about the arguably disproportionate impact of costs on their constituents. The following summary outlines the diverse perspectives presented regarding reforms to the current costs regime.

There was a mixed response to the proposal to establish fixed percentages for partial and full indemnity costs. While some welcomed a fixed definition as a remedy for uncertainty and unpredictability,[365] others raised concerns about fairness and proportionality.[366] At least one

[365] See, for example, the submissions of Definity, p. 3 and the HLA, p. 5.

[366] See, for example, the submissions of TSA, pp. 40-41 and Chet Wydrzynski, p. 1.

Consultee saw this proposal as essentially a clarification and continuation of the current rule 57.01 regime.[367]

Some Consultees expressed a preference for greater flexibility in the crafting of costs awards. Some, for instance, advocated for the inclusion of a "reasonableness" standard to guard against excessive costs or disincentivize counsel from running up large bills,[368] especially given disparities in hourly rates and resources between opposing parties.[369] Others observed that an exception to depart from the fixed percentages in cases of "injustice" granted insufficient flexibility to judges to fashion appropriate and just awards.[370]

Some Consultees viewed the Full Indemnity Presumption for breaches of the Representations Rule as problematic, expressing concern that it may be unworkable or create uncertainty. It was suggested that this approach could unduly limit judicial discretion and have adverse effects on civility, professionalism, and mental health within the profession.[371] Others regarded the proposal as a positive development and suggested that it be refined to also address frivolous or bad-faith responses to motions.[372]

In terms of low-income, self-represented, or unsophisticated litigants, several Consultees expressed concern about expanding the availability of enhanced costs. They felt the greater risk of Full Indemnity Costs could have a chilling effect on meritorious cases or otherwise impede access to justice.[373] The same concern was raised with respect to the possibility of enhanced costs awards against First Nations litigants and injured parties.[374]

To mitigate such concerns, some Consultees suggested that the new rules should ensure the fee waiver system is continued, with eligibility for legal aid continuing to constitute eligibility for the fee waiver.[375] We are not proposing any changes to the fee waiver system.

Some Consultees cautioned that our proposed changes to the costs rules would make Ontario an outlier in common law jurisdictions in terms of aggressive and punitive costs sanctions and that Full Indemnity Costs should continue to be reserved only for cases of reprehensible conduct.[376]

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[367] Submission of the Perells, p. 37.

[368] Submissions of CLHIA, p. 246; Chet Wydrzynski, p. 278; MLA, p. 1842; and TAS, p. 1686.

[369] See, for example, the submissions of the CCLA, p. 72; TAS, p. 40; and Mark Wainberg, p. 7.

[370] Submission of Ecojustice, p. 6.

[371] Submission of TAS, p. 41.

[372] Submission of the OBA, p. 21.

[373] See, for example, the submissions of the Advocacy Centre for Tenants Ontario, p. 4; Advocacy Centre for the Elderly, p. 6; Legal Aid Ontario, p. 2; and University of Windsor Community Legal Aid, p. 6.

[374] Submission of the Chiefs of Ontario, p. 2.

[375] See, for example, the submissions of the Advocacy Centre for Tenants Ontario, p. 4; Community Advocacy, p. 2; and Legal Aid Ontario, p. 2. We note that fee waivers are provided for under the *Administration of Justice Act* (see sections 4.3-4.5), independently of the Rules under the *CJA*.

[376] Submission of Mark Wainberg, p. 4.

At least two Consultees argued that the proposed costs reforms would create an access-to-justice barrier in public interest litigation.[377] One predicted that the proposal would inhibit public interest cases and, to mitigate that concern, proposed a one-way cost-shifting regime or alternatively a no-costs presumption for such cases. At a minimum, it was suggested that the Court's broad discretion on costs should be maintained for public interest litigation.[378] A qualified one-way cost-shifting model was also suggested by several Consultees for personal injury cases, akin to certain rules in England and Wales.[379] OTLA proposed eliminating adverse cost consequences for plaintiffs in class proceedings.[380]

The Working Group did not consider, research, or consult on a proposal to alter the cost-shifting model that has long been a feature of Ontario's civil justice system. We are not prepared to propose such a change without the comprehensive analysis we believe would be necessary to support such a proposed change.

Some Consultees favoured different approaches to the use of costs awards to hold parties accountable or rein in costs. One suggested maintaining oral discoveries, but creating a presumption of enhanced costs against an unsuccessful party on a failed discovery-related motion to deter the withholding of information or bringing of tactical or unmeritorious motions.[381] One Consultee suggested that a substantial indemnity presumption be applied to any motion that is brought or responded to unreasonably or in bad faith.[382] Another suggested expanding cost limits similar to those under the simplified rules to other cases (e.g., a cap tied a certain percentage of damages).[383] On the other hand, at least one Consultee favoured returning to a regime where most costs awards on motions would be payable in the cause.[384]

Only a few Consultees addressed the proposals regarding costs outlines. Views were mixed. One Consultee said there should be an opportunity to update costs outlines based on additional costs incurred after outlines are exchanged, which we are now proposing.[385] The same Consultee indicated that the proposed requirement to exchange costs outlines 30 days before trial would not likely capture significant work leading up to trial, particularly in personal injury or medical malpractice cases. It was suggested that the timeline for exchange should be closer to trial.[386] In response, we have amended the proposed rule to require that costs outlines be filed 20 days before trial.

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[377] Submission of Ecojustice, p. 3.

[378] *Ibid*.

[379] See, for example, the submissions of Phillips Barristers, p. 10 and Prof. Knutsen, pp. 7-8.

[380] Submission of OTLA, p. 69.

[381] Submissions of Bennett, p. 5 and Blaney, p. 3.

[382] Submission of the CCLA, p. 50.

[383] Submission of Definity, pp. 3-4.

[384] Submission of the Perells, pp. 37-38.

[385] Submission of OTLA, p. 65.

[386] *Ibid.*

It was proposed that parties be required, as part of their filing, to advise the Court what they considered to be a reasonable costs award in the event that they won and in the event that they lost.[387] It was also suggested that the forms should be streamlined so that a single form, rather than a costs form and confirmation form, can be filed before the hearing.[388]

Some Consultees emphasized the importance of maintaining or amplifying costs consequences for unreasonably refusing to accept a settlement offer under Rule 49.[389] It was also suggested that there should be costs consequences for the failure to accept a pre-litigation settlement offer.[390]

We are not proposing any significant reforms to Rule 49, other than replacing the reference to "substantial indemnity costs" with "Full Indemnity Costs." For example, if a claimant beats an offer to settle, it would receive Partial Indemnity Costs up to the date of the offer and Full Indemnity Costs thereafter.

The Working Group appreciates the diversity of views expressed in relation to the issue of costs reforms. It is inevitable that whatever costs reforms are introduced will have supporters and detractors. We remain committed to the proposals outlined above.

5. Recommendations

1. The Working Group recommends amending Rule 57 in the following ways:

    a. Adding definitions for "Partial Indemnity Costs," "Full Indemnity Costs;" "Partial Indemnity Presumption;" "Full Indemnity Presumption;" and "Costs Presumptions;"

    b. In relation to Costs Presumptions:

        i. Providing that the Costs Presumptions may be departed from where a party establishes that their application would result in an injustice, in which case the judge will have discretion to determine a fair and reasonable costs award having regard to the New Costs Factors;

        ii. Providing that the presumption on motions made without notice is that there will be no award of costs (as in Rule 57.03(3)); and

        iii. Providing that the Costs Presumptions will not apply in public interest litigation;

    c. Providing that the baseball arbitration model will be used to fix the costs of disputed Directions Conferences and Scheduling Conferences; and

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[387] Submission of The Honourable Regional Senior Judge Mark Edwards.

[388] Submission of the OBA, pp. 21-22.

[389] See, for example, the submission of OTLA, p. 64

[390] Submission of TAS, p. 14.

d. Establishing the requirements regarding the content, process, and timing of costs outlines and submissions for motions, Summary Hearings, and trials, as set out above.

2. The Working Group further recommends creating a focus group to determine what functionality, if any, Rule 58 retains in light of the proposed requirement that the Court fix costs on all motions, conferences, Summary Hearings, and trials.

T. APPEALS

The Working Group consulted on a suite of appeal-related reforms in the Consultation Paper. We continue to promote most of these proposed reforms based on their potential to make the appeal process more accessible, and to help avoid unnecessary costs and delays. They are set out below.

1. Clarifying the Final vs. Interlocutory Order Distinction

Confusion persists regarding the distinction between final and interlocutory orders. The absence of a clear dividing line increases the risk that litigants will start their appeals in the wrong court, resulting in unnecessary delay, wasted judicial resources, increased costs, and reduced efficiency. Moreover, where the Court of Appeal is found to lack jurisdiction, the appeal must instead be brought in the Divisional Court. By that point, however, the filing deadline has usually expired, requiring the appellant to bring a motion for leave to extend the time to appeal. This lack of clarity unnecessarily consumes the resources of both the Court and the parties and contributes to delay.

As a result, we propose to clarify appeal rights and routes. In particular, we propose that the Rules more clearly define final and interlocutory orders. To do so, we propose to provide an exhaustive list of **final orders** that would continue to have a right of appeal to the Court of Appeal without leave. The proposed list would include:

(i) orders that dispose of a proceeding, whether on liability, damages, or both;

(ii) orders that dismiss a motion to set aside a default judgment;

(iii) orders that determine jurisdiction (e.g., on the grounds of jurisdiction *simpliciter*, *forum non conveniens*, standing, capacity, and stays in favour of arbitration);

(iv) orders that finally dispose of one or more causes of action (for example, an order striking one or more claims, even if not dismissing all claims); and

(v) a residual, but narrow category, that delineates a list of orders that are so important to the administration of justice that they demand review (e.g. contempt orders).

We also propose defining **interlocutory orders** as all orders that are not included in the list of final orders. To provide additional guidance on how the exhaustive list of final orders is intended to be interpreted, the definition of interlocutory orders would be accompanied by a non-exhaustive schedule of examples, which would include:

(i) orders affecting non-parties (including production orders);

(ii) orders refusing to dispose of a cause of action (e.g. unsuccessful motions to strike);

(iii) orders refusing leave to amend a pleading to plead a new cause of action or defence on the grounds that doing so is contrary to the Rules;

(iv) orders refusing to add parties;

(v) orders setting aside *ex juris* service of a Claim;

(vi) orders granting a motion to set aside default judgment; and

(vii) orders dismissing a motion to strike based on the existence of a release (i.e., where the Court finds that the claim was not released).

We further propose that an order that has both final and interlocutory aspects would be appealable to the Court of Appeal without leave. This reform is aimed at resolving the current conflicting jurisprudence on the proper appeal route for orders that have final and interlocutory aspects and specifically adopts the reasoning in *Lax v. Lax*.[391]

Finally, we propose that the Rules require that every order of the Superior Court of Justice specify its nature (i.e., interlocutory or final) and identify the proper appeal route (i.e., Divisional Court or Court of Appeal) and the deadline to file a notice of appeal. This designation would itself be appealable. For instance, if an order is designated as final, it may be appealed to the Court of Appeal, where the classification can be challenged. If the designation proves incorrect, the Court of Appeal must transfer the appeal to the Divisional Court without prejudice to the litigant for any delay. The same protection would apply in reverse for orders designated as interlocutory.

Debating jurisdictional or procedural issues that do not affect an appeal's merits wastes Court and party resources. Clarifying the distinction between final and interlocutory orders will improve efficiency, access to justice, and the effective use of Court resources.

2. Appeals of Interlocutory Orders

Interlocutory Orders to Merge with Final Order: We propose that a party have two opportunities to appeal an interlocutory order. The first is to seek leave to appeal the order within 15 days of its release, largely consistent with the current framework. The second, newly proposed, is that all interlocutory orders will merge with the final order disposing of the proceeding, making the interlocutory orders appealable as of right at the end of a proceeding. This reform would discourage unnecessary mid-proceeding leave applications and promote efficiency.

Revising the Leave Standard for the Appeal of Interlocutory Orders: Given our proposal that interlocutory orders will merge with final orders and become appealable at the end of a proceeding, we believe the current standard for granting leave to appeal should be amended.

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[391] *Lax v. Lax* (2004), 70 O.R. (3d) 520 (C.A.).

We also note that the current leave standard in Rule 62.02(4)—which allows appeals where there are conflicting decisions of Ontario judges—may be outdated following the Supreme Court's decision in *R. v. Sullivan* ("***Sullivan***").[392] In that case, the Court confirmed that courts of coordinate jurisdiction should consider themselves bound by other decisions of the same level of court. Accordingly, in theory, conflicting decisions of the Superior Court of Justice should be rare.

We propose revising Rule 62.02 to clarify the leave standard for interlocutory appeals brought during a proceeding. Drawing from the current leave standard in British Columbia,[393] the new standard would provide for leave to be granted if the following criteria are met:

(i) there is reason to doubt the correctness of the order under appeal;

(ii) the point on appeal is of significance to the litigation before the Court;

(iii) the proposed appeal involves matters of such importance that, in the panel's opinion, leave to appeal should be granted; and

(iv) the interests of justice require that the appeal be heard on an interlocutory basis, rather than deferred until the end of the proceeding when the interlocutory decision merges with the final order and becomes appealable.

The criteria reflect the various purposes of appeals, such as delineating and refining legal rules, ensuring consistent application of settled law, and preventing injustice.

In circumstances involving a bifurcated issue that results in an interlocutory decision (for example, where the Court determines that a claim is not barred by a limitation defence), it is logical for the bifurcated issue to be finally resolved before the remainder of the case proceeds. In such circumstances, granting leave to appeal would be appropriate.

Concerns were raised that revising the leave standard could invite additional litigation over its interpretation. We believe, however, that a new standard is warranted in light of (a) the *Sullivan* decision and (b) our proposal that interlocutory decisions merge with final decisions to ensure that leave to appeal is only granted during a proceeding where it would be unjust or impractical to wait until its conclusion.

Stays When Appealing an Interlocutory Order: Because it is important that appeals do not unnecessarily delay proceedings, we also propose to introduce a rule specifying that seeking or obtaining leave to appeal an interlocutory order does not stay the underlying proceeding, unless the Court granting leave to appeal orders otherwise. Of course, that will not prevent parties from seeking to expedite the appeal, where they feel it necessary to do so.

Timeline for the Leave Process: With respect to the timing for seeking leave to appeal an interlocutory order mid-proceeding, we propose that a party have 15 days to serve and file its motion for leave, and the responding party have 15 days to serve and file its response. We further

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[392] *R. v. Sullivan*, 2022 SCC 19.

[393] See *Vancouver Shipyards Co. Ltd. v. Canadian Merchant Services Guild*, 2023 BCCA 77 at ¶ 20.

propose that if a party fails to appeal within the prescribed deadline, its right to pursue a mid-proceeding appeal would be extinguished. The party would then have to wait until the conclusion of the proceeding, when the interlocutory order would merge with the final order and become appealable at that stage.

3. Separating the Appeal Rules for Different Courts

The current structure of appeal-related rules can be confusing, especially for self-represented litigants, who may struggle to determine which rules apply to their appeal.

To address that confusion, we propose to reform Rules 61 and 62 by establishing three sets of rules unique to each of the following: (a) appeals to the Court of Appeal, (b) appeals to the Divisional Court, and (c) appeals to the Superior Court of Justice. Each set of rules would set out the process to be followed within each Court. This may also include a further tailoring of the Rules to reflect Court-specific procedures (e.g., with respect to filing requirements or the form of factums).

4. Increasing Single Judge Motions and Limiting Panel Reviews

Single appellate judges currently have limited jurisdiction. Our view is that a single appellate judge should be capable of addressing more matters, thereby making the appellate processes quicker and less expensive. At the same time, we also recognize that a single motion judge's determination is subject to a panel's right of review. Thus, in expanding the power of single appellate judges to administer justice, care should also be taken to avoid creating unnecessary delays with any subsequent panel review process.

Although legislative amendments are outside the scope of our mandate, we suggest amending the *CJA* to maximize the ability of a single judge to hear motions, while ensuring that a panel review is available only with respect to decisions that address the merits of an appeal (as opposed to the process pertaining to the appeal itself), either as of right or with leave of a single judge.

With respect to the Court of Appeal, this would include (a) amending section 7(3) of the *CJA* to allow a single judge to hear a motion to quash an appeal; (b) amending section 7(5) of the *CJA* to specify a list of "unreviewable orders", limited to procedural matters; and (c) amending rule 61.16(2.2) to ensure that a single judge could dismiss an appeal for delay or as abandoned. Such reforms would increase efficiency and maximize the effective use of court resources by limiting the circumstances in which panel reviews arise, which, in turn, would reduce delays and costs.

We also propose parallel amendments to the *CJA* and the Rules to allow certain motions to be heard by a single Divisional Court judge while limiting panel reviews.

5. Other Proposed Appeal Reforms

We suggest several other reforms of appellate rules, including:

(i) codifying frequently used common law procedural tests into the Rules to allow self-represented litigants to understand those tests. Examples include: (a) the test for an extension of time to perfect an appeal; (b) the test for an expedited appeal; and (c) the test for fresh evidence to be admitted on appeal;

(ii) providing express authority for appellate courts to order case management, at their discretion, and codifying the process for obtaining case management in appeals to make it more accessible to parties; and

(iii) harmonizing the approach to costs in the Court of Appeal with that of the Superior Court.

6. Consultation Feedback

Overall, there was modest engagement by Consultees in this area of proposed reform. Consultees demonstrated reasonable support for clarifying appeal routes and simplifying procedures, especially the distinction between final and interlocutory orders.[394] They also appeared to welcome reforms that would require judges to specify the nature of orders and allow automatic transfer of misfiled appeals to the correct court, thereby reducing confusion for self-represented litigants.[395]

There was general support for expanding the use of single-judge motions on appeals to expedite procedural matters and reduce backlog. Some Consultees, however, raised concerns about fairness and consistency, particularly for vulnerable litigants, emphasizing the need to ensure that disadvantaged groups are not subjected to a less robust appeal process.[396] Some Consultees emphasized the need for panels on substantive motions. Particular concern was expressed about the trend toward single-judge review for certain appeals, especially those from the Landlord and Tenant Board.[397] That particular issue, however, falls outside the scope of our mandate, as it arises from a discretion that the Chief Justice exercises under the *CJA*.

One Consultee strongly urged the elimination of the automatic stay of monetary orders pending final appeals.[398] He asserted that most stays of such orders would never be granted under the common law test and tend to foster frivolous appeals intended only to delay collection. He argued that concerns about the inability of an appellant to recover sums from the respondent after a successful appeal could be addressed by offering appellants the option of paying the disputed amounts into court pending appeal.

While the Working Group agrees that automatic stays of money judgments often encourage appeals aimed at hindering or delaying enforcement, we did not consider, research, or consult on a proposal to eliminate the automatic stay. We recommend that the Civil Rules Committee further consider this issue.

7. Recommendations

1. The Working Group recommends clarifying the distinction between interlocutory and final orders by:

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[394] See, for example, the submissions of PBO, p. 9; TAS, p. 41; OSC, pp. 4-5; and OTLA, p. 65.

[395] See, for example, the submission of OTLA, p. 66.

[396] Submission of the Community Advocacy, pp. 3-4.

[397] Submission of the Advocacy Centre for Tenants, p. 5.

[398] Submission of Latner, p. 15.

a. Providing an exhaustive list of final orders that would continue to have a right of appeal to the Court of Appeal without leave, as set out above;

b. Defining interlocutory orders as all orders that are not included in the list of final orders and provide a non-exhaustive schedule of examples;

c. Confirming that an order that includes both interlocutory and final aspects, will be appealable to the Court of Appeal as of right; and

d. Requiring that a judge, when issuing an order, identify whether it is final or interlocutory, identify the appropriate appellate court, and indicate the applicable deadline for filing a notice of appeal. To that end, we recommend developing standard appendices which will be attached to orders identified as final or interlocutory, as the case may be, and will describe the applicable appellate process and any applicable timelines.

2. The Working Group recommends introducing a rule providing that all interlocutory orders will merge with the final order disposing of the proceeding, making the interlocutory orders appealable as of right at that stage.

3. The Working Group recommends revising the rules governing appeals from interlocutory orders as follows:

a. Changing the leave standard for interlocutory appeals as set out above;

b. Introducing a rule specifying that seeking or obtaining leave to appeal an interlocutory order does not stay the underlying proceeding, unless the Court granting leave to appeal orders otherwise; and

c. Providing that a party has 15 days to serve and file a motion for leave to appeal, and the responding party has 15 days to serve and file its response. Introduce a rule that if a party fails to appeal within the prescribed deadline, its right to pursue a mid-proceeding appeal is extinguished. The party must then wait until the conclusion of the proceeding, when the interlocutory order merges with the final order and becomes appealable at that stage.

4. The Working Group recommends replacing Rules 61 and 62 with a new suite of appellate rules. This suite will include three sets of rules unique to each of the following: (i) appeals to the Court of Appeal, (ii) appeals to the Divisional Court, and (iii) appeals to the Superior Court of Justice. Each set of rules should set out the process to be followed within each Court, largely maintaining the content of existing Rules 61 and 62.

5. The Working Group recommends considering changes to the *CJA* that would increase single judge motions and limit panel reviews to those addressing the merits of an appeal, as set out above.

6. The Working Group recommends codifying the following frequently used common law procedural tests into the Rules:

a. The test for an extension of time to file an appeal or perfect an appeal;[399]

b. The test for an expedited appeal;[400] and

c. The test for fresh evidence to be admitted on appeal.[401]

7. The Working Group recommends providing express authority for appellate courts to order case management, at their discretion, and codify the process for obtaining case management in appeals to make it more accessible to parties.

8. The Working Group recommends harmonizing the approach to costs in the Court of Appeal with that of the Superior Court.

U. ENFORCEMENT

It cannot be overstated how frustrating and discouraging it can be for litigants to incur the time and expense of obtaining a judgment, only to find that the road to realizing on that judgment remains long and fraught with hurdles. If court orders can be ignored with seeming impunity, it begs the question as to what value they really hold.

The Working Group proposes several reforms aimed at making the process of enforcing court orders faster, less expensive, and more effective.

1. Removing the Leave Requirement to Issue Writs of Seizure and Sale and Notices of Garnishment More than Six Years after Judgment

Under the existing rules 60.07(2), 60.07(3), 60.08(2), and 60.08(3), a judgment creditor must obtain leave of the Court to issue writs of seizure and sale and notices of garnishment more than six years after the date of judgment. The test for leave has been summarized as follows:[402]

> A claimant seeking leave … should adduce evidence explaining the delay such that the Court may conclude that the claimant has not waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment. The judgment debtor may raise other grounds to convince the Court that it would be inequitable to enforce the claim. For example, the judgment debtor could demonstrate that they have relied to their detriment or changed their financial position in reliance on reasonably perceived acquiescence resulting from the delay. The onus is on the judgment debtor to adduce evidence of such reliance and detriment.

[399] See *Bell v. Amini*, 2023 ONCA 344, at ¶ 9.

[400] See *UD Trading Group Holding PTE Ltd. v. TAP Private Capital Ltd.*, 2021 ONCA 279, at ¶ 78.

[401] See *Leaf Homes Ltd. v. Khan*, 2022 ONCA 504, at ¶ 81.

[402] *Brawinger Group Limited v. Spring*, 2023 ONSC 4858 at ¶¶ 30-31 (citations omitted).

> The Court of Appeal in Ontario has confirmed that "a very low evidentiary threshold applies to a judgment creditor who requests leave and that it is a rare case where a judgment creditor cannot meet the test."

The Working Group believes that the leave requirement adds unnecessary time and expense to the enforcement of judgments and creates a loophole that enables judgment debtors to avoid payment.

The rationale in favour of maintaining this requirement is premised on finality and the notion that delinquency in enforcement might lead a judgment debtor to assume the judgment creditor has waived its rights or otherwise acquiesced to non-payment.

In our view, however, court orders should always be obeyed. This is foundational to promoting respect for the administration of justice. In addition, judgment debtors should (a) expect that a judgment imposes an ongoing obligation to pay and (b) assume that judgment creditors always seek payment and are not waiving their rights by ceasing to spend time and money on enforcement measures.

As a result, we propose eliminating the requirement for judgment creditors to obtain leave of the Court to issue writs of seizure and sale or notices of garnishment more than six years after the judgment date.

Rule 60.07(6) provides that writs of seizure and sale automatically expire after six years, unless renewed. Although we also considered eliminating this rule, we note that renewing a writ is a simple administrative process that does not require a motion and, therefore, imposes far less burden than the leave requirement discussed above.[403] We further note that the requirement to renew a writ after six years serves the practical purpose of clearing away the clutter of stale writs. For this reason, we propose to maintain this rule. That said, even if a writ is not renewed at the six-year mark, there would be nothing preventing the judgment creditor from filing a new writ later.

2. Omnibus Requisitions of Notices of Garnishment

In the current system, a judgment creditor obtains a notice of garnishment by paying a fee and filing with the Registrar a requisition for garnishment (Form 60G) along with a supporting affidavit (see rule 60.08(4)). Rule 60.08(6) states that "[o]n the filing of the requisition and affidavit required by subrule (4), the registrar shall issue **notices** of garnishment."

Although this language contemplates the Registrar issuing multiple notices of garnishment pursuant to a single requisition and supporting affidavit, the requisition form (Form 60G) contemplates the issuance of only a single notice of garnishment. We also understand that, as a practical matter, the Court typically requires a separate requisition and supporting affidavit for each notice of garnishment. This adds time and expense without apparent reason and, more fundamentally, appears to be contrary to the intent of the existing rule.

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[403] Under Rule 60.07(6), (8), (9).

We propose to revise the Rules and requisition form to clarify that multiple notices of garnishment may be issued via a single requisition supported by a common affidavit.

3. Access to Information about a Judgment Debtor's Bank Accounts

Under sections 462(1) and (2) of the *Bank Act*,[404] notices of garnishment are effective only if served at the specific branch where the judgment debtor's account is held. The primary way for judgment creditors to discover the existence and location of a judgment debtor's bank account is by obtaining this information from the debtor during an examination in aid of execution under Rule 60.18. Not surprisingly, however, judgment debtors are often evasive during such examinations, making it difficult to identify funds to garnish.

Judgment creditors may also seek to compel information from third parties via examinations in aid of execution. To do so, they must bring a motion and show that they are having difficulties enforcing the judgment and that the third party may possess information relevant to the enforcement (Rule 60.18(6)). This is a resource intensive process.

To address this problem without amending the *Bank Act*, we propose to introduce a multi-pronged rule that would function as follows:

(i) The new rule will allow judgment creditors to obtain an order that could be served on a bank or other financial institution for disclosure of basic bank account information of a judgment creditor;

(ii) To obtain the order, the judgment creditor will be required to:

a. establish that a valid and final judgment exists against the judgment debtor (i.e. the appeal period has passed);

b. provide the judgment debtor's date of birth and last known address if known (in the case of an individual or sole proprietor), corporate profile report[405] or other official business registration (in the case of a corporation or partnership)—all of which must be included in any resulting order; and

c. attest that the judgment debt has not been paid;

(iii) The judgment creditor will not be entitled to seek such an order until (a) 60 days have passed from the date payment is due, or (b) in the case of a default judgment or other order for payment of money made without notice to the judgment debtor, within 60 days from service of the judgment or order on the judgment debtor;

(iv) The request for relief will be made on notice to the financial institution, which will then be able to raise any objection to providing the requested information;

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[404] Bank Act, S.C. 1991, c 46.

[405] In line with a recommendation of the OSC, at p. 5 of its submission.

(v) The request for relief will not need to be made on notice to the judgment debtor as such notice may prompt the debtor to move the funds before they can be garnished;

(vi) The Rules will prohibit the financial institution from providing the judgment debtor with notice that the judgment creditor is seeking such an order or, once the order is made from providing notice that the order was issued;

(vii) The order will only require the financial institution to disclose for each account held by the judgment debtor with that bank (either solely or jointly):[406] (a) the branch at which the account is held and (b) whether there is a current positive balance (i.e., whether there are funds in the account); and

(viii) The institution served with such an order or direction will be allowed to charge the judgment creditor a reasonable fee for providing the information, which must be paid before the information is provided. The judgment creditor will be permitted to add that fee to the amount owing on account of the judgment.

In today's digital age, there is no reason why a bank cannot conduct a centralized search and provide this information, thereby improving the likelihood that a judgment creditor can successfully garnish a judgment debtor's account.

In response to Consultees' concerns about the disclosure of private information—particularly account numbers and balances—we have revised the proposal set out in our Consultation Paper. Rather than requiring disclosure of the account number, branch, and current balance, we now propose to limit disclosure to the branch where the account is held and whether it has a positive balance, being the only information necessary to garnish.

In response to Consultees' concerns about the compliance cost for financial institutions, we recommend further consultation with banking associations regarding the establishment of a fixed fee for these types of requests that will reasonably compensate financial institutions for the work required and provide predictability for creditors.

4. Active Case Management of Contempt Hearings

Rule 60.11 allows for a contempt order to be obtained on a motion to a judge. The main procedural requirements are personal service of the motion and the stipulation that supporting affidavits must not contain contentious hearsay. Since contempt proceedings are quasi-criminal and may result in a custodial sentence, the moving party must prove its case beyond a reasonable doubt.

The Rules are currently unclear as to how contempt hearings are to be conducted. In our view, that is dangerous, given that an alleged contemnor's liberty is at stake. Moreover, contempt proceedings can be resource-intensive for both the parties and the Court.

Consistent with our proposed approach to motions practice, we believe that contempt motions should be actively case managed. In particular, the quasi-criminal nature of contempt motions

[406] *Ibid*.

heightens the importance of resolving issues of disclosure and procedure up-front. Among other things, we propose the following:

(i) Like most other motions on notice, motions for contempt will first proceed to a Directions Conference. If the DC Judge determines it is appropriate for the motion to proceed, he or she will set the procedure to be followed, set a timetable for all necessary steps leading to the motion hearing, and schedule the hearing of the motion. The DC Judge may also give directions specifying whether any existing proceedings will proceed or be stayed pending the hearing;

(ii) In advance of the Directions Conference, the moving party will be required to provide the following through their ten-page Written Submission:

a. a statement of particulars specifying the alleged contempt;

b. certification that they have disclosed all relevant information to the alleged contemnor with respect to the alleged contempt; and

c. a submission as to whether they are seeking to rely on *viva voce* evidence, affidavit evidence, or both for the contempt hearing, so that the judge can give the necessary directions;

(iii) If *viva voce* evidence is required, whether in whole or in part, the moving party should be directed to provide a witness list and "will-say" statements for all anticipated witnesses;

(iv) Because a contempt motion is quasi-criminal, the contempt procedure will typically require that a moving party's evidence be complete (with cross-examinations concluded) before the alleged contemnor must elect whether to respond by filing evidence;

(v) The gravity of bringing a contempt motion or forcing one to be brought should be reflected in costs consequences to the unsuccessful party. Failed contempt motions should attract Full Indemnity Costs payable to the alleged contemnor by the moving party, absent exceptional circumstances. Similarly, a party found in contempt should be presumptively required to pay Full Indemnity Costs of the motion (in addition to any penalty ordered at the penalty phase).

5. Summary Contempt Hearings for Non-Compliance with Judgment Debtor Examinations

The existing Rule 60.18 sets out the procedure for an examination in aid of execution. Unlike a similar rule in the *Small Claims Court Rules*,[407] it lacks a procedure for impugning non-attendance or a failure to properly answer questions (i.e. truthfully or at all) through the contempt process. Typically, where a debtor does not attend, a party must seek an order for attendance and then, if

[407] See *Rules of the Small Claims Court*, O. Reg. 257/98, Rule 20.11.

necessary, enforce that order by way of a contempt proceeding, which is a time and resource intensive process for both parties and the Court.

The Working Group proposes to introduce a new rule, similar to Rule 20.11 of the *Small Claims Court Rules*, that would define the process for impugning non-attendance, or a failure to properly answer questions.

6. Recoverability of Enforcement Costs

The existing Rule 60.19 sets out specific enforcement costs that a party can recover. There is no reason, however, why a party should not be entitled to collect all the costs it incurs in trying to enforce a court order. As such, we propose to amend this rule to provide that a party is entitled to recover its Full Indemnity Costs incurred trying to enforce a court order.

7. Consultation Feedback

Relatively little feedback was generated with respect to the Working Group's proposed reforms to the enforcement provisions of the Rules. That limited feedback was, however, almost largely positive.

Unsurprisingly, there was broad support for making enforcement mechanisms easier and less expensive.[408]

To that end, Beard Winter LLP recommended a centralized, province-wide writ filing system.[409] This is beyond the scope of our mandate, but we agree one makes sense.

A Consultee in the banking industry weighed in on the Working Group's proposed order to compel financial institutions to disclose basic information about judgment debtors, including whether the debtor has an account with an institution, where the account is held, and whether it has a positive balance. They cautioned that the proposal may have unintended consequences, including the potential contravention of applicable privacy laws, financial impacts on unintended individuals and consequential liability, and operational considerations. They encouraged the Working Group to consult with the Office of the Privacy Commissioner of Canada regarding this proposal.

They also raised a concern about fraud and urged the Working Group to consider a means by which production orders might be authenticated.

In an effort to avoid false positive matches (e.g. where an innocent third party has the same name and date of birth), the Consultee recommended that production orders should also include the last known address of the judgment debtor.

The Consultee suggested an alternative to the Working Group's proposal: creating a centralized office for service of judgment creditor orders, similar to the delivery of production obligations by the Canada Revenue Agency and the Family Responsibility Office under s. 462 of the *Bank Act*.

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[408] See, for example, the submissions of Beard, p. 5; the Perells, p. 39; and TAS, p. 42.

[409] Submission of Beard, p. 5.

While this is an intriguing suggestion, it would require an amendment to federal legislation. Instead, we amended our proposal in response to this feedback.

8. Recommendations

The Working Group recommends:

a. Eliminating the leave requirement to issue writs of seizure and sale and notices of garnishment more than six years after judgment;

b. Amending Rule 60.08(6) and Form 60G to clarify that multiple garnishments may be issued on a single requisition supported by a common affidavit;

c. Creating a rule that provides that a judgment creditor may obtain, on motion in writing, without notice to the judgment debtor, but with notice to the named financial institution, a production order requiring one or more named financial institutions to disclose to the judgment creditor, the branch at which any account is held and whether there is a current positive balance in it. The rule will include provisions setting out the information a judgment creditor must include in its motion materials, as well as the applicable timeline for bringing the motion, as described above;

d. Amending Rule 60.11 to provide for active case management of contempt motions as described above;

e. Adding a new rule modelled after Rule 20.11 of the *Small Claims Court Rules* to provide a summary process for contempt proceedings arising from a party's failure to attend a judgment debtor examination, or to properly answer questions asked during that examination;

f. Amending Rule 60.19 to provide that parties are entitled to their Full Indemnity Costs incurred in relation to the enforcement of an order or judgment.

V. SPECIFIC TYPES OF LITIGATION

1. Bankruptcies and Receiverships

Following consultations with a Registrar in Bankruptcy, the Working Group does not propose any reforms to the current practice before Registrars in Bankruptcy.

We propose that bankruptcy, insolvency, and receivership matters[410] proceeding before a Superior Court judge proceed directly to a Directions Conference immediately following the issuance of a Notice of Claim, where directions will be provided for the efficient management of the proceedings. Most of these proceedings are expected to be streamed to the Application Track

[410] Including proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, and s. 101 of the *CJA*.

where they would proceed to a Directions Conference immediately after commencement of the proceeding in any event. But to be clear, regardless of what track they stream to, they will commence with a Directions Conference following the issuance of the Notice of Claim. For bankruptcy, insolvency, and receivership matters proceeding in Toronto, they will almost invariably proceed on the Commercial List and be subject to its Practice Directions.

There was relatively modest response to the bankruptcy issues raised in the Consultation Paper. Significantly, the Office of the Superintendent of Bankruptcy made brief submissions in which they did not express any concerns regarding our proposed approach to bankruptcy and insolvency matters, save to suggest that consideration could be given to whether the term "close of pleadings" needs to be further defined in the insolvency context.[411] We do not believe it is necessary to formally address the concept of "close of pleadings" in the insolvency context because of the fact that directions will be provided at the outset of those proceedings as to what, if any, further pleadings are required subsequent to the issuance of the Notice of Claim.

2. Class Proceedings

The *Class Proceedings Act* sets out unique procedural rules applicable to the litigation of class proceedings in Ontario. Among other things, class proceedings must be certified by the Court before they are permitted to proceed to a trial or other determination on the merits that is binding on the class. We are not recommending that consideration be given to amending the *Class Proceedings Act* and, thus, any proposals that we make must remain consistent with the procedures prescribed in the *Class Proceedings Act*.[412]

Class proceedings are routinely case managed by one judge. Indeed, s. 34 of the *Class Proceedings Act* provides that the same judge is to hear all motions before the trial of the common issues but shall not thereafter preside at the trial of the common issues.

The Working Group believes that the case management model of class proceedings should continue. While we believe that the Trial Track process model will generally apply to class proceedings, its presumptive timelines may need to be modified on a case-by-case basis.

The existing one-year timeline under section 29.1 of the *Class Proceedings Act* for filing of the claimant's motion record (or the defendant's, in a defendant class proceeding) in support of certification, following issuance of the Notice of Claim, will continue to apply, along with the other provisions of section 29.1.

If the claim is certified, whether in whole or part, the parties will attend a Directions Conference to establish the schedule for the remaining steps in the proceeding leading to the common issues trial following: (a) the expiry of the applicable appeal period or the disposition of any appeal(s), and (b) the delivery of a notice of certification to the class.

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[411] Submission of the Office of the Superintendent of Bankruptcy, p. 2.

[412] Section 35 of the *Class Proceedings Act* provides that the *Rules of Civil Procedure* apply to class proceedings.

Class proceedings will otherwise generally be subject to the same processes as other civil proceedings.

Given the unique policy rationales applicable to class proceedings, the common issues trial will proceed presumptively by way of a conventional trial (as opposed to a Summary Hearing) unless directed otherwise by the DC Judge.

Class proceedings are a specialized form of litigation. The limited number of Consultees who made submissions about the proposed reforms and their impact on class proceedings reflected that specialization.

Generally, Consultees were concerned about flexibility and the need to maintain examinations for discovery in class proceedings.[413] We believe the process we have described provides that flexibility. Moreover, class proceedings will follow the Trial Track process model, which provides for focused examinations.

Consultees generally agreed that PLPs should not apply to class proceedings.[414] We agree.

The Working Group is also aware that recent years have seen increased reliance on Rules 5 and 6 (joinder, consolidation, or hearing together) in litigation involving large groups of plaintiffs. These proceedings resemble class proceedings in that they involve a group of plaintiffs with causes of action arising from the same transaction or occurrence or share common or related issues of law or fact. However, they may not proceed as class proceedings either because they have not been certified, or because the plaintiffs prefer not to pursue a class proceeding given the additional procedural requirements and their desire for a more individualized approach.

Use of Rules 5 and 6 for such "group claims" can present procedural uncertainty and therefore higher costs and greater delays for litigants. They can also put more pressure on judicial resources and require more intensive case management.[415] It may be that these uncertainties and pressures could be alleviated by creating tailored rules, or perhaps specific practice directions, for more efficient processing of group claims. Such rules and practice directions exist in the Civil Practice Rules of England & Wales.[416] Although the Working Group has not consulted on this particular issue, we do believe it is worthy of further investigation.

3. Indigenous Litigation

Civil litigation commenced by Indigenous communities or individuals alleging breach or infringement of section 35 of the *Constitution Act, 1982* or relating to historical Crown conduct, such as alleged breaches of fiduciary obligation, can demand unique consideration. These claims often include allegations of wrongdoing over many decades and can reach back to the 19th century

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[413] See, for example, the Collaborative Submissions of Toronto Firms, p. 3; and the submissions of OTLA, p. 66; Phillips Barristers, p. 5; Siskinds, p. 1; and TAS, pp. 43-44.

[414] See, for example, the submissions of TAS, p. 43; OBA, p.11; and MLA, p. 14.

[415] Suzanne Chiodo, *Safety in Numbers or Lost in the Crowd? Litigation of Mass Claims and Access to Justice in Ontario*, (2023) 39 Windsor Yearbook of Access to Justice 48.

[416] CPR 19, Section III, and Practice Direction 19B.

or earlier. The number of documents introduced into evidence is typically voluminous. Many of the documents require expert historians to provide analysis on their proper interpretation, historical significance, and context. Additionally, ceremonies and Indigenous perspectives, which may be better presented orally, are integral elements of these proceedings.

The Supreme Court of Canada and the Court of Appeal for Ontario have underscored the imperative to confront and redress injustices inflicted upon Indigenous peoples. Unfortunately, to achieve these objectives, the nature and magnitude of many Indigenous cases have often come to reflect elements similar to those of Commissions of Inquiry rather than conventional civil trials. This is precisely the opposite of what the Supreme Court has said is the appropriate approach in such cases:[417]

> [T]he "commission of inquiry" approach is not suitable in civil litigation, even in civil litigation conducted under rules generously interpreted in Aboriginal cases to facilitate the resolution in the public interest of the underlying controversies.

While these cases may have unique features compared to standard civil litigation (including, but not limited to a lack of living witnesses, the relevant timespan at issue, voluminous documentary materials, evidentiary considerations pertaining to Elders and traditional knowledge holders, and the central role of expert evidence), they remain formal, adversarial proceedings subject to the established rules of evidence and civil procedure.

While many of the proposed reforms discussed in this Report can and should be applied to Indigenous litigation, the distinct characteristics of these cases underscore the need to interpret and apply the usual rules of Court with flexibility and sensitivity. At the same time, it remains essential to preserve the core formalities of civil procedure that ensure fairness, clarity, and consistency in adjudication. A balanced approach is therefore required: one that respects the unique nature of Indigenous litigation while maintaining the integrity of the adversarial process. In light of this, we propose certain modifications to the up-front evidence model recommended above.

a) An Early Directions Conference

We propose that when a proceeding involving Indigenous claims is commenced, a Directions Conference date will be scheduled within 90 days of the issuance of the Notice of Claim, at which the parties will discuss, among other things:

(i) the date for completion of pleadings;[418]

(ii) the anticipated nature of disclosure required by the parties;

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[417] *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56, at ¶ 40.

[418] The requirement to file a Notice of Intent within 20 days and a Statement of Defence within 45 days will necessarily be suspended.

(iii) whether third party researchers are required to fulfil disclosure requests (e.g. where historical documents are housed in archival institutes) and, if so, the status of such retainers and estimated time to complete the research;

(iv) to the extent possible, the manner and timing of the exchange of evidence, including the identification of witnesses anticipated to provide witness statements, or to give evidence in another manner, and the nature and identification of any experts if known or alternatively a plan to revisit this issue at a later stage of the proceedings;

(v) a protocol for the conduct of the proceedings, including anticipated timelines;[419] and

(vi) whether there is a need for future case management.[420]

b) Modification of the Initial Disclosure Requirement

As discussed above, the up-front evidence model imposes an initial disclosure obligation that requires production of all the documents referred to in a pleading that are within the party's possession, control or power.

In many cases alleging historical wrongs perpetrated by the Crown, a Notice of Claim may refer to documents which, while known to exist, are not in the claimant's possession, control or power. Given this reality, where (a) the claimants refer in a pleading to a document that is not in their possession, control or power, and (b) the claimants have made reasonable efforts to retrieve the document but have been unable to do so, the claimants may make a specific request that the Crown party make reasonable efforts to assist in locating the document. If the parties are unable to agree on what, if any, efforts the Crown party should take to assist in locating the document, they may address the issue at the first Directions Conference.

c) Consultation Feedback

There was limited, but helpful, feedback from Consultees on this aspect of the Consultation Paper. TAS recommended that a provision should be included in the Rules providing that in claims involving the determination of the rights of Indigenous peoples, or injustices perpetrated against them, the Rules should be liberally construed, in a culturally sensitive and trauma-informed manner, to secure the just determination of the claims.[421] TAS also recommended that the Court consider developing guidelines, akin to the Federal Court's Practice Guidelines for Aboriginal Law Proceedings, that set out the Court's best practices for litigation involving Indigenous

[419] To be clear, the standard timelines proposed for proceedings on the Summary and Trial Tracks will not presumptively apply to Indigenous litigation.

[420] Case management of Indigenous claims can facilitate a more responsive and culturally sensitive judicial process, ensure that legal processes are tailored to the specific needs and circumstances of Indigenous communities, and promote efficiency and greater access to justice.

[421] Submission of TAS, p. 44; and the submission of Olthuis Kleer Townshend LLP ("**OKT**") generally.

peoples.[422] The development of such guidelines is beyond our mandate, but we support such an initiative.

The Chiefs of Ontario submitted that the Working Group paid insufficient attention to the complexities and nuances of bringing forward First Nations' claims. They urged the Court to establish an Indigenous Advisory Group and an Aboriginal Law Bar Liaison Committee to contribute to modernization initiatives. The establishment of such committees is also beyond our mandate, but again, we support the proposed initiative.

The Chiefs of Ontario raised additional concerns about the inadequacy of the proposed reforms in the following respects:

(i) The initial proposed exception for claims brought pursuant to s. 35 of the *Constitution Act* was too narrow. Duties of the Crown may arise out of other common law doctrines, private law causes of action, and international law. These claims can be equally complex and nuanced. The Department of Justice Canada similarly advocated for a broader exception to include other types of claims brought by Indigenous collectives, groups, or individuals including fiduciary duty or honour of the Crown-based claims. We agree with these submissions. Our intent was not to introduce a narrow definition of "Indigenous claims." The definition should remain broad and flexible;

(ii) Consideration of the use of experts, who are almost always required to interpret historical, linguistic, archeological, and other evidence. More experts may be required than currently permitted by the Rules. Moreover, the suggestion that they testify sequentially may not work well in Indigenous rights litigation;

(iii) Consideration of witness testimony and incorporation of culturally appropriate and suitable ways to introduce evidence from community experts, such as knowledge keepers and Elders. Written witness statements may not be culturally appropriate; and

(iv) Consideration of the cost consequences for First Nations litigants.

The law firm, Olthuis Kleer Townshend LLP ("**OKT**"), urged in its submission that consideration should be given to the organization of the hearing, court set-up and logistics, how ceremony might be included, and the use of demonstrative evidence.[423]

The Working Group believes that the core process reforms set out in this Report can be adapted to Indigenous litigation, provided they are tailored to the needs and context of each case. It is hoped that the introduction of an early Directions Conference will provide for the flexibility needed to tailor the proposed process model to the claim's needs. It is clear to us that the timelines involved in moving these types of cases forward will depend on, among other things, the nature of the claim, the number and type of documents involved, and the number of experts engaged.

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[422] Submission of TAS, p. 45.

[423] Submission of OKT, pp. 13-14.

Several Working Group members participated in a follow-up consultation with the Chiefs of Ontario and counsel from OKT. The upshot of that consultation, from the Working Group's perspective, was to underscore the importance of flexibility when addressing Indigenous rights litigation. A consensus was reached that a model process order would be a helpful guide to DC Judges at the first Directions Conference. Such an order will provide for a modified process to be followed for these hearings as well as establishing how evidence will be adduced. A small focus group has been assembled for the purpose of helping to create a template of that draft order. We recommend that we continue working with the group to finalize that order.

4. Construction Lien Proceedings

Pursuant to section 50(2) of the *Construction Act*,[424] (the "***Construction Act***"), the Rules apply to construction lien proceedings except to the extent that they are inconsistent with the *Construction Act* and the Regulations thereunder, including O. Reg 302/18 (the "**Regulations**").

We have identified six issues concerning the interplay between construction lien proceedings and the Rules, including our proposed amendments thereto, each of which is described below.

a) Identified Problems

Issue 1: The *Construction Act* and the Regulations set out rules for construction lien proceedings that differ from the rules governing regular proceedings. The Working Group's proposed reforms make these distinct procedures under the *Construction Act* and the Regulations not only unnecessary, but potentially counterproductive to the goal of efficient justice. For example:

(i) Section 1(2) of the Regulations requires that a claim in a construction lien proceeding be served within 90 days—a longer timeframe than is proposed under the reforms (i.e. 45 days);

(ii) Section 37 of the *Construction Act* provides that construction liens expire unless the action is set down for trial, or an order for trial is made, within two years of issuing the statement of claim. This safeguard would be unnecessary if, as proposed, most claims are expected to have dispositive hearing dates set within that timeframe;

(iii) Section 13 of the Regulations prohibits interlocutory steps not expressly provided for in the *Construction Act* unless leave of the Court is obtained. This restriction would directly impede the proposed process model, which relies on the up-front exchange of evidence.

Issue 2: Regional inconsistencies in the handling of construction lien matters create confusion.

As set out above, construction liens expire unless the action is set down for trial, or an order for trial is made, within two years of the issuance of the statement of claim. Procedures for doing so, however, vary across judicial regions. In Toronto and Ottawa, where associate judges frequently hear construction lien matters, litigants typically—but not always—obtain both a judgment of reference to an associate judge and an order for trial. In other regions without associate judges,

[424] *Construction Act*, RSO 1990, c C.30.

actions are simply set down for trial. These differing practices create uncertainty and procedural inconsistency across the province.

The practice of referring a lien action to an associate judge, an arbitrator, or the Small Claims Court is also unnecessarily cumbersome.[425] Under the *CJA*, associate judges only have jurisdiction to hear a construction lien matter once it has been referred to them by a judge. When a matter is referred to an associate judge (as frequently occurs in Toronto and Ottawa), parties must spend unnecessary time and money obtaining both the judgment of reference and, subsequently, the order for trial. Finally, the term "order for trial" is itself misleading, as it refers to a procedural trial management conference rather than the actual commencement of trial.

Issue 3: Although the *Construction Act* requires that "[t]he procedure in an action shall be as far as possible of a summary character,"[426] lien proceedings are often just as long and cumbersome as other proceedings.

Issue 4: Construction lien proceedings and construction-related cases more broadly are inherently complex, involving not only intricate legislation (i.e. the *Construction Act*) but also complex facts specific to the construction industry. It is far more efficient for a judge with specialized expertise to hear construction matters.

Issue 5: The *Construction Act* provides for certain motions and examinations as of right. The exercise of these rights is sensible in some contexts. Motions as of right, however, can sometimes be used strategically to delay lien proceedings or drive-up costs. For example, lien claimants have the right under section 40 of the *Construction Act* to cross-examine on a claim for lien, which can presumptively be exercised at any time. This serves important purposes, such as informing decisions on whether to bring a motion to vacate a lien upon payment of a reduced amount, a motion to reduce security paid into court, a motion to declare a lien expired, or a motion to discharge a lien. A section 40 cross-examination, however, should not be used to delay a lien proceeding or as an early "kick at the can" that duplicates or unnecessarily inflates the proposed new litigation process.

Issue 6: The Regulations (a) prohibit counterclaims against a person other than the claimant;[427] (b) provide that leave is required to issue a third party claim;[428] and (c) provide that only claims for breach of contract (not breach of trust) may be joined with construction lien claims.[429] While these rules were intended to streamline lien proceedings, they can result in duplicative proceedings between the same parties or in respect of the same project. This approach overlooks the reality that, while some lien claims resemble class proceedings—where many parties focus only on

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[425] Section 58 of the *Construction Act* provides for the ability to refer a lien action to an associate judge, an arbitrator, or the Small Claims Court.

[426] See Section 50(3).

[427] Regulation 302/18, s. 2(1)

[428] *Ibid*., s. 4.

[429] *Ibid*., s. 3. Draft amendments announced on August 25, 2025, however, have adopted Duncan Glaholt's recommendation to amend this regulation to permit joinder of lien and trust claims. As of the time of writing, the amendment has not yet been promulgated or brought into force.

common issues about the lien amount—many others involve parties who want to resolve all project-related disputes together to avoid fragmented proceedings and inconsistent outcomes.

b) Proposed Reforms

While legislative reform is outside of the CRR's mandate, we strongly recommend that consideration be given to making the following changes to the *Construction Act* and its Regulations:

(i) Eliminate the procedural differences identified in Issue 1 above; namely the requirement to serve a claim within 90 days (i.e. sections 1(2)), the prohibition on interlocutory steps without leave (i.e. section 13 of the Regulations), and the requirement to take certain action within two years (i.e. section 37 of the *Construction Act*);

(ii) Amend section 58 of the *Construction Act* to authorize the Court, upon the close of pleadings in a construction lien proceeding, to automatically issue an order of reference to an associate judge (or to the Small Claims Court, where appropriate), without the need for a motion. This approach would allow the Court to determine, based on resource considerations, which matters should proceed before an associate judge, rather than leaving that decision to the parties. It will also reduce the cost and delay associated with obtaining a judgment of reference;

(iii) Eliminate any references in the Regulations to fixing a date for trial or to a "settlement meeting;"

(iv) Rename a "Notice of Trial" as a "Notice of Directions Conference" in the *Construction Act* and the Regulations. When a party who has served or been served with such a notice becomes aware of additional lien claimants in relation to the same improvement, require that party to schedule a Directions Conference and serve the Notice of Directions Conference on all existing and newly identified lien claimants;

(v) Unless already repealed, eliminate the prohibition on joining lien and trust claims (section 2(1), 3, and 4 of the Regulations);

(vi) Maintain the prohibition on advancing counterclaims against non-claimants and the requirement for leave to issue a third-party claim but require that all proceedings related to the lien proceeding (i.e., all claims arising from the same project) be addressed at the same Directions Conference. The DC judge will have the authority to determine which matters or issues should be heard together, sequentially, or separately; and

(vii) Amend section 40 of the *Construction Act* to require that any cross-examination of a lien claimant be conducted expeditiously. Section 40 cross-examinations are most often associated with motions to vacate, reduce, or discharge registered liens under ss. 44(2), 44(5), 45, or 47 of the *Construction Act*. To ensure those motions are similarly brought expeditiously, they should be required to proceed to a pre-screening Directions Conference. That way, the Court can maintain control over interlocutory proceedings in lien actions and ensure that motions to vacate, reduce, or discharge liens are not being

brought on the eve of a dispositive hearing that would otherwise resolve the live issues on the motion.

In addition to reforms to the *Construction Act* and the Regulations (and regardless of whether those reforms are ultimately implemented), we recommend:

(i) Creating a team of judges (and associate judges) specializing in construction law to handle all construction lien and construction-related proceedings. This proposal is discussed in greater detail in Section VI(X)(1) below, as part of a broader proposal to develop a province-wide list system;

(ii) Mandating that all construction lien proceedings presumptively proceed on the Summary Track, consistent with the principle that the procedures that govern them are to be "as far as possible of a summary character."[430] As with other such matters, the Court should schedule a Directions Conference after the Close of Pleadings, at which any necessary order(s) will be made to enable the matters to proceed in accordance with the proposed reforms. We recognize that some construction lien matters, particularly with larger projects and multiple lien claimants, may not be well-suited to the Summary Track, and the DC Judge will retain the discretion to transfer those types of cases to the Trial Track;

(iii) If the proposal to permit the automatic generation of a judgment of reference is not adopted, requiring the lien claimant—or, if the lien claimant fails to do so, permit another party—to obtain the judgment of reference before the first Directions Conference (but only when the Court directs that the matter proceed before an associate judge);

(iv) Working with a construction subgroup to:

a. establish guidelines for DC Judges on when construction lien proceedings should be stayed until substantial performance to allow all lien claimants to take part in one proceeding, and when they should be permitted to proceed in whole or in part in the normal course; and

b. develop any further rules necessary to ensure consistency across judicial regions in how construction lien proceedings progress up to trial, regardless of which of our proposals are adopted.

There were relatively few comments from Consultees on our construction-specific proposals. Those who did respond were generally supportive of: (a) the creation of a specialized construction court; (b) applying the same rules to construction lien proceedings as to other proceedings, provided our proposed changes are implemented; (c) requiring notices to be served in advance of

[430] Construction Act, s. 50(3)

Directions Conferences; (d) repealing section 37 of the *Construction Act*; and (e) ensuring that motions are managed so they do not unnecessarily delay matters.[431]

5. Recommendations

1. The Working Group recommends defining the following types of matters as "**Modified Process Matters**":

   a. Proceedings to which the *Bankruptcy and Insolvency Act* applies;

   b. Proceedings to which the *Class Proceedings Act* applies;

   c. Proceedings to which the *Construction Act* applies; and

   d. Indigenous claims.

2. The Working Group recommends including a provision requiring that Modified Process Matters be commenced using the same Notice of Claim as all other proceedings, with Appendix "A" identifying that the claim falls within one of the categories of Modified Process Matters.

3. The Working Group recommends that, for Modified Process Matters, other than proceedings subject to the *Construction Act*, a Directions Conference be scheduled immediately following the issuance of the Notice of Claim. In *Construction Act* proceedings, a Directions Conference should be scheduled immediately following the Close of Pleadings. At the Directions Conference, the DC Judge will issue directions governing the procedures to be followed in the particular matter. To the extent reasonably possible, those procedures should align with the presumptive processes applicable to all other civil proceedings, adapted as necessary to the circumstances of the case and any governing legislation.

4. The Working Group recommends amending the *Construction Act*, the Regulations, and the Rules to address the various issues relating to construction lien proceedings as outlined above.

5. The Working Group recommends excluding non-contentious estate proceedings under Rules 74 and 74.1 altogether from the proposed three track process model.

W. TRANSITION

A recurring and pressing theme raised with the Working Group was the critical importance of an effective transition. We agree: successful reform requires a successful transition. Transition planning is, in turn, intrinsically linked to implementation planning. A clear understanding of how

[431] See, for example, the submissions of the Council of Ontario Construction Associations, p. 2 (re a specialized construction court); and the OBA, pp. 36-37.

the new process will be implemented is essential to determining the most effective approach to transition.

Neither transition nor implementation planning can be fully developed until the system to be implemented has been approved. If and when approval is granted for these policy proposals, in whole or in part, the implementation and transition team will be positioned to undertake the detailed work necessary to design and execute a comprehensive implementation strategy and a smooth transition.

In the meantime, we make the following limited recommendations:

(i) We recommend that a pilot project be eschewed in favour of staged implementation. The scope of the proposed reforms does not lend itself to a pilot. If adopted, these reforms will amount to a near-complete re-write of the Rules, accompanied by the creation of numerous new and, in many cases, interactive forms. They will also require extensive retraining of the bar, court staff, and judges. Given their breadth, it is unrealistic that one could "dip one's toe in the pool to gauge the temperature before jumping in." Moreover, implementing a pilot project in only one region would likely trigger forum shopping, driven not by strategy, but by a natural preference for the familiar over the unfamiliar;

(ii) We recommend that any new Rules be implemented province-wide, but in stages. For example, reforms relating to PLPs, service, motion practice, and appeals could be rolled out separately from those pertaining to the up-front evidence model, which would impact Court scheduling. A staged implementation will allow stakeholders to adjust gradually to the significant reforms being proposed and provide an opportunity to assess and refine the new processes as they are introduced;

(iii) We recommend that a dedicated team be established to provide education and training on the new Rules to litigators, Court staff, the judiciary, and the public; and

(iv) We recommend the creation of a "blitz team" composed of senior members of the bar to provide *pro bono* mediation services in existing cases waiting for a pretrial. The objective would be to reduce the current backlog and ensure that fewer overlapping matters remain when the new Rules come into effect.

X. MISCELLANEOUS MATTERS

1. Developing a List System

Through our consultations, we repeatedly heard that litigants and their lawyers would prefer to have their cases adjudicated in a specialized court presided over by judges with expertise in the relevant area of law. Stakeholders emphasized that such specialization would promote consistency and predictability while allowing procedures to be tailored to the distinct realities of each area of law within the broader framework we propose. The prevailing view was that specialization would improve efficiency, reduce unnecessary costs, and strengthen confidence in the justice system.

List systems are used in England and Wales and Australia. A similar benefit is available in arbitration, where parties can select an arbitrator with expertise in the area of law in dispute.

As Professor Erik Knutsen pointed out, specialized courts and lists (such as the Commercial List, the Class Actions List, and the Estates List) have a proven track record in Ontario. Matters on those lists arguably run more efficiently than in the generalist court. He further argued that:[432]

> [t]he notion of a generalist mixed civil-criminal bench is an expensive, time-consuming concept whose time has long past, especially with the increasing specialization of the law in some civil areas like injury law, the proliferation of caselaw via online databases, and complex advances in medicine and science. How is a judge who has no experience in these matters to somehow get up to speed and mete out justice in this dynamic area of law? What happens is that inordinate amounts of court time are spent educating an inexperienced judge on basic matters which are common from case to case.

Although outside our formal mandate, we strongly recommend the establishment of a broader, province-wide, list system for certain types of matters. In particular, we urge the Court to create specialized lists for: commercial matters, estates, construction, personal injury, medical malpractice, liquidated damages, class proceedings, Indigenous claims, and employment, as well as a general civil list to address all other matters.

The shift to virtual hearings makes such a system both practical and timely, as specialized judges no longer need to be physically present in every region. Moreover, subject-matter differences, rather than regional differences, provide a far more meaningful basis for tailoring procedures.

A comprehensive list system would modernize civil justice by saving significant judicial time, reducing costs, and ensuring that litigants across the province have equitable access to the same specialized processes and resources. It would further enable the development of practice directions tailored to the unique features of each area of law, recognizing that a single, uniform process does not always serve the interests of efficiency or fairness.

2. Pierringer Agreements

A Pierringer Agreement is a type of partial settlement agreement, often referred to as a proportional share agreement. It reflects a plaintiff's settlement with one (or some) but not all defendants in a multi-party proceeding. The settlement, although partial, results in a guaranteed recovery for the plaintiff, and reduces the number of parties in the litigation, as well as the complexity, costs and duration of trial.

To encourage parties to enter into such agreements, our Consultation Paper proposed reverting to the litigation framework that existed before *Laudon v. Roberts,*[433] under which settlement monies paid pursuant to a Pierringer Agreement were not deducted from the damages awarded at trial. In the pre-*Laudon* model, the non-settling defendants were required to pay whatever damages were assessed, in proportion to the percentage of liability the Court attributed to them. Where there were multiple non-settling defendants, they would remain jointly and severally liable among themselves. We suggested reverting to this model because it appears unfair that a plaintiff entering

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[432] Submission of Prof. Knutsen, p. 7.

[433] *Laudon v. Roberts*, 2009 ONCA 383.

into a Pierringer Agreement would have to accept the risk of making a bad deal but not reap the benefits of making a good deal—an unfairness that may tend to act as a disincentive for plaintiffs to enter into these types of agreement.

Consultees were divided in their responses, with support largely falling along party lines: plaintiff-side stakeholders in favour[434] and defence-side stakeholders opposed.[435]

Ultimately, we agreed with both TAS and the OBA that this issue is more substantive than procedural in nature.[436] As TAS observed,[437]

> The question of the efficacy of partial settlements has not been studied, and the law regarding the effect of partial settlements on subsequent damages assessments is unsettled. In TAS's view, this is not an appropriate topic to address in the context of Rules reform; among other things, the [Working Group's] proposal is not a procedure point.

Accordingly, we are not proposing any changes to the rules concerning Pierringer Agreements, though we do believe the issue is worthy of further study.

3. Prejudgment Interest

Several Consultees identified the issue of pre-judgment interest as an area in need of reform. Generally, the concerns raised were that pre-judgment interest rates are not sufficiently high to either (1) meaningfully encourage settlement; or (2) provide full compensation to successful claimants who may have waited years to receive that compensation.[438]

While we agree that these concerns are valid, we did not consider, research, or consult on a proposal to increase prejudgment interest. We recommend that the Civil Rules Committee further consider this issue.

4. The Limitation Period

In our Consultation Paper, we proposed extending the basic limitation period from two years to three years to promote the introduction of PLPs and better accommodate their time requirements.

There were mixed views on whether the limitation period should be extended to three years. Some Consultees argued that an extension would unnecessarily lengthen timelines and may increase insurance costs given the need to pay out higher pre-judgment interest. These Consultees recommended that the limitation period remain at two years.[439]

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[434] See, for example, the submission of OTLA, p. 66.

[435] See, for example, the submissions of Aviva, p. 4; CDL, pp. 43-44; City of Toronto, p. 13; and the Collaborative Submissions of Toronto Firms, Appendix "A", p. 10.

[436] Submissions of the OBA, p. 34 and TAS, p. 42.

[437] Submission of TAS, p. 42.

[438] See, for example, the submissions of the CCLA, pp. 90-91and Siskinds, p. 6;

[439] See, for example, the submissions of Aviva, p. 3; CLHIA, p. 2; City of Toronto, p. 11; Definity, p. 7; Hassell Trial Counsel, pp. 3-4; HIROC, p. 5; and the Medico-Legal, p. 4.

For example, in its submissions, one Consultee from the insurance industry cautioned that extending the limitation period to three years would increase claims costs by lengthening the period for accruing pre-judgment interest and requiring higher "incurred but not reported" (IBNR) reserves. They explained that a 50% extension of the limitation period would raise reserve requirements and, in turn, the overall cost of insurance for Ontarians.

Other Consultees supported an extension to three years on a variety of different grounds. Some suggested that the two-year limitation period is too short for individuals who lack ready access to legal assistance.[440] LawPro supported the extension on the basis that it would attenuate one of the main sources of malpractice claims against lawyers. It also submitted that the short limitation period may compel parties to commence litigation before they are satisfied that a meritorious claim exists, or before the plaintiff's injuries have stabilized.[441]

After considering all Consultees' submissions, we concluded that limitation periods are fundamentally substantive, rather than procedural in nature and, thus, not within our mandate. Moreover, a change in the limitation period may have far-reaching and unintended consequences. In our view, a more robust study of the issue is required before any extension of the current limitation period can be seriously considered. Accordingly, we are not proposing any change.

5. Backsheets

The requirement of a backsheet is a vestige of the paper-based system, when documents were exchanged and filed in hard copy and judges wrote endorsements on the reverse side. In the modern electronic environment, backsheets serve little purpose and create unnecessary inconvenience. The Working Group recommends that backsheets be eliminated, subject to further review to determine whether operational needs justify their retention in limited circumstances.

6. Rule 1.09: Communications to the Court

Rule 1.09 appears to have been intended to prevent *ex parte* communications with judges or associate judges. *Ward v. Ward*,[442] for example, involved a party writing to the Court after trial to provide additional information without copying the other side—conduct that is clearly improper. The concern, however, is that the rule is sometimes interpreted more broadly, as prohibiting any communication with the Court on any matter unless all parties consent or the Court directs otherwise.

To address this, we propose clarifying the rule, the substance of which would be as follows:

> 1.09 (1) When a proceeding has concluded, the Court has reserved its decision, but no decision has yet been released, no party to the proceeding and no party's lawyer shall communicate about the proceeding with a judge or associate judge out of Court, directly or indirectly, unless, (a) all the parties consent, in advance, to the out-of-court communication; or (b) the Court directs otherwise.

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[440] Submission of the OIPC, pp. 2-3.

[441] Submission of Lawpro, pp. 6-7.

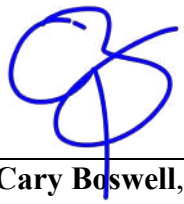
[442] *Ward v. Ward*, [2009] O.J. No. 5159 (S.C.J.).

(2) It is not a violation of subsection (1) if the out-of-court communication is: (a) in writing and copied to all other parties and (b) the only content of the out-of-court communication is to request that the Court release the decision under reserve or to request the Court convene a case conference.

(3) When a proceeding is ongoing, no party to the proceeding and no party's lawyer shall communicate about the proceeding with a judge, associate judge, or Case Management Officer out of Court, directly or indirectly, unless all parties are copied on any written communication or participating in any oral communication.

ENDORSEMENT

The Civil Rules Review Working Group respectfully submits this Report to the Chief Justice of the Superior Court of Justice and the Attorney General of Ontario.



Justice Cary Boswell, Co-Chair

Allison Speigel, Co-Chair

APPENDIX "A"
SUB-GROUP MEMBERS

- The Honourable Justice Peter Lauwers – Court of Appeal for Ontario
- The Honourable Justice Ranjan Agarwal - Ontario Superior Court of Justice
- The Honourable Justice Bruce Fitzpatrick - Ontario Superior Court of Justice
- The Honourable Justice Graeme Mew -Ontario Superior Court of Justice
- The Honourable Justice Fred Myers - Ontario Superior Court of Justice
- The Honourable Justice Mohan Sharma - Ontario Superior Court of Justice
- The Honourable Justice Evelyn ten Cate - Ontario Superior Court of Justice
- The Honourable Gertrude Speigel
- Lisa Belcourt, Partner, Ferguson Deacon Taws LLP
- Andrea Bolieiro, Counsel, Ministry of the Attorney General, Constitutional Law Branch
- Allison Bond, Partner, McCarthy Tetrault LLP
- Blair Botsford, Botsford Law
- Michelle Bouthiette, Senior Manager, CDT, Ontario Superior Court of Justice
- Brian Cameron, Partner, Oatley Vigmond
- Louis Century, Partner, Goldblatt Partners LLP
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- Amandeep Dhillon, Litigation Counsel, Kramer Simaan Dhillon LLP
- Estee Garfin, Deputy Director (A), Ministry of the Attorney General, Constitutional Law Branch
- Andrea Gonsalves, Partner, Stockwoods LLP
- Moya Graham, Partner, McCarthy Tetrault
- Theresa Hartley, McCague Borlack LLP
- Anisah Hassan, Partner, Tyr LLP
- Chris Horkins, Partner, Cassels Brock & Blackwell LLP
- Meghan Hull Jacquin, Partner, Howie Sacks & Henry LLP
- Rosemarie Juginovic, Executive Legal Officer, Ontario Superior Court of Justice
- Professor Gerard Kennedy, University of Alberta, Faculty of Law
- Eva Krajewska, Partner, Heinen Hutchison Robitaille LLP
- Zohar Levy, Partner, Lundy Levy Eski Baum LLP
- Stephen Libin, Associate Counsel, Branch MacMaster LLP
- Sabrina Lucenti, Partner, Dooley Lucenti LLP
- Andrew Max, Partner, Addario Law Group LLP
- Stephen Morrison, SRM ADR Inc.
- Rikin Morzaria, Kinara Law
- Justin Nasseri, Partner, Ross Nasseri LLP
- Daniel Naymark, Naymark Law LLP

- Hayley Pitcher, Deputy Legal Director, Court of Appeal for Ontario
- Dan Rabinowitz, Partner, Miller Thomson LLP
- Helen Richards, Partner, Ross Nasseri LLP
- Ariel Schneider, Counsel, Office of the Public Guardian and Trustee
- Ananthan Sinnadurai, Counsel, Crown Law Office
- Doug Smith, Partner, Borden Ladner Gervais LLP
- Chloe Snider, Partner, Dentons LLP
- Mary-Anne Strong, Partner, Beckett Personal Injury Lawyers
- Laurie Tucker, Partner, Burn Tucker Lachaine PC
- Neil Wilson, Partner, Whelton Hiutin LLP
- Michael Wolkowicz, Partner, Neinstein Personal Injury Lawyers LLP
- Stuart Zacharias, Partner, Lerners LLP

APPENDIX "B"
GLOSSARY OF DEFINED TERMS

"**Application Track**" means the presumptive procedural track applicable to cases permitted or required by statute to proceed by way of application, including those cases referred to in current Rule 14.05(3)(a) to (g.1).

"**Agreed Chronology**" means a jointly prepared chronology of all keys facts upon which the parties agree.

"**Agreed Costs Form**" means a form to be filed at least one day before a motion or Summary Hearing memorializing any agreement reached between the parties regarding the costs of the relevant event.

"**BCRC**" means the Better Civil Rules Collaborative.

"**Case Management Officers**" (or, singular, "**Case Management Officer**") means a proposed position to be filled by vetted senior members of the bar to conduct certain conferences involving resolution discussions, narrowing issues, and timetabling proceedings.

"**CCLA**" means the County of Carleton Law Association.

"**CDL**" means Canadian Defence Lawyers.

"**Claim Form**" means a fillable form that will generate the Notice of Claim.

"**CLHIA**" means Canadian Life & Health Insurance Association.

"**Close of Pleadings**" means the date that the last Statement of Defence is filed or the time for filing pleadings has otherwise expired.

"**CMPA**" means Canadian Medical Protective Association.

"**Community Advocacy**" means Community Advocacy and Legal Centre.

"**Consultation Paper**" means the CRR's Phase Two Consultation Paper, released April 1, 2025, available here.

"**Consultees**" (or, individually, a "**Consultee**") means those parties who were consulted with during the Phase 2 process or the CRR.

"**Costs Presumptions**" means the Partial Indemnity Presumption and the Full Indemnity Presumption.

"**CRR**" means the Civil Rules Review.

"**DC Judge**" (or, plural, "**DC Judges**") means a judicial officer presiding over a Directions Conference.

"**Delay Penalty**" means the penalty payable by a party in breach of an Interim Deadline following notice of default being delivered by the non-breaching party.

"**Directions Conference**" means a conference held before a judicial officer in which directions will be given regarding the conduct of the case, including the vetting of any proposed interlocutory motions.

"**Discovery Dispute Chart**" means the document by which all disputes arising from the discovery and examination processes (not relating to motions) are addressed (see Appendix "E").

"**Discovery Request Chart**" means the form utilized by parties to track requests for documents, undertakings, and refusals (and responses thereto) (see Appendix "D").

"**DRO**" means a Dispute Resolution Officer.

"**Duty to Cooperate**" means the general duty imposed on all users of the civil justice system, to cooperate with one another to further the Goals.

"**Ecojustice**" means Ecojustice Canada Society and the Canadian Environmental Law Association jointly.

"**Extension Rules**" means the rules that govern the limited available extensions to the time for service of a Notice of Claim.

"**Final Defence**" means the last statement of defence that is filed with no indication of an intention to add a subsequent party.

"**Focused Examinations**" means limited oral examinations permitted as part of the discovery process in cases streamed to the Trial Track.

"**FOLA**" means the Federation of Law Associations of Ontario.

"**Full Indemnity Costs**" means 100% of a party's actual legal fees, including those incurred to comply with any applicable PLP, plus 100% of disbursements, plus HST (where applicable).

"**Full Indemnity Presumption**" means the presumption that full indemnity costs will be awarded in certain identified circumstances, such as where a party's pleading is struck in its entirety for being frivolous, vexatious, or an abuse of process.

"**Goals**" means the overarching guiding principles of the proposed Rules.

"**HIROC**" means the Healthcare Insurance Reciprocal of Canada.

"**HLA**" means Hamilton Law Association.

"**Inactive List**" means a list of cases where orders have been made suspending the operation of a presumptive standard timeline for up to a period of one year.

"**Interim Deadline**" means any interlocutory deadline, whether it be Court-ordered, on consent, or prescribed by the Rules.

"**Interlocutory Relief Form**" means a form, replacing the current Notice of Motion, by which a party will notify an opposing party of its intention to seek interlocutory relief.

"**JBD**" (or, plural, "**JBDs**") means either of two joint documents books required to be prepared by parties before the TMC, one containing all documents the parties agree are authentic and admissible for the truth of their contents, and the other containing all documents for which at least one party disputes authenticity or is asserting other grounds of inadmissibility.

"**JDR**" means Judicial Dispute Resolution, a binding form of mixed judicial mediation and adjudication available to parties on consent, provided the circumstances of the case meet specific criteria.

"**Late Materials**" means materials delivered outside the time limits imposed by an Interim Deadline.

"**LawPro**" means the Lawyers' Professional Indemnity Company.

"LSO" means the Law Society of Ontario.

"**Medico-Legal**" means the Medico-Legal Society of Toronto.

"**MLA**" means the Middlesex Law Association.

"**Modified Process Matters**" means Indigenous claims, as well as proceedings to which any of the following statutes apply: the *Bankruptcy and Insolvency Act*, the *Class Proceedings Act*, or the *Construction Act*.

"**New Costs Factors**" means the costs factors currently enumerated in Rule 57.01 plus (i) a party's failure to conduct the litigation in accordance with the Goals; (ii) a party's breach of the Duty to Co-operate; (iii) the advancement of a claim, defence, or interlocutory position without a reasonable basis; and (iv) the public benefit of the litigation.

"**Notice of Claim**" means the sole originating process for all proceedings on the Application Track, Summary Track, and Trial Track.

"**Notice of Default**" means the notice a claimant must provide to a defendant of its default in filing a Statement of Defence, as a pre-requisite to obtaining default judgment.

"**Notice of Directions Conference**" means a document served by a party notifying other parties of a scheduled date for a Directions Conference.

"**Notice of Intent**" means the initial responding pleading required to be filed by all defendants in all Application Track, Summary Track, and Trial Track cases within 20 days of service of a Notice of Claim. Through the Notice of Intent, defendants will indicate whether they intend to (a) defend the claim; (b) submit their rights to the Court but with notice of future hearings in the proceeding; or (c) submit their rights to the Court without requiring notice of future hearings.

"**Notice of Intent to Issue Fourth Party Claim**" means a notice that a third party will be required to serve and file to indicate an intention to issue a fourth party claim.

"**Notice of Intent to Issue Third Party Claim**" means a notice that a defendant will be required to serve and file to indicate an intention to issue a third party claim.

"**Notice of Withdrawal of Counsel**" means the notice served and filed by a lawyer who wishes to remove himself or herself as counsel of record for a party.

"**OBA**" means the Ontario Bar Association.

"**OCL**" means the Office of the Children's Lawyer.

"**OIPC**" means the Osgoode Investor Protection Clinic.

"**One-Year Scheduling Conference**" means the Scheduling Conference scheduled for one year following the Close of Pleadings in Trial Track cases at which a trial date will be set, along with a timetable for the completion of all steps necessary for trial readiness.

"**OPA**" means the Ontario Psychological Association.

"**OSC**" means the Ontario Securities Commission.

"**OTLA**" means the Ontario Trial Lawyers Association.

"**Paper Record+ Process**" means the Summary Hearing process applicable to cases on the Application Track and the Summary Track. The dispositive hearing is paper-based, but with a discretion in the hands of the hearing judge to order limited oral evidence.

"**Partial Indemnity Costs**" means 60% of a party's actual legal fees, including those incurred to comply with any applicable PLP, plus 100% of disbursements, plus HST (where applicable).

"**Partial Indemnity Presumption**" means a codified presumption that the Court will award a successful party its partial indemnity costs against an unsuccessful party.

"**PBO**" means Pro Bono Ontario.

"**PGT**" means the Public Guardian and Trustee.

"**Presumptive Summary Proceeding**" (or, plural, "**Presumptive Summary Proceedings**") means a claim presumptively streamed to the Summary Hearing Track.

"**PLP**" (or, plural, "**PLPs**") means a pre-litigation protocol, which will be in the form of a practice direction mandating certain steps the Court will expect parties to take before commencing most types of claims.

"**Pre-Trial Costs Outline**" means a costs outline to be filed by each party 20 days before the commencement of trial, covering all costs and disbursements incurred from the commencement of the proceedings to the date of submission.

"**Reliance Documents**" means those documents upon which a party intends to rely to prove its case.

"**Report**" means the final policy report of the Working Group of the CRR.

"**Representations Rule**" means the proposed new rule concerning parties' obligations with respect to representations made to the Court through pleadings, written motions, or other documents.

"**Rules**" means the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, under the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

"**SABA**" means the South Asian Bar Association.

"**Scheduling Conference**" means a summary conference held before a judicial officer, principally to address scheduling or timetabling issues and includes the One-Year Scheduling Conference.

"**Summary Hearing**" means the dispositive hearing conducted in Application Track and Summary Track cases, following the Paper Record+ process.

"**Summary Track**" means the procedural track that culminates in a Summary Hearing.

"**TAS**" means The Advocates Society.

"**Three-Party Claim**" means a claim involving only claimant(s), defendant(s), and third part(ies).

"**TLA**" means the Toronto Law Association.

"**TMC**" (or, plural, "**TMCs**") means the trial management conference held in Trial Track cases shortly before the trial date at which trial management issues are canvassed, including the exchange of chronologies and JBS.

"**Trial Track**" means the procedural track that culminates in a conventional trial.

"**Two-Party Claim**" means a claim involving only claimant(s) and defendant(s).

"**Wagg Motion**" means a third-party disclosure motion brought pursuant to existing Rule 30.10 seeking a Crown disclosure brief, including police records, involving an incident relating to the subject matter of the litigation.

"**Water Works Association**" means the Ontario Water Works Association Construction Committee.

"**Williston Committee**" means the Civil Procedure Revision Committee initiated in 1975 and led by Walter B. Williston, Q.C.

"**Woolf Reforms**" means the civil justice reforms introduced in England and Wales in 1999 following the report of The Right Honourable the Lord Woolf.

"**Working Group**" means the group of fourteen individuals drawn from the bar, bench, and academia, to identify issues and develop proposals for the reform of the Rules to make civil court proceedings more efficient, affordable, and accessible.

"**Written Submission**" means a brief document (of ten pages or less) supporting an Interlocutory Relief Form, which sets out the evidence and legal argument on which a party intends to rely at a Directions Conference initiated by a party seeking interlocutory relief.

APPENDIX "C"
EXTRA-JURISDICTIONAL RESEARCH

The Working Group conducted extensive consultations with judges and lawyers in Ontario, other Canadian provinces, and jurisdictions outside of Canada including England, Australia, New Zealand, and Singapore. We also consulted arbitrators with extensive experience in Ontario as well as under various international arbitration rules. In addition, we conducted research concerning the civil process rules in several jurisdictions that included British Columbia, Alberta, Manitoba, Nova Scotia, New York State, Texas, the Cayman Islands, and Mauritius.

The core reforms that we are proposing involve a transformation of the discovery process, both documentary and oral. Their design borrows significantly from aspects of civil justice process models used successfully in jurisdictions that include England and Wales, Australia, New Zealand, and Singapore, as well as in arbitrations, both within Ontario and internationally.

As many Consultees observed, caution is warranted in adopting process models from other jurisdictions in the absence of detailed information about their litigants, court resourcing, and litigation cultures.[1] At the same time, we have aimed to design an alternative litigation model for Ontario that offers a substantive, streamlined approach without being experimental.

In the result, we are proposing to retain certain aspects of our existing process model, with modifications, and to adopt certain aspects of other jurisdictions' process models that have proven effective in reducing costs and delays. We are not proposing to adopt any other jurisdiction's process model in totality. Instead, we identified the elements of successful models that could help us meet our mandate and now propose a hybrid model, tailored to Ontario, that we believe will best serve the diverse litigants that appear before the Superior Court of Justice.

The principal adaptation we borrowed from other jurisdictions is the up-front evidence model. To provide some perspective on the use of that model in other jurisdictions and contexts, we will briefly review the civil justice systems of England and Wales, New South Wales Australia, New Zealand, and Singapore. We will also briefly describe the International Bar Association's Rules on the Taking of Evidence in International Arbitrations and the Arbitration Rules of the ADR Institute of Canada. Before doing so, however, we will take a moment to comment on recent civil justice reforms in a jurisdiction closer to home: Manitoba.

[1] See, for example, the submission of Dr. King, p. 1.

A. MANITOBA

On January 1, 2018, significant amendments were introduced to Manitoba's Court of King's Bench Rules that ushered in a one-judge model for civil cases proceeding in that court. Four major changes were introduced:

(i) Active case management, where the same judge manages all interlocutory proceedings, conducts all pre-trial conferences, and presides over the trial;

(ii) Early scheduling of trial dates. In particular, trials are scheduled at the first case conference and targeted within 18 months. Adjournments are rarely granted and must be obtained from the Chief Justice or Associate Chief Justice;

(iii) Availability of judicially assisted dispute resolution, together with the opportunity to obtain a "neutral evaluation" of the case from a judge; and

(iv) The requirement that a pre-hearing conference occur before a summary judgment motion may proceed.

We consulted with Chief Justice Glenn D. Joyal, Associate Chief Justice Shane I. Perlmutter, and Justice John Menzies (now retired) about the Manitoba experience with the model. Each of them praised the model and noted that it has eliminated not only the Court's backlogs for motions and trials, but also the motions culture.

Judges hear case conferences each morning at 9:00 a.m. Some will also schedule case conferences during the lunch hour or at the end of the day. While this represents a new demand on judges' time, the *quid pro quo*, according to Justice Menzies, is that they now rarely hear contested motions.

B. ENGLAND AND WALES

Achieving a functional understanding of the civil justice system in England and Wales is a challenge for a foreign observer. The basic hierarchical structure of their system is straightforward enough. At the bottom of the pyramid are the County Courts. Next is the High Court, followed by the Court of Appeal and the Supreme Court.

The High Court, however, is comprised of the King's Bench Division, the Chancery Division, and the Family Division. The King's Bench Civil List handles claims for personal injury, professional negligence, nuisance, and breach of contract, among others. The Business and Property Courts have both King's Bench and Chancery Divisions. In turn those divisions comprise several speciality courts including the Commercial Court, the Admiralty Court, the Technology and Construction Court, the Financial List, the Business List, the Insolvency and Companies List, the Competition List, the Intellectual Property List, the Revenue List, and the Property, Trusts, and Probate Court.

Litigation conducted in the County and High Courts of England and Wales is governed by the Civil Procedure Rules[2] (the "**CPR**"). That said, the CPR are augmented with a substantial number of practice directions outlining additional procedural guidelines both generally and with respect to the functioning of the various specialty courts. The following comments relate, for the most part, to rules of general application.

The CPR came into effect in 1999 following the seminal reform work of the Right Honourable The Lord Woolf, which led to the *Access to Justice Final Report* in July 1996. The Woolf reforms sought to achieve the following:

- The avoidance of litigation whenever possible;
- Less adversarial and more co-operative litigation;
- Less complexity;
- Decreased delay;
- Greater affordability, predictability, and proportionality;
- Increased equality between parties of unequal means; and
- Increased case management.

The CPR provides for early case management and the streaming of cases at an early case conference conducted shortly after the close of pleadings. Based on questionnaires completed by the parties, cases are assigned to one of four streams: small claims track, fast track, intermediate track, and multi-track.[3]

In intermediate and multitrack claims, parties must file, at least 14 days before the initial case management conference, a report that briefly describes what documents exist or may exist that are or may be relevant to the matters in issue in the case, as well as the custodians of the documents. Each party must also estimate the cost of giving standard disclosure in the case. At least seven days before the conference, the parties must discuss and attempt to agree on a proposal for disclosure that meets the CPR's overriding objective, which is to deal with cases justly and at a proportionate cost.[4]

At the initial case conference, the court will make an order regarding disclosure. The court may dispense with disclosure in an appropriate case, or it may make an order for standard disclosure or any other order that the court considers appropriate.

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[2] *Civil Procedure Rules 1998* (U.K.), SI 1998 No 3132 (L 17).

[3] Broadly speaking, and subject to numerous exceptions: the small claims track is applicable to cases up to £10,000; the fast track is applicable to cases between £10,000 and £25,000; the intermediate track is applicable to cases between £25,000 and £100,000; and multi-track cases are everything else. *Ibid* at 26.9.

[4] *Ibid* at 31.5.

A standard disclosure order requires parties to disclose those documents on which the party relies, documents required to be disclosed by any applicable practice direction, and documents which may adversely affect its or another party's case.

If a party considers that the disclosure given by another party is inadequate, that party may apply to the court for an order for specific disclosure under CPR 31.12. The court may order the disclosure of particular documents or classes of documents or may order a party to conduct a specific search. In cases proceeding in the Business and Property Courts, Practice Direction 57AD requires parties to provide initial disclosure at the time of pleading. This disclosure must include the key documents on which the party relies in support of its pleading, as well as the key documents necessary for the other parties to understand the claims or defences they are required to meet. Any party may then seek reasonable and proportionate extended disclosure. That extended disclosure may take the form of one or more prescribed models: (a) disclosure confined to known adverse documents; (b) limited disclosure; (c) disclosure of particular documents or narrow classes of documents; (d) narrow search-based disclosure; or (e) wide search-based disclosure.

The CPR adopted a practice that had begun in some of the specialty divisions of the High Court, requiring the exchange of sworn witness statements prior to trial as an element of the disclosure process. There is no fixed schedule for the exchange of witness statements; rather, the court has discretion to determine when witness statements and expert reports must be served. Witness statements stand as evidence-in-chief at trial unless the court orders otherwise. Witnesses are generally restricted in their trial evidence to the four corners of their witness statements, unless the court finds good reason to permit amplification.

Oral examinations for discovery are not permitted. Under CPR 34.8, however, a party may apply to the court for an order for a person to be examined before the hearing takes place, referred to as a deposition. The primary purpose of the rule is to preserve the evidence of a witness whose testimony could not otherwise be obtained at trial, similar to an examination *de bene esse*. In practice, this is rarely done.

C. NEW SOUTH WALES, AUSTRALIA

Like England and Wales, civil litigation in New South Wales ("**NSW**") may proceed in a number of different courts and is governed by a combination of the provisions of the *Civil Procedure Act 2005*, the *Uniform Civil Procedure Rules 2005* ("**UCPR**"), and numerous practice directions (called "**practice notes**").

Cases of $100,000 or less generally proceed in the Local Court. The District Court—the largest trial court in Australia—has jurisdiction over all motor vehicle accident cases, regardless of the amount involved, as well as any other civil case up to a value of $1.25 million. The Supreme Court has unlimited civil jurisdiction and handles claims of $750,000 or more.

The Supreme Court consists of the Common Law Division and the Equity Division. Both have specialized courts (referred to as specialized lists). The Common Law Division encompasses the administrative and industrial law list; the defamation list; the possession list; the professional negligence list; and the general list for all other civil cases. The Equity Division has numerous

specialty lists including, among others, corporations; commercial, arbitration, technology and construction; admiralty; and succession and probate.

Each list is subject to its own practice note(s). The District Court has its own practice notes, most notably Practice Note No. 1, which relates to general case management.

Oral discoveries are not a part of the process model for the courts in NSW. There is a provision in the UCPR (r. 24.3) that allows for the examination of a witness before trial. Our consultations with practitioners in NSW have confirmed that the rule is rarely invoked and, when it is, it is used in a manner akin to an examination *de bene esse*.

Discovery is otherwise made through documentary disclosure, written interrogatories, and the exchange of witness statements.

A party initiates documentary discovery by serving a notice to produce specific documents for inspection.[5] Those documents may be ones referred to in any originating process, pleading, affidavit, or witness statement, as well as any other specific document clearly identified and relevant to a fact in issue. A court order is necessary for production of any documents beyond those specific documents that may be sought through a notice to produce.

Interestingly, in personal injury cases, a party is not required to comply with a notice to produce, except where the notice relates to a document that has been referred to in that party's filed documents. That said, as soon as practical after serving a statement of claim, a plaintiff must provide the defendant(s) with a statement setting out the particulars of the injuries alleged and the claimed damages, accompanied by a prescribed list of documents supporting the claim.

Written interrogatories are available with leave. A request for leave must be accompanied by a copy of the proposed interrogatories. There is no prescribed limit in NSW on the number of interrogatories that may be asked. An order permitting interrogatories will not be granted unless the interrogatories are deemed necessary. None are permitted in personal injury cases unless the court is satisfied that special reasons exist that justify them.

Civil cases in NSW are subject to extensive case management, the nature and scope of which are list-specific and generally governed by practice notes, which vary considerably. Given the extent of case management, the particular processes utilized in any given case tend to be somewhat bespoke. The extent of documentary disclosure, and the timing of the delivery of witness statements, for instance, may vary according to the needs of the case.

By way of example, the commercial list of the Equity Division of the Supreme Court (the rough equivalent of the Commercial Court in Toronto) has a practice note[6] that establishes unique procedures in that court. Pleadings are largely replaced by "List Statements" in which the litigants set out, in a relatively informal way, the nature of the dispute and the party's position with respect to the issues in contention. An early case conference is conducted at which directions are given for disclosure, delivery of evidence (including witness statements), and other steps intended to achieve

[5] *Uniform Civil Procedure Rules 2005* (NSW) at Part 21, Division 2.

[6] Supreme Court of New South Wales, SC Eq 3 (issued March 26, 2025).

the quickest and least expensive determination of the case. The Chief Judge in Equity, Justice David Hammerschlag, advised us that they aim to finalize cases on the commercial list – even the most complex commercial litigation – within 6 to 9 months.

The NSW model appears to be largely successful in managing delay. The District Court's Annual Review for 2023 noted that 63% of cases proceeding in that court were finalized within 12 months, and 90% within 24 months. The Supreme Court's Operations Review for 2023 noted that 70% of civil cases commenced in the Common Law Division were finalized within 12 months, and 91% were finalized within 24 months. In the Equity Division, 76% of cases were finalized within 12 months and 90% within 24 months.[7]

D. SINGAPORE

According to the World Bank, "Singapore is a high-income economy built on a business-friendly regulatory environment and strong investments in infrastructure, education, healthcare, and public services [and] … is among the world's most competitive economies"[8]

In 2024, Singapore ranked eight out of 142 countries in the World Justice Project civil justice rankings. Its civil justice system handles a broad spectrum of cases, including, but not limited to, contract disputes, fraud, personal injury (including medical negligence), defamation, intellectual property, admiralty, and shipping claims.[9] As a former British colony, much of its legal system—including its civil procedure—is rooted in English law.[10]

Although Singapore is widely recognized for its efficient, transparent and internationally well-regarded legal system,[11] that has not always been the case. In the early 1990s, Singapore's civil justice system was plagued by a significant backlog of cases, with nearly half of all cases taking between five to ten years to resolve. This created a serious obstacle to Singapore's aspirations to become a leading financial hub.[12] Parties and their counsel were largely allowed to control the pace of litigation, while the Court viewed its role primarily as adjudicating disputes rather than providing justice in a timely manner.[13]

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[7] Supreme Court of New South Wales, "2023 Annual Review"; The District Court of New South Wales, "2023 Annual Review".

[8] World Bank Group, "The World Bank in Singapore".

[9] Singapore Courts, "Starting a Claim by Writ of Summons".

[10] Justice Stephen Chong, *Judicial Reform: Reshaping the Civil Justice System in Singapore*, Judicial Conference of the Supreme Courts of the G20 (October 10, 2018).

[11] See, for example, Dentons, "New Courts, New Procedures and Renewed Access To Justice: Key Developments Since 2021 and What To Expect Over the Horizon" (April 19, 2022).

[12] *Supra*, fn. 10.

[13] Waleed Hader Malik, *Judiciary-Led Reforms in Singapore: Framework, Strategies, and Lessons*, (Washington: The International Bank for Reconstruction and Development/The World Bank, 2007), pp. 14-15.

In response, an initial wave of reforms was launched to, among other things, overhaul civil procedure and enhance the efficiency and timeliness of the civil justice system. Reforms included:[14]

(i) Giving the court a more proactive role in case management, including through the introduction of pre-trial conferences to promote early case management;

(ii) Placing greater emphasis on performance measurements such as clearance rates, case durations, and wait times;

(iii) Providing a stricter approach to procedural non-compliance; and

(iv) Setting hearing dates automatically and imposing strict curbs on adjournments.

The reforms were regarded as largely successful. Within a decade, Singapore had cleared its backlog.[15] In a 2024 article, Professor Noel Semple explained that:[16]

> By the end of the … [1990s], the backlog had been eliminated and the average commercial case was being disposed of in fifteen months. 95% of civil cases, in fact, were resolved within 365 days of their statements of claim.
>
> These results were not, apparently, achieved at the expense of substantive or procedural justice. The first World Justice Project Rule of Law Index, issued in 2015, ranked Singapore 9th in the world, ahead of Canada at 15th. In a 1999 survey, 97% of Singaporeans agreed that 'the courts administer justice fairly to all, with 92% describing the system as efficient.'
>
> … Appointing more judges was certainly a factor in Singapore's success. However, at the end of the 1990s Singapore had some of the most efficient courts in the world but only 0.64 judges per 100,000 residents — one of the smallest ratios in the world, according to one comparative study.
>
> Interestingly, if Ontario had only 0.64 judges per 100,000 residents, the province would have fewer than 100 of them in total. In fact, there are over 300 in the Superior Court of Justice alone, plus hundreds more in the Ontario Court of Justice as well as hundreds of tribunal adjudicators. Chief Justice Yong did not shy away from connecting case disposal times to the productivity of judges, court staff, and lawyers.
>
> … Successful reforms from other countries should be studied closely, and Singapore seems a good place to start.

According to Justice Steven Chong, a Justice of the Singapore Court of Appeal, although the first wave of reforms helped to address some of the more problematic aspects of the adversarial system,

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[14] *Supra*, fn 10 and 13.

[15] *Supra*, fn 10.

[16] Noel Semple, *How Singapore Beat Court Delay* (Slaw: June 11, 2024).

they did not fundamentally transform it. The procedural framework remained complex, with substantial time and resources still being consumed by procedural issues that often distracted from the substantive merits of disputes.[17]

These issues lead to the next set of reforms. The Civil Justice Commission ("**CJC**") was created with an objective "to transform, not merely reform, the litigation process by modernizing it, enhancing efficiency and speed of adjudication and maintaining costs at reasonable levels."[18] Its proposals led to the new Rules of Court 2021 ("**ROC 2021**"), which took effect on April 1, 2022 and apply to, among other things "all civil proceedings in the Supreme Court or the State Courts which are commenced on or after 1 April 2022."[19] The Supreme Court includes the General Division of the High Court, which hears civil cases where the claim value exceeds $250,000.[20]

The ROC 2021 aimed to "modernise the litigation process, enhance the efficiency and speed of adjudication, and maintain costs at reasonable levels."[21] They were designed around the following five key ideals: (a) fair access to justice; (b) expeditious proceedings; (c) cost-effective and proportionate work; (d) efficient use of court resources; and (e) fair and practical results suited to the needs of the parties.[22] To achieve these ideals, ROC 2021 places greater emphasis on case management and introduced the following key changes:[23]

(i) Introducing a Single Application Pending Trial to address most interlocutory matters required for the case to proceed efficiently at that stage, thereby replacing the current practice of litigating issues sequentially;

(ii) Exchanging affidavits of evidence-in-chief before, rather than after, document production, to streamline and crystallize the issues in dispute;

(iii) Appointing a single expert through a court-supervised process, replacing the previous practice of each party appointing its own expert;

(iv) Requiring parties to consider amicable resolution of the dispute both before commencing and throughout the course of any action or appeal, thereby replacing the earlier, more formalistic Offer to Settle process with a simpler and more flexible approach; and

(v) Modernising the language used in the rules to enhance accessibility.

As for discovery obligations, ROC 2021 provides that parties are required to produce all documents that the party in question will be relying on, all known adverse documents, and where

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[17] *Supra*, fn 10, at ¶ 9.

[18] *Ibid*, at ¶ 10.

[19] Supreme Court of Singapore, Rules of Court 2021 (see O. 1, r. 2(3)(a)).

[20] Singapore Courts, "Role and Structure of the Courts".

[21] *Ibid*, "General Overview of the New Rules of Court – What is New?"

[22] *Ibid*, s. B; see also *supra*, fn 19 at O. 3, r.1.

[23] *Supra*, fn 11.

applicable, documents that fall within a broader scope of discovery as agreed-upon by the parties or as ordered by the Court.

Singapore has never permitted pre-trial oral examinations akin to examinations for discovery. Pre-trial examinations of a witness—which occur before a judge or registrar—are only allowed in Singapore in limited circumstances, such as when the witness is unlikely or unwilling to attend trial or where the witness's age or health raises a significant risk that they may become incapable of testifying before trial.[24] In practice, they are rarely conducted.

E. NEW ZEALAND

The conduct of litigation in New Zealand is governed by the District Court Rules 2014 (for cases up to $350,000) and the High Court Rules 2016.

New Zealand's civil justice system has traditionally focused on documentary discovery, written evidence served close to trial, and live testimony during hearings. Oral discovery has never been routine or permitted as of right in New Zealand. Neither its High Court Rules 2016, nor its District Court Rules 2014 grant an automatic right to oral examinations outside of court. Oral examinations before trial require court approval and are permitted only in exceptional and specific circumstances,[25] such as when a witness is unavailable for trial (i.e., *de bene esse* evidence), or when early clarification of specific factual matters is necessary for resolving an interlocutory issue.

Both the District Court Rules 2014 and the High Court Rules 2016 currently provide for documentary disclosure in two key phases. First, each party must serve, together with its pleading, a copy of any document referred to in the pleading or relied upon in preparing the pleading that the party intends to use at trial. Second, parties are required to comply with either standard or tailored discovery.

Standard discovery requires a party to produce all documents in its control that it intends to rely upon at trial, as well as all documents in its control that are adverse to that party, that would adversely affect another party, or that would help another party.

Tailored discovery may be ordered at a case management meeting where the interests of justice require more or less discovery than the standard provision contemplates. Tailored discovery orders are presumptive in cases where standard discovery would be disproportionate to the value of the case, where there are allegations of fraud or dishonesty, where it is on consent, or, in High Court cases, the value of the claim exceeds $2.5 million.

The parties are then required to exchange witness statements, which form their evidence-in-chief at trial, according to a timetable fixed by the court at a case management conference.

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[24] *Supra,* fn 19 at O. 11, r. 2 and O. 9, r. 24.

[25] *High Court Rules 2016* (NZ) (LI 2016/225) (as at September 1, 2024) at r. 7.27; *Ibid* at r. 9.17.

The High Court Rules 2016 provide for unlimited written interrogatories, though the court has an obligation to make orders, on application, to prevent unnecessary or oppressive interrogatories.

Prompted by concerns over the affordability, accessibility, and complexity of New Zealand's civil justice system, the New Zealand Rules Committee ("**The Committee**") launched a comprehensive review of their Dispute Tribunal, District Court, and High Court Rules in December 2019.[26]

The Committee's final report, "Improving Access to Civil Justice", was released in November 2022.[27] Among the reforms proposed were the adoption of the up-front evidence model and the limitation of documentary discovery to what is necessary and proportionate to the issues in dispute. Additionally, to minimize duplication and reduce the need for live witness testimony at hearings on basic matters, parties were encouraged to rely on agreed documentary records to establish undisputed facts.

Broad amendments to the High Court Rules 2016 are slated to come into effect on January 1, 2026.[28] They include, among others:

(i) The introduction of a pre-litigation protocol for debt-collection cases;

(ii) The introduction of a general duty to co-operate;

(iii) Enhanced case management;

(iv) The up-front (i.e. shortly after pleadings close) exchange of witness statements and chronologies of important events (before the exchange of documents);

(v) Prescribed requirements for the content of witness statements;

(vi) A provision for "further disclosure" where parties are not satisfied with the reliance and adverse documents provided by an opponent; and

(vii) Pre-trial conferencing ("hot-tubbing") of expert witnesses.

There is an expectation that parties will agree on proportionate disclosure. Cost consequences will be used to reinforce the emphasis on co-operation. Cost sanctions for breaches of the rules regarding proportionality and co-operation will ensure that those rules are more than just aspirational.

One of the most significant, and debated, aspects of the New Zealand reforms was the adjustment in the timing of the delivery of witness statements. Though the exchange of witness statements has long been a feature of the New Zealand discovery model, the reforms move the preparation and exchange of those statements to the front of the proceedings, immediately after the exchange of

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[26] Courts of New Zealand, "Improving Access to Civil Justice — Courts of New Zealand".

[27] Rules Committee, "Improving Access to Civil Justice Report" (November 2022).

[28] *Ibid*. See, in particular, Rules Committee, Drafting Instructions for Changes to the High Court Rules (February 9, 2024).

pleadings. Absent exceptional circumstances, witness statements are to be prepared and exchanged before documentary discovery.

The rationales for the reform include: (a) avoiding evidence being formulated by the legal representatives of the parties in light of the issues of the case; (b) ensuring the evidence is more likely to reflect the witnesses' actual recollection of events; (c) avoiding the mischief of parties constructing their evidence around the discovered documents by requiring them to first commit their case to the witness statements; (d) reducing the prospect of witness statements containing submissions or reciting the contents of documents; and (e) facilitating an earlier and clearer understanding of the case, which promotes earlier resolution and better informs disclosure and other interlocutory orders.[29]

During their consultation period, concerns were expressed that the implementation of an up-front evidence model would front load costs and lead to a proliferation of applications to admit supplementary witness statements. The Committee's view was that these concerns did not outweigh the advantages of the proposed model and noted that similar concerns had been raised in New South Wales and had proven unwarranted.[30] That said, an exception is available where it would be appropriate for statements to be served later, for instance in cases involving fraud, where more extensive disclosure or interrogatories may be appropriate before witness statements are served.[31]

A flowchart detailing the proposed new process model can be found here.

Unlike Ontario and the other jurisdictions with whom we consulted, New Zealand has a comprehensive government scheme for personal injury compensation and, as such, has no personal injury or med-mal litigation.

F. ARBITRATION MODELS

While not strictly "extra-jurisdictional", the Working Group has considered the process models reflected in the International Bar Association's Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**")[32] and the Arbitration Rules of the ADR Institute of Canada (the "**ADRIC Rules**").[33] Both employ an evidence-first model.

The IBA Rules provide that the arbitration tribunal may set timetables for the following:

(i) the exchange of reliance documents;

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[29] *Supra*, fn 27 at ¶¶ 184-190.

[30] *Supra*, fn 28, Rules Committee at ¶ 8.

[31] *Ibid* at ¶ 15.

[32] International Bar Association, *Rules on the Taking of Evidence in International Arbitration* (Adopted December 17, 2020).

[33] ADR Institute of Canada, *Arbitration Rules* (Adopted March 1, 2025).

(ii) exchange of requests to produce specific documents or specific categories of documents;

(iii) witness lists, together with the subject matter of each witness's evidence; and

(iv) affirmed witness statements from each witness from whom evidence is to be tendered at the hearing.

No provision is made for the adverse questioning of witnesses outside of the hearing before the Tribunal.

The parties may agree, or the Tribunal may order, that a witness's affirmed statement constitute his or her evidence-in-chief at the hearing, though discretion exists to permit further oral direct evidence.

Provision is made for the calling of expert evidence, either through party-appointed experts or Tribunal-appointed experts. The Tribunal has the discretion to order that party-appointed experts who have offered opinions on the same or related issues meet and confer and produce a record of the issues on which they agree and disagree.

The presumptive order of presentation of witnesses at a hearing is for fact witnesses to testify for both sides, followed by the presentation of expert evidence.

The ADRIC Rules call for a meeting as soon as practicable after the Tribunal is constituted, at which the arbitration procedure is expected to be set. The parties may agree on the procedure; if they do not, the Tribunal will set it.

Where the Tribunal sets the procedure, the following rules are to be applied, absent agreement to the contrary, unless there is good reason to depart from the default procedure:

(i) The parties must exchange, up front, all the evidence they intend to rely upon in the proceedings. "Evidence" includes all documents upon which they intend to rely, sworn witness statements from all fact witnesses, and reports from all experts;

(ii) Parties are then given the opportunity to seek and obtain relevant documents and information from opposing parties through written requests that are specific and narrow, proportionate, and not privileged;

(iii) Witness statements constitute the witness's evidence-in-chief at the hearing. Experts' reports constitute the experts' evidence-in-chief.

Adverse questioning of witnesses outside of the hearing before the Tribunal is generally prohibited, but a discretion exists to permit it where there is a specific need to question a witness because a party is unable to obtain relevant and material evidence through other means.

G. WORLD JUSTICE PROJECT RULE OF LAW INDEX

1. Civil Justice Score

The World Justice Project ("**WJP**") was founded in 2006 as "a presidential initiative of the American Bar Association."[34] In 2009, it transitioned into an independent non-profit organization. According to its website:[35]

> The World Justice Project Rule of Law Index is the world's leading source for original, independent data on the rule of law. Now covering 142 countries and jurisdictions, the Index relies on more than 214,000 household surveys and 3,500 legal practitioner and expert surveys to measure how the rule of law is experienced and perceived worldwide. Published annually since 2009 and subject to a rigorous methodology, the Index is used by governments, multilateral organizations, businesses, academia, media, and civil society organizations around the world to assess and address gaps in the rule of law.

Factor 7 of the *WJP Rule of Law Index* ("Civil Justice") "measures whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system[;] … whether civil justice systems are accessible and affordable as well as free of discrimination, corruption, and improper influence by public officials[;] … whether court proceedings are conducted without unreasonable delays[;] … whether decisions are enforced effectively[; and] … the accessibility, impartiality, and effectiveness of alternative dispute resolution mechanisms."[36]

In 2024, Canada's Civil Justice score left much room for improvement. Specifically, Canada ranked:[37]

- 25th out of 142 countries globally;
- 16th out of 31 countries of its "EU+EFTA+North America regional peers;" and
- 25th out of 41 countries of its "high income peers."

In 2024, Singapore, New Zealand, Australia, and the United Kingdom all outperformed Canada in this ranking.[38] The United States, by contrast, ranked lower:[39]

The same trends have persisted since 2015, the first year for which WJP data is available.

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[34] World Justice Project, "About Us".

[35] World Justice Project, "The Global Rule of Law Recession Continues, But Some Progress Emerges" (October 23, 2025).

[36] World Justice Project, "Civil Justice".

[37] World Justice Project, "Canada: Civil Justice".

[38] *Ibid.*

[39] World Justice Project, "United States: Civil Justice".

The chart attached as **Schedule "1"** summarizes the Civil Justice score for each of Singapore, New Zealand, Australia, the United Kingdom, Canada, and the United States from 2020 to 2024.

2. Sub-Factors of Civil Justice Score

The Civil Justice Score is comprised of seven sub-factors, three of which are of particular importance to the CRR and shown in bold below:

- **7.1 – people can access and afford civil justice**
- 7.2 – civil justice is free of discrimination
- 7.3 – civil justice is free of corruption
- 7.4 – civil justice is free of improper government influence
- **7.5 – civil justice is not subject to unreasonable delay**
- **7.6 – civil justice is effectively enforced**
- 7.7 – alternative dispute resolution mechanics are accessible, impartial, and effective

7.1 – People can access and afford civil justice

With respect to this subfactor, in 2024, Canada ranked 74th out of 142 countries globally, 29th out of 31 in its regional group, and 44th out of 47 among its high-income peers.[40]

Singapore, New Zealand, and Australia outperformed Canada.[41] The United Kingdom ranked somewhat lower than Canada, while the United States ranked much lower—coming in 107th out of 142 countries globally; 31st out of 31 countries in its regional group (i.e. dead last), and 47th out of 47 among its "high income peers" (i.e. dead last).[42]

The chart attached as **Schedule "2"** summarizes the 7.1 subfactor scores for Singapore, New Zealand, Australia, the United Kingdom, Canada, and the United States from 2020 to 2024.

7.5 – Civil justice is not subject to unreasonable delay

With respect to this subfactor, in 2024, Canada ranked 62nd out of 142 countries globally, 19th out of 31 in its regional group, and 29th out of 47 among its high-income peers.[43]

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[40] World Justice Project, *supra*, fn 37.

[41] *Ibid.*

[42] World Justice Project, *supra*, fn 39.

[43] World Justice Project, *supra*, fn 37.

Singapore, New Zealand, Australia, the United Kingdom, and the United States all outperformed Canada.[44]

The chart attached as **Schedule "3"** summarizes the 7.5 subfactor scores for Singapore, New Zealand, Australia, the United Kingdom, Canada, and the United States from 2020 to 2024.

7.6 – Civil justice is effectively enforced

With respect to this subfactor, Canada ranked 18th out of 142 countries globally, 13th out of 31 in its regional group, and 17th out of 47 among its high-income peers.[45]

Singapore and Australia outperformed Canada. The United States, United Kingdom, and New Zealand by contrast, ranked lower than Canada.[46]

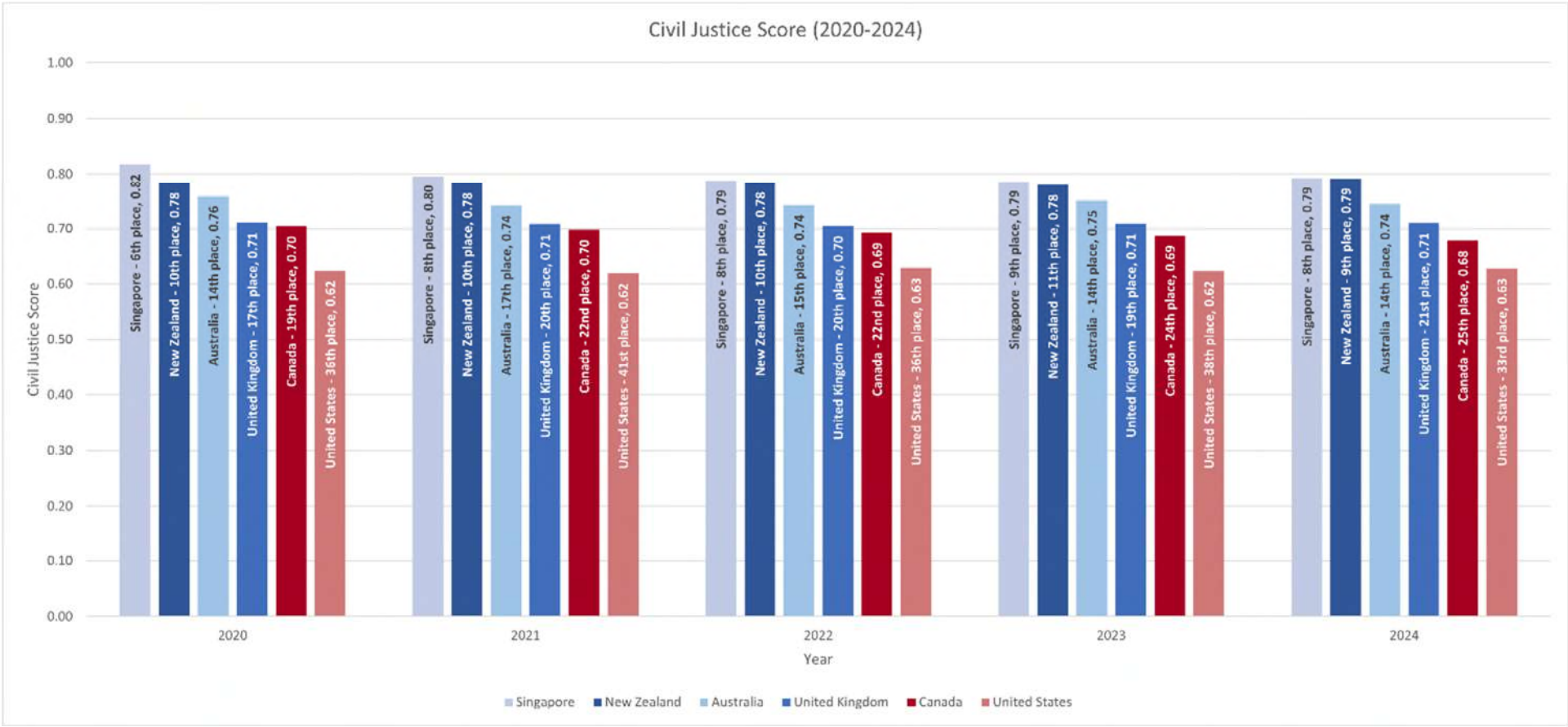
The chart attached as **Schedule "4"** summarizes the 7.6 subfactor scores for Singapore, New Zealand, Australia, the United Kingdom, Canada, and the United States from 2020 to 2024.

[44] *Ibid.*

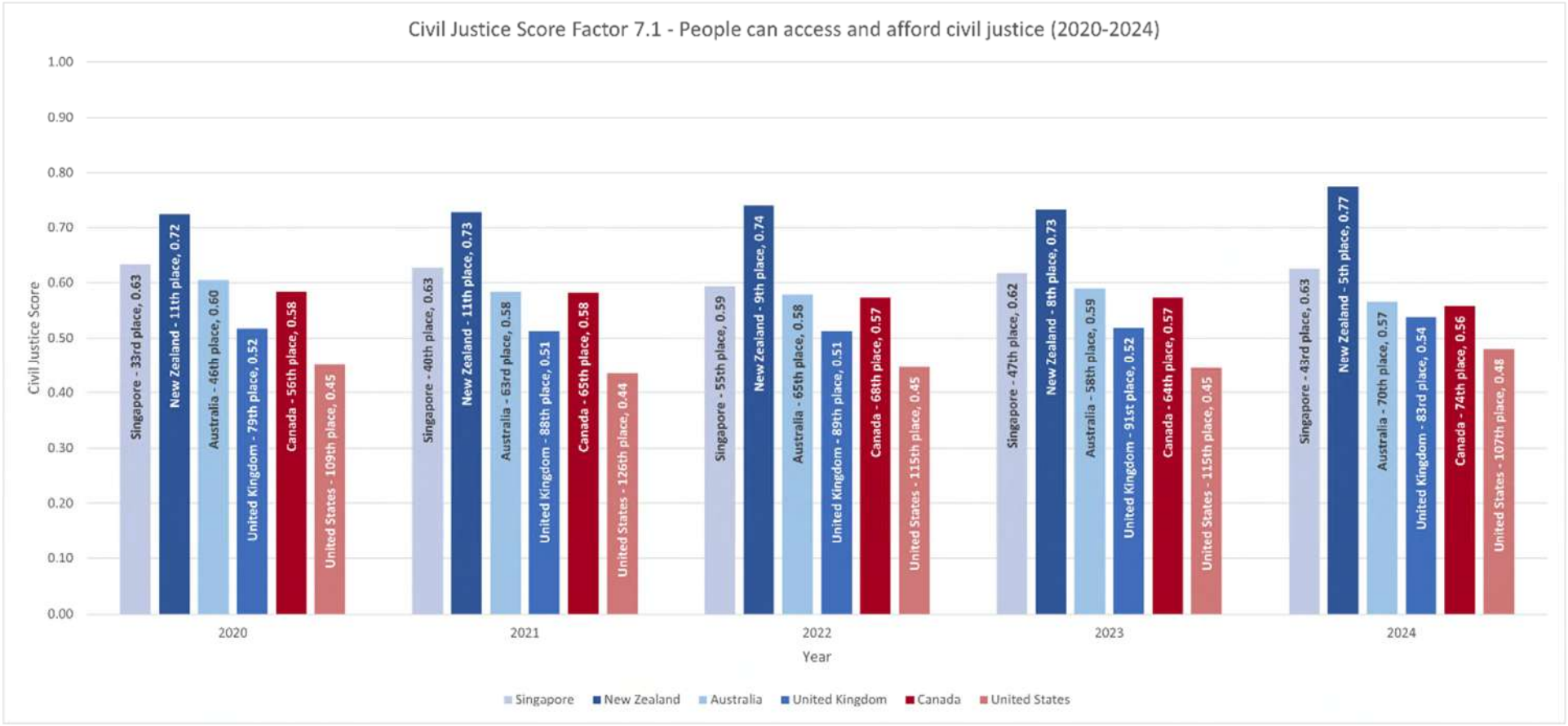
[45] *Ibid.*

[46] *Ibid.*

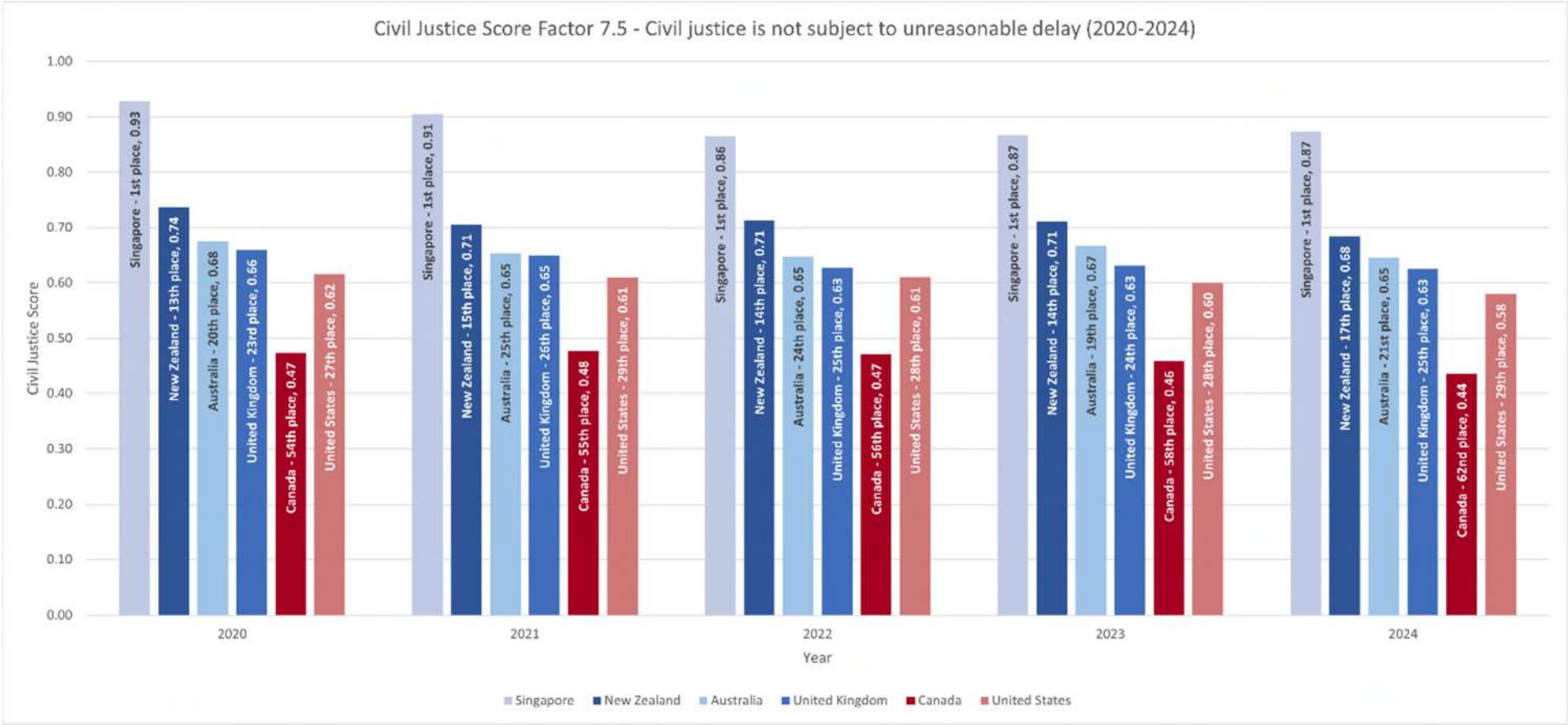
Schedule "1"


Civil Justice Score (2020-2024)
Civil Justice Score
1.00
0.90
0.80
0.70
0.60
0.50
0.40
0.30
0.20
0.10
0.00
Singapore - 6th place, 0.82
New Zealand - 10th place, 0.78
Australia - 14th place, 0.76
United Kingdom - 17th place, 0.71
Canada - 19th place, 0.70
United States - 36th place, 0.62
Singapore - 8th place, 0.80
New Zealand - 10th place, 0.78
Australia - 17th place, 0.74
United Kingdom - 20th place, 0.71
Canada - 22nd place, 0.70
United States - 41st place, 0.62
Singapore - 8th place, 0.79
New Zealand - 10th place, 0.78
Australia - 15th place, 0.74
United Kingdom - 20th place, 0.70
Canada - 22nd place, 0.69
United States - 36th place, 0.63
Singapore - 9th place, 0.79
New Zealand - 11th place, 0.78
Australia - 14th place, 0.75
United Kingdom - 19th place, 0.71
Canada - 24th place, 0.69
United States - 38th place, 0.62
Singapore - 8th place, 0.79
New Zealand - 9th place, 0.79
Australia - 14th place, 0.74
United Kingdom - 21st place, 0.71
Canada - 25th place, 0.68
United States - 33rd place, 0.63
2020
2021
2022
2023
2024
Year
Singapore
New Zealand
Australia
United Kingdom
Canada
United States

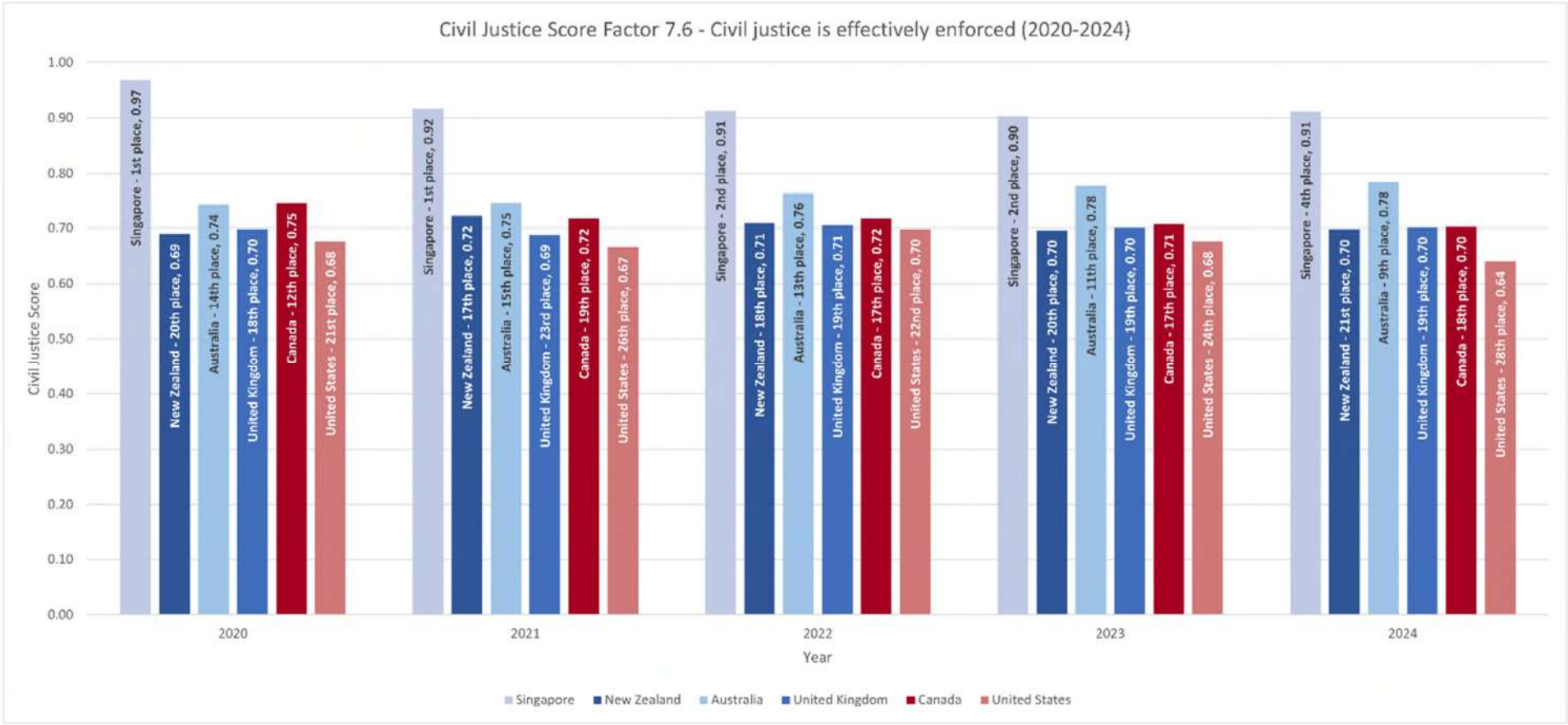
Schedule "2"


Civil Justice Score Factor 7.1 - People can access and afford civil justice (2020-2024)
Civil Justice Score
1.00
0.90
0.80
0.70
0.60
0.50
0.40
0.30
0.20
0.10
0.00
Singapore - 33rd place, 0.63
New Zealand - 11th place, 0.72
Australia - 46th place, 0.60
United Kingdom - 79th place, 0.52
Canada - 56th place, 0.58
United States - 109th place, 0.45
Singapore - 40th place, 0.63
New Zealand - 11th place, 0.73
Australia - 63rd place, 0.58
United Kingdom - 88th place, 0.51
Canada - 65th place, 0.58
United States - 126th place, 0.44
Singapore - 55th place, 0.59
New Zealand - 9th place, 0.74
Australia - 65th place, 0.58
United Kingdom - 89th place, 0.51
Canada - 68th place, 0.57
United States - 115th place, 0.45
Singapore - 47th place, 0.62
New Zealand - 8th place, 0.73
Australia - 58th place, 0.59
United Kingdom - 91st place, 0.52
Canada - 64th place, 0.57
United States - 115th place, 0.45
Singapore - 43rd place, 0.63
New Zealand - 5th place, 0.77
Australia - 70th place, 0.57
United Kingdom - 83rd place, 0.54
Canada - 74th place, 0.56
United States - 107th place, 0.48
2020
2021
2022
2023
2024
Year
Singapore
New Zealand
Australia
United Kingdom
Canada
United States

Schedule "3"


Civil Justice Score Factor 7.5 - Civil justice is not subject to unreasonable delay (2020-2024)
Civil Justice Score
1.00
0.90
0.80
0.70
0.60
0.50
0.40
0.30
0.20
0.10
0.00
Singapore - 1st place, 0.93
New Zealand - 13th place, 0.74
Australia - 20th place, 0.68
United Kingdom - 23rd place, 0.66
Canada - 54th place, 0.47
United States - 27th place, 0.62
Singapore - 1st place, 0.91
New Zealand - 15th place, 0.71
Australia - 25th place, 0.65
United Kingdom - 26th place, 0.65
Canada - 55th place, 0.48
United States - 29th place, 0.61
Singapore - 1st place, 0.86
New Zealand - 14th place, 0.71
Australia - 24th place, 0.65
United Kingdom - 25th place, 0.63
Canada - 56th place, 0.47
United States - 28th place, 0.61
Singapore - 1st place, 0.87
New Zealand - 14th place, 0.71
Australia - 19th place, 0.67
United Kingdom - 24th place, 0.63
Canada - 58th place, 0.46
United States - 28th place, 0.60
Singapore - 1st place, 0.87
New Zealand - 17th place, 0.68
Australia - 21st place, 0.65
United Kingdom - 25th place, 0.63
Canada - 62nd place, 0.44
United States - 29th place, 0.58
2020
2021
2022
2023
2024
Year
Singapore
New Zealand
Australia
United Kingdom
Canada
United States

Schedule "4"


Civil Justice Score Factor 7.6 - Civil justice is effectively enforced (2020-2024)
Civil Justice Score
1.00
0.90
0.80
0.70
0.60
0.50
0.40
0.30
0.20
0.10
0.00
Singapore - 1st place, 0.97
New Zealand - 20th place, 0.69
Australia - 14th place, 0.74
United Kingdom - 18th place, 0.70
Canada - 12th place, 0.75
United States - 21st place, 0.68
Singapore - 1st place, 0.92
New Zealand - 17th place, 0.72
Australia - 15th place, 0.75
United Kingdom - 23rd place, 0.69
Canada - 19th place, 0.72
United States - 26th place, 0.67
Singapore - 2nd place, 0.91
New Zealand - 18th place, 0.71
Australia - 13th place, 0.76
United Kingdom - 19th place, 0.71
Canada - 17th place, 0.72
United States - 22nd place, 0.70
Singapore - 2nd place, 0.90
New Zealand - 20th place, 0.70
Australia - 11th place, 0.78
United Kingdom - 19th place, 0.70
Canada - 17th place, 0.71
United States - 24th place, 0.68
Singapore - 4th place, 0.91
New Zealand - 21st place, 0.70
Australia - 9th place, 0.78
United Kingdom - 19th place, 0.70
Canada - 18th place, 0.70
United States - 28th place, 0.64
2020
2021
2022
2023
2024
Year
Singapore
New Zealand
Australia
United Kingdom
Canada
United States

APPENDIX "D"
DISCOVERY REQUEST CHART

A. Requests for Documents Served on _____(date)

No.	Document or Category of Documents Requested	Response
1.		

B. Written Interrogatories Served on _____(date)

No.	Question	Answer
1.		

C. Undertakings Given During Examination of _____(name) on _____(date)

No.	Page Number	Question Number	Question asked	Answer
1.				

D. Refusals Given During Examination of _____(name) on _____(date)

No.	Page Number	Question Number	Question asked	Reason for Refusal
1.				

APPENDIX "E"
DISCOVERY DISPUTE CHART

I. PARTIES SUBMISSIONS

A. Requests for Documents Served on _____(date)

No.	Document or Category of Documents Requested	Response	Rationale for Request	Responding Party's Basis for Opposition
1.				

B. Written Interrogatories Served on _____(date)

No.	Written Interrogatory	Response	Rationale for Request	Responding Party's Basis for Opposition
1.				

C. Undertakings Given During Examination of _____(name) on _____(date)

No.	Page Number	Question Number	Question asked	Answer	Requesting Party's Grounds for Challenging the Answer	Responding Party's Grounds for Defending the Answer
1.						

D. Refusals Given During Examination of _____(name) on _____(date)

No.	Page Number	Question Number	Question asked	Reason for Refusal	Requesting Party's Basis for Requiring an Answer	Responding Party's Basis for Refusal to Answer
1.						

II. COURT'S DECISION

A. Requests for Documents Served on _____(date)

No.	Document or Category of Documents Requested	Court's Decision
1.		☐ The request is granted because it complies with Rule XXX ☐ The request is dismissed because: ☐ Requested documents are not relevant and material ☐ Request is not focused and specific ☐ Requested documents are in the possession, control, or power of the requesting party ☐ Requested documents are not in the possession, control, or power of the requested party ☐ The request is not consistent with the Goals ☐ The requested documents are privileged for the reasons that are attached to this schedule.

		☐ Other reasons for dismissing the request:

B. Written Interrogatories Served on _____(date)

No.	Written Interrogatory	Court's Decision
1.		☐ The request is granted because it complies with Rule XXX ☐ The request is dismissed because: ☐ Requested information is not relevant and material ☐ Request is not focused and specific ☐ Requested information is in the possession, control, or power of the requesting party ☐ Requested information is not in the possession, control, or power of the requested party ☐ The request is not consistent with the Goals ☐ Requested information is privileged for the reasons that are attached to this schedule. ☐ Other reasons for dismissing the request:

C. Undertakings Given During Examination of _____(name) on _____(date)

No.	Page Number	Question Number	Question asked	Court's Decision
1.				☐ The undertaking was not properly answered and must be answered. ☐ The request is dismissed because the undertaking was properly answered.

D. Refusals Given During Examination of _____(name) on _____(date)

No.	Page Number	Question Number	Question asked	Court's Decision
1.				☐ The request is granted because it complies with Rule XXX ☐ The request is dismissed because: ☐ Requested documents/information are not relevant and material ☐ Request is not focused and specific ☐ Requested documents/information are in the possession, control, or power of the requesting party ☐ Requested documents/information are not in the possession, control, or power of the requested party ☐ The request is not consistent with the Goals ☐ The requested documents/information are privileged for the reasons that are attached to this schedule. ☐ Other reasons for dismissing the request:

COSTS: _____shall pay $_____ in costs to _____ forthwith.