Ontario Superior Court of Justice

Ministry of the Attorney General

CIVIL RULES REVIEW

PHASE 2 CONSULTATION PAPER

April 2025

TABLE OF CONTENTS

PART 1: INTRODUCTION

A. THE NEED FOR REFORM

The importance of a robust civil justice system cannot be overstated. As Professor Dame Hazel Genn aptly described in her 2008 Hamlyn Lecture, *Judging Civil Justice*:[1]

> The machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured, and for the power of government to be scrutinized and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly re-affirm norms and behavioural standards for private citizens, businesses, and public bodies.

The ability of individuals to have their civil rights upheld and to receive compensation for violations of those rights, through an impartial arbiter in a fair and public process, is a fundamental human right.[2] As is the right to the equal protection and benefit of the law.[3]

It is, thus, concerning that Ontario's civil justice system was recently described in the Globe and Mail as "arcane, expensive, and plagued by delay – in short…in crisis."[4] What is even more troubling is that this description is hard to dispute.

A decade ago, in *Hyrniak v. Mauldin*,[5] the Supreme Court concluded that ordinary Canadians cannot afford to access the civil justice system. There is consensus that the problem of access to timely and affordable civil justice has only gotten worse since *Hyrniak*, particularly following the Supreme Court's decision in *R. v. Jordan*.[6] The constitutional timelines for criminal trials articulated in *Jordan* resulted in an inevitable marshalling of the Court's resources to ensure that

[1] The Hamlyn Lectures are given annually in the U.K. on one legal topic. The quotation referenced was cited in Stephen Clark and Sir Rupert Jackson, *The Reform of Civil Justice*, 2nd Ed. (London: Sweet and Maxwell, 2018), at ¶ 1-010.

[2] *Universal Declaration of Human Rights,* GA Res 217A (1948), art 10.

[3] *Charter of Rights and Freedoms*, s. 15.

[4] Wilson, M. and Lim, P. (2024, October 14). We Can Fix Ontario Civil-Justice System Without Breaking the Bank. The Globe and Mail.

[5] *Hryniak v. Mauldin*, 2014 SCC 7.

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

those timelines could be met. The already strained resources available to hear and dispose of civil matters became even further taxed, resulting in considerable delays for many scheduled events in many centres across the province.

Delays are only part of the problem. The cost of litigation is prohibitive for many Ontarians. Even those who can afford to access the civil justice system are confronted with the troubling reality of excessive delays and costs, meaning that many civil cases are simply not economically rational to pursue. As a result, litigants are increasingly turning to private arbitrations to resolve their disputes. Others are simply unable to adequately access the system.

Inequality of access to civil justice creates the risk 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 not able to access the system are less likely to believe that courts will fairly and justly resolve disputes involving them or people like them. Similarly, confidence in this province as an economic marketplace is also diminished when individuals and businesses are unsure whether their rights can be enforced in a fair, timely, and cost-effective manner.

Our civil justice system, in its present form, is indeed in crisis. In fact, access to justice has been at a crisis point for decades. The Civil Justice Review conducted in 1995 observed then that the civil justice system was in a crisis situation due to unacceptable delays and mounting costs.[7] The crisis has only deepened since then and may now fairly be described as existential. Absent impactful reforms, our civil justice system risks becoming irrelevant.

Some argue that what ails the system is not the process that governs it, but insufficient resources. While additional resources would undoubtedly help alleviate delays in the system, they would do little to reduce the overall cost of litigation. Regardless, the concept of additional resources is not a viable solution because, as the saying goes, the cavalry is not coming. In the result, we must either accept the unacceptable status quo or, having regard to our existing resources, critically examine our current processes for managing civil disputes to improve their efficiency and reduce their delays and costs. The Attorney General and the Chief Justice of the Superior Court have directed us to do the latter.

Over a year of consultations, we have found that our current process model is working reasonably well for a select few. Naturally, those parties are resistant to change. For many others, however, the process is broken. As former Chief Justice Strathy observed in his remarks at the opening of Ontario's Courts in 2014, "our justice system has become so cumbersome and expensive that it is inaccessible to many of our own citizens."[8] To echo Chief Justice Wagner, we believe the time has come to focus on "getting good justice for everyone, not perfect justice for a lucky few."[9]

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[7] Civil Justice Review, First Report, 1995, page 3.

[8] Opening of the Courts of Ontario for 2014 – Remarks of the Honourable George R. Strathy, Chief Justice of Ontario, September 9, 2014, https://www.ontariocourts.ca/coa/about-the-court/archives/opening-of-the-courts-of-ontario-for-2014/.

[9] 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. Available online here.

While our complex web of existing rules is based on the belief that extensive rules make the process fairer, the reality is that many litigants struggle to understand the process, making it seem no fairer to those who matter most. More concerningly, what litigants ultimately understand about our current process model are its practical effects: namely, costs and delays, neither of which seems fair and both of which give rise to frustration with and cynicism about the civil justice system.

It is axiomatic that litigants enter the civil justice system seeking to resolve substantive disputes. The process they must navigate, however, has become so procedurally complex that they end up spending years and significant sums of money fighting over the process, rather than the substantive dispute itself. As time passes and their resources are drained, they are left exhausted, having spent years, significant sums of money, and considerable emotional energy on procedural battles. Eventually, they are warned that it only makes sense to settle, lest they incur more time, cost, and stress. A settlement driven primarily by the need to stop the drain of resources is not rooted in justice. Rather, it is an implicit acknowledgement that our justice system is, in many ways, incapable of resolving substantive disputes in a fair and meaningful way.

In her Opening Address to the Bencher's Retreat in 1999, Justice Rosalie Abella, a former Supreme Court judge, made remarks that perfectly describe the problem:[10]

> We 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. It may be time – again – to rethink how civil disputes are resolved.
>
> For a start, we need to sever the philosophies of dispute resolution in the civil and criminal justice systems. The dispute in criminal law is between an individual and the state. Process protects that individual's presumption of innocence from the overwhelming power of the state, and necessarily so. But civil justice is usually a dispute between two private parties. Can we honestly say that the fair resolution of such a dispute requires several years and resort to hundreds of rules? It would be worth asking a client who has just lost a lengthy trial how good he or she feels about having had the benefit of an elaborate procedural journey. Would it really surprise anyone if we learned from such a client that the result was of more interest than the process, and that all he or she wanted was a fair chance to be heard? People want their day in court, not their years …
>
> The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law.

[10] A fully copy of her remarks, all of which are remarkably relevant, can be found here: https://www.ontariocourts.ca/coa/about-the-court/archives/the-law-society-of-upper-canada-professionalism-revisited/

> Let's put [Roscoe] Pound's almost 100-year old observation [that uncertainty, delay, and expense are direct results of the backwardness of our procedure] in historical context. The horse and buggy of 1906 have been replaced by cars and planes; morphine for medical surgery has been replaced by anaesthetics, and the surgical knife by the laser; caveat emptor has been replaced by consumer law; child labour has been replaced, period; a whole network of social services and systems is in place to replace the luck of the draw that used to characterize employment relationships; the phonograph has been replaced by the compact disc player; the hegemony of the majority has been replaced by the assertive diversity of minorities; and adoring wives have been replaced by exhausted ones.
>
> And yet, with all these profound changes in how we travel, live, govern, and think, none of which would have been possible without fundamental experimentation and reform, we still conduct civil trials almost exactly the same way as we did in 1906. Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Could a doctor from 1906 feel the same way in an operating room?
>
> 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?
>
> We cannot keep telling the public that this increasingly incomprehensible, complicated process is in their interests and for their benefit, because they are not buying it any more. If our defensive arguments make no sense to the public, how much sense can they be said to make, period.
>
> The public does not believe it should take years to decide where their children should live, whether their employer should have fired them, or whether their accident was compensable. Maybe for a constitutional case, but decidedly not for the resolution of a dispute between two private parties.

Reform is not just long overdue—it demands sweeping, comprehensive changes to the way we litigate civil claims in this province.

B. THE CIVIL RULES REVIEW

On January 25, 2024, Attorney General Downey and Chief Justice Morawetz launched the Civil Rules Review ("**CRR**"). A Working Group of 14 individuals – drawn from the bar, the bench, and academia – was mandated to identify issues and develop proposals for reforming the Rules of Civil Procedure (the "**Rules**") to make civil court proceedings more efficient, affordable, and accessible.

The CRR involves three phases spanning a two-year period:

(i) Phase 1 was completed in May 2024. Through a process of discussion and targeted consultation, it involved identifying the scope of potential reforms for more in-depth consideration. The Phase 1 report can be found here.

(ii) Phase 2 is ongoing. During it, the Working Group, supported by eight sub-groups, further studied the potential reforms identified in Phase 1. The sub-groups were led by Working Group members and reflected a broad cross-section of civil justice system participants (listed in Appendix "A"). Over the course of Phase 2, we have been developing a new procedural model for civil proceedings commenced in Ontario. That proposed model is the subject of this consultation paper. Public consultation is an important step in the process. The proposals set out in this consultation paper should not be viewed as a *fait accompli*. Following completion of the consultation phase, detailed policy proposals will be prepared for referral to the Attorney General and the Chief Justice for approval.

(iii) Phase 3 will involve refinement, drafting, and implementation of the policy proposals that the Attorney General and Chief Justice have approved.

To be clear, small changes to the existing Rules will not result in the kind of change that the CRR was mandated to deliver. Bold reforms are required. The stakes are high. The system needs to be re-thought from the ground up.

Chief Justice Morawetz envisioned such sweeping change in his Opening of the Court remarks in September 2024:[11]

> [T]he 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.

It is natural, when considering civil justice reform, to seek to achieve perfect procedural fairness in designing or re-designing procedural rules. Perfection, however, can be the enemy of the good. It is certainly the enemy of the pragmatic. The quest for perfect procedural fairness, accessible only to the fortunate few who can afford it, should not come at the expense of timely or cost-effective justice for all. The time has come to recognize that a properly functioning civil justice system – one that works for everyone – does not demand perfection. Rather it demands a system that is accessible, fair, efficient, and economically rational. The attempt to meet these demands – to balance fair and just outcomes with an efficient and affordable process – is the focus of the reforms proposed in this consultation paper.

The proposed reforms set out in this consultation paper have been the subject of substantial debate within the Working Group and the various subgroups. They will undoubtedly be the subject of substantial debate among justice system participants. Differing points of view are not only valued

[11] https://www.ontariocourts.ca/scj/news/speeches/oc/

but are essential to the development and implementation of reforms that will bring about real change and benefit to Ontario's civil justice system. The members of the Working Group are united in the view that substantial change is required. Opinions differ, however, on the best path forward.

There was disagreement within the Working Group in respect of a number of the proposed reforms set out below. As such, the proposals submitted for consultation do not always reflect the unanimous views of the members of the Working Group. The members also participated personally and not on behalf of their firms, employers, or any other organization with which they are affiliated, such that the consultation paper is not intended to reflect the views of those entities.

C. THE PARTICIPANTS

Co-Chairs

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

Project Co-Ordinators

- 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
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- Rebecca Jones, Partner, Lenczner Slaght LLP
- The Honourable Justice Sunil S. Mathai, Ontario Superior Court of Justice
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- Jeremy Opolsky, Partner, Torys LLP
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Sub-Group Members

The reforms outlined in this Consultation Paper were made possible by the efforts, insights, and contributions of numerous talented professionals who assisted the Working Group through various

dedicated sub-groups during the Phase 2 process. The Co-Chairs and the Working Group would like to extend their gratitude to all sub-group members, who are listed on Appendix "A".

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

D. COMMENTS AND SUGGESTIONS

Consultation is a critical part of the Working Group's process. We are not so bold to believe that we have all the answers. Nor can we cover all the various views from across the bar and society. Your feedback is invaluable.

The Working Group invites comments and suggestions on the proposed reforms set out below. Responses are due by **June 16, 2025**, but early submissions would be greatly appreciated. They may be forwarded by email to **Jennifer.Smart@Ontario.ca**. Note that responses provided may be disclosable under the *Freedom of Information and Protection of Privacy Act*[12] in accordance with its provisions.

In considering the proposed reforms, please remember our mandate. We begin with the premise that the status quo is not an option. The current system is **not** working. Minor adjustments will not lead to the meaningful improvements required to ensure our civil justice system survives and thrives.

We understand that change can be daunting and recognize that the proposed reforms represent a significant shift and may provoke strong reactions. We regard many of the proposed reforms as integral components of a comprehensive new system. We encourage you to read this consultation paper in its entirety before forming an opinion on any one part. Understanding the full scope of reforms is crucial to evaluating any individual proposed change. Lastly, we ask you to recognize that identifying problems with the proposals is most helpful if paired with proposed solutions.

[12] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.

PART 2: OVERVIEW

A. OVERVIEW OF THE PROPOSED NEW FRAMEWORK

> *Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system.*
>
> *Hryniak v. Mauldin*, per Karakatsanis J., at para. 2.

In this section, we provide an overview of the new framework we propose for civil justice processes in Ontario. We believe it meets the CRR's mandate to re-think the civil justice system from the ground up and promotes the culture shift that the Supreme Court called for in *Hryniak*.

Concerns about access to justice, runaway costs, and excessive delays in the civil justice system have been steadily growing over a generation. The reasons for the problems plaguing the system are varied and complex. Two that stand out are under-resourcing and what we have identified as a maximalist culture of litigating. We are not able to change the former. Instead, the new framework for civil justice largely focuses on the latter.

The court's fundamental role is to decide a dispute following a hearing on its merits. There are two immutable features to that process: a notice pleading and a hearing. We can make the former more accessible and we can make the latter more efficient. We believe, however, that if we are to meaningfully reduce costs and delay, we must focus on the interlocutory steps that occur between the notice pleading and the hearing, namely discovery and motions practice. We believe these two areas are where the maximalist approach to litigating is most pronounced.

We believe that the current iteration of the Rules permits, if not promotes, a culture of maximalism. By this, we mean that the Rules facilitate the broad drafting of pleadings, which in turn triggers an expansive scope of discovery. They do not require parties to quickly identify and focus on the core issues in dispute. Instead, they allow parties to explore every potential issue, pursue every available procedure, and argue every conceivable angle, often without adequate consideration of proportionality or, at times, even their relevance to resolving the central issues at hand. Finally, they permit parties to bring formal motions to address an almost unlimited variety of perceived infringements of the Rules. Too much time is spent litigating over process instead of substance.

The foregoing comments are not a criticism of the bar. Lawyers are not to be criticized for adhering to the existing Rules or for using them to their advantage in the zealous pursuit of their clients' interests. Instead, our criticism is aimed at the structure of the Rules themselves.

The overarching interpretive principle of the current Rules is found in rule 1.04, which provides that they are to be interpreted to ensure the just, most expeditious and least expensive determination of proceedings on their merits. While that principle is laudable, it is undermined by the balance of the Rules, which have given rise to a culture of maximalism.

Reforms introduced in 2010 codified the concept of proportionality as a guiding principle. That concept, however, has found relatively little purchase in our civil justice system. Instead, the maximalist culture has proven intractable. There are several possible explanations for this, including:

(i) The structure of the Rules makes it all but inevitable. For instance, if a party is entitled to all non-privileged documents relevant to any issue in a broadly-worded pleading, we should expect them to insist on it. Similarly, if they are entitled to oral discovery or to bring motions for every perceived infraction, we should expect that they will do so;

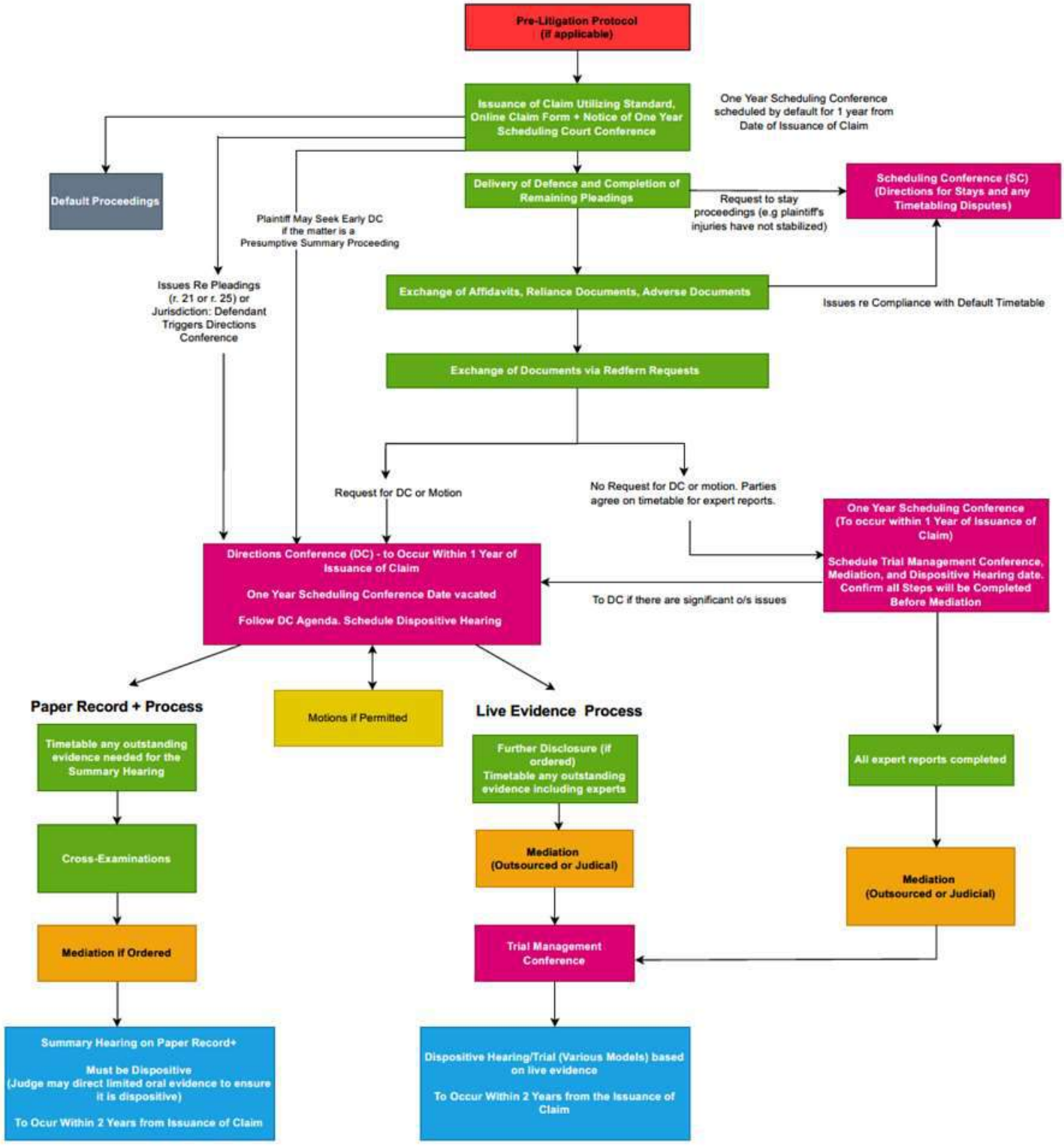
(ii) The intentional use, by some litigants, of existing procedures as a tool of attrition; and,

(iii) Defensive lawyering – that is, the "leave no stone unturned" approach to litigating as a strategy to protect oneself against claims of negligence or criticisms of ineffectiveness.

We believe the maximalist approach is fueled by the model of complete discovery entrenched in the current Rules and reflected in disproportionate interlocutory skirmishing over non-dispositive issues. We have identified these two areas as ones where we believe reforms will be impactful and will reduce costs and delay.

Our proposed reforms aim to strike a practical balance between ensuring litigation is fair, promoting early resolution of disputes, and providing all Ontarians with access to timely and cost-effective civil justice. As described further below, the Working Group proposes a robust, "up-front evidence model" and, flowing from the benefits of that model, considerable change to the scope of discovery. We also envision a significant shift away from the use of motions, currently the primary means of resolving most interlocutory disputes, towards a case conferencing system.

The proposed up-front evidence model is reflected in a process flowchart set out on the following page. The structure may appear a little daunting at first. We will provide a brief overview of it in this section. The balance of the consultation paper will fill in the details.


Pre-Litigation Protocol
(if applicable)
Issuance of Claim Utilizing Standard, Online Claim Form + Notice of One Year Scheduling Court Conference
One Year Scheduling Conference scheduled by default for 1 year from Date of Issuance of Claim
Default Proceedings
Delivery of Defence and Completion of Remaining Pleadings
Request to stay proceedings (e.g plaintiff's injuries have not stabilized)
Scheduling Conference (SC) (Directions for Stays and any Timetabling Disputes)
Plaintiff May Seek Early DC if the matter is a Presumptive Summary Proceeding
Issues Re Pleadings (r. 21 or r. 25) or Jurisdiction: Defendant Triggers Directions Conference
Exchange of Affidavits, Reliance Documents, Adverse Documents
Issues re Compliance with Default Timetable
Exchange of Documents via Redfern Requests
Request for DC or Motion
No Request for DC or motion. Parties agree on timetable for expert reports.
One Year Scheduling Conference (To occur within 1 Year of Issuance of Claim)
Schedule Trial Management Conference, Mediation, and Dispositive Hearing date. Confirm all Steps will be Completed Before Mediation
Directions Conference (DC) - to Occur Within 1 Year of Issuance of Claim
One Year Scheduling Conference Date vacated
Follow DC Agenda. Schedule Dispositive Hearing
To DC if there are significant o/s issues
Paper Record + Process
Motions if Permitted
Live Evidence Process
Timetable any outstanding evidence needed for the Summary Hearing
Further Disclosure (if ordered)
Timetable any outstanding evidence including experts
All expert reports completed
Cross-Examinations
Mediation (Outsourced or Judical)
Mediation (Outsourced or Judicial)
Mediation if Ordered
Trial Management Conference
Summary Hearing on Paper Record+
Must be Dispositive
(Judge may direct limited oral evidence to ensure it is dispositive)
To Ocur Within 2 Years from Issuance of Claim
Dispositive Hearing/Trial (Various Models) based on live evidence
To Occur Within 2 Years from the Issuance of Claim

At a very high-level, our proposal includes the following:

(i) The proposed framework will apply to all civil cases commenced in the Ontario Superior Court of Justice, excluding the Small Claims Court, with modifications to some types of proceedings that involve unique policy considerations or legislative schemes, such as proceedings under the *Bankruptcy and Insolvency Act*[13] and the *Class Proceedings Act, 1992*,[14] non-contentious estate proceedings, and claims brought by Indigenous people or communities alleging infringement or breach of section 35 of the *Constitution Act, 1982*;[15]

(ii) In certain types of cases, notably personal injury claims, debt collection claims, and disputes about the validity of a testamentary instrument, parties will be required to follow a pre-litigation protocol. Generally, and as discussed further below, this will require parties to potential litigation to communicate with one another, exchange specifically identified documents, and discuss the advisability of early mediation before the commencement of a court 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,[16] fillable form 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) Proceedings required or authorized to proceed by way of application pursuant to statute or under the current Rule 14.05(3)(a)-(g.1) (which are summary in nature) will proceed directly to a Directions Conference (defined below) to set a schedule for the exchange of materials, as necessary, and a date for a paper-based dispositive hearing;

(v) For all other proceedings, parties will engage in an up-front exchange of evidence after pleadings are completed through:

  (a) the sworn (or affirmed) witness statements of all the witnesses they intend to rely on to prove their case, which will ultimately form their case in chief at trial (or for purposes of another form of dispositive hearing); and

  (b) documentary disclosure based on a modified reliance-based standard requiring parties to disclose any documents upon which they intend to rely at their final dispositive hearing and any adverse documents known to be in their possession;

(vi) Oral examinations for discovery will be eliminated;

(vii) After the exchange of evidence, parties will attend a case conference. Parties requiring minimal court intervention will attend a One Year Scheduling Conference (defined below), where a dispositive hearing date will be set, along with a schedule for mediation, a trial management conference, and the exchange of any outstanding expert reports.

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[13] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

[14] *Class Proceedings Act*, 1992, SO 1992, c 6.

[15] Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[16] For those litigants unable to access the online form, a paper version will be available.

Parties needing more court involvement—such as those seeking interlocutory relief or requesting a summary, paper-based hearing—will attend a Directions Conference. The Directions Conference is expected to result in an order giving directions that will address outstanding issues and schedule any necessary motions, a mediation, the exchange of expert reports, a trial management conference, and a dispositive hearing; and

(viii) Following a transition period, the goal is to schedule dispositive hearings (e.g. a trial) for most claims commenced under the new system within two years of the claim's commencement.

The proposed reforms will undoubtedly have many initial critics. It is important to recognize, however, that while they may appear "new", they are not experimental. The core elements of the proposed reforms have been successfully implemented in other jurisdictions, including the U.K., Australia, New Zealand, and Singapore, as well as in various national and international arbitration models.

The new framework is expected to achieve, among other things, the following results:

(i) easier access to the system;

(ii) earlier focus on the real issues in dispute, which will create earlier settlement opportunities;

(iii) reducing the scope and burden of documentary discovery;

(iv) meaningful and timely disclosure;

(v) a significant reduction in the motions culture that currently exists;

(vi) the elimination of failed summary judgment motions, in favour of summary disposition hearings;

(vii) improved case management;

(viii) better management of expert witnesses;

(ix) reduced costs; and

(x) the early scheduling of fixed trial dates.

B. THE REJECTION OF ALTERNATIVE OPTIONS

During the course of this project, we considered and rejected a variety of proposed reforms for various reasons. In the interests of brevity, it is not possible to outline every suggested reform that was tabled and debated. We believe it useful, however, to highlight some of them.

The One-Judge Model. One of the first ideas tabled was a proposal to implement a one-judge model, which would see each new civil action commenced in Ontario assigned to a particular judge, who would case manage it through to at least the completion of a pre-trial conference. A similar model was recently introduced in Manitoba, where it has proven successful at reducing

backlogs and delays through increased and consistent case management. A recurring remark from jurisdictions with whom we consulted, where successful civil justice reforms have been implemented, is the importance of shifting from a party-driven system to a court-managed system. The one-judge model offers the optimum in court management.

Unfortunately, the one-judge model is currently unworkable in Ontario due to current resourcing issues. In 2023, there were 66,212 new civil proceedings commenced in Ontario – far too many to manage individually with existing judicial resources in the current system.[17] The proposed new civil justice system, however, is compatible with a one-judge model and could arguably operate more efficiently under such a structure. We hope that by implementing the proposed reforms, we can conserve enough resources to make the one-judge model feasible or, at the very least, ensure greater judicial continuity between different steps in a proceeding.

Bespoke Processes. The Working Group members agree that not all cases are created equal. Some require and can afford more process than others. The Working Group accordingly considered whether we might funnel all cases through an initial directions conference with a judge or associate judge following the close of pleadings. The idea was that orders giving directions would be made at the initial conference, providing for what interlocutory processes would be applicable to the case. Some cases might follow a model consistent with the existing Rules. Others might have more limited discovery. Still others might follow a model more consistent with the Simplified Rules.

The bespoke model was rejected for the same reason as the one-judge model. The Court simply does not have the necessary resources to conduct a directions conference and provide bespoke modelling for more than 60,000 new cases per year.

Tiered Processes. Another proposal that we considered was to establish different process models depending on the value of the claim. The theory is that increased interlocutory processes are more proportional in higher value cases. This proposal would be manifested either through an increase to the ceiling for Simplified Rules cases, or the introduction of our proposed up-front evidence model in cases under a certain ceiling.

We rejected this proposal for several reasons, which include:

(i) Concerns that the value of the claim does not necessarily correspond to the importance of the claim to the parties (e.g. a $100,000 claim against a doctor in which his/her professionalism is called into question may be of extremely high "value" to the doctor even if the amount at stake does not exceed whatever threshold was established);

(ii) Concerns about policing any arbitrary threshold. Said otherwise, if the threshold was $500,000, above which the full array of current interlocutory procedures would apply, litigants could easily commence claims at or above the threshold without regard to the actual value of the claim;

[17] Ontario Superior Court of Justice, Annual Report 2019-2023, p. 69: Annual Reports | Superior Court of Justice

(iii) The need to control costs, reduce the time spent by both counsel and parties throughout the course of a proceeding, and reduce delays across all matters regardless of the value of the claim;

(iv) The need to reduce the system's resource allocation for any single case to increase court access for all Ontarians; and

(v) Most importantly, our belief that the up-front evidence model works well for cases of any value.

Reduced Oral Discoveries. Some proponents for oral discoveries have suggested that eliminating them entirely may be excessive, and that simply reducing their length could be a more appropriate solution. We rejected this suggestion for two reasons. First, reducing oral discoveries from the 7 hours currently permitted to another arbitrary number of hours will not further any of the CRR's goals. Second, if we essentially maintain the current discovery process, but layer the up-front evidence model on top of it, we will have succeeded in adding more process, more expense, and more delay to existing procedures – the exact opposite of our mandate.

Discretionary Oral Discoveries in Exceptional Cases. We have heard arguments that discoveries are critical in certain types of cases: personal injury, fraud, conspiracy, and class actions for instance. Some suggest that perhaps a case management judge should have a discretion to permit limited oral discoveries in certain types of cases. Again, there are several problems with this suggestion. First, it has the potential to spawn substantial litigation over what cases fall within the "exceptional" standard. Given the entrenched nature of oral discoveries in our civil justice system, we expect that many parties, if not most, would consider their case to be just the type of case that needs oral discoveries. Second, it is difficult to determine on what basis the discretion would be consistently exercised. Third, there is a concern that, if the discretion were to be exercised too liberally, then we would have, as noted above, succeeded in introducing a system with greater expense and delay than the one we currently have. And fourth, and most importantly, we believe oral discoveries are simply not necessary in any type of case in the up-front evidence model.

In the sections that follow, the key aspects of the proposed new framework are addressed in greater detail. Again, we encourage you to read this consultation paper in its entirety before forming an opinion on any one part. A comprehensive understanding of the entire suite of proposed reforms is essential for evaluating any one particular proposed change.

PART 3: SETTING THE TONE – GENERAL PRINCIPLES

In the current system, the guiding principles are 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.

The existing guiding principles are commendable, but they lack the requisite specificity. Moreover, they are not being effectively implemented to achieve their intended goals. The proof is on the ground. Some parties cannot afford to access the system. For those who can, the majority experience justice delayed. A level of complacency appears to have taken hold regarding delays in the civil justice system. Delays have long been decried as anathema to justice,[18] yet a generation or more has passed in which the will to effect necessary change has not materialized or, worse, has been overcome by a resignation that circumstances will simply never improve.

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 co-operate with one another to ensure that the overarching goals are met.

A. THE GOALS

We propose that the Rules include 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. The proposed substance of the new Rule, however, would be as follows:[19]

[18] "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.

[19] 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).

(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;

(b) cost-effective proceedings that are proportionate to:

- the nature of the proceeding 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) expeditious proceedings that strive for settlement or final resolution within two years or less from the date of commencement;

(d) timely access to, and efficient use of, Court resources for the parties and all other litigants who need to access Court resources;[20] and

(e) enforced compliance with the Rules and the orders and directions of the Court.

(iii) The Court must seek to achieve the Goals when imposing orders and giving directions.

Unlike the existing guiding principles (set out in rule 1.04), the new Goals will: (i) provide increased specificity as to the various Goals that the Rules seek to attain, including proportionality, timeliness, and efficient use of the Court's resources for the benefit of all litigants who need to access the Courts; and (ii) provide 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, for the most part, undermines them. By contrast, the new system will incorporate the Goals directly into the processes that will govern all aspects of legal proceedings.

B. 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).

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

To address this problem, we propose to introduce new rules concerning representations made to the Court (the "**Representations Rules**"), the substance of which is outlined below.[21]

(i) By presenting to the Court a pleading, written motion, or other document—whether by signing, filing, submitting, or authorizing a lawyer to do so on their behalf – a party certifies that, to the best of their knowledge, information, and belief:

(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) the claims, defences, and other legal contentions advanced are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(c) the factual contentions advanced are, or likely will 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 to the Court a pleading, written motion, or other document," a separate certification document or attestation will not be necessary.

As described in Part 11B below concerning costs, a breach of the Representation Rules will result in the Court applying the Full Indemnity Presumption (defined below).

C. THE GENERAL DUTY TO CO-OPERATE

One of the reasons why rule 1.04 has been ineffective is that litigants simply do not co-operate to ensure that its aims are achieved. A change in litigation culture is required. We propose to introduce a general duty to co-operate (the "**Duty to Co-operate**"). 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 Co-operate is about embracing a shared responsibility to manage the Court's limited resources to promote the Goals.

In the result, parties and their lawyers will have a Duty to Co-Operate with one another to further the Goals. This duty will require the parties, or their counsel, to engage in direct discussions to attempt to agree on how the proceeding will be conducted. More specific duties to co-operate will appear in relation to specific rules, such as disclosure, preparing a joint book of documents, and preparing a chronology.

The proposed substance of the new Rule is as follows:

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

(i) All parties and their lawyers 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 action 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 a motion or appearance before the Court;

(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.

PART 4: CLAIMS

IV.

A. PRE-LITIGATION PROCESSES

Having set the stage for cultural change, we move now to the processes that will facilitate the realization of the Goals. Those Goals are best achieved when parties find a way to resolve their differences without initiating a Court proceeding. Litigation should be means of last resort. Accordingly, we propose to introduce a requirement that parties take certain steps before a claim is commenced.

1. Pre-Litigation Protocols

The Need for Change: Pre-litigation protocols ("**PLPs**" or singular "**PLP**") 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 aim to narrow the issues in dispute and streamline the Court process when it starts.

PLPs do not currently exist in Ontario. They are, however, effectively used in other jurisdictions. England and Wales first adopted PLPs in 1999. Australia, Singapore, Hong Kong, Scotland, and Northern Ireland have followed suit. The limited use of PLPs was also recently recommended in New Zealand.[22] In 2023, the UK's Civil Justice Council – which advises the Lord Chancellor, the judiciary, and the Civil Procedure Rule Committee on civil matters – conducted a review on the use of PLPs in England and Wales. The Council described PLPs as now occupying "a crucial space in the civil justice system" and concluded they should be made formally mandatory.[23]

Proposed Reforms: We propose that the Court adopt a limited series of dispute-specific PLPs. Each PLP will delineate the conduct that the Court requires prospective parties to follow before commencing Court proceedings in the context of a particular type of dispute. Typically, each PLP will (i) set standards for the content and quality of letters of claim and response, (ii) establish a reasonable process and timetable for the exchange of a limited set of specific documents, and (iii) provide a framework within which the parties are able to explore an early resolution of their dispute

[22] https://www.courtsofnz.govt.nz/assets/Rules-Committee-Improving-Access-to-Civil-Justice-Report.pdf

[23] Civil Justice Council, Review of Pre-Action Protocols – Final Report, Part 1, August 2023. Online: https://www.judiciary.uk/wp-content/uploads/2023/08/CJC-PAP-report-Aug-23-FINAL.pdf. Part 2 of the Final Report was subsequently released in November 2024 and may be found online here.

or narrow the issues in dispute so that Court proceedings can be resolved more quickly and at a lower cost if and when they begin.

Although the UK makes wide use of PLPs in all manner of civil proceedings,[24] we propose to introduce them gradually, beginning with (i) personal injury claims (other than claims to which the *Crown Liability and Proceedings Act*[25] ("***CLPA***") applies), (ii) disputes related to the collection of liquidated debts, and (iii) disputes about the validity of a testamentary instrument.

These three areas were selected for slightly different reasons. Personal injury claims were selected because they represent the majority of civil cases commenced in the Superior Court of Justice. Liquidated debt claims were selected because they are usually straightforward and should be capable of resolution, or at least a significant narrowing of issues, in most cases before the commencement of a formal claim. Disputes about the validity of a testamentary instrument were selected because they generally begin with an Order Giving Directions that compels the parties to exchange certain information. We believe it makes sense for that information to be exchanged as early in the process as possible, before expensive and divisive litigation takes place (generally between family members).[26]

For illustration purposes, a draft proposed PLP for personal injury matters is attached as Appendix "B".

As will be made clear in the PLPs themselves, a PLP will not amend, vary, or extend any applicable statutory limitation period. If adhering to the PLP will result in the expiration of a limitation period, the claimant will be required to initiate their claim without following the protocol's requirements. The parties may, however, be directed to comply with the PLP following the issuance of the claim.

The Working Group has heard concerns about the requirements imposed by PLPs and the challenges that they may pose in the context of Ontario's two-year limitation period. In the U.K., where PLPs are used extensively, the basic limitation period is three years. To promote the introduction of PLPs and to better accommodate their time requirements, the Working Group proposes to recommend to the Attorney General that the basic limitation period for civil actions in Ontario be increased from two to three years.

2. Pre-Litigation Discovery

The Need for Change: The use of PLPs is designed to, among other things, increase pre-claim disclosure. Admittedly, however, they are not a perfect solution for helping parties understand one another's case. Most obviously, not all cases will be governed by a PLP, at least not at the outset of the proposed new model. Moreover, even when a dispute is governed by a PLP, requiring

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[24] See the UK's Practice Direction – Pre-Action Conduct and Protocols here: https://www.justice.gov.uk/Courts/procedure-rules/civil/rules/pd_pre-action_conduct

[25] *Crown Liability and Proceedings Act*, *2019*, SO 2019, c 7, Sch 17.

[26] Disputes about the validity of a testamentary instrument often begin with the filing of a Notice of Objection to an Application for a Certificate of Appointment of Estate Trustee. The proposal to impose a PLP on these types of proceedings may require an amendment to Rule 75.03 in terms of the process to be followed filing the Notice of Objection.

compliance may, in some cases, be unreasonable, such as when the opposing party has engaged in misconduct like fraud or dishonesty, or when more immediate disclosure is necessary to protect the claimant's property or other rights.

Indeed, in some cases, it may be impossible for the claimant to comply with a PLP, such as where a party does not know against whom to claim or whether they even have a claim.

Proposed Reforms: For the foregoing reasons, we propose that the Rules be amended to clarify and codify the circumstances in which the equitable remedy of pre-action discovery is available. The remedy is currently available through what is conventionally referred to as a "*Norwich* Order"[27], though the Working Group believes that the pre-conditions for such orders and their permitted reach are matters that warrant clarification.

B. COMMENCING A CLAIM

The Need for Change: We have identified two issues with the current process for commencing a claim that would benefit from reform.

First, in the current system, legal proceedings can be 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 started as an application when an action would have been appropriate, motions are brought to convert those applications into actions. There are also a significant number of estate matters that are properly commenced as applications, but later converted into actions. Not only is time spent on deciding whether to convert the application into an action, but the resulting orders also need to reconcile any steps taken pursuant to one process with the steps that must be taken in the other.

Second, some claims in the current system are convoluted and prolix. Others fail to specifically articulate the actual causes of action that are being pleaded (e.g. claims of negligence, breach of contract, etc.). This can make it difficult to understand what is being communicated or to quickly distil the important aspects of the claim. Motions inevitably arise. Time and money are wasted arguing about how the dispute is to be framed.

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,[28] there is no need to put litigants to the task of deciding which form to use to initiate a proceeding.

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[27] *Norwich* Orders have their roots in the principles articulated in *Norwich Pharmaceutical Co. v. Comrs. of Customs and Excise*, [1974] A.C. 133 (H.L.). The Ontario approach is reflected in the cases of *GEA Group AG v. Ventra Group Co*. (2009), 96 O.R. (3d) 481, at ¶¶ 62 and 91, and *1654776 Ontario Limited v. Stewart*, 2013 ONCA 184, at ¶¶ 47-59.

[28] Although there will be no formal distinction between applications and actions, the existing process governing applications will remain largely intact (as described in Part 7 below).

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

The Claim Form will consist of two sections: (i) the Claim and (ii) Appendix A. The online fillable form will guide prospective claimants through a series of questions to gather information necessary to populate a Claim. Once the Claim Form is completed, the fillable form will generate the body of the claim along with an attached Appendix A (collectively, the "**Claim"**).[29] Experienced drafters may choose to draft the Claim and Appendix A directly, bypassing the question-and-answer process. They will, however, be responsible for ensuring that all required information is included in both the Claim and Appendix A.

The Body of the Claim: The body of the Claim will include much of the same information that is currently included in a Statement of Claim or Notice of Application under the current Rules. For instance, it will include (i) information concerning the parties, (ii) the relief sought (but where there is more than one defendant, it will now specify the defendant against whom particular relief is sought), (iii) a statement of facts, (iv) information required to serve a defendant outside of Ontario, and (v) a list of statutes on which the claimant is relying. As is done in cases filed in the Federal Courts in the United States,[30] the body of the Claim will also include a list of the specific causes of action being pleaded (with each one in the United States being known as a "count") and the facts supporting each element of each cause of action.

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.

Appendix A: Appendix A will include information that will be used for case management purposes. For instance, it will include (i) an overview of the Claim (in 250 words or less), (ii) the legal nature of the Claim (in a check box format that is similar to that used on the existing Form 14(F)), (iii) information concerning adherence to any applicable PLPs, (iv) information concerning requests for early conferences (discussed in Part 6B below), and (v) information concerning claims against the Crown.

Providing a single point of entry and guiding prospective claimants through the claim drafting process through a series of questions will:

(i) simplify the process of initiating a Claim;

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

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

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

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

(iv) ensure that essential information is included in every 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.

C. ASSIGNMENT OF THE ONE YEAR SCHEDULING CONFERENCE

As soon as is practicable after the Claim is issued, the case will be assigned a scheduling conference date (the "**One Year Scheduling Conference**"), that will be set for approximately one year after the Claim is issued. The topics to be addressed at the One Year Scheduling Conference are detailed in Part 6 below, while the benefits of fixing dates and maintaining them are addressed in Part 11 below.

D. SERVICE

The Need for Change: The Working Group has identified two issues relating to the service of an originating process that may benefit from reform: (i) it can be costly and time intensive to effect personal service; and (ii) parties represented by counsel should not be permitted to avoid service by refusing to instruct their counsel to accept it.

Proposed Reforms: We propose to introduce four reforms that we expect will meaningfully reduce the burden of serving an originating process.

First, we propose to adopt a new Rule that requires defendants to (i) confirm acceptance of service whenever a Claim comes to their attention in any manner and (ii) avoid placing an undue burden on the claimant regarding service. This is similar to the United States Federal Court rules, which impose an obligation on defendants to help prevent unnecessary expense and delay related to service.[31]

Second, we propose to introduce a rule stating that a defendant who breaches its service-related duties will be liable to pay the claimant costs in an amount equal to the higher of: (i) the claimant's costs of service or (ii) $2,500.

Third, we propose to include service by email as an alternative to personal service of a Claim. To effect service by email, the claimant (or its counsel) will be required to send the document by (i) email to the defendant at its last known email address and obtain a "Delivery Receipt" from their own email service provider as confirmation that the email was delivered and (ii) ordinary mail to the defendant's 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. The change, however, is

[31] See Rule 4(d)(2) of the *Federal Rules of Civil Procedure* of the United States.

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.

Fourth, we propose to allow service of a 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 gives rise to, the litigation. That lawyer, whether retained to defend the litigation or not, will have an obligation to provide the Claim to their client and confirm to the claimant that they have done so. Although service will then be effective, the lawyer who provided the Claim to its client will not be deemed to be acting for the defendant. This proposed change will eliminate situations where a lawyer, after corresponding with claimant's counsel about a dispute, advises that he or she has no instructions to accept service and insists the defendant must be served personally.

E. AMENDING PLEADINGS

Pleading amendments are common, and the existing Rules are quite generous in allowing them. 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.[32]

As more fully described in Part 11 below, one of the central themes of the proposed reforms is the adherence to fixed dates. As such, we propose changes to the Rules governing amendments of pleadings that are consistent with the goal of maintaining trial dates.

Amendment 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 documents (discussed more fully in Part 5 below).

Amendment 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 (i) it is on consent of all parties, (ii) the amendment will not require an adjournment of the dispositive hearing date, and (iii) the parties agree on a timetable for the further exchange of evidence required as a result of the amendment.

Amendment with leave: If the 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 (i) the amendment will not require an adjournment of the dispositive hearing date, (ii) the amendment does not materially prejudice another party's ability to prepare for the dispositive hearing, and (iii) the amending party pays all reasonable costs thrown away on a full indemnity basis.

[32] Rule 26.

An amendment that includes or requires the addition, deletion or substitution of a party: As in the current system, leave of the Court will be required for an amendment that includes or requires the addition, deletion, or substitution of a party.

F. DEFAULT PROCEEDINGS

The Need for Change: 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 (i) it has been noted in default or (ii) the plaintiff is seeking default judgment. The current Rules, thus, permit a default judgment to be ordered against a defendant who has only failed to engage properly with the system on one occasion (i.e. by failing to respond to the Claim). In light of 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, even where the Rules do not mandate service. The harshness of the Rules may also explain why the test to set aside a default judgment is not particularly onerous.

The Working Group has identified two issues with the current 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 concern is the perception that motions to set aside default judgments are too frequent and too easily granted, resulting in a substantial waste of both litigant and Court resources.

Proposed Reforms: We propose to modify the default judgment process as set out below:

(i) As with the current process, if a defendant does not respond to a Claim within the prescribed period of time, the defendant may be noted in default;

(ii) The claimant must serve a Notice of Default upon the defendant personally (or by an alternative to personal service) and file it. Thereafter, the defendant will have 14 days to serve and file a request that the Notice of Default be set aside. Such a request would trigger a Directions Conference to address the issue. If a defendant does not make its request within 14 days, the claimant will be at liberty to seek default judgment, without providing further notice to the defendant. A requisition for default judgment will require proof that the Notice of Default was served at least 14 days prior;

(iii) If the Court sets aside the noting in default, the claimant shall presumptively be entitled to an award of its reasonable Full Indemnity Costs (defined below in Part 11.B.1) and the Court will impose a deadline to defend that is peremptory upon the defendant; and

(iv) In light of the proposed new requirement to serve a Notice of Default, the threshold for setting aside default judgment will be made more onerous and, in the exceptional cases where default judgment is set aside, the defendant will presumptively be responsible for the claimant's reasonable Full Indemnity Costs (defined below) thrown away.

The requirement to serve a Notice of Default on a non-responsive defendant obviates the need to serve any ensuing motion for default judgment. Additionally, since a default judgment can only be sought after a defendant has had two opportunities to respond, the standard for setting it aside

can be made more stringent. A defendant who fails to engage with the system twice should be required to provide a compelling explanation for their non-compliance.

G. DISCONTINUING AN ACTION

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

The Working Group believes that requiring a motion to discontinue an action creates unnecessary delay, increases costs, and discourages claimants from discontinuing their actions. This, in turn, results in a higher number of cases languishing in the system.

As such, we propose that a claimant should have the right to discontinue all or part of an action at any time, subject to the defendant's ability to seek costs. 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 would be permitted to discontinue all or part of an action at any time by delivering a Notice of Discontinuance, while the existing rules 23.02 to 23.04 would continue to apply with minor modifications. A defendant would continue to be entitled to seek its costs under the existing rule 23.05.

PART 5: DISCOVERY AND THE UP-FRONT EVIDENCE MODEL

v.

A. THE NEED FOR CHANGE: REJECTING THE COMPLETE DISCOVERY MODEL

At the heart of the proposed reforms is the premise that costs and delays must be controlled by a more pragmatic approach to civil litigation and, particularly, to interlocutory processes, which consist of two main features: (i) the discovery process, and (ii) motions practice. In this section, we focus on proposed reforms to the discovery process that we believe will reduce delay and costs.

The Rules currently mandate: (i) the identification and production of all documents relevant to any issue raised by the pleadings or the governing substantive law; and (ii) the submission by the parties to pre-trial examinations under oath (i.e. examinations for discovery). Twenty-five years ago, the Court of Appeal for Ontario characterized this mandate as a model of complete discovery.[33]

The complete discovery model was introduced in 1985. Documentary discovery was significantly less burdensome in that era. For instance, emails did not then exist. In fact, the principal idea that would evolve into the World Wide Web was not established until 1990. Since that time, digital technology and the means by which people communicate with one another have changed dramatically. It is now estimated that 361 billion emails are exchanged worldwide each day.[34] Emails are just one aspect of the explosion in digital documentation that has profoundly increased the scope and burden of documentary discovery.

Concerns about the burden of discovery are not new. In 1995, the Civil Justice Review team raised a concern about the breadth of discovery. 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."[35] They observed that the explosion of information and data driven by technological growth had resulted in a vast increase in discovery 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 amendments.

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[33] *General Accident Assurance Co. v. Chrusz,* (1999), 45 O.R. (3d) 321(C.A.), at ¶ 25.

[34] Emails sent per day 2018-2027 | Statista

[35] Civil Justice Review, First Report, 1995, page 236.

The problem is that the current model requires parties to take the following steps in most proceedings, all of which are time-consuming (for lawyers and litigants alike) and add complexity, delay, and substantial costs:

(i) negotiate a Discovery Plan;

(ii) compile and exchange Affidavits of Documents and productions, which, on a relevance-based standard, has become increasingly disproportionate and economically unsustainable;

(iii) find mutually convenient dates for examinations, often many months away;

(iv) prepare for and attend examinations, which require the presence of both counsel and parties, who often need to take time off work to attend;

(v) obtain costly transcripts;

(vi) address undertakings and refusals;

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

(viii) review transcripts before trial.

Proportionality and pragmatism dictate that we move away from a process model that promotes the maximalist approach associated with complete discovery. The proposed new model transitions from a relevance-based standard of disclosure to a modified reliance-based standard, one that requires parties to disclose the documents upon which they intend to rely to prove their case as well as all known adverse documents in their possession, control or power. It also eliminates oral examinations for discovery in favour of the exchange of sworn witness statements.

We believe our proposed model offers a more pragmatic and efficient means to achieve a reasonable measure of discovery and to promote early trial-readiness. We will take a moment to outline the discovery aspects of the proposed model, then highlight how the model meets the objectives generally associated with discovery. Next, we will identify how we believe the proposed model will reduce delay and promote cost efficiency. Finally, we will address concerns that have been raised with respect to the elimination of oral examinations for discovery and with the creation and exchange of witness statements.

B. DISCOVERY IN THE UP-FRONT EVIDENCE MODEL

The up-front evidence model provides discovery through three principal steps, which we refer to as initial disclosure, primary disclosure, and supplementary disclosure.[36]

[36] The changes described in this section do not apply to proceedings required or authorized to proceed by way of application pursuant to statute or under the current Rule 14.05(3)(a)-(g.1). This is because such proceedings are already summary in nature and typically require minimal court resources. Instead, and as described in Part 7 below, such proceedings will proceed directly to a Directions Conference to set a schedule for the exchange of materials, as necessary, and a date for a paper-based hearing.

1. Step One: Initial Disclosure

The initial disclosure obligation requires each party to produce, at the time the pleading is served, all non-publicly available documents referenced in the pleading that are in the party's possession, custody, or control.

2. Step Two: Primary Disclosure

The primary disclosure obligation imposed on parties is triggered by the close of pleadings. The timing of each party's obligations is set out in a table at Part 6A below. Primary disclosure is achieved through three features: (i) sworn or affirmed witness statements; (ii) affidavits of documents (or lists of documents in the case of the Crown as per section 19(1) of the *CLPA*); and (iii) proposed timetables for the exchange of expert reports.

(i) Witness Statements

Following the close of pleadings, and in accordance with the deadlines outlined in Part 6A below, the parties will exchange sworn (or affirmed) statements of all the witnesses on which they intend to rely to prove their case. The witness statements will ultimately form the party's case in chief at the dispositive hearing (e.g. a trial).

The content of witness statements will be prescribed. We are considering the following guidelines:

(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 will be restricted to the witness's personal observations, though they may include hearsay provided there is a sustainable basis for its admission;

(iii) They are not to include commentary, opinion, disguised submissions, or the lengthy review and characterization of documents; and

(iv) They must include only admissible evidence.[37]

Requiring witness statements to be exchanged at the outset of the case has the following advantages:

(i) They will allow each party to understand its own case and the case of the other side more fully, so that everyone reaches a better understanding of the true issues in dispute at an early stage;

(ii) Witnesses will provide evidence based on their own recollections, which are freshest at the outset of the case;

[37] 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.

(iii) Witness statements will not be prepared by reference to extensive documentation provided by the other parties through the disclosure process; and

(iv) Witness statements will be prepared without being formulated in response to arguments that have developed over the course of the proceedings. In this way, they are likely to involve less advocacy and maintain a stronger focus on the witness's actual testimony.

Witness statements are distinguished from expert evidence, which is subject to its own requirements, as set out in Part 9 below.

(ii) Documents

Together with their witness statements, parties will be required to prepare and serve the documents upon which they intend to rely to prove their case (including those documents provided as part of initial disclosure) and any known adverse documents.

Known adverse documents are documents known to a party that contain information adverse to their case or another party's case or that support the case of another party. Said otherwise, they are documents that the party anticipates the opposing party(ies) would reasonably want to litigate the merits of the issues in dispute. The question of what constitutes a "known adverse document" is the subject of ongoing debate in the Working Group. Provisionally, we propose that knowledge of an adverse document will be established if the party actually knows or has good reason to believe the document exists. Parties will be required to take reasonable and proportionate steps to identify known adverse documents but will not be obligated to conduct extensive searches or reviews.

(iii) Expert Evidence

Too often the timing of the delivery of expert reports derails scheduled steps in a proceeding, notably pre-trials and trials. To better manage the exchange of expert reports, parties will be required to exchange proposed timetables for the delivery of any expert reports on which they intend to rely in accordance with the timetable set out in Part 6A.

We understand that sometimes the need for an expert or the expected delivery of a report is unknown. Hence, there will be an ongoing obligation to update the proposed expert timetable as circumstances change.

3. Step Three: Supplementary Disclosure

There may be cases where parties are not satisfied with the extent of disclosure provided through the initial and primary disclosure steps. Two features of the proposed new model will offer a means to obtain supplementary disclosure: Redfern Schedule requests and limited written interrogatories. Parties may also, of course, simply agree on additional disclosure to be provided.

(i) Redfern Schedule Requests for Additional Documents

Parties may request that additional documents be provided to them by an opposing party provided that (i) the documents are relevant and material; (ii) the request is focused, narrow and specific; (iii) the documents are not in the requesting party's possession, custody, or control; (iv) the

documents are within the possession, custody, or control of the requested party; and (v) the request is consistent with the Goals.

The process for requesting specific additional disclosure will be through a Redfern Schedule. Redfern Schedules are regularly used in arbitrations. A Redfern Schedule "is a living document with pre-set columns that allow the parties and the [Court] to track document requests, party positions and rulings."[38] There are five main columns on the Schedule. The first column sets out the documents sought. The second, the rationale for seeking the document. The third, any objections made by the opposing party. The fourth, any response to the objections. And the fifth, any rulings by the Court. A sample Redfern Schedule is attached as Appendix "C".

Any required rulings on disputed Redfern Schedule requests will be addressed at Directions Conferences (defined and discussed in Part 6 below).

(ii) Limited Written Interrogatories

Finally, parties seeking additional information about another party's case may submit a limited number of written interrogatories. There has been significant debate within the Working Group regarding whether written interrogatories should be permitted and, if so, how many. One of the main concerns is that written interrogatories should not serve as a substitute for oral examinations for discovery. As a result, we propose to limit them to a set number (yet to be settled), which can be increased with leave. The expectation is that parties should generally have a very good idea about the case they have to meet through the other disclosure steps included in the proposed new system. Limited written interrogatories will provide an additional means to understand the other side's case, without unduly increasing expense or prolonging the proceedings.

Any party receiving a list of written interrogatories will be required to respond to them within a fixed period by a sworn or affirmed response. Objections to interrogatories or answers provided in response will be addressed at a Directions Conference (defined and discussed in Part 6 below). A party may only object to a question asked by interrogatory, however, on the grounds that the interrogatory is scandalous (meaning that it seeks information that is (i) irrelevant and (ii) highly confidential or of a disgraceful nature), calls for disproportionate disclosure, or seeks information that is privileged.

[38] Kenneth Glasner, *A Primer for Redfern Requests – Rule 19 of the VanIAC Rules.*

(iii) The Duty to Co-operate in the Disclosure Phase

Disputes about disclosure create a significant risk of delay and elevated costs. In the proposed model, therefore, parties will have a Duty to Co-Operate with one another and to facilitate disclosure in a practical way to ensure the process is conducted in a manner consistent with the Goals. More specifically, disclosure must be appropriately focused and proportionate to the proceedings.

Parties will also have a duty to ensure that technology is used as efficiently and effectively as is possible.

C. THE UP-FRONT EVIDENCE MODEL PROMOTES COST EFFICIENCY AND REDUCES DELAY

We believe that, for the following reasons, the up-front evidence model achieves cost efficiency and reduces delay.

First, the financial burden of documentary disclosure is reduced through a transition from relevance-based disclosure to modified reliance-based disclosure, the latter of which involves a much narrower scope of material.

Second, eliminating oral examinations for discovery will eliminate the costs to prepare and attend examinations, review transcripts, and answer undertakings and questions taken under advisement (which often lead to further examinations). In addition, it will eliminate motions arising from these examinations, which currently impose significant costs on both litigants and the court system.

Third, the up-front exchange of all evidence-in-chief means that a trial date can be set earlier in the process. We believe that reducing delay between a proceeding's commencement and conclusion will result in a corresponding reduction of costs.

Fourth, the preparation of witness statements is, for the most part, essential work. It constitutes the evidence-in-chief of each party at trial. By contrast, much of the current oral discovery process is non-essential work. Its significance to the outcome of the proceeding may vary from case-to-case, but typically relatively little of the fruits of oral discovery finds its way into the trial record.

By freeing up judicial resources and reducing the length and cost of civil proceedings, the up-front evidence model will help to ensure that dispositive hearings—in cases destined to be heard on the merits— can be heard without excessive delay and before excessive costs are incurred. 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. Given our belief that such settlements are inherently unjust, reducing their occurrence necessarily increases access to justice.

D. THE UP-FRONT EVIDENCE MODEL SERVES THE OBJECTIVES OF THE DISCOVERY PROCESS

The documentary and oral discovery process has several key objectives, which include:

(i) serving the needs of the adversarial system by facilitating the gathering of evidence and assessing its quality, improving the understanding of an opponent's theory of the case, and narrowing the issues in dispute;

(ii) avoiding trial by ambush; and

(iii) facilitating settlement.

There is a paucity of research literature about how well the complete discovery model meets these objectives. Based on the up-front evidence model's design and the experiences of other jurisdictions using it, we believe that, as explained below, this model will achieve the same objectives of discovery as the complete discovery model. At the same time, the up-front evidence model promises to be more cost-efficient and ensures that parties are trial-ready more quickly than under the current system, thereby reducing delays.

1. The Up-Front Evidence Model Serves the Needs of the Adversarial System

The adversarial system is based on the premise that the surest way to arrive at the truth of a matter is for opposing litigants to zealously pursue and present their cases in their own self-interest and to challenge their opponents' cases with equal zeal. The currency of zealous litigation is information, both helpful and harmful about one's own case and that of one's opponent.

Complete discovery undoubtedly supports optimal information gathering. It allows litigants and counsel to say, at least in theory, "I now know everything there is to know about this case", which, if true, certainly tends to support the mounting of the most zealous case possible.

But everything comes at a cost.

In 2003, an Ontario Discovery Task Force concluded that "many…consider the costs and delays associated with discovery to be an impediment to access to justice."[39] During their consultation process, they heard many examples of individual or small business litigants forced to abandon claims or accept less than adequate settlements because of excessive discovery costs. Scheduling problems and delays in commencing or completing oral discoveries were also identified as significant concerns.[40] These problems have only grown in the last two decades.

[39] Report of the Task Force on the Discovery Process in Ontario, November 2003, p. 54 Online: Report of the Task Force on Discovery Process | Superior Court of Justice.

[40] *Ibid*., at ¶¶ 54 et. seq.

Complete discovery is a time-consuming exercise for all sides of a dispute. While generating relevant and helpful information, it also generates a great deal of information with little probative value. Over-production is an inevitable consequence of a model that compels parties to locate, list, produce, and review documents—often in large volumes—before they have a clear understanding of whether these documents are necessary or even relevant to the live issues in dispute. Zealous claims and defences are never based on evidence that lacks probative value. What would enhance the efficient functioning of the adversarial system is a focus on the evidence that actually enables parties to prepare zealously.

We believe 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 an action. Our belief is grounded in three key factors:

(i) First, the exchange of sworn or affirmed statements from all anticipated fact witnesses ensures that each side knows from an early point in the litigation, exactly what factual evidence their opponent is going to tender and rely upon at trial. They are also readily able to assess the quality of that evidence, both in support of and against their case;

(ii) Second, the inefficient "leave no stone unturned" standard currently manifested in our relevance-based disclosure model is replaced with the requirement to exchange the documents that actually matter to the live issues in the case as framed by the sworn or affirmed witness statements; and

(iii) Third, the up-front exchange of evidence should narrow and focus the real issues in dispute at an early stage in the proceedings and should ensure that the litigants are ready to fix a dispositive hearing date within a year of the Claim's commencement.

We recognize that complete discovery can sometimes uncover the proverbial "smoking gun" or "needle in a haystack." Such instances, however, are infrequent and do not justify the maximalist approach to discovery currently embedded in the Rules for every case. Regardless, under the proposed model, parties will be entitled to receive any adverse documents known to be in an opposing party's possession, control, or power and, moreover, can request the production of specified documents and information relevant to the live issues, making it likely they will still uncover the same revelatory materials.

In the up-front evidence model, parties will have a complete understanding of their opponent's case heading into the dispositive hearing – indeed long before then. While it may not be complete disclosure of all relevant evidence, it is complete disclosure of everything significant to the litigant's and its opponent's case. The real issues in dispute will quickly become narrowed. This process 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.

2. The Up-Front Evidence Model Avoids Trial by Ambush

Complete discovery serves to sharply curtail the risk of a "trial by ambush" and the attendant fear that litigants and counsel will be unable to mount a sufficiently vigorous testing of an opponent's evidence when it is heard for the first time at trial.

The up-front evidence model, however, arguably eliminates the risk of trial by ambush altogether. Parties are provided, early on in the process, with the whole of their opponent's case in chief. The only "new" evidence that comes out at trial is what a questioner chooses to elicit during cross-examination.

Moreover, under the up-front evidence model, 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 of time.

3. The Up-Front Evidence Model Fosters Settlement

Disclosure of information has always been understood as enabling parties to better assess the strengths and weaknesses of both their own cases and those of their opponents. The theory is that parties who are better informed are better positioned to properly manage the risks of litigation.

The up-front evidence model is based on the same principle. While we acknowledge that parties will no longer have full documentary disclosure or the ability to ask questions during oral examination, they gain access to their opponent's case in chief. This shifts the information-gathering process from sifting through a mountain of material to find what is useful, to 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. In the end, each party will be well-informed of the case they need to meet and, thus, will be able to engage in the risk analysis critical to determining whether to settle or take the matter to a dispositive hearing.

The up-front evidence model will also facilitate earlier settlement. Settlement rates of civil proceedings in Ontario have historically been very high. Still, too many cases do not settle until the trial date is looming. By then, cases have taken too long, have often used too many Court resources, and have incurred too much cost. The up-front evidence model recognizes the indisputable fact that almost every case in the system is going to settle. The goal is to provide the litigants with the tools and information they need to settle earlier rather than later. Experience in jurisdictions employing the up-front evidence model is that the overwhelming majority of cases continue to settle without the need for a trial.[41]

E. ADDRESSING CONCERNS ABOUT THE LOSS OF ORAL DISCOVERY

In this section, we address concerns debated by the Working Group regarding the elimination of oral discoveries. These are the following:

(i) eliminating oral discovery will remove a significant and valuable means of understanding the facts of the case;

[41] See, for instance, Settlement Around the World: Settlement Rates in the Largest Economies, Journal of Legal Analysis, Volume 14, Issue 1, 2022, Pages 80–175, Published April 11, 2023 - https://academic.oup.com/jla/article/14/1/80/7114596#410642080.

(ii) parties will lose an important means of testing the opposing party's credibility, which will hinder their ability to settle;

(iii) oral discoveries provide an opportunity to obtain admissions; and

(iv) oral discoveries provide an opportunity to discuss resolution and narrow the issues in dispute.

1. Understanding the Facts

Conducting an oral examination for discovery is one means of learning about another party's case. But it is not the only means. The up-front evidence model offers an alternative; namely, by providing parties with full access to their opponent's case in chief early in the proceedings—something not available under the current model—in addition to access to all documents upon which the opposing party will rely, as well as additional documents and information relevant to the live issues in dispute.

Other Commonwealth jurisdictions – including the U.K., Australia, New Zealand, and Singapore – provide ample examples of robust and thriving civil justice systems that succeed without the need for oral discoveries.

2. Credibility Testing and Settlement

Witness credibility is undeniably an important feature of many cases that come before the court. Oral discoveries can be a good opportunity to assess credibility and test evidence, although some counsel believe that the best practice is to save cross-examination for trial, so as not to give one's opponent a practice run. In such circumstances, oral discovery serves more as tool for information-gathering than for testing information or the credibility of witnesses.

Regardless, by eliminating oral discovery, parties are not forfeiting the right to cross-examine witnesses and test their credibility—that right remains at trial. All that is lost is the opportunity for a "dry run" to test credibility in the hopes of being able to impeach the witness at trial. Oral discoveries, however, are an expensive process to undertake on the chance that a witness might be impeached at trial by something he or she said on discovery.

Some have raised concerns that the credibility assessment undertaken at oral discoveries is more nuanced and involves a broader assessment of how the witness comports himself or herself. It has long been understood, however, that a witness's demeanour when testifying is of limited significance. The more important consideration in assessing the believability and reliability of a witness's testimony is the extent to which their trial evidence is consistent with the probabilities of the case on the whole.[42]

Oral discoveries are also generally limited to the examination of one witness. Trials, of course, usually involve multiple witnesses for each side. Although most witnesses who testify at trial have not been "pre-examined," parties still manage to assess their likely credibility at trial. In the up-front evidence model, the evidence-in-chief of all witnesses will be known at the outset of the

[42] See *Faryna v. Chorny*, [1952], 2 D.L.R. 354 (B.C.C.A.), which continues to be regularly cited. See, for instance, *R. v. Rhayel*, 2015 ONCA 377.

proceeding. Litigation is, at its core, an exercise in risk management. It is inevitably so when parties submit their rights to a neutral arbiter to make decisions about their fates. Concerns about an inability to test a party's credibility through oral discovery are really concerns about impairing one's ability to conduct a proper risk analysis. We would argue that such concerns are overblown.

Under the current Rules, parties conduct risk analyses based on information gathered during the discovery process, including their perception of the credibility of the limited witnesses who are examined, as well as through any expert reports exchanged. Under the proposed new model, parties will engage in similar risk analyses based on the documents disclosed, the sworn witness statements of all witnesses, answers to interrogatories, and any expert reports exchanged. The ability to conduct a meaningful risk analysis is not impaired. Rather it is, at most, reconfigured.

3. Admissions

Two features of the proposed new model will provide parties with an opportunity to seek admissions. Both are explored in further detail below. First, there will be an opportunity to ask questions of an opposing party through a limited number of written interrogatories. Second, the parties will be required to exchange chronologies of important events. They will be further required to prepare a merged chronology, which will also indicate what facts are admitted and disputed. This merged chronology is, in effect, a mutual request to admit, along with the parties' responses.

4. Narrowing Issues

We believe the up-front evidence model offers a superior means of narrowing issues than does an open-ended examination for discovery. Since each party is required to put their evidence-in-chief forward at the outset, the issues in dispute will be clear. Moreover, there are ample opportunities in the proposed new framework for parties to communicate with one another with a view towards resolution. Indeed, parties will have a positive obligation to do so as part of the General Duty to Co-operate as defined in Part 3.

5. The Limited Benefits of Oral Examinations Are Outweighed by their Costs

Given all of the above, we believe that oral examinations are unnecessary in the proposed up-front evidence model. We are not suggesting, however, that they offer absolutely no value. But the purposes they serve – understanding facts, credibility testing, fostering settlement, narrowing issues, and obtaining admissions – are adequately met by the proposed new model. Layering examinations for discovery on top of the procedural steps that the new model requires would add considerable cost with minimal additional benefit. The result would be a model that undermines, rather than promotes, the CRR's mandate to ensure more timely and cost-effective civil justice.

F. ADDRESSING CONCERNS ABOUT WITNESS STATEMENTS

In addition to the concerns raised about the elimination of oral examinations for discovery, the Working Group has discussed and debated potential concerns regarding the exchange of witness statements. They include:

(i) there will be significant costs associated with preparing witness statements;

(ii) litigants and counsel may not know the identity of all their witnesses up front;

(iii) witness statements may be excessively long;

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

(v) not all necessary witnesses will be prepared to swear or affirm a written statement.

In this section, we will briefly address each of these concerns.

1. The Cost of Witness Statements

It is undeniable that there will be an expense associated with preparing witness statements and that the up-front evidence model tends to front-end load the expense of litigation. To our knowledge, and unsurprisingly, there is no research literature comparing the average cost of a case proceeding from start to finish under our existing model with the average cost of a proceeding from start to finish under the up-front evidence model. Nevertheless, we believe there are sound reasons to prefer the proposed up-front evidence model, which include:

(i) The preparation of witness statements is one aspect of a proposed new discovery model. Its associated costs must be weighed against the reduction in costs resulting from:

  (a) the shift from a relevance-based standard of discovery to the significantly less expensive reliance-based standard of discovery; and

  (b) the elimination of examinations for discovery and the motions that arise from them, which can be extremely costly;

(ii) As we noted earlier, the preparation of witness statements is, for the most part, essential work. It is the preparation of each party's evidence in-chief for trial (or other dispositive hearing);

(iii) For most witnesses, save in jury trials, their witness statements will go in as read, such that trial time should be shortened; and

(iv) The requirement to disclose the entirety of one's case immediately following the close of pleadings is designed to put parties into a position of trial readiness within roughly one year of the commencement of most proceedings. The reduction of delay is, on its own, a key part of the CRR's mandate. Additionally, however, in our view, delay and increased costs go hand in hand. We believe that reduced delays will be correlated with reduced average costs.

2. Counsel May Not Know What Witnesses They Need Up-Front

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 permit supplemental witness statements in circumstances where they are warranted.

3. Witness Statements may be Excessively Long

Lawyers and judges alike are right to be concerned about the prolixity of witness statements. The prescribed standards for the content of witness statements should, however, go a long way to ensuring that statements are not unduly lengthy.

4. Witness Statements May Reflect the Voice of the Lawyer

Where a party is represented by counsel, one would expect counsel to prepare the party's witness statements. Concerns have been expressed that the content of these statements will reflect the voice of the lawyer, not the witnesses. Again, we believe this concern is overblown. Competent counsel will ensure, as they do now with affidavits, that witness statements accurately reflect the witness's evidence before they are affirmed or sworn. This is consistent with a lawyer's role as an officer of the Court. Moreover, party witnesses will testify at trial. The presumption, as more fully explored below, is that party witnesses will provide their evidence-in-chief orally, subject to a restriction that they remain within the "four corners" of their witness statements. All witnesses, party and non-party, will be cross-examined at trial. Their voices will be heard.

5. Some Witnesses May Not Voluntarily Swear or Affirm a Witness Statement

Not all witnesses are keen to testify. For those not inclined to co-operate, a party may provide a "Will Say" statement of the witness's anticipated evidence and ask for leave to adduce oral testimony from that witness at trial. Where leave is granted, the witness's attendance may be compelled through a Summons to Witness.

PART 6: THE UP-FRONT EVIDENCE MODEL PROCESS

VI.

A. THE STANDARD TIMETABLE

We propose to establish the following standard timetable to govern the exchange of pleadings, witness statements, affidavits of documents, and timetables for expert evidence:[43]

	Days from last step	**Overall days in timeline**
Claimant issues the Claim	0	0
Claimant serves the Claim	45	45
Defendant serves and files its statement of defence and any third party claim	45	90
Third party defends the third party claim	45	135 (~4.5 months)
Claimant delivers its witness statements, documents, and expert evidence timetable	45	180 (~6 months)
Response(s) from all parties to the Claimant's expert evidence timetable	30	210 (~6.5 months)
Defendant delivers its witness statements, documents and expert evidence timetable	60	270 (~9 months)
Third Party delivers its witness statements, documents and expert evidence timetable	90	360 (~12 months)
Claimant delivers its reply witness statements and any supplementary documents		360 (~12 months)
One Year Scheduling Conference		**~365 (12 months)**

[43] As detailed more fully below, the default timelines will not apply to summary proceedings or cases otherwise expressly excluded from it, for instance as referenced in Part 2.A.

Defendant delivers its reply witness statements and any supplementary documents	30	390 (~13 months)
Third party delivers its reply witness statements and any supplementary documents	30	420 (~14 months)

We propose to allow parties to consent to amend any interim deadlines (be it a Court-ordered deadline, an agreed-upon deadline, or a deadline prescribed by the Rules) (an "**Interim Deadline**"), so long as the new deadline does not (i) require the adjournment of a Court hearing (i.e. motion date or dispositive hearing date) or (ii) preclude the parties from completing the steps outlined in the default timetable before the One Year Scheduling Conference. Any agreement to amend an Interim Deadline on consent will need to be in writing.

Consistent with the proposed General Duty to Co-operate (discussed in Part 3 above), we propose to codify the conventional practice of reasonable accommodation. Parties will be subject to a Duty to Co-Operate with one another to address any scheduling issues that arise in advance of an Interim Deadline. For instance, it will be expected that a party will agree to grant an opposing party a short indulgence to deliver their witness statements in the normal course. The reasonableness of the request will be paramount.

The consequences for breaching this duty are discussed in Part 11 below.

B. ATTENDING AN EARLY SCHEDULING CONFERENCE

Scheduling conferences ("**Scheduling Conferences**") will be brief Court appearances, typically 15 minutes or less. They will be exclusively used to address scheduling issues. They will be similar to existing Civil Practice Court appearances in Toronto and Triage Court appearances in Newmarket. The hope is that Scheduling Conference lists will be run at least once per week in each judicial region.

As noted in Part 4, a One Year Scheduling Conference date will be assigned to parties shortly after the Claim is issued. That said, the parties will be able to attend an early Scheduling Conference if they anticipate having issues completing the up-front evidence exchange within one year or otherwise being ready for trial in two years.

At a Scheduling Conference, the Court will have the discretion to take any of the following actions, keeping in mind that one of the Goals is, following a reasonable transition phase, to have all cases heard within two years:

(i) Place the case on an inactive list (the "**Inactive List**") for up to one year if (a) all parties consent, (b) damages have not yet crystallized, (c) an injury at issue in a personal injury action has not stabilized, or (d) it is otherwise in the interests of justice. If the Court places the case on the Inactive List, it must schedule the next Scheduling Conference within one year. Within that one-year period, however, the parties may request an earlier Scheduling Conference if they wish to remove the case from the Inactive List;

(ii) In cases where an injury at issue in a personal injury action has not yet stabilized or damages have not yet crystallized, order that the parties proceed with the exchange of evidence concerning liability but wait to exchange their evidence concerning damages. The intent here is to ensure that witness statements on the issue of liability are prepared at the case's outset, when recollections are freshest; or

(iii) Reschedule the One Year Scheduling Conference to a later date if the case involves additional parties, requiring more time for all parties to complete the up-front discovery process, or it is otherwise in the interests of justice.

C. THE LIGHT TOUCH TRACK AND THE ONE YEAR SCHEDULING CONFERENCE

If the parties can complete the up-front exchange of evidence, agree on a schedule to govern the exchange of expert reports (as discussed in Part 5 and detailed more fully in Part 10 below), and do not require any interlocutory relief, the parties will proceed to their One Year Scheduling Conference. As set out above, the One Year Scheduling Conference date will be set as soon as is practicable after the Claim is issued and will aim to be scheduled approximately one year thereafter.

The purpose of the One Year Scheduling Conference is to provide a touchpoint with the Court to ensure the proceeding is on track and will be ready for a dispositive hearing within (approximately) one additional year.

During the conference, the Court will be expected to:

(i) confirm that the parties have exchanged their evidence and are not requesting any interlocutory relief;

(ii) ensure the parties have agreed on a reasonable schedule for the exchange of expert reports and formalize the expert schedule into a Court order;

(iii) schedule a mandatory mediation, if that has not already occurred;

(iv) set a date for the trial management conference; and

(v) set a date for the dispositive hearing.

The ultimate goal, recognizing that it may take some time to transition to it, will be to schedule a dispositive hearing date within two years from the Claim's issuance (i.e. approximately one year after the One Year Scheduling Conference). If it serves the interests of justice, the Court may schedule the dispositive hearing for a later date.

In determining whether a delay is justified, the Court will balance the goal of having all cases heard within approximately two years 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 will not crystallize within the two-year period; an injury that will not stabilize within the two-year period;

a large number of expert reports that cannot be completed within a 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 Part 11.

D. 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 proceed by way of a paper-based summary hearing process (i.e. a "Summary Hearing", defined and discussed in Part 7 below); or (ii) a party seeks any form of interlocutory relief that relates to more than scheduling.

During the Directions Conference, parties can expect that the Court will:

(i) Address any interlocutory disputes (discussed in Part 8 below);

(ii) Determine what kind of dispositive hearing will be used to determine the proceeding: (a) a Summary Hearing (defined and discussed in Part 7 below) or (b) a live evidence hearing (i.e. a trial);

(iii) Schedule the date and time for the dispositive hearing;

(iv) If the matter is proceeding by way of a live evidence hearing, schedule (a) a trial management conference and (b) a mediation if one has not occurred;

(v) If the matter is proceeding by way of Summary Hearing (defined and discussed in Part 7), timetable any remaining steps that need to take place before the dispositive hearing;

(vi) Where requested, schedule a Binding Judicial Dispute Resolution (defined and discussed in Part 9 below);

(vii) If one or more parties intend to rely on expert evidence, make an order addressing all issues relating to experts (i.e. number of experts, joint experts, the schedule governing the exchange of reports, etc.); and

(viii) Where appropriate, make attempts to settle the matter and, if advisable, order a judicial settlement conference.

A further Directions Conference may occur if additional interlocutory issues arise.

PART 7: SUMMARY HEARINGS AND THE PAPER RECORD+ PROCESS

VII.

A. PRESUMPTIVE SUMMARY PROCEEDINGS

As set out above, the commencement of a proceeding will be through one point of entry. Although there will be no distinction between applications and actions in the proposed new model, the existing process governing applications as they presently exist will remain largely intact.

The following matters, all of which can or may be commenced as an application in the current system, will be considered "**Presumptive Summary Proceedings**" in the new system:

(i) A proceeding initiated under a statute that permits or requires the commencement of a proceeding by way of an application; and

(ii) A claim in which the only relief being sought is:

(a) the Court's opinion, advice, or direction on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

(b) an order directing executors, administrators, or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators, or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract, or other instrument, or on the interpretation of a statute, order in council, regulation, or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgagee, lease or variation of trust;

(g) an injunction, mandatory order, or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in any of the foregoing proceedings;

(h) for a remedy under the *Canadian Charter of Rights and Freedoms*; or,

(i) recognition of a foreign judgment.

The foregoing list includes all matters listed in rule 14.05 other than the basket clause at rule 14.05(3)(h). We believe that applications commenced under the basket clause have too often had material facts in dispute leading to orders converting them to actions.

Regardless, parties will also still have an opportunity to persuade a Directions Conference judge[44] (a "**DC Judge**") that their matter is capable of a summary disposition notwithstanding that it may not appear on the presumptive list above.

Presumptive Summary Proceedings will presumptively be heard by way of a "**Summary Hearing**" pursuant to a "**Paper Record+ Process**", which will proceed as follows:

(i) The Claimant commences a Claim in the manner described in Part 4 above;

(ii) On Appendix A of the Claim Form, the Claimant will indicate that the Claim is a Presumptive Summary Proceeding and will request an early Directions Conference;

(iii) At the Directions Conference, the DC Judge will confirm whether the Claim is, in fact, a Presumptive Summary Proceeding and, if so, make an order:

  (a) setting the date for the Summary Hearing (i.e. the dispositive hearing date);

  (b) allocating the amount of time being reserved for the Summary Hearing; and

  (c) setting the timetable that will govern the Paper Record+ Process, which will address the exchange of any materials appropriate for the particular proceeding (e.g. affidavits, expert reports, or record of proceeding); scheduling of cross-examinations (if necessary); the setting of a mediation (if appropriate); and the exchange of factums;

(iv) Where cross-examinations occur, a party may only refuse to answer a question on the grounds of privilege or on the basis that the question is scandalous (i.e. both (a) irrelevant and (b) highly confidential or of a disgraceful nature). Objections to questions on any other grounds should be stated on the record, with an answer to the question provided. A request for an undertaking may also be challenged 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. The admissibility of any evidence given under objection will be determined by the hearing judge;

(v) The parties will proceed to the Summary Hearing in accordance with the Court-ordered timetable;

(vi) The judge presiding at the Summary Hearing will retain the discretion to allow oral evidence from one or more parties, with or without time limits (hence the "+" in the "Paper Record+ Process"). This will equip the judge with the necessary tools to ensure they have all the information required to issue a final decision; and

(vii) The judge will issue a final determination.

[44] Where this Consultation Paper refers to any proceeding before a "judge," it should be deemed to include an associate judge wherever possible.

The proposed approach maintains the current system's benefit of allowing certain cases to be presumptively heard in a summary manner. At the same time, it eliminates confusion about which matters can be properly initiated by application and eliminates resources wasted on addressing the need to convert one form of proceeding into another.

B. NON-PRESUMPTIVE SUMMARY PROCEEDINGS

The Need for Change: Currently, summary judgment motions under 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), rule 20.04(2.2) provides discretion to the judge hearing the motion 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 (i) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence or (ii) 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 proceeding to trial can be economically irrational, whereas summary judgment offers a more affordable 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. Unfortunately, however, this leads to numerous failed summary judgment motions.

This is precisely the problem we are trying to address. Summary judgment motions consume significant resources of both the parties and the Court. They require comprehensive briefing of both the facts and the 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 facts and issues must be revisited. This redundancy not only wastes the litigants' time and financial resources, it also delays the case's final resolution, sometimes by more than a year, and wastes significant Court resources that could otherwise have been used to move the case toward an actual resolution.

Proposed Reforms: The proposed new Paper Record+ Process closely mirrors the old summary judgment process, with one key difference: it eliminates the possibility of a failed summary judgment motion.

In the context of all non-Presumptive Summary Proceedings, after the parties have completed the up-front exchange of evidence, if one or more parties wish to proceed under the Paper Record+ Process, they can make a request at a Directions Conference. The DC Judge will then decide whether the matter will be determined by way of the Paper Record+ Process and, if so:

(i) set a date for the Summary Hearing, aiming to schedule it within a year of the Directions Conference;

(ii) allocate the amount of time being reserved for the Summary Hearing; and

(iii) order a timetable to govern the remaining steps in the process, which will address any further exchange of evidence, including expert reports (if necessary), cross-examinations, a mediation (if appropriate), and the exchange of factums.

As explained above, the judge presiding at the Summary Hearing will retain the discretion to allow oral evidence from one or more parties, with or without time limits, thereby ensuring that she or he has all information that is necessary to make a final decision.

Unlike the present model, where summary judgment motions may be dismissed due to a finding that there is a genuine issue requiring a trial, the proposed new model will mandate that the presiding judge issue a final decision at the Summary Hearing's conclusion. There will be no option to order that the matter proceed to trial. Said otherwise, once the DC Judge decides that the matter will be determined through the Paper Record+ Process, that will be the process used to finally determine the matter.

This proposed new process retains the benefits of enabling the summary disposition of a non-Presumptive Summary Proceeding, while eliminating the drawbacks of delays and wasted resources arising from failed summary judgment motions. In that way, it remains truer to the goals set by the Supreme Court in *Hryniak*.

PART 8: REFORMING MOTIONS PRACTICE

VIII.

A. CURBING MOTIONS PRACTICE

Earlier, we indicated that the bulk of our proposed reforms were focused on interlocutory procedures – primarily discovery and motions practice. In this section, we tackle the long-standing problem of the "motions culture" fostered by the current Rules.

Ontarians expect a justice system that is "within reach" – one that is designed to provide an efficient, fair, and timely resolution of civil disputes. Regrettably, motions have contributed to a civil justice system that is proving to be out of reach for many Ontarians. 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. Justice David Brown described the problem in a speech he made to the 2014 Annual Meeting of the Carlton County Law Association:[45]

> 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.

Motions can significantly increase litigation costs, with a single motion sometimes exceeding $100,000 in costs by the time it is resolved. Litigants with deep pockets can leverage motion 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, motion practice also leads to substantial delays. This too can be exploited for strategic

[45] *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 Costs Effective Determinations of Civil Cases on "Their Merits"*, November 21, 2014; this same point was made by Brown J.A. in an update to his paper: https://www.ccla-abcc.ca/ at ¶ 28.

advantage, particularly by defendants who benefit from delay. Presently, a party can often 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.

B. A PROPOSED NEW INTERLOCUTORY DISPUTE PROCESS

Not all motions are created equal. Some motions are merely procedural and do little to advance a matter to resolution. Other motions play a crucial role in the litigation process 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 does a disservice to the parties and the Court and is at odds with the Goals.

A more bespoke process, supported by early judicial intervention, will ensure that motions are addressed in a manner proportionate to the significance of the issues and the impact they have on the substantive dispute. This point was emphasized by 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:*"[46]

> 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 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 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."[47] As Justice Myers recently noted, summary resolution of interlocutory motions at case conferences can provide a meaningful

[46] 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.

[47] Miller v. Ledra, 2023 ONSC 4656 at ¶ 30 (citing *Hryniak v Mauldin*, 2014 SCC 7); see also *Plaxiy v. Fedun*, 2023 ONSC 6459.

way to address the use of procedural motions to drive up costs and delay litigation.[48] A similar approach has been adopted on the Commercial List in Toronto.[49]

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. One key amendment was to permit a party to opt into a one-judge case management model. At a case conference, a judge may, without the need for filed materials, make any order or give any direction deemed necessary to facilitate the just, most expeditious, and least costly resolution of an action. Reflecting the principle of proportionality, parties no longer have an automatic right to litigate every procedural issue, and judges may refuse to permit interlocutory motions. As a result, proceeding with a formal contested motion has become the exception rather than the norm. According to members of the Manitoba judiciary, the recent amendments have nearly eliminated their previous "motions culture."

The Working Group proposes to introduce new rules to govern interlocutory matters that are modelled, in part, on the case management approach being used in Toronto and Manitoba. The new proposed process will operate as set out below and is intended to drastically curb the pervasive motions culture that currently exists.

While the current Rules refer to relief that can be sought by way of "motion", the proposed reforms will distinguish between three different types of relief:

(i) Relief that is more procedural in nature and that will be presumptively decided at a Directions Conference. The resulting decision will be called a "**Direction**." Examples include but are not limited to: requests to bifurcate, requests for production of additional documents (unless contested on the grounds of privilege), and requests to proceed by way of a Summary Proceeding (as discussed in Part 7);

(ii) Relief that requires a more fulsome evidentiary record or legal submissions and that will be presumptively decided at a formal motion. The resulting decision will be called a "**Motions Order**." Examples include but are not limited to: requests for security for costs, and contested requests for a certificate of pending litigation;

(iii) A residual category of "**Relief**", for which no presumption will apply and that may be decided at a Directions Conference or a formal motion. Examples include but are not limited to: requests to strike a claim on the grounds that it discloses no reasonable cause of action, and requests for production of additional documents contested on the grounds of privilege.

All contested requests for interlocutory relief will be subject to a Directions Conference.

Before attending a Directions Conference, the parties will be required to file a Notice of Relief and a Directions Conference Submission of up to five pages (both defined and discussed below).

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[48] *Country Wide Homes Upper Thornhill Estates Inc. v. Su*, 2022 ONSC 4998.

[49] See Consolidated Practice Direction Concerning the Commercial List, Part X: Chambers Matters, effective June 15, 2023.

The DC Judge will have the power to:

(i) decide the interlocutory issue at the Directions Conference, including the issue of costs, and issue a resulting Direction;

(ii) order that the parties attend a further Directions Conference and, if necessary, exchange further materials before such attendance; or

(iii) schedule a formal motion, impose a timetable that will govern the exchange of evidence in connection with the motion, limit the amount of evidence to be exchanged or the lengths of the parties' factums, and determine whether the motion will be heard orally or in writing.

The DC Judge will also have the power to:

(i) make attempts to settle the interlocutory issue; and

(ii) prohibit a party from making further motions in the proceeding without leave (i.e. maintaining the rights that currently exist under Rule 37.16).

Although the DC Judge will have discretion to decide what process will be followed (e.g. deciding the issue at the Directions Conference or ordering that the matter proceed to a formal motion), they will be guided by the presumptions that will be set out in the new Rules:

(i) Relief that is presumptively to be heard at a Directions Conference will, unless the interests of justice require otherwise, be heard at the Directions Conference;

(ii) Relief that is presumptively to be heard at a motion will, unless the interests of justice require otherwise, be heard at a motion;

(iii) For the residual category, the DC Judge will not be guided by any presumptions but will instead consider whether the interlocutory dispute can be decided based on the five-page Directions Conference Submission (defined and discussed below) or whether a more comprehensive record or additional legal submissions are required for a fair resolution of the dispute.

The presumptions are designed to give litigants greater certainty as to which matters will be decided at a Directions Conference and which will be decided at a formal motion.

The Working Group believes that this process will work optimally if, subject to available resources, the same DC Judge is able to preside over any subsequent Directions Conference or formal motion.

Parties will not be required to attend a Directions Conference if the relief they are seeking is (i) on consent or unopposed (and does not involve a party under disability), (ii) can be granted by the Registrar, or (iii) is brought on a without notice basis.

C. MATERIALS FILED WHEN SEEKING INTERLOCUTORY RELIEF

Motion materials can be unnecessarily repetitive:

(i) When two affiants have similar testimonies, there may be two affidavits conveying nearly identical information;

(ii) A notice of motion must include the relief sought, along with the grounds for the relief, which frequently consists of a summary of the facts and legal arguments also set out in the factum;

(iii) Depending on the Court, parties are also required to file compendiums and, sometimes, a summary that further narrows the materials to those on which the party intends to rely during the hearing; and

(iv) If parties wish to rely on documents where authenticity is not in dispute (e.g. correspondence between counsel), they are still required to file an affidavit attaching those documents.

All of that is to say that there is frequently a lot of "fat" that might reasonably be trimmed from the materials filed on motions. The prolix and repetitive nature of motion materials has serious consequences: even simple motions become expensive to litigate. In addition, precious judicial resources are wasted sifting through voluminous materials to identify what is actually helpful or determinative. Finally, although there are no limits on the number or length of affidavits a party may file, there are restrictions on the length of the factums a party may submit. If some judges are only reading the parties' factums, it is unclear what is gained from the filing of more voluminous motion records.

As a result, we recommend revising the requirements for materials to be filed with the Court.

1. Materials for a Directions Conference

Before attending a Directions Conference at which interlocutory relief is being sought, parties will be required to file the following documents:

(i) To book a Directions Conference, the moving party will be required to file a Notice of Relief (the "**Notice of Relief**") that will replace the existing Notice of Motion. The Notice of Relief will identify (i) the relief sought, (ii) the Rules and/or legislation relied upon in support of the relief sought, and (iii) any process presumption that applies. It will also require the moving party to certify that it has consulted with the opposing parties and that the matter could not be resolved;

(ii) Ten days before the Directions Conference, the moving party will be required to file a submission of no more than five pages (the "**Directions Conference Submission**") setting out the evidence on which they intend to rely and their legal submissions, with supporting documents attached as a Schedule.

(iii) Three days before the Directions Conference, any opposing party will be required to file its responding Directions Conference Submission.

If the Directions Conference 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. By requiring an attestation, the Directions Conference Submission will constitute a modest evidentiary record on which Directions may be made.

2. Materials for a Formal Motion

The Working Group is considering streamlining the materials that will need to be filed if the interlocutory dispute proceeds to a formal motion. We are also considering whether page limits should be replaced with word limits.

The Notice of Relief will be simplified: As described above, a new Notice of Relief will replace the existing Notice of Motion. It will not include the "grounds" section that is currently included in a Notice of Motion. The rationale is that the grounds for the request will be outlined in the Directions Conference Submission and the factum, making it unnecessary to duplicate that information in the Notice of Relief.

A "One Document" Approach: To address the problem of repetition between multiple affidavits, the Working Group is considering combining all evidence and law into a single document, which will continue to be referred to as a factum, but which will have the following features:

(i) Instead of exchanging affidavits, the moving party will serve a "**Moving Facts"** document. The responding party will serve a "**Responding Facts**" document. The moving party will then have the opportunity to file a "**Reply Facts**" document. These three documents will be referred to as the "**Facts Documents**."

   (a) The Facts Documents will be drafted in the third person;

   (b) Each fact included in a Facts Document must include a footnote to a witness who has firsthand knowledge of the fact and/or, where helpful, a document;

      - **Note:** where the authenticity of a document is not challenged, the document may be attached to the Facts Documents without adducing a witness with first-hand knowledge of the document;

   (c) Multiple witnesses can be cited as having firsthand knowledge of the same fact;

   (d) Each witness will be required to swear that each fact included in a Facts Document being attributed to them is true (just as they do in an affidavit). All witnesses will sign the same Facts Document attesting to the truth of the facts attributed to them;

   (e) As is the case under the existing Rule 39.01(4), the Facts Documents may contain statements of a witness's information and belief, if the source of the information and the fact of the belief are specified in the footnote;

(ii) If a party contests the authenticity of a document, it will provide notice of the objection;

(iii) The parties will have the opportunity to cross-examine any witness based on the facts attributed to them in any Facts Documents;

(iv) After completing cross-examinations, the parties will draft their factums, limited to no more than 20 pages without leave of the Court, unless the Court has ordered a shorter page limit. Factums will consist of (a) a revised version of the relevant Facts Documents, incorporating any additional facts obtained from the cross-examination (or shortened to meet the page limit) and (b) a legal argument.

This approach has at least three benefits. First, it will encourage parties to evaluate up-front what facts are important for the motion and consider the length of their Facts Documents, bearing in mind the total page limit for their factums. This is expected to discourage the inclusion of needless narrative and submissions dressed up as facts, with the result being a focus on the facts that really matter.

Second, by reducing the volume of materials filed and eliminating the need to redraft content, the proposed changes will reduce the costs associated with motions.

Third, the reduced volume of materials will also minimize the judicial resources required to address motions. The expectation is the motions judge will be required to review only the factums as filed and any expert reports. The new form of factums should obviate the need for compendiums.

D. URGENT MOTIONS

A party who brings an urgent, without notice, request for relief will not be required to first attend a Directions Conference. The Working Group's expectation is that they will continue to be addressed according to local practices.

Where a party seeks to bring an urgent request for relief on notice, a Directions Conference will be scheduled no later than three business days after the request is made. At the time of making the request, the moving party will file its Notice of Relief and Directions Conference Submission. The responding party will file its Directions Conference Submission one day before the conference.

At the conference, the DC Judge will decide whether the request for relief is truly urgent and whether to grant the relief sought. If necessary, he or she will also establish the appropriate process for resolving the interlocutory dispute.

E. MOTIONS TO REMOVE 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. Anecdotally, the Working Group has heard from several judges and associate judges that motions to remove counsel are cluttering their dockets.

The bar has 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."[50] In deciding whether to grant the relief, the Court will consider the following factors: (i) the reason counsel is seeking to get off the record; (ii) the *Rules of Professional Conduct* (which are informative, but not binding on the Court); (iii) whether the civil action is of the type where it is feasible for the client to be self-represented; (iv) 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; (v) whether the removal of counsel will cause a delay in the proceeding or an adjournment that will prejudice other parties; and (vi) whether removal of counsel will cause serious harm to the administration of justice.[51]

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, the Working Group proposes that a lawyer should be entitled to requisition an order to be removed as counsel of record when the following preconditions (the "**Preconditions**") have been met: (i) there are no deadlines (agreed upon or imposed by the Court or the Rules) or Court attendances within the next 90 days; (ii) there is no trial or dispositive hearing scheduled to be heard within the next 180 days; and (iii) the client is not under a disability.

The requisition will need to be made on notice to the client and opposing parties. The lawyer seeking to get off the record will need to certify that the Preconditions have been met.

Rules 15.04(4) to (9) would continue to apply. The order would be issued by the Court 14 days after the requisition is filed. Where a lawyer improperly certifies that the Preconditions have been met, the lawyer's client or an opposing party would be entitled to challenge the requisition within the 14-day period.

Where the Preconditions are not met, a modified version of the existing rule 15.04 will apply, and the parties will be required to attend a Directions Conference and, thereafter, follow the new interlocutory relief process.

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. If the Preconditions are met, then there is little risk of prejudice to a client's ability to retain new counsel or, if permissible, act on their own behalf. Of course, a lawyer that seeks to remove themselves as counsel of record must continue to adhere to the *Rules of Professional Conduct*.

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[50] *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, 2023 ONCA 196 at ¶ 13.

[51] *RULE 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; *Cengic v. Castro*, 2020 ONSC 986 (CanLII) at ¶ 17.

F. PLEADINGS MOTIONS

The concept of "pleadings motions" covers a lot of ground. Pleadings 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 motions that warrant reform. The first two are in the nature of housekeeping, while the last is more substantive:

(1) Eliminating Motions for Particulars. The up-front evidence model obviates the need for motions for particulars. The evidence exchanged in the up-front evidence model following the close of pleadings should provide the particulars of the claim and the defence. In the result, the Working Group proposes to eliminate motions of this nature.

(2) Consolidating Pleadings Rules. The rules that govern pleadings, and in turn motions involving pleadings, are found in different places in the current iteration of the Rules. The result is inefficiency and a risk of confusion. The Working Group proposes consolidating these rules into a single location. Specifically, we suggest merging the following rules into one comprehensive "umbrella" rule, accompanied by corresponding sub-rules:

Rule 5 – Joinder of Claims and Parties

Rule 6 – Consolidation or Hearing Together

Rule 6.1 – Separate Hearings (Bifurcation)

Rule 21 – Determination of an Issue Before Trial

Rule 25 – Pleadings in an Action

Rule 26 – Amendments

Rule 27 – Counterclaims

Rule 28 – Crossclaims

Rule 29 – Third Party Claims

It is further proposed that because rules 6.1.01 and 21.01(1)(a) have much in common, they should be combined in an effort to make them simpler and easier to navigate. In particular:

(i) 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;

(ii) 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."

In substance, a proposed consolidation of Rules 6.1.01 and 21.01(a) would provide that:

(i) A party may seek a separate determination of one or more issues of fact, law, or mixed fact and law, including separate hearings on the issues of liability and damages, where the determination of the issue(s) may dispose of all or part of the action, substantially shorten the trial, or result in a substantial saving of costs;

(ii) If the issue(s) to be decided are ones of law, no evidence will be admissible, except with leave of the judge or consent of the parties;

(iii) If the issue(s) to be decided are ones of fact or mixed fact and law, evidence will be admissible;

(iv) The request will be addressed at a Directions Conference, at which time the DC Judge may, in the clearest of cases, decide the issue of fact, law, or mixed fact and law;

(v) If the DC Judge does not decide the issue(s) of fact, law, or mixed fact and law, he or she shall give directions as to whether the issue(s) should be addressed as separate issues and, if so, how they will be decided (e.g. motion, Summary Hearing (defined and discussed in Part 7), or a live evidence hearing).

Similarly, rules 21.01(1)(b), 21.01(3) and 25.11, tend to overlap and should be consolidated into one rule, again to make them simpler and easier to navigate. In substance, the consolidated rule would provide as follows:

(i) The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document:

  (a) discloses no reasonable cause of action or defence;

  (b) is scandalous, frivolous or vexatious;

  (c) is an abuse of the process of the court; or

  (d) may prejudice or delay the fair adjudication of the proceeding,

  and the judge may make an order or grant judgment accordingly.

(ii) The defendants may have an action stayed or dismissed on the following grounds:

  (a) the court has no jurisdiction over the subject-matter of the action;

  (b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

  (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

  (d) the subject-matter of the claim is subject to a binding release,

  and the judge may make an order or grant judgment accordingly.

(iii) Evidence will not be permissible on request for relief under sub-sections (1)(a)-(c), without leave of the court.

Finally, given the fact that Rule 22 (Special Case) is so rarely invoked, we are considering its elimination.

(3) Striking Pleadings. 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 Directions Conference Submission.

The DC Judge – or the Judge hearing the motion if the matter is directed to proceed to a formal motion with a different judicial offer – will have four available options:

(i) Dismiss the request for relief if the original pleading is found not to be deficient;

(ii) Grant leave to amend the pleading in accordance with the draft amended pleading filed, 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 direct a trial of those 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 trial from the material filed.

PART 9: PRE-TRIAL AND TRIAL PROCEDURES

IX.

A. ALTERNATIVE DISPUTE RESOLUTION

1. Mediation and Pre-Trial Conferences

The Need for Change: Resolution without the need for a trial has many salutary effects, including significant costs savings to the litigants, reduced demand on limited court resources, and of course the ability of the parties to control the result.

Pre-trial conferences have come to occupy an important place in the life of an action and contribute to a consistently high rate of resolution before trial year over year. Strained judicial resources have, however, resulted in unacceptable backlogs in some Regions, resulting in long wait times for pre-trial dates and, in turn, long wait times for trial dates once proceedings are trial ready.

Without significantly increased resourcing, which is not expected, breaking the pre-trial bottleneck is a challenge. Other neutral venues for facilitating resolutions between litigants must be considered.

The response to the Phase 1 consultation report indicated very strong support for expanding mandatory mediation – currently limited to Toronto, Ottawa, and Windsor – throughout the province. That support is consistent with a survey conducted by the Ontario Bar Association in 2019, which asked members of the OBA to express their views about whether mandatory mediation ought to be expanded throughout the province. Although the response rate was apparently low, those that did respond were overwhelmingly in favour of expansion.[52]

Proposed Reforms: The Working Group proposes to outsource the settlement portion of pre-trial conferences to mandatory mediation in matters not proceeding on a summary basis as outlined in Part 7.[53] The court will retain a discretion to exempt parties from mandatory mediation in appropriate circumstances, for instance where a mediation already occurred, or where it would clearly be inappropriate. The Court will also retain a discretion to order a judicial settlement conference in circumstances that warrant it.

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[52] See Jennifer L. Egsgard, "Mandatory Mediation in Ontario: Taking Stock after 20 Years", (July 16 2020), online: OBA.org - Mandatory Mediation in Ontario: Taking Stock After 20 Years. See also www.oba.org/CMSPages/GetFile.aspx?guid=4f756ca7-2962-417b-aec6-18e1ae760d12

[53] This is not to say that mediation will never occur in cases assigned to the Paper + Hearing track. There may be cases where a DC Judge orders a mediation to take place before a Summary Hearing.

Parties will, to some extent, be able to determine the timing of the mediation that best suits their needs. That said, if a mediation has not been scheduled before the One Year Scheduling Conference, or a corresponding Direction Conference, it will be scheduled by the court at that time. Parties attending such a conference will be required to have discussed mediation and the selection of a mediator. If they fail to do so, the court will assign a mediator from the mediation roster.

Under this proposal, the court will retain the trial management portion of the pre-trial conference. The hope is that, in most cases, the trial judge will conduct the trial management conference ("**TMC**" or plural "**TMCs**"). A dedicated TMC form and prescribed requirements for parties attending TMCs should aid in making them efficient and significantly less time consuming than current settlement pre-trials. TMCs are discussed in greater detail in Part 9B.

The Working Group debated a number of concerns related to this proposal including the following:

(i) mediation may add a financial burden, particularly for lower-income parties;

(ii) the timing of mediation can often determine its likelihood of success; and

(iii) some parties just need to hear from a judge.

We will take a moment to address these concerns.

The Financial Burden of Mediation: There is no doubt that mandatory mediation adds an expense to most proceedings. We make several observations in response. First, the proposal is to expand the current mandatory mediation process with its rostered mediators and fixed schedule of fees. For those parties that can afford off-roster mediators, that option will exist. For others, the roster fees are considered reasonable and proportionate to cases commenced in the Superior Court. 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 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.[54]

Timing Issues. The Working Group agrees with the observation that the timing of a mediation can determine its likelihood of success. The proposed reform allows the parties to largely determine the timing of the mediation. The up-front evidence model will ensure, however, that the parties are able to meaningfully assess the strengths and weaknesses of the case early in the litigation. In turn, this will enable them to engage in meaningful settlement discussions at an earlier stage.

One view, expressed in Working Group meetings, is that mediation will only be successful in many personal injury cases when it is conducted close to the trial date. Again, the timing of the mediation will be left largely to the parties, who are best suited to decide when the time is right. For those

[54] 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.

cases where a mediation has not been scheduled within a year of the commencement of the claim, a date will be fixed either at the One Year Scheduling Conference or at a Directions Conference.

Some Parties Just Need to Hear from a Judge. The Working Group accepts that there is real value in judicially facilitated settlement conferencing. But it comes at a significant cost in terms of delay. In some Regions, the wait time for a pre-trial conference is a year or more. We are faced with a difficult choice: either accept that those delays are an inevitable feature of the process or find a work-around. We reached the conclusion that, on balance, it is preferable to reduce delays by outsourcing settlement conferencing. Mandatory mediation has been in place for a quarter of a century, 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.

We return to the observation that litigation is about risk-management. Parties may not have the benefit of a judge's pre-trial evaluation of a case in all cases, 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.

Taking Mediation Seriously. The Working Group has heard concerns that, if mediation is made mandatory, parties with little interest will simply file *pro forma* briefs and will not seriously engage in a dispute resolution process. The result may be wasted time, wasted costs, and the risk that settlement rates will drop given that judicial pre-trials will no longer be routinely available under the new proposed model.

One means of attenuating these concerns, that the Working Group is currently considering, is to implement *evaluative* mediation. 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 consequences would result where a party failed to accept a mediator's recommendation and ultimately achieved a less favourable result at trial than that recommendation.[55]

While implementing an evaluative element to the mediation process may encourage litigants to approach mediation more seriously, there is a concern that it may also have the deleterious effect of increasing the cost of mediation, given the risk that parties may expend considerable effort attempting to persuade the mediator of the righteousness of their positions. It may also result in parties taking a more adversarial approach to mediation, which may tend to undermine the goal of the process. Given these concerns, the Working Group is interested in hearing consultees' views of the proposal to import an evaluative element to mandatory mediation.

[55] See Bill Hourigan, Michael Willson, and Preston Jordan Lim, *A Modest and Principled Proposal for Civil Justice Reform in Ontario* (March 6, 2025). Available at SSRN: https://ssrn.com/abstract=5166916.

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, where the parties consented. The model proved successful and has been taken up in other family courts around the province. A new rule has recently been introduced to the Family Law Rules to provide for JDR and it can be found here.

The model permits 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 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 and the hearing is treated as a case conference.

The model is suitable to cases where 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.

The Working Group proposes to introduce a similar model of binding JDR for similarly straightforward civil cases, where the parties consent. The suggestion to introduce such a model was supported by a significant number of consultees who responded to the Phase 1 consultation paper.

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). A similar model is also employed in New Zealand by their Civil Disputes Tribunal for cases up to $30,000.

B. TRIAL MANAGEMENT CONFERENCES

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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 a performative checklist at the end of a pre-trial conference. The result: *ad hoc* trial management conducted at the outset of trial (or during the trial itself) to address issues and procedures which ought to have been addressed before the trial began or, worse, no trial management at all.

The lack of thorough trial management can result in valuable trial time being wasted on litigating undisputed issues, prolonged disputes over procedural or evidentiary matters, or the voluminous and tedious filing and referencing of documents with no relevance or little, if any, probative value.

2. Proposed Reforms

The Working Group's view is that the best way to improve trial efficiency is to provide for enhanced trial management at the pre-trial stage. As a result, we propose that a TMC be established as a standard event in civil litigation. 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 to ensure that the matter is not only ready to proceed to trial, but that the trial will proceed efficiently.

It is anticipated that a TMC will occur 2-3 weeks before the scheduled commencement of trial and, ideally, that it be presided over by the assigned trial judge. Subject to resourcing, we propose that this become the standard, only to be departed from in exceptional circumstances.

Guidelines will be prescribed to ensure consistency of trial management and trial practice across the province. A TMC checklist will include:

(i) the manner in which 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 an Agreed Chronology, as described 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 manner of the presentation of evidence. The presumption, subject to the discretion of the trial judge, will be that parties' evidence in-chief will be provided orally, though it will be limited to the "four corners" of their sworn witness statements. 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. The presentation of expert evidence will also be addressed, in accordance with the process described in Part 10 below;

(vi) addressing any objections to the admissibility of evidence, either in witness statements or proposed document books that were not previously addressed at a Directions Conference;

(vii) identifying any anticipated motions;

(viii) canvassing the use of technology; and

(ix) canvassing the anticipated length of the trial, including whether the parties' presentation of evidence and/or legal submissions will be subject to time limits.

Certain aspects of the proposed new process for trial management require explanation.

a) Chronologies

The Working Group proposes to move away from the permissive nature of Agreed Statements of Fact and Requests to Admit toward a mandatory approach requiring parties to exchange chronologies of key facts in advance of the TMC. Agreed chronologies are used in other

jurisdictions, including Singapore and New Zealand, as a mechanism to streamline agreements on facts and narrow issues in dispute.

Chronologies will be required to be drafted neutrally, without arguments, opinions, hyperbole, or adjectives which often infect Requests to Admit and Agreed Statements of Fact rendering the effort to create them futile. Chronologies will follow a prescribed format and be presumptively exchanged in accordance with the following timetable:

(i) 60 days before the TMC, the plaintiff will serve its chronology on all defendants and any subsequent party, detailing key facts;

(ii) 35 days before the TMC, all defendants and any subsequent parties will serve their responses, using the plaintiff's chronology as a base and identifying two things:

- which facts in the plaintiff's chronology are agreed and which are disputed; and
- any additional key facts the defendant(s) or subsequent parties seek to add to the chronology;

(iii) 21 days before the TMC, all defendants and any subsequent parties, will serve each other and the plaintiff with their responses to the chronologies of all other defendants and subsequent parties;

(iv) 7 days before the TMC, the plaintiff will serve a compiled (joint) chronology on all defendants and any subsequent parties and file it with the court. The chronology will include all facts from any party's chronology, along with an indication of (a) which facts are agreed upon and by whom and (b) which facts are disputed and by whom. This will include the plaintiff's response to the additional facts put forward by the defendant(s) or subsequent parties.

Any proposed fact included in the joint chronology to which no objection was made will be taken as an agreed fact. The trial will focus on the facts in dispute.

Failure by a party to comply with the chronology requirements or a failure or refusal to admit a fact which ought to have been admitted will be subject to costs consequences.

It remains an open question how detailed the chronologies should be. That is a matter that is likely going to have to be worked out in practice.

b) Joint Books of Documents

Simultaneous with the creation of a joint chronology, parties will be required to prepare a Joint Book of Documents ("**JBD**"). This requirement follows the guidance of the Court of Appeal for Ontario in *Girao v. Cunningham*[56] and expanded upon in *Bruno v. Dacosta*.[57] Since those decisions, trial courts have regularly impressed upon parties that JBDs are expected and strongly encouraged, but the practice is not mandated or enforced, nor is there any standardized practice

[56] *Girao v. Cunningham*, 2020 ONCA 260

[57] *Bruno v. Dacosta*, 2020 ONCA 602

for preparation of JBDs. The proposed reforms will make JBDs mandatory and will prescribe the practice for their creation. The requirements will mirror those applicable to the creation of a joint chronology. In particular:

(i) 60 days before the TMC, the plaintiff will serve all defendants and any subsequent party with a proposed JBD index in a prescribed form. Unless noted otherwise, the plaintiff will be deemed to be submitting the documents in the index as authentic and admissible for the truth of their contents;

(ii) 35 days before the TMC, each defendant and any subsequent party will serve the plaintiff, all other defendants, and any other subsequent parties with a response using the plaintiff's JBD index as a base and identifying two things:

- any additional documents the defendant(s) or subsequent party wants included in the JBD index. Unless noted otherwise, the defendant or subsequent party will be deemed to be submitting the additional documents as authentic and admissible for the truth of their contents; and
- any objections the defendant(s) or subsequent party is making on the basis that any document listed on the plaintiff's JBD index: (a) is not authentic; (b) should not be admitted for the truth of its contents; or (c) is not otherwise admissible. The failure to object will be deemed to be an acceptance that the documents listed on the plaintiff's JBD index are authentic and admissible for the truth of their contents;

(iii) 21 days before the TMC, each defendant and any subsequent party will serve on all other parties their response to the proposed additional documents of any other defendant or subsequent party, again using the base document. The response will indicate whether the party is objecting to any newly listed document on the grounds that: (a) it is not authentic; (b) it should not be admitted for the truth of its contents; or (c) it is not otherwise admissible. Again, the failure to object will be deemed to be an acceptance that the newly listed documents are authentic and admissible for the truth of their contents;

(iv) 7 days before the TMC the plaintiff will serve on all defendants and any subsequent parties and file with the court a compiled JBD index (and the JBD itself), which will include all documents included in any party's JBD index, along with an indication of which party is objecting to the admission of which document and on what grounds. It will also identify any objections the plaintiff is making to any documents listed by any defendant or subsequent party on the grounds that: (a) it is not authentic; (b) it should not be admitted for the truth of its contents; or (c) it is not otherwise admissible. The failure to object will be deemed to be an acceptance that those documents are authentic and admissible for the truth of their contents.

The JBD index filed with the court will serve as the parties' agreement regarding the admissibility and use of the documents included on the index. It will also identify any remaining admissibility issues that still need to be addressed.

The JBD 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 (and in particular ss. 35 and 52 thereof).

The following table illustrates the timelines for the exchange of Chronologies and Joint Books of Documents:

Time to TMC	**Required Steps**
60 days	Plaintiff serves all other parties with its chronology and JBD index.
35 days	Using the plaintiff's forms as a base, all defendants and subsequent parties serve each other and the plaintiff with their responses to the plaintiff's chronology and JBD and indicate any additions they wish to make to each form.
21 days	All defendants and subsequent parties serve each other with any responses they have to the additions proposed by other defendants and subsequent parties.
7 days	The plaintiff serves all parties with compiled chronologies and JBDs, indicating the parties' positions and the plaintiff's position with respect to the additions proposed by all defendants and subsequent parties.

c) Agreed Glossary of Definitions

The Working Group proposes to introduce a requirement that the judge presiding at the TMC canvass whether an agreed list of definitions ("**Glossary**") 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.

PART 10: EXPERT EVIDENCE

A. THE NEED FOR CHANGE

The proliferation of expert evidence continues to present serious challenges. While the 2022 amendments to the Rules have had a positive impact on delays caused by late-breaking expert reports, the number of experts being engaged, the timing of the delivery of expert reports, expert bias and concerns about "hired guns" (i.e. purportedly independent experts who are, in fact, lobbyists for a cause), and the length of trials with expert evidence continue to be troubling issues. Further reforms are needed to better manage the number and timing of expert reports and the way experts provide evidence to the trier of fact.

B. THE PROPOSED REFORMS

The Working Group proposes a suite of reforms that we believe will make the Rules surrounding expert evidence more readily comprehensible, may reduce the number of experts appearing at trials, and may make the evidence of those that do, less time consuming and more accessible for the trier of fact. In particular:

(i) Generally, we propose to adopt practices currently in place in England, Wales, Australia, and Singapore, which involve greater court oversight of expert evidence, in an effort to ensure that expert evidence at trial is truly necessary and helpful to the trier of fact;

(ii) To aid litigants' comprehension of the often-confusing rules about expert evidence and the pre-requisites to its admission, we propose to provide guidance in the Rules through two measures: (a) providing definitions for the different categories of expert witnesses; and (b) codifying the *White Burgess*[58] requirements for admissibility.

(iii) To manage concerns about bias, as well as the number of experts being tendered at trial, we propose to expand the use of joint experts and strengthen the expert's acknowledgement of their duty to the court;

(iv) To narrow issues and ensure the most clear and efficient presentation of expert evidence, we propose to:

  (a) require opposing experts to confer before trial;

  (b) introduce a standard format for expert reports; and

[58] *White, Burgess, Langille, Inman v. Abbott and Haliburton Co*., 2015 SCC 23.

(c) re-sequence the presentation of evidence at trial, such that all fact witnesses on both sides will testify, followed by the introduction of expert evidence on an issue-by-issue basis.

1. Defined Terms

The language of "litigation experts", "participant experts", and "non-party experts" can be confusing, particularly to self-represented litigants. Accordingly, we propose that a definition section be added to the Rules, similar to Rule 20.2(1) of the *Family Law Rules*. We proposed that the definitions track the language used by the Court of Appeal for Ontario in *Westerhof v. Gee*.[59] Namely,

(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).

2. Requirement for Litigation Expert Evidence

In an effort to assist both represented and self-represented litigants, the requirements for litigation expert evidence should be clearly set out in the Rules. We propose that the Rules indicate that a party who seeks to adduce litigation expert evidence must establish that they have done the following:

(i) complied with the requirements for litigation expert evidence set out in the Rules, including the presumption of joint litigation experts in certain matters;

(ii) served a report which sets out the substance of the litigation expert's opinion evidence in accordance with the Rules and any court orders; and

(iii) are able to satisfy the admissibility requirements of *White Burgess* which we propose be codified in the Rules.

Under the proposed new system, expert evidence (whether it be litigation, participant, or non-party expert) will be restricted to that which is reasonably required to resolve the proceedings. Parties will be required to consider whether expert evidence is necessary to assist the trier of fact and whether any issue that might otherwise require expert evidence might be resolved by an agreed statement of facts or by submissions based on mutually agreed materials. Expert evidence will, in any event, be restricted to one expert *per* issue *per* party, unless leave of the Court is obtained.

[59] 2015 ONCA 206, at ¶ 6.

If expert evidence is to be adduced, parties will be required to agree on a schedule for delivery of their litigation expert evidence, which they will file using a prescribed form. The exchange of proposed schedules for the delivery of expert reports is addressed in Parts 5 and 6 above.

If the parties are unable to agree on a schedule, a timetable for the exchange of litigation expert reports will be imposed at a Directions Conference. At the same conference, the Court will assess the need for expert evidence and the suitability of a joint expert.

Subject to any specific directions otherwise provided by the Court, the default timelines for delivery of litigation expert reports currently set out at Rule 53.03(1) to (3) will be amended to require service of expert reports as follows:

(i) initial reports at least 90 days before a Court-ordered mediation;[60]

(ii) responding reports at least 60 days before a Court-ordered mediation; and

(iii) supplementary reports, if any, at least 45 days before the trial.[61]

Any party who wishes to rely on participant or non-party expert evidence at trial will generally be required to serve the sworn witness statement of the expert together with all the party's other sworn witness statements served following the close of pleadings (see Parts 5 and 6 above). There will be circumstances in which (i) a party may need to update participant or non-party expert's evidence or (ii) a party may not know that participant or non-party expert evidence is required before serving their witness statements. In such cases, the timing of the delivery of the witness statement of the proposed participant or non-party expert should be set out in the party's proposed schedule for the exchange of expert evidence. Regardless, the witness statements of all non-party and participant expert witnesses are to be served no later than the dates by which all litigation experts' reports are due.

The sworn witness statement of any non-party or participant expert will need to include a copy of the expert's *curriculum vitae* and any records on which the witness has relied in preparing his or her statement, together with the balance of documents presently required by Rule 53.03(2.1). The statement will also need to clearly identify any opinion evidence to be offered by the witness.

Barring exceptional circumstances, trial dates will not be adjourned to accommodate late delivery, or non-delivery, of experts' reports (see Part 11 below). A failure to comply with the timelines for the delivery of expert reports or witness statements will result in the inadmissibility of that witness's evidence at trial, unless the defaulting party satisfies the court that there is a reasonable explanation for the failure and the admissibility of the evidence will not materially prejudice the opposing party or the conduct of the trial. The defaulting party will also be subject to costs consequences and the Delay Penalty (see Part 11 below).

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[60] In cases where mandatory mediation is not ordered (e.g. because an early mediation occurred), the same timetable will apply with the TMC substituted instead of mediation. Similarly, in cases where a judicial settlement conference is ordered instead of a mandatory mediation, the same timetable will apply with the judicial settlement conferenced substituted instead of mediation.

[61] These timelines would not apply to Summary Hearings described in Part 7 because in those proceedings, the exchange of expert reports (if necessary) will be timetabled at the Directions Conference.

3. Joint Experts

Under the proposed system, the use of joint litigation experts will be encouraged. The Court will be given authority, either on the motion of a party or on its own initiative, to order the use of joint litigation experts.

We propose that joint litigation experts be presumptively required for a fixed list of issues; namely, ones that are standardized, involve mathematical calculations, or are otherwise amenable to a joint litigation expert. Issues being considered as potentially amenable to such a presumption include:

(i) property valuations where the property consists primarily of developed land;

(ii) business valuations;

(iii) calculations of past and future economic loss, compromise of competitive position and loss of earning capacity in personal injury cases;

(iv) quantification of care costs;

(v) life expectancy;

(vi) standards of care;

(vii) engineering analysis;

(viii) fire investigation and analysis;

(ix) handwriting analysis; and

(x) capacity determinations.

For all other issues, the parties will be required to consider the use of a jointly retained litigation expert. Only where a jointly retained expert is not suitable, may they each retain their own litigation experts. The failure to reasonably consider using a jointly retained expert will be a factor for the court to consider in making a costs award.

Any dispute concerning the use of a joint litigation expert would be addressed at a Directions Conference. In deciding whether a joint litigation expert is suitable, the Court 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 an individual expert has already been retained by one or more of the parties;

(iv) the ability of the parties to pay an expert witness;

(v) proportionality;

(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;

(viii) the importance of the issue to the determination of the proceeding;

(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;

(x) whether the matter is to be tried by a jury or judge alone; and

(xi) any other matter relevant to the issue of litigation expert evidence.

The following procedures are proposed where parties jointly retain a litigation expert:

(i) The expert would be retained by all relevant parties;

(ii) If the parties are unable to agree on the selection of a joint litigation expert, the court may select the expert from a list prepared or identified by the parties or may 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 the completion of the report;

(v) The court may give Directions, including 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, examination or experiments to be conducted, and the instructions to be given to the joint litigation expert;

(vi) If requested by one or more of the parties, the court may limit the fees and expenses that can be paid to the joint litigation expert;

(vii) Unless ordered otherwise, the instructing parties are jointly and severally liable for the payment of the joint litigation expert's fees and expenses;

(viii) A joint litigation expert shall provide a copy of his or her report, along with a sworn Attestation of Expert Duty and a copy of his or her *curriculum vitae*, to all instructing parties at the same time;

(ix) 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;

(x) 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 the assessment of costs.

4. Court-Appointed Experts

Rule 52.03 currently allows the court to appoint an expert on a motion by a party or on its own initiative. Court-appointed experts, while not frequently employed, have proven useful in a number of cases.[62] The key distinction between a court-appointed expert and joint litigation expert is that court-appointed experts are often, but not always, appointed after the parties retain their own experts and are appointed for the sole purpose of assisting the court in reconciling or understanding the evidence.

Under the proposed model, rule 52.03 would remain, but to better distinguish court-appointed experts from joint litigation experts, rule 52.03 will only be available on the court's own initiative. The parties will, however, have an opportunity to flag the need for a court-appointed expert on a prescribed form to be filed before a Directions Conference or Scheduling Conference, where the issue will be addressed.

5. Expert Conferences for Opposing Litigation Experts

Expert conferencing, sometimes referred to as "hot-tubbing", presents an opportunity for opposing experts to meet and try to narrow the issues on which they disagree. It may reduce the scope of the testimony needed from experts at trial and may help focus examinations and cross-examinations on the real issues in dispute. It may also foster resolution.

As a result, we propose that the Rules be amended to require opposing experts to meet and conference before trial.

Consulting experts will have a duty, adopted from a model used in the U.K., to exercise independent, impartial, and objective judgment on the issues addressed at the conference and to identify the points on which they agree and those on which they disagree.

We propose that the expert conference take place outside the presence of the parties or their counsel, while allowing the parties to set the agenda for the conference. With the parties' consent, a neutral facilitator or transcriptionist could also be hired to assist with the conference and preparation of the expert's joint report.

The experts will be required to prepare a joint report that sets out 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.

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[62] For example, see *Nowick v. Nowick Estate*, 1995 CarswellOnt 2447 (Ont. Ct. J. (G.D.)); *Ericsson Communications Inc. v. Novatel Communications Ltd.*, 1996 CarswellOnt 752 (Ont. Ct. J. (G.D.)); *Colenbrander v. Savaria Corporation*, 2018 ONSC 3829.

Except in jury trials, the experts' trial testimony will focus on the areas of disagreement, but where necessary, the experts will be permitted to provide brief evidence on the areas of agreement.

6. Experts' Duty to the Court

The Working Group proposes to continue the practice of requiring litigation experts to provide an acknowledgment of their duties to the court, which is presently reflected in Form 53. We propose, however, that the acknowledgment take the form of a sworn attestation (the "**Attestation**"). The Attestation will include, as attachments, the expert's *curriculum vitae* and his or her report. With the use of the Attestation, the parties will have the option of tendering the expert's report as his or her evidence in chief.

7. Standardized Form of Expert Reports

The appearance and structure of expert reports can vary significantly from expert to expert. The variation makes it more difficult, at times, to compare reports and to readily appreciate where there are differences in terms of facts relied upon by the expert to form his or her opinion and in the opinions themselves.

The Working Group proposes to introduce a standardized format for expert reports to follow. The format will be similar to that currently utilized for factums:

(i) overview / executive summary;

(ii) summary of qualifications;

(iii) delineated proposed scope of expertise;

(iv) background facts (with references to the evidence) or assumptions;

(v) issues (i.e. what specific questions has the expert been asked to answer?);

(vi) analysis;

(vii) opinions (i.e. answers to the specific questions posed); and

(viii) appendices, which are to include:

  (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 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 to, or their representatives in, the proceeding, or the subject matter of the proposed evidence that might affect the expert's duty to the Court;

  (e) for responding or supplementary reports, an acknowledgement that the expert has reviewed the prior report(s) and opinions, if any, and an indication of with which opinions the expert agrees or disagrees; and

(f) 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 found in rule 53.03(2.1)(6.1).

8. Presentation of Expert Evidence at Trial

To shorten and simplify trials and to make expert evidence more comprehensible for the trier of fact, we also propose that there be a presumption, subject to the Court's discretion to order otherwise, that a litigation expert's report will be taken as read for the purpose of his or her examination in chief. This presumption would not apply in jury trials.

We also propose that evidence at trial be re-sequenced so that, to the greatest extent possible and unless otherwise ordered, the fact witnesses on all sides of the dispute are presented first, followed by the expert evidence from all sides. More specifically:

(i) The plaintiff(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.

This ordering ensures that lay evidence that may impact the experts' opinions is presented before the experts take the stand. It also helps the trier of fact better assess opinions from competing experts by having them testify on the same issue consecutively. The trial judge would of course retain the discretion to determine the appropriate sequence at trial, which we recognize may be particularly important for jury trials.

PART 11: DELAYS AND COSTS

XI.

A. ADDRESSING DELAYS: FIXED HEARING DATES, SCHEDULING CONFERENCES, AND PENALTIES

1. The Need for Change: Putting an End to Delay

Delay is a defining characteristic of the current civil justice system. Delays, however, are problematic for many reasons.

First, delays prolong the resolution that the parties are seeking— in some instances, desperately.

Second, delays lead to increased costs. A delay in a matter forces the lawyers (and/or parties) to pause their work and, when the case resumes, devote additional time to refamiliarizing themselves with its details. In addition, as time elapses, work can sometimes expand to fill the time.

Third, delays erode public confidence in the administration of justice and foster a perception that the legal system is inefficient, unresponsive, and incapable of delivering real justice.

Fourth, delays can lead to an administrative dismissal under rule 48.14, motions arising from administrative dismissals, and motions to dismiss for delay, all of which deplete scarce judicial and administrative resources.

There are many reasons for delay. Some cases stall because the claimant has no intention of proceeding with the matter in a timely manner, resulting in a backlog of cases that are either stagnant or seem to be on a slow boat to nowhere. This can be frustrating for a defendant who wants the case to progress but does not wish to bear the responsibility or pay the costs associated with pushing it forward. Some cases stall because the defendant actively tries to delay its progress. Other cases stall because counsel are busy. Finally, some cases stall because the civil justice system is insufficiently resourced.

Although we cannot address resourcing issues, we *can* address features of the current Rules that enable persistent delay. We have identified three such features:

(i) The current civil justice system is a party-driven system as opposed to a Court-managed one. This allows parties to proceed, for the most part, at their chosen pace. This issue is addressed in more detail below;

(ii) Many of the existing Rules contemplate adjournments as a recourse to avoiding prejudice. As a result, hearing dates are frequently adjourned for a wide variety of reasons, many of which are trivial and some of which amount to an abuse of the Court's

process. Our view, however, is that the Rules must reflect the reality that delay itself is inherently prejudicial to the parties, other litigants waiting to access the system, and the integrity of the system as a whole;

(iii) The existing Rules 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 the Consequences of Not Attending

During our consultations with stakeholders from other jurisdictions where successful reforms have been introduced, including Manitoba, Singapore, and Australia, a number of recurring themes emerged, one of which was to "fix hearing dates and stick to them."

As such, we propose to do just that: namely, to fix court appearance dates (whether for a Scheduling Conference, Directions Conference, motion, trial, or other dispositive hearing) and significantly reduce the availability of adjournments.

We propose that all requests for an adjournment of a fixed court appearance date (whether for a Scheduling Conference, Directions Conference, motion, trial, or other dispositive hearing) will need to be made to the Regional Senior Judge, or his or her designate, and will only be granted in exceptional circumstances (e.g. illness or injury to oneself or a family member, death in the family, family emergency, etc. of a party, its lawyer, or a witness).

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).

Parties who know hearing dates are not likely to be adjourned are incentivized to prepare in a timely manner and make attempts to resolve issues sooner. As a result, the proposed approach is expected to promote faster resolution. In addition, the proposed approach will 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. 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.

b) Interim Deadlines

To ensure that parties can meet all fixed hearing dates, all Interim Deadlines must be strictly managed.

Rules 20A(30) & (31) of the Manitoba Court of King's Bench Rules[63] provide a useful model for the imposition of sanctions for the failure to comply with timelines or Court orders and directions:

> 20A(30) The Court must (a) make an order for costs against a party; or (b) strike out the claim or defence of a party; when a party, without reasonable excuse, (c) fails to comply with a time limit imposed by this Rule; or (d) fails to abide by an order or direction made under this Rule.
>
> 20A(31) Costs under subrule (30) are to be fixed by the Court and are payable immediately.

c) Consequences for Missing an Interim Deadline

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 harsh rule may unfairly penalize those who find themselves in exceptional circumstances (e.g. dealing with health issues or a family emergency) or could have negative impacts on the mental health of lawyers. The new rules must be strict enough to ensure compliance in most cases, while still allowing for relief from sanctions in certain circumstances.

With that in mind, we propose to introduce a delay penalty (the "**Delay Penalty**"). It will provide that, subject to the notice requirement (described below), if a party fails to meet an Interim Deadline, the breaching party will be presumptively required to pay to the non-defaulting party a penalty of a fixed amount imposed for each day the defaulting party is in breach (e.g. $500 per day). The Delay Penalty would be awarded at the next Court appearance. This rule would satisfy the need for 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 (i) a deadline has been missed and (ii) the non-defaulting party is seeking the Delay Penalty. This notice will initiate the counting of days for the purpose of the

[63] *The Court of King's Bench Act*, C.C.S.M. c. C280 , M. RULE 553/88.

penalty, starting two days after the notice is served. While this notice requirement places some burden on the non-defaulting party, it will help to ensure that inadvertent mistakes by counsel (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.

If a party misses an Interim Deadline (or anticipates missing an Interim Deadline) and the parties cannot agree on an amendment to the governing timetable, the parties can attend a Scheduling Conference to address the issue.

We propose that the non-defaulting party's rights to a remedy in the face of a missed Interim Deadline will then depend on (i) whether the breach (or anticipated breach) will materially prejudice its ability to meet its own Interim Deadlines or effectively prepare for the up-coming hearing and (ii) whether the non-defaulting party has abided by the Duty to Co-operate. To that end, we propose to introduce new Rules that will provide that, if a party fails to comply (or anticipates failing to comply) with an Interim Deadline and the parties are unable to agree to a revised timetable, the Court *shall* make one of the following orders:

(i) If the requested extension does not (or will not) materially prejudice the non-defaulting party: an order (a) establishing a new timetable, (b) requiring the defaulting party to pay the non-defaulting party its reasonable costs thrown away on a full indemnity basis (if any exist), and (c) requiring the defaulting party to pay the non-defaulting party the Delay Penalty (described above) unless the non-defaulting party breached the Duty to Co-operate; or

(ii) If the requested extension will materially prejudice the non-defaulting party: an order refusing to amend the existing timetable or striking, as applicable, the defaulting party's claim, defence, or relevant document (e.g. the expert report that a party is trying to introduce after the deadline has passed), unless an adjournment of the hearing date is obtained from the Regional Senior Judge or his or her designate.

3. Should the Civil Litigation Process Be Party-Driven or Court Managed?

One of the core features of the proposed new model is a move towards a Court-driven process, which is viewed as being necessary to reduce delays and interlocutory wrangling. An alternative viewpoint, with which we disagree, is that legal proceedings should be party-driven rather than Court-managed and proceed at the pace determined by the parties themselves. We set out below some commonly raised questions and our corresponding responses.

Why should a claimant be forced to proceed with their case faster than they desire?

As set out above, prolonged duration of many cases 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. In addition, while many defendants may tolerate, and even prefer delays, many others do not want litigation hanging over their heads due to the financial, emotional, and other consequences arising from the existence of pending litigation (e.g. difficulty in obtaining financing). 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.

If the parties agree on a timetable, why should the Court impose a more onerous one?

In the proposed new model, the Court will have the discretion to determine whether it is in the interest of justice to place a case on the Inactive List, extend the default timetable, or schedule the dispositive hearing more than two years after the Claim is filed. In exercising this discretion, the Court will be required to balance the interests of the parties with the goal of having most cases heard within two years, an objective that we believe will help promote public confidence in the judicial system.

If all parties agree to an adjournment of a Court appearance, why would a Court deny it?

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 frequently goes unused because of them. Parties who wish to take advantage of this public resource must respect that it is a scarce and vital one. Adjournments also lead to delays which, as described above, erode public confidence in the administration of justice. Finally, the availability of adjournments discourages parties from organizing their cases efficiently and in a timely manner, which can cause cases to languish.

B. COSTS

The Need for Change: The current regime for costs awards, reflected in rule 57.01, came into effect in 2005. It followed a series of reviews and recommendations by the Civil Rules Committee and other *ad hoc* committees in the early 2000s, which considered different approaches. This regime, which remains in force today, firmly rejected the then-prevailing "costs grid scheme." Costs grids had been widely criticized by members of the judiciary as failing to account for regional differences, as well as resulting in lengthy costs hearings that frequently took up more time than substantive hearings on the merits.

Rule 57.01 currently employs a cost-shifting regime, whereby a successful party will generally receive a costs award requiring the unsuccessful party to pay some portion of its costs. It lists a series of factors governing the Court's discretion in arriving at a fair and reasonable costs award. Parties are required to submit costs outlines, which set out their legal fees and disbursements. Although the presumptive award is on a "partial indemnity" scale, that scale is not defined with any precision and, thus, can vary from case to case. In practice, however, partial indemnity typically ranges between 40-60% of actual legal fees incurred (in addition to 100% of disbursements).

The current rule also allows costs to be awarded on a "substantial indemnity" basis, defined as costs awarded in an amount that is 1.5 times partial indemnity. Finally, in some cases, a Court may award "full indemnity." Case law has established circumstances in which elevated costs awards

are appropriate. The factors that justify the award of substantial versus full indemnity costs are not clearly defined.

The Working Group has identified two main problems with the existing costs regime:

Problem 1: Addressing costs disputes can take up significant judicial resources that could be more effectively deployed elsewhere. In many cases, costs determinations impose a burden on judges to issue a second decision after having already written a (sometimes lengthy) merits decision on a trial or motion. As a result, costs decisions can take months to be released. Litigating the issue of costs often adds an additional layer of expense and delay, straining the limited resources of the Court and the litigants. The Working Group believes that the costs rules should be streamlined so that costs can be determined more quickly and with less burden on the Court.

Problem 2: The current Rules generate uncertainty and unpredictability for litigants. The term "partial indemnity" is not defined and is subject to the Court's exercise of discretion. This can make it difficult for counsel to advise clients on their potential costs' exposure or potential recovery. This undermines the overall effectiveness of costs as a behavioural tool and makes the risk/reward assessment of a given litigation strategy more difficult. Imposing more categorical rules, with discretion to depart from them in certain circumstances, is likely to ameliorate these issues and result in greater consistency in costs awards.

In considering proposed amendments, the Working Group was mindful that any change to the current costs rules must balance competing considerations. We believe that a costs regime should advance, to the greatest extent possible, six desirable goals, while recognizing that trade-offs between them will sometimes be unavoidable:

(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.

Proposed Reforms: The proposals below reflect continuity with the existing costs regime while seeking to address the problems discussed above.

1. Defined Terms

We propose defining the following terms as set out below, which is broadly consistent with the prevailing approach:

(i) "**Partial Indemnity Costs**" will be defined as 60% of actual legal fees (including those incurred complying with any applicable PLP) plus 100% of disbursements plus HST (where applicable);

(ii) **"Full Indemnity Costs**" will be defined as 100% of actual legal fees (including those incurred complying with any applicable PLP) plus 100% of disbursements plus HST (where applicable).

A notional set of rates will be established for salaried counsel, which will be used to calculate the "actual" costs.

2. Presumptions

We propose codifying a presumption (the "**Partial Indemnity Presumption**") that the Court will order the unsuccessful party to pay the successful party its Partial Indemnity Costs, with provisions allowing departures from this presumption in certain circumstances (discussed below).

We further propose codifying a presumption (the "**Full Indemnity Presumption**") that Full Indemnity Costs in favour of the successful party will apply where:

(i) a party fails to establish a serious issue to be tried on an interim or interlocutory motion;

(ii) a party's pleading is struck in its entirety as being frivolous, vexatious or an abuse of process;

(iii) the proceeding, motion, or other request for relief is found to be frivolous, vexatious, or an abuse of process;

(iv) a 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) a party breaches the Representations Rules; or

(vi) the Rules specifically provide for the imposition of Full Indemnity Costs.

Based on the Court's reasoning in reaching a decision on the merits, it will likely be evident if any of the circumstances outlined above apply. As with the Partial Indemnity Presumption, the rule will allow departures from the Full Indemnity Presumption in certain circumstances (discussed below).

The Partial Indemnity Presumption and the Full Indemnity Presumption (collectively, the "**Costs Presumptions**") will not apply when their application would result in an injustice. In such a case, the Court will have the discretion to depart from either of the Costs Presumptions and award fair

and reasonable costs to the successful party, or decline to make a costs order, having regard to an enumerated list of factors (similar to Rule 57.01(1)), plus the following:

(i) where a party did not conduct the litigation in accordance with the Goals;

(ii) where a party breaches the Duty to Co-operate; or

(iii) where a party is found to have advanced claims or defences without a reasonable basis for doing so.

This discretionary exception will preserve flexibility for the Court to depart from either of the Costs Presumptions when warranted. The Court in the proposed new model will only be required to consider the requisite factors once a party has established that the application of the Costs Presumptions would result in an injustice. The Costs Presumptions are designed to be robust, with the "injustice" threshold being a substantial threshold to overcome.

In our view, codifying the Costs Presumptions will streamline the process of awarding costs, making them more predictable. Unless the parties can overcome the "injustice" threshold (i.e. warranting a departure from the Costs Presumptions), the Court will be able to apply the Costs Presumptions without the need to provide extensive reasons. This will ease the burden on the Court by allowing it to rely on the Costs Presumptions in many cases, rather than requiring a full consideration of all the relevant factors as is the current approach under rule 57.01.

3. Costs Outlines – Motions and Summary Proceedings

Fixing costs, on the basis of the Costs Presumptions or otherwise, will continue to require a review of costs outlines. The Working Group is concerned that costs outlines are not consistently prepared and filed in a timely manner. We propose to introduce the following multi-pronged rule governing costs of interlocutory matters, aimed at reinforcing the practice of disclosing costs in advance of a hearing, discouraging unreasonable positions on costs, and encouraging the settlement of costs:

(i) The parties will be required to confer or attempt to confer about costs in advance of any hearing or conference in which a party is seeking interlocutory relief. This obligation will be a procedural requirement; it 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 the parties will reach an agreement on costs, thereby reducing the amount of time and money spent addressing costs disputes;

(ii) If no agreement on costs is reached, the parties will be required to exchange their respective costs outlines four days before the Court appearance;

(iii) The parties will be required to file a standard form two days before the Court appearance. The standard form will require the party seeking relief to (a) certify that it has conferred or attempted to confer with the opposing party about costs and (b) indicate the terms of any agreement reached or attach the parties' respective costs outlines if no agreement was reached. If the responding party disagrees with the contents of the completed form, it will be required to complete and file its own form; and

(iv) If a party fails to take these steps and is ultimately successful at the hearing or conference, the Court must reduce the costs they would otherwise be entitled to or order that no costs be paid.

The structure of the standard form—requiring the parties to certify that they conferred or attempted to confer, with costs outlines only to be filed as a last resort where no agreement is reached—is intended to shift the mindset toward resolution. This approach was inspired by established practices in certain Courts (e.g. the Court of Appeal and the Commercial List) where conferral by parties and agreements on costs are more often the norm than the exception.

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.

4. Costs Outlines – Live Evidence Hearings

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 an interlocutory appearance. That said, there is still a strong rationale for requiring parties to disclose their actual costs to date, before the trial begins. As such, we propose that parties be required to file:

(i) their respective costs outlines thirty days before a trial begins, covering all costs incurred from the start of the case up until the date of submission; and

(ii) an updated costs outline within twenty days after the trial ends, covering the final thirty days leading up to and including the trial time.

We believe that 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. The requirement to exchange updated costs outlines after trial, but before a decision is released, avoids the issue of parties submitting inflated costs outlines once the outcome is known.

5. Costs at Conferences

Under our proposed new civil process model, a significant percentage of interlocutory disputes are expected to be resolved at Directions Conferences. In keeping with the summary nature of dispute resolution to be conducted at those conferences, the Working Group wishes to introduce a particularly simple form of costs assessment for costs awarded at those conferences. In particular, the Working Group proposes to introduce a "baseball arbitration" model for Directions Conference costs assessments. Under that model, each side will propose an amount for costs. The presiding justice will pick whichever of the two numbers he or she considers to best reflect the fair and reasonable costs of the appearance and impose that number on the unsuccessful party.

Though one would expect that cost disputes at Scheduling Conferences will be rare, we propose that the baseball arbitration model be employed for them as well.

6. 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 tariffs and costs grids is that they tender 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. We believe that they undermine, rather than advance, the principle of indemnity.

PART 12: POST-TRIAL PROCESSES

XII.

A. APPEALS

The Working Group proposes six reforms to appeal-related rules, which we believe will make the appeal process more accessible and help prevent unnecessary costs and delays.

1. Clarifying the Final vs. Interlocutory Order Distinction

The Need for Change: The distinction between final and interlocutory orders causes confusion and unduly consumes resources of the Court and the parties.

There are two interrelated issues. The first is confusion surrounding the distinction between a final and interlocutory order. The lack of a clear distinction between these types of orders increases the likelihood that litigants will bring an appeal in the wrong Court, which unnecessarily delays the adjudication of appeals, wastes judicial resources, increases costs, and undermines efficiency. Moreover, if the Court of Appeal lacks jurisdiction over the appeal, it must be filed with the Divisional Court. This often requires a party to file a motion for leave to extend the filing deadline, as the appeal is typically already out of time.

The second issue is the Working Group's view that the scope of orders that can be appealed as of right (i.e. final orders) is presently too broad.

Proposed Reforms: We propose to clarify appeal routes and appeal rights. In particular, we propose to define final and interlocutory orders in the Rules. 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, including all liability or damages, or both;

(ii) orders that determine jurisdiction, for example, jurisdiction *simpliciter*, *forum non conveniens*, standing/capacity, abuse of process, stays regarding arbitration, transferring from administrative forum, etc.;

(iii) orders that define the liability of a party with respect to any one cause of action, for example, a dispositive motion (whether successful or not); and

(iv) 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. In order 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 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;

(iii) orders refusing to add parties;

(iv) orders setting aside *ex juris* service of a Claim;

(v) orders dismissing a motion to set aside default judgment;

(vi) orders dismissing a motion to dismiss an action because the action is statute-barred; and

(vii) orders dismissing a motion by finding that no settlement agreement existed.

We further propose that an order which has both final and interlocutory aspects would be appealable to the Court of Appeal without leave. This reform is aimed at addressing 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*.[64]

Finally, we propose that all orders issued by the Superior Court of Justice indicate the nature of the order (i.e. interlocutory or final) and provide guidance on the appropriate appeal route (i.e. which Court and the deadline by which to appeal). This aspect of the order would also be appealable. If the order is designated as a final order, it would be appealable to the Court of Appeal, where the nature of the order could be contested. If incorrect, the Court of Appeal would be required to transfer the case to the Divisional Court, with no prejudice to the litigant for being out of time. The opposite would hold true of an order designated as an interlocutory order.

The need for a clear and accessible appeal route must be the order of the day. Irrespective of whether the number of appeals is reduced, it is a waste of judicial resources and litigants' time and money to require litigants to debate jurisdictional and procedural issues that do not address an appeal's merits. Clarifying the distinction between final and interlocutory orders will increase efficiency and access to justice for Ontarians. It will also contribute positively to the effective use of Court resources. Any concerns regarding fewer appeals as of right will be addressed by revising the leave standard for interlocutory orders, an issue to which we turn next.

2. Revising the Leave Standard for the Appeal of Interlocutory Orders of Judges

The Need for Change: By creating the proposed exhaustive list of defined final orders, we are proposing to narrow the scope of final orders while broadening the scope of interlocutory orders. In our view, the current stringent standard for leave to appeal should be relaxed somewhat to reflect the proposed expansion of the scope of interlocutory orders.

[64] *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 permits appeals from conflicting decisions of Ontario judges, may be outdated in light of the Supreme Court's instruction on the application of horizontal *stare decisis* articulated in *R. v Sullivan*.[65]

Proposed Reforms: We propose to revise rule 62.02 to amend the leave standard for interlocutory orders. Drawing from the current leave standard in British Columbia, the new standard would provide for leave to be granted based on the court's consideration of the following factors: (i) the appeal's significance to the case itself and the broader practice of law; (ii) whether there is good reason to doubt the correctness of the decision below; and (iii) most importantly, whether the appeal will unduly hinder the action's progress.[66] The factors reflect the various purposes of appeals, such as delineating and refining legal rules, ensuring consistent application of settled law, and preventing grave injustice.

3. Additional Safeguards Against Delay

It is important that appeals do not unnecessarily delay proceedings. We propose two additional measures to achieve this goal. First, we propose to introduce a rule that specifies 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. The underlying proceeding must continue along the same timeline and the parties may, if appropriate, seek to expedite the appeal.

Second, we propose that all interlocutory orders merge with the final order of the proceeding. Interlocutory orders would then be appropriately appealable at the same time as any appeal of the merits of the case. This would disincentivize parties from unnecessarily seeking leave to appeal while the litigation remains ongoing.

4. Streamlining the Leave Process

The current process for obtaining leave to appeal an interlocutory order is inefficient and should be streamlined. Addressing this concern is particularly significant given that the other proposed reforms are aimed at expediting proceedings.

As such, we propose two amendments to the leave process for interlocutory orders. First, the new Rules would specify that a party has 15 days to serve and file their motion for leave, and the opposing party has 15 days to serve and file a response. Second, the leave process would be streamlined by requiring shorter factums, while allowing parties to append submissions made in the Court below. These amendments will have the effect of increasing efficiency and reducing costs.

5. 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.

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[65] *R. v. Sullivan*, 2022 SCC 19.

[66] *Vancouver Shipyards Co. Ltd. v. Canadian Merchant Services Guild*, 2023 BCCA 77 at ¶ 20.

The Working Group proposes to reform Rules 61 and 62 by establishing three sets of rules unique for 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 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).

6. Other Proposed Appeal Reforms

We suggest other reforms of appellate rules, including:

(i) codifying frequently used common law procedural tests into the Rules to allow self-represented litigants to understand the standards and tests to be met. 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) codifying the process for obtaining case management in appeals and outlining the powers of the case management judge in the Rules to formalize this mechanism and make it more accessible to parties; and

(iii) providing express authority for appellate Courts to provide for case management at their discretion.

7. Increasing Single Judge Motions and Preserving Panel Review for Meritorious Appeals

Single appellate judges have limited jurisdiction. Our view is that a single judge should be capable of addressing more matters, thereby making the appellate processes quicker and cheaper. At the same time, we also realize that a single motion judge's determination is subject to a right of review by a panel. Thus, in expanding the power of single appellate judges to administer justice, care should also be taken to avoid creating unnecessary delays with the panel review process.

If legislative amendments were within the scope of our mandate, we would propose amending the *Courts of Justice Act* to maximize the ability of a single judge to hear motions, while ensuring that a panel review is available on decisions that address an appeal's merits, either as of right or with leave of a single judge. These reforms would include (i) amending section 7(3) to allow a single judge to hear a motion to quash an appeal; (ii) amending section 7(5) to specify a list of "unreviewable orders", limited to procedural matters; and (iii) 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 review arises, which, in turn, would reduce delays and litigation costs.

B. 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.

Responses to the Phase 1 consultation were overwhelmingly in favour of reforms aimed at making the process of enforcing Court orders faster, less expensive, and more effective. The Working Group proposes several reforms to achieve that end.

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:[67]

> 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.
>
> 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 is of the view that the leave requirement adds unnecessary time and expense to the enforcement of a judgment and creates incentives for judgment debtors to delay payment. There is no strong rationale in favour of maintaining this requirement, which appears to be premised on the notion that delinquency in enforcement might lead a judgment debtor to assume the judgment creditor has waived it rights or otherwise acquiesced to non-payment.

Court orders should be obeyed. This is foundational to promoting respect for the administration of justice. In addition, judgment debtors should (i) expect that a judgment imposes an ongoing obligation to pay and (ii) 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 that judgment creditors 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.

Rule 60.07(6) provides that writs of seizure and sale expire automatically after six years, unless renewed. Although we considered eliminating this rule, we noted that renewing a writ is a simple

[67] *Brawinger Group Limited v. Spring*, 2023 ONSC 4858 at ¶¶ 30-31 (citations omitted).

administrative process that does not require a motion and, therefore, imposes far less burden than the leave requirement discussed above.[68] We also noted 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 at a later date.

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) 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 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.

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. Electronically Filing Requisitions for Writs of Seizure and Sale

Rule 60.07(1.1) provides that "the creditor may file the requisition [for a writ of seizure and sale] electronically." The Working Group understands that the Justice Services Online portal does not currently permit this.

We propose that all necessary administrative or technological steps be taken to better ensure that creditors can requisition writs of seizure and sale electronically, with these requisitions being processed as promptly as if they had been submitted in person at the courthouse.

4. Access to Information about a Judgment Debtor's Bank Accounts

Under sections 462(1) and (2) of the *Bank Act*,[69] 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

[68] Under Rule 60.07(6), (8), (9).

[69] SC 1991, c 46.

enforcing the judgment and that the third party may possess information relevant to the enforcement (rule 60.18(6)). This, however, is a resource intensive process.

If a judgment debtor fails to disclose all of its bank accounts, it can be extremely challenging for a judgment creditor to uncover the existence of an account with funds and identify the branch where the account is held. In many instances, this lack of information makes it very easy for judgment debtors to hide their money.

To address this problem, we propose to introduce a multi-pronged rule:

(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 (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;

(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 order will only require the financial institution to disclose for each account held by the judgment debtor with that bank, (a) the account number, (b) the branch at which the account is held, and (c) the current balance;

(vii) The institution served with such an order or direction will be allowed to charge the judgment creditor a reasonable fee for providing the information. 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.

5. Active Case Management for 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 a quasi-criminal process that may result in a custodial sentence, the moving party is required to prove their case beyond a reasonable doubt.

The Rules are currently unclear as to how contempt hearings are to be conducted. Contempt proceedings can be resource-intensive, often consuming significant judicial time and requiring parties to invest considerable effort.

The Working Group believes that, as with our proposed approach to motions practice, contempt motions must be actively case-managed. In particular, the quasi-criminal nature of contempt motions heightens the importance of resolving issues of disclosure and procedure up-front. Among other things, we propose the following:

(i) Motions for contempt will proceed to a Directions Conference before any hearing date is set. Provided the DC Judge determines it is appropriate for the motion to proceed, he or she will set the procedure to be followed and a timetable for all necessary steps leading to the motion hearing. The DC Judge may also give directions specifying whether any existing proceedings will proceed or be stayed pending the motion's hearing;

(ii) In advance of the Directions Conference, the moving party will be required to provide the following through their five-page Directions Conference 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* or affidavit evidence for the contempt hearing (or both), so that the judge can give the necessary directions;

(iii) If the judge accepts that *viva voce* evidence, in whole or in part, is required, the moving party should be directed to provide a witness list and "will-say" statements;

(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 is required to 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 required to pay Full Indemnity Costs of the motion, absent exceptional circumstances. (The latter would be in addition to any penalty ordered at the penalty phase).

6. 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*,[70] it lacks a procedure for impugning non-attendance

[70] See *Rules of the Small Claims Court*, O. Reg. 257/98, Rule 20.11.

or a failure to answer proper 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 necessary, enforce that order by way of a contempt proceeding, 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 answer proper questions.

7. 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 of 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.

PART 13: MISCELLANEOUS

XIII.

A. PARTIAL SETTLEMENTS – 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 action. The settlement, although partial, results in a guaranteed recovery for the plaintiff, and it reduces the number of parties in the litigation, as well as the complexity, costs and duration of the trial.

The Working Group believes that agreements of this nature should be encouraged. The common law's current treatment of Pierringer Agreements, however, disincentivizes parties (particularly plaintiffs) from entering into them. The problem is that, while a plaintiff who enters a Pierringer Agreement with one or more defendants takes a risk that the settlement may result in under-compensation, the plaintiff does not reap the benefit if the settlement results in over-compensation. Instead, that benefit inures to the non-settling defendants since the current practice in Ontario is for any amounts received by the plaintiff under a Pierringer Agreement to be deducted from any damages awarded at trial.

For example, a plaintiff injured in a motor vehicle accident may sue two potential tortfeasors: D1 and D2. She may assess her damages at $1 million. She may agree with D1 to fix its proportionate liability at 10% and settle for a payment of $100,000. D1 would be let out of the action, which would continue against the D2.

If the plaintiff's damages are, as she hoped, assessed at $1 million at trial, but D1's proportionate liability is fixed at 20%, then the plaintiff will be under-compensated: she will have received $100,000 (as opposed to $200,000) from D1 and $800,000 from D2 (for a total of $900,000).

On the other hand, if D1's proportionate liability is fixed at 5%, the plaintiff does not reap the benefit of making a good settlement. This is because the amount that D1 paid is deducted from any amounts otherwise found to be owing by the non-settling defendant. In this scenario, the plaintiff would receive $100,000 from D1 and $900,000 from D2. In the result, it is D2 who receives the economic benefit of the plaintiff's good settlement with D1 (i.e. D2 pays $900,000 even though his liability was assessed at 95%). Concerns have been raised with the Working Group that it is unfair that a plaintiff entering a Pierringer Agreement should have to accept the risk of making a bad deal, but not reap the benefits of making a good deal. That unfairness may tend to act as a disincentive for plaintiffs to enter Pierringer Agreements.

To encourage parties to enter into these types of agreements, we are proposing to revert to the pre-*Laudon v. Roberts*[71] litigation scheme where the settlement monies paid under a Pierringer Agreement are not deducted from the damages awarded at trial. Whatever the damages happen to be and whatever percentage of liability the court finds against the non-settling defendants is the amount the non-settling defendants must pay. If there are multiple non-settling defendants, they will remain jointly and severally liable amongst themselves.

B. BANKRUPTCIES AND RECEIVERSHIPS

Following consultations with a Registrar in Bankruptcy and the team leads of the Commercial List in Toronto, the Working Group has concluded that bankruptcy, insolvency, and receivership matters should be excluded from the proposed reforms to the extent that they conflict with any governing legislation.

We do not, in the result, propose any reforms to the current practice before Registrars in Bankruptcy.

We propose that bankruptcy, insolvency, and receivership matters[72] before a Superior Court justice proceed directly to a Directions Conference immediately following the close of pleadings, where directions will be provided for the efficient management of the proceedings.

C. CLASS PROCEEDINGS

The Class Proceedings Act, 1992[73] (“***CPA”***) 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. Amendments to the *CPA* are outside the CRR’s scope. Accordingly, to the extent we propose to modify the procedures applicable to class proceedings,[74] any such modifications must remain consistent with the procedures prescribed in the *CPA*.

The existing one-year timeline for delivery by the plaintiff (or defendant, in the case of a defendant class proceeding) of their motion record in support of a motion for class certification following the delivery of the Claim (section 29.1 of the *CPA*) will continue to apply, as will the other provisions of section 29.1 of the *CPA*. The provisions regarding the scheduling of a One Year Scheduling Conference, described in Part 6 above, and the exchange of evidence described in Part 5 above, will not apply before the determination of the certification motion and the disposition of any appeal

[71] *Laudon v. Roberts*, 2009 ONCA 383.

[72] 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 *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[73] *Class Proceedings Act*, 1992, SO 1992, c 6.

[74] Section 35 of the *CPA* provides that the *Rules of Civil Procedure* apply to class proceedings.

arising therefrom. Any party may schedule a Directions Conference, however, during that pre-certification period if any procedural disputes arise. Class proceedings are routinely case-managed by one judge and any Directions Conferences will take place in that context.

Upon delivery by the plaintiff (or defendant, as applicable) of the motion record in support of class certification, the parties will attend a Directions Conference for the purpose of scheduling the remaining steps leading to the certification motion, including pre-certification motions (if any). Pre-certification motions will be subject to the same procedures as motions in regular civil actions, described in Part 8 above.

If an action is certified, whether in whole or part, the parties will attend a further Directions Conference to establish the schedule for the remaining steps in the action leading to the common issues trial following: (i) the expiry of the applicable appeal period or the disposition of any appeal(s), and (ii) the delivery of notice of certification to the class. Class proceedings will otherwise be subject to the same processes as other civil actions.

Given the unique policy rationales applicable to class proceedings, the common issues trial will proceed presumptively by way of a live evidence hearing (as opposed to a Summary Hearing), unless directed otherwise by the DC Judge.

D. CLAIMS BROUGHT BY INDIGENOUS PEOPLE OR COMMUNITIES ALLEGING INFRINGEMENT OR BREACH OF S. 35 OF THE *CONSTITUTION ACT, 1982*

Civil litigation commenced by Indigenous communities or individuals pursuant to section 35 of the *Constitution Act*, 1982 demands unique consideration. The Supreme Court of Canada and Ontario's Court of Appeal have underscored the imperative to confront and redress injustices inflicted upon Indigenous peoples.

To achieve these objectives, the nature and magnitude of many Indigenous cases often reflect elements similar to those of Commissions of Inquiry rather than conventional civil trials. As these claims often include allegations of wrongdoing over many decades and reach back to the 19th century 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, Indigenous perspectives, which may be better presented orally, and ceremonies are integral elements of these proceedings.

While many of the proposed reforms discussed in this Consultation Paper can and should be applied to section 35 Indigenous claims, the differences noted above underscore the need to interpret and apply the usual rules of Court more liberally in some respects. In light of this, we propose certain modifications to the up-front evidence model recommended above.

1. An Early Directions Conference

We propose that when Indigenous communities or individuals pursuant to section 35 of the *Constitution Act*, 1982 commence a Claim, a Directions Conference date will automatically be scheduled within 90 days, during which the parties will discuss, among other things:

(i) the completion of pleadings;

(ii) the anticipated nature of disclosure required by the parties;

(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) 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 known; and

(v) future case management.

Requiring case management for Indigenous matters will 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.

2. 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 is within the party's possession, custody, or control. In many cases alleging historical wrongs perpetrated by the Crown, claims may refer to documents which, while known to exist, are not in the claimant's possession, custody, or control. Given this reality, and in keeping with the principle of the honour of the Crown, where the claimants refer to a document that is not in their possession, control or power, and where the Crown is able to access the document referred to, the Crown will have an obligation to produce the document, regardless of whether it intends to refer to the document in its pleading, rely on it at trial or other hearing, or believes it to be adverse to its case.

E. CONSTRUCTION LIEN PROCEEDINGS

Pursuant to section 50(2) of the *Construction Act*,[75] (the "***Construction Act***"), the Rules apply to construction lien actions except to the extent that they are inconsistent with the *Construction Act* and the regulations thereunder, including O. Reg 302/18 (the "**Regulation**").

The following rules governing construction lien actions differ from those that apply to regular actions under the Rules:

[75] *Construction Act*, RSO 1990, c C.30.

(i) A claim in a construction lien action must be served within 90 days (section 1(2) of the Regulation);

(ii) The Regulation (a) prohibits counterclaims against a person other than the claimant (section 2(1) of the Regulation); (b) provides that leave is required to issue a third party claim (section 4 of the Regulation); and (c) provides that only claims for breach of contract (not breach of trust) may be joined with construction lien claims (section 3 of the Regulation).[76] While these rules were intended to streamline lien proceedings, they can result in duplicative proceedings between the same parties in respect of the same project. This approach overlooks the reality that parties typically want all disputes as between them relating to the same project resolved simultaneously, without the risk of inconsistent outcomes;

(iii) Construction lien actions must be commenced in the Court office for the county in which the improvement is located (section 1(1) of the Regulation);

(iv) Construction liens expire unless the action is set down for trial, or an order for trial made, within two years of the issuance of the statement of claim (section 37 of the *Construction Act*). There are, however, inconsistent procedures across the province to get this done. In Toronto, litigants typically obtain a judgment of reference and an order for trial, while in other regions, actions are typically set down for trial. These regional differences can lead to confusion;

(v) Interlocutory steps not expressly provided for in the *Construction Act* cannot be taken without leave of the Court (section 13 of the Regulation).

Many of the differences between the rules applicable to construction lien actions and the Rules (i.e. that govern other civil proceedings) were intended to expedite lien actions. In practice, however, these variations can slow down proceedings, as parties often obtain pre-trial dates and procedural orders before taking necessary steps. This can lead to confusion for both parties and their lawyers, sometimes resulting in individuals losing their substantive rights due to technicalities. By creating an overly technical regime, the burden of liability has, in many cases, shifted from those who should be responsible for issues arising on a construction project to their lawyers, who are held accountable for failing to meet complex and confusing requirements.

The proposed suite of reforms to the Rules render the Construction Act's distinct procedures not only unnecessary, but potentially counterproductive to the notion of efficient justice. For instance:

(i) There is no need for a provision requiring a lien action to be set down for trial within two years if all actions are anticipated to have trial dates set in that timeframe;

(ii) The prohibition on interlocutory steps without leave will actively impede the new rules which provide for the up-front exchange of evidence; and

(iii) The limitations on counterclaims and third-party claims are unnecessary when all actions will be processed to trial faster than almost any lien actions are today.

[76] Duncan Glaholt recently recommenced an amendment to this regulation, but it has not yet been implemented.

Again, while legislative reform is outside of the CRR's mandate, it would be preferable if the *Construction Act* and Regulation were amended to eliminate these differences. In the meantime, we suggest that all construction lien actions be immediately directed to an early Directions Conference, where any necessary order(s) will be made to enable construction lien matters to proceed in accordance with the proposed reforms.

In addition, construction lien actions, 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 in construction issues to hear construction matters. Therefore, we propose that all construction lien and construction-related cases be handled by a team of Judges (or Associate Judges) specializing in construction law.

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
- Grace Cheng, Counsel, Office of the Children's Lawyer
- 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"

PRE-LITIGATION PROTOCOL
Personal Injury Claims

I. GENERAL PROVISIONS

1. This Protocol is made pursuant to Rule of the *Rules of Civil Procedure* (the "**Rules**"), a copy of which is annexed hereto as Appendix "A". It applies to personal injury claims, in other words, to claims where a claimant's medical condition, loss of income, and/or ability to earn income are at issue. It does not apply to claims to which the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched 17 applies.
2. Litigation should be a last resort. This Protocol sets out conduct that the court requires prospective parties to follow before the commencement of court proceedings.
3. The Protocol's objectives are to:

    a) encourage better and earlier pre-action investigation by all parties;

    b) encourage settlement in the hopes of avoiding litigation;

    c) support the just, proportionate, and efficient management of proceedings where litigation cannot be avoided; and

    d) reduce the cost of resolving the dispute.

4. In complying with the Protocol, parties must seek to achieve the Goals reflected in Rule .
5. If a party to the claim does not have a legal representative, the party should still, in so far as reasonably possible, fully comply with this Protocol. Any reference to a potential claimant (hereafter referred to as a "**claimant**" whether in plural or singular) in this Protocol will also mean the claimant's legal representative. Any reference to a potential defendant (hereafter referred to as a "**defendant**" whether in plural or singular) in this Protocol will also mean the defendant's legal representative.
6. Nothing in the Protocol prevents (a) a claimant from starting court proceedings if their complaint is not resolved after taking the steps outlined in the Protocol or (b) a defendant from refusing to resolve a claim that they have determined is defensible. Parties, however, should not advance a claim or defence without reasonable grounds for doing so.
7. The costs incurred in complying with this Protocol should be proportionate to the dispute. Proportionality takes into account a wide range of factors including the amount at stake and the complexity of the issues involved. Where parties incur disproportionate costs in

complying with the Protocol, those costs may not be allowed as part of the costs of the proceedings.

8. Where this Protocol requires a document to be sent to another party, it may be served by regular mail, courier or email. Service by regular mail shall be effective five days after mailing and ten days after mailing outside of Canada. Service by courier shall be effective two days after delivery to the courier. Service by email shall be deemed to be effective on the day it was sent.

9. Each party will bear their own initial costs for providing copies of documents under the Protocol.

10. All information and documents exchanged pursuant to the Protocol is subject to the deemed undertaking set out in Rule .

11. Information and documents exchanged pursuant to the Protocol are not privileged. An admission made by any party under this Protocol will be binding on that party in any ensuing litigation.

12. The Protocol does not apply to counterclaims, crossclaims, or third (or subsequent) party claims.

II. THE PROTOCOL

13. An illustrative flow chart is attached at Appendix "B" which shows each of the sequential steps that the parties are expected to take before commencing proceedings. Each subsequent step is dependent on compliance by all parties with the previous step.

14. The Protocol is divided into three main phases:

a) Early exchange of relevant information by all parties;

b) Engaging in a dispute resolution process; and

c) Completing a pre-action report (the "**Stocktake Report**").

A. Early Exchange of Information

1. Letter of Claim

15. At least 90 days before issuing a court proceeding, the claimant must send the defendant a letter which concisely sets out the details of the claim (the "**Letter of Claim**") based on

the information available to the claimant at that time.

16. The Letter of Claim should include the information that is set out in the template at Appendix "C". The level of detail will need to be varied to suit the particular circumstances of the case. The Letter of Claim should contain sufficient information for the defendant to assess liability and damages, including;

a) a clear summary of the facts on which the claim is based;

b) a list of the injuries suffered that are known as of the date the letter is written;

c) a description of the way in which the injuries have impacted the claimant's day to day functioning and prognosis to date;

d) a description of any financial loss incurred by the claimant to date; and

e) a schedule of any future expenses and losses being claimed even if the schedule is necessarily provisional. The schedule should contain as much detail as reasonably practicable and should identify those losses that are ongoing. If the schedule is likely to be updated before the case is concluded, it should say so.

17. The Letter of Claim must indicate that it is being sent pursuant to the Protocol and enclose a copy of the Protocol.

2. Claimant's Request for Third Party Documents

18. At least 90 days before issuing a court proceeding, the claimant must request the production of any of the Claimant's Documents (defined below) that are in the possession of third parties.

3. Letter of Acknowledgment

19. Within 21 days of receiving the Letter of Claim, the defendant must send a letter of acknowledged (a "**Letter of Acknowledgment**") to the claimant:

a) acknowledging receipt of the Letter of Claim;

b) confirming that it is the correct entity to respond to the claim or, if known, providing the name of the entity which it says is the correct entity, and, if known, the contact details of that entity;

c) confirming that it has a policy of insurance which may provide coverage for the claim and an indication as to whether its insurers have confirmed that the claim is covered under the policy; and

d) providing details of the identity and contact information of any insurer.

20. If the defendant fails to provide a Letter of Acknowledgment, the claimant may proceed to

issue a claim.

4. Exchange of Claimant's Protocol Documents

21. Within 21 days of receiving the defendant's Letter of Acknowledgement, the claimant must provide the defendant with the following documents (the "**Claimant's Documents**"), to the extent they exist and are in the claimant's possession:

a) where the party has such coverage, a decoded Ontario Health Insurance Plan summary that covers the period of three years before the incident that gave rise to the claim (the "**Incident**");

b) the clinical notes and records of the claimant's family doctor, primary medical care provider, or clinic for the period of three years before the Incident;

c) the clinical notes and records of any hospital the claimant attended for the period of three years before the Incident;

d) the clinical notes and records of all doctors who provided treatment in connection with (i) the injury (the "**Claimed Injury**') resulting from the Incident and/or (ii) any pre-existing injury or condition that relate or affect the Claimed Injury;

e) all hospital and ambulance records relating to (i) the Claimed Injury and/or (ii) any pre-existing injury or condition that relates to or affects the function the claimant asserts is now impaired, for the three years before the Incident;

f) a copy of any police report related to the Incident;

g) a copy of any statement given to the police by the claimant;

h) the file from the Statutory Accident Benefit provider;

i) any disability claims file or other collateral benefit provider file arising from the Incident;

j) if loss of income or loss of earning capacity is being claimed, the as-filed tax returns and/or the notice of assessment from the Canada Revenue Agency for three years before the Incident;

k) video evidence, if the claimant is in possession of such evidence, which depicts the circumstances of the Incident, including dash-cam video;

l) any expert reports that have been obtained on which the claimant intends to rely;

m) any additional information the defendant has requested if it is materially relevant, reasonable, and proportionate to produce.

22. If any of the Claimant's Documents are in the possession of third parties and have not been received by the time the Claimant is required to produce them, the Claimant must provide these documents promptly upon receipt.

5. Defendant's Request for Third Party Documents

23. Within 30 days of receiving the Claimant's Protocol Documents, the defendant must request the production of any of the Defendant's Documents (defined below) that are in the possession of third parties.

6. Letter of Response and the Exchange of the Defendants' Documents

24. Within 30 days of receiving the Claimant's Protocol Documents, the defendant must send the claimant a responding letter (the "**Letter of Response**").

25. The Letter of Response should include the information that is set out in the template at Appendix "D". The level of detail will need to be varied to suit the particular circumstances of the case. The letter should:

a) indicate whether the defendant admits liability;

b) indicate whether the defendant accepts the damages being claimed in whole or in part;

c) if the defendant rejects liability or the quantum of the damages allegedly suffered, provide the reasons for rejection, indicate which facts and aspects of the claim are disputed, and provide the defendant's version of events; and

d) indicate if the defendant intends to advance a counterclaim, crossclaim, or third party claim and a description of the facts on which such claims would be based.

26. The defendant should also enclose with its Letter of Response, the following documents (the "**Defendants' Documents**") to the extent they exist:

a) the insurance policy and declaration page of any policy that affords coverage to the defendant for the Incident;

b) subject to privilege and to the extent that they currently exist, the statement(s) of any party and/or will-say statements of any witnesses to the Incident or any witness having relevant evidence to the issues raised in the Letter of Claim;

c) a copy of any police report related to the Incident;

d) a copy of any statement given to the police by the party;

e) if loss of income or loss of earning capacity is being claimed and the claimant is or was at the time of the Incident employed by the defendant, a copy of the claimant's employment file;

f) a summary of surveillance video evidence on which the defendant intends to rely to defend the claim, if the defendant is in possession of such evidence;

g) video evidence which depicts the circumstances of the Incident, including dash-cam video, if the defendant is in possession of such evidence;

h) If the claim concerns winter road maintenance or a slip and fall, documents regarding the design and construction of the section of roadway (if the Incident occurred on a roadway), as well as documents regarding the system of inspection and maintenance in place for the 48 hours prior to the Incident and 12 hours thereafter;

i) any expert reports that have been obtained on which the defendant intends to rely.

27. If the defendant fails to provide a Letter of Response within 30 days of receiving the Claimant's Documents, the claimant may issue a court proceeding.

28. If any of the Defendant's Documents are in the possession of third parties and have not been received by the time the defendant is required to produce them, the defendant must provide these documents promptly upon receipt.

7. Experts

29. Where expert evidence is desired on a disputed issue, the parties are encouraged to obtain and exchange expert reports as expeditiously as possible. The parties are also encouraged to consider the joint retention of experts.

B. Alternative Dispute Resolution

30. Most cases which are brought before the courts end in settlement without a trial or judgment. Within 18 days of the claimant receiving the Letter of Response (and before a court proceeding is commenced), counsel or parties (if self-represented) shall participate in a meeting by phone or videoconference to discuss whether negotiation or some other form of Alternative Dispute Resolution ("**ADR**") might enable them to resolve their dispute before they incur the time, cost and stress of litigation. Some examples of ADR include:

a) discussions and negotiation (which may or may not include making offers to settle or providing an explanation and/or apology);

b) mediation; or

c) early neutral evaluation, where a third party such as an independent lawyer gives an informed opinion on the dispute.

31. Any ADR process undertaken on consent of the parties does not need to occur before a court proceeding is commenced.

32. Where the parties have engaged in mediation under this Protocol and the dispute does not

settle, the parties will not be required (though will still be entitled) to engage in another mediation if court proceedings are started.

C. Stocktake Report

33. If a claim is ultimately issued, the claimant shall, at the time of issuing the claim, file a Stocktake Report with the court, a template of which is attached as Appendix "E." The Stocktake Report should concisely set out the following:

a) whether the parties engaged in ADR and, if so, what kind of ADR;

b) a list of the documents that have been disclosed by the parties;

c) a list of the documents that should have been disclosed pursuant tot the Protocol but were not and the reasons for non-disclosure; and

d) a list of the dates on which the required steps of the Protocol were completed.

34. The claimant shall make a good faith effort to ensure that the Stocktake Report accurately reflects the defendant's position.

35. If the defendant disagrees with the contents of the Stocktake Report, the defendant shall file its own Stocktake Report, at the time of filing its Statement of Defence, with any differences to the claimant's version shown by way of underlining or strikeout.

III. COMPLIANCE WITH THE PROTOCOL

36. Compliance with the Protocol is mandatory, except where:

a) the complainant seeks urgent relief or has a reasonably held belief that compliance with the Protocol will result in immediate economic or physical harm to themselves or another; or

b) the complainant seeks early relief and notice to the defendants is likely to defeat or frustrate the relief that the complainant seeks.

37. The Protocol does not amend, vary or extend any applicable statutory limitation period(s). If a claim is issued after the relevant limitation period has expired, the defendant will be entitled to use that as a defence to the claim. If adhering to the Protocol would result in the expiration of a limitation period, the claimant must initiate their claim without following the Protocol's requirements. The claimant shall, however, also start simultaneously taking steps in accordance with the Protocol.

38. The court may decide that there has been a failure to comply with this Protocol when a

party has:

a) not complied in substance with one or more steps referred to above; or

b) acted unreasonably in such a way as to undermine the objectives of the Protocol.

39. Except in the circumstances described in paragraph 36 above, where either or both parties have failed to comply with the Protocol:

a) the parties shall be directed to attend Scheduling Court, at which time the proceedings shall be stayed while particular steps are taken to comply with the Protocol; and,

b) the court shall, at the first case conference, order that:

i) the party at fault shall pay a fine to the court presumptively fixed in the amount of $2,000.00 and payable within 30 days; or

ii) where both parties are equally at fault, that each shall pay a fine to the court presumptively fixed in the amount of $1,000.00 and payable within 30 days.

40. In awarding costs of the action, the court shall include costs of complying with the Protocol.

Appendix "A"

[text of applicable Rule]

Appendix "B"

Pre-Litigation Protocol Flowchart

Appendix "C"

Template Letter of Claim

To

[**Defendant**]

Dear Sirs/Mesdames

Re: [**Claimant's full name and address**]

We are writing to you pursuant to the Pre-Litigation Protocol of the Superior Court of Justice, a copy of which is attached.

[If appropriate: We act as counsel for [name of the claimant].] [**Name of the claimant**] is claiming damages in connection with [**nature of incident**] on [**date**] at [**location of incident**].

Please confirm the identity of your insurers. Please note that the insurers will need to see this letter as soon as possible and it may affect your insurance coverage and/or the conduct of any subsequent court proceedings if you do not send this letter to them.

The circumstances of the [**incident]** are:

[brief outline]

Liability

The reason why the claimant is alleging fault is:

[**simple explanation of the basis of liability**]

Injuries

A description of the claimant's injuries known to date is as follows:

[brief outline]

The claimant received treatment for the injuries arising from the incident at [**name and address of hospital**].

Loss of Earnings

The claimant is employed as [**occupation**] and has had the following time off work [**dates of absence**]. **[If known: The claimant's weekly income is .]**

Other Financial Losses

The claimant is also aware of the following (likely) financial losses arising from the incident: [**provide description**].

Pursuant to the provisions of the Protocol, you must provide a Letter of Response within 21 days of receipt of this letter.

Yours truly

Appendix "D"

Template Letter of Response

To [**Claimant**] or [**Claimant's legal representative**]

Dear Sirs/Mesdames

Letter of Response

Re: [Claimant's name] v [Defendant's name]

[If appropriate: We have been instructed to act on behalf of [defendant] in relation to [claimant's] claim concerning the [alleged incident] on [date].]

[If appropriate: We note that you have also written to [ ] in connection with this claim. We [do/do not] believe they are a relevant party because [ ]. In addition, we believe [the claimant's] claim should be directed against [ ] for the following reasons: [ ].]

Liability

In respect of alleged liability for this incident, [**defendant**] admits the [**incident**] occurred and that [**defendant]** is liable for loss and damage to the claimant, the extent of which will require quantification.

Or

In respect of alleged liability for this incident, [**defendant**] admits the [**incident**] occurred but denies that [**defendant**] is responsible for any loss or damage alleged to have been caused for the following reasons: [ ].

Or

In respect of alleged liability for this incident, [**defendant**] does not admit the [**incident**] occurred either in the manner described in your letter of claim [**or at all**] because: [ ].

[If appropriate: The defendant does not intend to raise any limitation defence]

Documents

Attached are copies of the following documents in support of [**the defendant's**] position: [.]

You have requested copies of the following documents which we are not enclosing because [ ].

Next Steps

Please let us know when you are available for a telephone or video conference to discuss a possible resolution of this dispute.

Yours truly

Appendix "E"

Template Stocktake Report

Section 1 – The Parties

Claimant(s)	
Defendant(s)	

Section 2 – Steps to Try to Resolve or Narrow the Dispute

Please indicate the step or steps the parties engaged in to try to resolve or narrow the dispute. Only one step is required, but please tick all that were undertaken:

Steps	**Yes**
Mediation: a neutral third party (called a 'mediator') assists the parties to try to resolve their dispute	
Early neutral evaluation: non-binding evaluations by an independent lawyer who advises the parties on the strengths and weaknesses of their respective cases	

A pre-action meeting: A meeting between the parties, either virtually, in person, or by telephone, to discuss the scope of their dispute, its root causes, and ways it might be resolved or narrowed	
Other (Please specify)	

Section 5 – Disclosure

5A Documents Disclosed by the Parties

There is no need to attach the documents to the Stocktake Report.

	Documents disclosed by the Claimant(s)	**Documents disclosed by the Defendant(s)**
1		
2		
3		
4		
5		
6		
7		
8		

Create additional rows or continue on separate sheet if required.

5B Documents that should have been disclosed but were not

	Documents required to be disclosed pursuant to the Protocol	**Reason for non-disclosure**
1		
2		
3		
4		

Create additional rows or continue on separate sheet if required.

Section 6

	Yes	No
Did the claimant serve a Letter of Claim on the defendant? Date Served:		
Did the defendant serve a Letter of Acknowledgement? Date Served:		
Did the claimant deliver its documents to the defendant? Date Delivered?		
Did the defendant serve a Letter of Response? Date Served:		

Section 7 – Signatures

Signature of claimant	Signature of defendant
_____ Name: Date:	_____ Name: Date:

Add as many rows as necessary

Appendix "C"

Redfern Document Disclosure Schedule

Requesting Party: _____

(a)	(b)	(c)		(d)	(e)	(f)
No.	Documents or Category of Documents Requested	Rationale for Document Request		Objections to Document Request	Reply to Objections to Document Request	Decision of the Arbitral Tribunal
		Reference to Submissions/Document	Comments			