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January 29, 2026

Trials on Trial: A New Vision for Adjudication in Ontario

If the Civil Rules Review Working Group's proposals for reforms to the *Rules of Civil Procedure* (summarized here) are adopted, trial practice in Ontario will undergo significant changes. Key aspects of those proposed reforms from the Final Policy Report released include:

1. **A Three-Track Litigation System**: Application, Summary, and Trial Tracks all have different procedures, each of which will feature significant adjudicative efficiencies over existing procedures.
2. **Summary Hearings**: Matters roughly corresponding to current applications and those matters under $500,000 in value will be determined at a Summary Hearing, with only the potential for limited oral evidence.
3. **More Paper Evidence in (Non-Jury) Trials**: The witness statements of non-party witnesses will be taken as read.
4. **Less Oral Evidence in Chief**: The evidence in chief of party witnesses will be restricted to what is within the four corners of their witness statements.
5. **Changes to Expert Evidence at Trial**: Presumptively, all fact witnesses for all parties will testify, followed by all experts. All expert reports will be presumptively taken as read, with testimony focused on areas of disagreement.

The focus of these proposals is to get cases to trial faster and reduce trial time. Their impact on actual efficiency for litigants – including the cost of taking cases to a "Dispositive Hearing" – remains to be seen.

Application Track and Summary Track cases will be familiar to Ontario lawyers and litigants who are used to current "applications," which generally result in a hearing on a paper record. Whether the new rules result in hybrid or bifurcated modes of hearing (as are occasionally used under the existing *Rules*) remains to be seen. Trial Track cases will generally result in a trial – unless converted to the Summary Track, in which case a dispositive Summary Hearing will result.

How these principles work in practice will depend in large part on how judges resolve disputes over the mode of hearing under any proposed rules, and what criteria are applied to determine

those disputes.

It is also significant that the Working Group did not adopt the model in place in England and Wales, in which (presumptively) all evidence in chief at trial is adduced by way of witness statement. That jurisdiction has used that default mode of evidence for all civil trials since 1999.

Instead, the Working Group suggests that all non-party and expert evidence be presented by default through witness statements. However, party evidence would still be given orally but limited to what is said to be the "four corners" of their disclosure; namely, their witness statement(s), their documents disclosed, and any evidence adduced through the 90-minute "focused examinations" envisioned for Trial Track cases.

Some Ontario judges have adopted similar approaches to "hybrid" proceedings or trials of an issue (e.g., *SS&C Technologies v The Bank of New York*). But handling disputes over whether a witness' statement aligns with prior written evidence exchanged by the parties often extends beyond the usual impeachment process at trial. In some cases, this issue has consumed significant resources from both the parties and the court, which may not fully align with the goals of the proposed reforms.

The newly proposed Trial Management Conference may provide an opportunity for addressing some of these issues. The Working Group proposes that, subject to resource constraints, these sessions would be led by the trial judge and held in the weeks leading up to the trial. The primary focus will be on ensuring trial readiness, including the preparation of joint books of documents and chronologies. Additionally, these conferences will serve as a platform to identify and manage potential disputes regarding the scope of anticipated evidence. In any case, Ontario trial lawyers will have to significantly alter their practice if the proposed reforms related to witness statements are adopted.

Implications for In-House Counsel

The proposed changes to adjudicative processes will not only impact external counsel and their conduct of trials but will have some apparent implications for in-house counsel:

> **1. Early Witness & Narrative Identification**. If the new reforms are adopted, gone will be the days of in-house and external counsel working to identify an examination for discovery representative, or other key witnesses in the weeks or months leading up to discovery or trial. All documents and witness statements will need to be exchanged early in the process (at least by the time of the

One-Year Scheduling Conference on Trial Track matters) so in-house counsel will need to be ready to work with external counsel to identify and develop the whole “story” to tell at trial, including the witnesses through whom that evidence will be led, early in every case.

2. More & Shorter Trials? The effect of the up-front evidence model means that much of the cost of trial preparation will be moved up into the first 12 months of any given case. This is likely to make the actual conduct of trials more efficient or at least take up less court time. In-house counsel and their clients may need to re-calibrate their expectations for trial risk if the incremental resource cost of trials is significantly reduced.

3. Or More & Early Settlement? While trials may be more efficient, the effect of the proposed *Rules* reforms may be to reduce the need for dispositive hearings. This is so given the resource pressure that the up-front evidence model will place on parties and counsel. In-house counsel should consider being prepared to assess cases and litigation costs early, and early resolution in appropriate cases if the unavoidable costs justify it.

This is only one part of our series, A New Vision for Litigation, analyzing the proposed reforms to Ontario’s Rules of Civil Procedure. See our other blogs here:

- Summary of Proposed Changes to Ontario’s Rules of Civil Procedure
- Preparing for Proposed Changes to the Rules of Civil Procedure in Ontario: Strategic Insights & Practical Steps for In-House Counsel
- Motions Practice Transformed: What the Proposed Civil Justice Reform in Ontario Means for Litigants
- Expediting Justice: Pre-Litigation Protocol in the Proposed Changes to the Rules of Civil Procedure in Ontario
- Up-Front Evidence: A New Era in Discovery Proposed by the Civil Rules Review in Ontario
- Proposed Changes to the Rules for Expert Witnesses: Cooperation, Conferencing, & Consequences