



April 5, 2024

The Civil Rules Review Working Group
The Honourable Mr. Justice Cary Boswell
Superior Court of Justice
Court House
75 Mulcaster Street
Barrie, Ontario L4M 3P2

Via Email (jennifer.smart@Ontario.ca)

Dear Justice Boswell:

Re: Civil Rules Review – Phase 1 Consultation Paper

Thank you for requesting comments from the Federation of Ontario Law Associations (FOLA) regarding the Phase 1 Consultation Paper in the process to reform the *Rules of Civil Procedure*. We have enclosed with this letter a response to the questions, and we would like the opportunity to continue to provide feedback at each stage as the direction of the new *Rules* evolves.

We want to provide several high-level comments to you at the front-end of this process. As you know, FOLA represents Ontario's 46 county and district law associations. Many of our members are sole practitioners or work in small firms in smaller cities and rural areas. As a federation with representation across Ontario, we are the only provincial legal association consistently connected to lawyers in every part of the province. Our initial impressions arise from this constituency. They are as follows:

- First, the most significant gap causing the justice system to take on water in smaller jurisdictions is understaffing in the court system, from registrars and trial coordinators to judges. Bailing water by addressing the *Rules* is a welcome but limited stop-gap. Reforms must be cognizant of the judicial and staff resource constraints in court centres across the province, and the need to align the back-end administration of court processes with the structure and allocation of resources of the Court Services Division of the Ministry of the Attorney General.
- Second, we understand that there is interest in expanding the role of case management at the outset of proceedings to determine process issues. In so doing, a difficult balance must be struck. For example, early case management can help streamline the process by providing the court with the power to control or select the way a lawsuit can be litigated. This can make a proceeding more efficient, more proportionate to the issues, and remove some unnecessary 'battlegrounds' in the *Rules* themselves.

*"The Voice of the
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in Ontario"*

Corporate Mailing Address:
731 9 th Street West,
Owen Sound, ON
N4K 3P5

Phone:
(519) 270-4001

Website:
www.foia.ca

Social Media:
[@ont_law_assoc](https://twitter.com/ont_law_assoc)

On the other hand, this change may merely shift procedural conflicts to the new battleground of case management – which, inevitably, will require memoranda and a new regime of filings and documents that parties will need to pay for at an early stage, likely in a forum where costs will not be presumptive.

- Third, parties also need predictability and consistency as to what process will be applied in a proceeding, as this controls cost expectations and how we advise clients of risk and evidentiary issues at the front-end of a claim or defence. If commencing a proceeding becomes a ‘black box’ exercise without sufficient procedural guardrails or some standardization of process, it will diminish access to justice by elevating risk for litigants.

At this early stage, we simply want your working group to understand that a wholesale change in the *Rules* can result in unintended consequences and may place a heavier burden on judicial and party resources if it introduces new steps, new constraints that cannot be accommodated by human resources, or more uncertainty for litigants.

- Fourth, FOLA is concerned by the under-representation of those who practice outside of small firms and larger centres on your working group – and, in particular, the over-representation of those from the Greater Toronto Area. As indicated, we are the only legal organization that represents a broad cross-section of the bar across Ontario. Our membership base would not want to see changes to the *Rules* that, in seeking to solve “Toronto problems”, introduce new challenges where there are currently none or few. Many smaller centres would benefit from targeted and incremental changes in the *Rules* and not a seismic shift in process – particularly one designed without their direct perspective being shared at the table. For instance, in many smaller centres, delay is far less of an issue to advance a proceeding. The administration and practice directions are, similarly, far more straight-forward than what we are seeing in larger judicial centres. It may be useful to consider bifurcating the *Rules* themselves, even partially, or introducing cost consequences or other incentives to pull proceedings from congested jurisdictions and push them into less congested jurisdictions.
- Finally, it strikes us that while a wholesale revision of the *Rules* is an important goal, changes will need to be phased-in in order to be workable and without stagnating or shocking those who work in the existing system. To that end, we would encourage the committee to triage areas for reform. What can be taken out of court? How can we modernize service and productions? What restraints on enforcement are antiquated and need to be addressed? What Court Service functions ought to be moved online and centralized rather than localized?

As a final comment, we are of the view that this process cannot be approached from a mindset that places the onus of managing delay and expediency entirely on the shoulders of counsel. Lawyers and parties are often not the source of delay, and yet are routinely left facing costs thrown away, unhappy clients waiting years for their matters to

be disposed of, time wasted completing forms that are clunky and inefficient, and an inability to enforce their victories when the court is under-resourced and the *Rules* and related statutes are frozen in time. All of these issues are related to the *Rules*, but require action by other players in the system to address them effectively. We do not think it is fair or reasonable for the new rules to be developed from a view that the responsibility for delay and cost of civil litigation falls entirely to the actions of counsel or their clients.

Please do not hesitate to contact me or Ian Hu, our Director of Policy and Advocacy (ian.hu@folo.ca) to discuss further. We are happy to engage with any issue and look forward to pushing the justice system forward.

Sincerely,

A handwritten signature in black ink that reads "Douglas W. Judson". The signature is written in a cursive, flowing style with a long horizontal line extending from the end of the name.

Douglas W. Judson
Chair

C. County and District Law Association Presidents

