# CIVIL RULES REVIEW
# PHASE 1 CONSULTATION PAPER

## Background

For several decades, there have been growing concerns about the accessibility, efficiency, and expense of the civil justice system in Ontario. Several task forces have been assembled to address these pressing issues.

In 1994, for instance, a Civil Justice Review was undertaken at the request of the Chief Justice of Ontario and the Attorney General for Ontario. Its mandate was to develop an overall strategy for the civil justice system to provide a speedier, more streamlined, and more efficient structure to maximize the use of public resources allocated to civil justice. The Civil Justice Review delivered its final report in November 1996. It made several recommendations, including the implementation of a province-wide system of case management.

In June 2006, The Honourable Coulter Osborne was retained to lead a Civil Justice Reform Project. The Project was tasked with proposing options to make the civil justice system more accessible and affordable for Ontarians. The Civil Justice Reform Project delivered its final report in November 2007. It similarly made several recommendations for reform including the adoption of proportionality as an overarching principle of interpretation.

Several other, more focused, task groups have been convened in the interim, with a similar mandate to find ways to reduce wait times, increase access to justice, and reduce the costs associated with civil justice in Ontario.

Despite best efforts, serious issues with respect to accessibility, cost, and efficiency remain.

On September 28, 2023, Attorney General Downey and Chief Justice Morawetz announced that a Civil Rules Review ("CRR") would be launched in early 2024, with a mandate to identify issues and develop proposals for reforming the *Rules of Civil Procedure* to make civil court proceedings more efficient, affordable, and accessible to all Ontarians. It is recognized that fundamental changes need to be made to the way in which civil justice is administered in Ontario. To that end a *full* review of the *Rules* has been mandated.

To be clear, the CRR's mandate is limited to a review of the *Rules* and to a consideration of whether technological solutions may be leveraged to enhance access to justice and reduce delay. It does not include broader legislative reform.

The CRR is a two-year project. It will proceed in three phases. Phase 1 will be a scoping phase. Phase 2 will involve an in-depth study of the potential reforms identified in Phase 1 and the development of a policy proposal. Phase 3 will involve approval and implementation.

The CRR will engage in province-wide consultations in both Phases 1 and 2. The goal of Phase 1 consultation is limited to identifying potential reforms meriting deeper consideration in Phase 2. A preliminary Phase 1 report identifying areas for further consideration is expected to be delivered to the Attorney General and Chief Justice by May 31, 2024.

## CRR Working Group Members

Justice Cary Boswell
Allison Speigel
(Co-Chairs)
John Adair
Tamara Barclay
Justice Jennifer Bezaire
Suzanne Chiodo
Chantelle Cseh
Jacob Damstra
Trevor Guy
Rebecca Jones
Sunil Mathai
Zain Naqi
Jeremy Opolsky
Darcy Romaine

Jennifer Hall, Counsel

Jennifer Smart, Administrative Assistance

## Guiding Principles

The CRR will focus on areas where targeted amendments to the *Rules* will:

- Increase efficiency and access to justice for Ontarians, both represented and unrepresented.
- Reduce the complexity of the civil justice system.
- Reduce costs for litigants.
- Maximize the effective use of court resources.
- Reduce delay.
- Leverage technical solutions.

In conducting its work, the CRR will be guided by principles which include the following:

- Proportionality must be the central organizing principle of any modern code of civil procedure.
- Civil justice involves a triangulation of accuracy, time, and cost. Proportional justice must account for time and cost. Delays and runaway costs are the most pressing threats to proportional justice presently faced by the civil justice system.
- The contribution that each existing rule makes to truth-seeking and procedural fairness must be balanced against any inefficiencies associated with the rule, including any potential for abuse.
- How each rule moves the process towards a fair and final resolution, while also accounting for cost, efficiency, and expeditiousness, must be considered.
- Litigation should focus on substance, not process.
- Specific rules are more accessible than non-specific rules.
- The rules must reflect the reality of the justice system's resources.
- Any recommendations for reform should promote access to justice for both represented and unrepresented litigants and should consider that different issues may be experienced by different regions, populations, and categories of justice system participants.

## Comments and Suggestions Sought

This Phase 1 Consultation Paper provides a general outline of some of the areas the CRR Working Group has identified for potential reform and deeper consideration in Phase 2 of the review. The decision as to what reforms will be considered in greater detail in Phase 2 ultimately lies with the Chief Justice and the Attorney General jointly.

The CRR invites brief comments on the issues set out below, and, more generally, invites you to raise any other reforms you believe merit deeper consideration in Phase 2 of the review process.

Responses are required by **April 5, 2024**. They may be forwarded by email to **Jennifer.Smart@Ontario.ca**. Note that responses provided may be subject to the *Freedom of Information and Protection of Privacy Act* and may be disclosed.

When formulating any comments, please consider the following questions:

1. What features of the *Rules* are most in need of reform?
2. What features of the *Rules* are the most prone to abuse?
3. What reforms might improve efficiency and reduce delays and costs?
4. What reforms might make the *Rules* more accessible for represented and unrepresented litigants alike?
5. What targeted changes to the *Rules* might leverage technological solutions to increase access to justice and reduce the complexity of the civil justice system?

The following are potential areas of reform identified by the CRR.

## I. STARTING A CASE

There are presently two forms of originating pleadings: statements of claim and applications. There is concern that neither is particularly accessible to self-represented litigants. There is a further concern that, where pleadings are drafted without sufficient regard to their accuracy, they may result in overbroad discovery and, in turn, increased costs and delays.

Consider the current pathways to commencing a proceeding and the possibility that, once commenced, different litigation processes may be applied to different matters, having regard to the relief sought and the complexity of the issues.

1. Should we consider a broader role for applications, as a paper-based, discovery-free, alternative proceeding?

   Yes ☐ No ☐ No Opinion ☐

2. Alternatively, should we consider the use of a single, simplified form of originating process for all civil matters?

   Yes ☐ No ☐ No Opinion ☐

3. If using a single originating process, should we consider the application of different process models, depending on the relief sought and the complexity of the issues? Consider perhaps whether an order might be made at an early case conference customizing the process to be utilized from the outset of the case to its completion.

   Yes ☐ No ☐ No Opinion ☐

4. Should we consider a process requiring counsel or parties to certify that a pleading is true or meets some evidentiary threshold as a means of discouraging overly broad or speculative pleadings and, in turn, improving efficiency and/or reducing cost and delay?

   Yes ☐ No ☐ No Opinion ☐

5. Should the process to amend a pleading be made easier, for instance by permitting more amendments (or some identified number of amendments) as of right?

   Yes ☐ No ☐ No Opinion ☐

| Comments |
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## II. SERVICE

We live in a digital age. Smart phones are ubiquitous. Many millions of Canadians have social media accounts. Digital methods of serving court documents arguably offer fast, effective, and cost-efficient solutions.

Consider whether the current rules governing service sufficiently allow for service of court documents, including originating processes, by digital means.

1. Should we consider permitting a wider range of digital service options, including for originating processes?

   Yes ☐ No ☐ No Opinion ☐

2. Should we consider expanding the options or ways in which personal service may be effected, for instance, by allowing for alternative service on certain parties, without the need for a motion?

   Yes ☐ No ☐ No Opinion ☐

3. Should we consider providing that all documents filed with the Court are to include an email address, where available, for service on that party and that service of documents may be effected by email to the address provided?

   Yes ☐ No ☐ No Opinion ☐

| Comments |
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## III. CASE MANAGEMENT

There are concerns that civil cases take too long to complete, that some litigants abuse the system, and that the processes employed often exceed what is necessary to achieve the objective of proportional, cost-efficient, and fair results.

Consider whether some degree of case management, at the outset of a case, may help to identify appropriate processes tailored to the needs of the case, having regard to the amount involved and the complexity of the issues. Consider also whether case management at other points in the case may help to reduce abuse and increase efficiency.

1. Should we consider providing for mandatory, active, or more robust case management?

   Yes ☐ No ☐ No Opinion ☐

Consider whether, as part of early case management, the fixing of firm timetables, including trial dates, may serve the goal of completing cases in a predictable and expeditious manner.

2. Should we consider a rule requiring the establishment of a firm timetable at the outset of a case?

   Yes ☐ No ☐ No Opinion ☐

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## IV. DISCOVERY

### A. Documentary Discovery

The modern trend in civil litigation has been strongly in favour of full disclosure. Despite recent efforts, including the modification of the test from "semblance of relevance" to "relevance to any matter in issue", documentary disclosure remains a significant source of delay and expense.

The digital age has seen an enormous rise in the number and nature of documents which may be relevant to the issues in a case. Relevance is a low threshold. There is concern that, even accounting for proportionality, a test based on relevance may require significant disclosure (with associated delay and expense) of documents that have little, if any, probative value.

1. Should we consider changing the standard for production of documents from relevance to a higher threshold?

   Yes ☐ No ☐ No Opinion ☐

2. Should we consider ways to reduce the volume of documents produced in litigation?

   Yes ☐ No ☐ No Opinion ☐

3. Should we consider a requirement that, prior to documentary production, the parties meet (with attendees who have knowledge of the parties' claim or defence and are empowered to make decisions) and confer on the scope of documentary discovery, being mindful of the overarching goals of proportionality and time efficiencies?

   Yes ☐ No ☐ No Opinion ☐

4. Should we consider whether the requirement that parties agree on a discovery plan should remain in the *Rules*?

   Yes ☐ No ☐ No Opinion ☐

Consider whether an "ask-based" system of discovery may result in more focused, efficient, proportional, and meaningful disclosure. Such a system could include an obligation to make timely disclosure of any documents a party intends to rely upon in the ligitation. It could also include the right of each party to demand production of such further and other documents as that party reasonably requires to prepare for and advocate its case.

5. Should we consider the use of an ask-based system of discovery?

   Yes ☐ No ☐ No Opinion ☐

Consider whether discovery obligations should depend on the nature of the case, having regard to the relief sought, the nature of the dispute, and whether it is primarily driven by facts or law, and the complexity of the issues.

6. Should we consider whether disclosure obligations should be dependent on the nature of the case?

   Yes ☐ No ☐ No Opinion ☐

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## B. Oral Discovery

There is concern that oral examinations for discovery may not be proportionally justifiable in every case, notwithstanding the time limits in the *Rules*.

Consider whether additional limits should be placed on the right to conduct oral discoveries, in light of the complexity of a case and the relief sought, in an effort to create a more proportional, cost-efficient and fair process.

1. Should we consider the elimination of the right to oral examinations for discovery in certain cases?

   Yes ☐ No ☐ No Opinion ☐

2. Should we consider replacing oral examinations for discovery with written interrogatories in certain cases?

   Yes ☐ No ☐ No Opinion ☐

There is concern that refusals to answer questions during oral examinations for discovery, and more particularly interlocutory motions to address the validity of refusals, take up a disproportionate amount of the court's resources and result in disproportionate delays and expense to the parties. The Civil Rules Committee has recently been examining this issue.

Consider whether a rule enabling a party to answer a question under objection but disentitling that party to refuse to answer a question – save in the case of an assertion of privilege (or other identified limited exceptions) – would foster the goals of proportionality, cost-efficiency, and the reduction of delay. In considering this issue, assume that in all cases the admissibility of an answer provided in response to a question objected to would be determined by the trial judge.

3. Should we consider eliminating the right to refuse questions on an oral examination for discovery, except for questions where privilege (or another identified limited exception) is asserted?

   Yes ☐ No ☐ No Opinion ☐

Alternatively, consider whether a rule that an adverse inference will presumptively be drawn from the failure to answer a proper question could provide litigants with an option for how to proceed in the face of an improper refusal. In other words, instead of bringing a refusals motion, a party could rely on the negative inference that would be drawn at the hearing.

4. Should we consider a presumptive adverse inference arising from improper refusals?

   Yes ☐ No ☐ No Opinion ☐

Comments

## V. MOTIONS

### A. Non-Dispositive Motions

There are presently significant delays in obtaining both short and long motions dates across the province's judicial regions.

There is concern that non-dispositive motions consume disproportionate time, expense and system resources relative to their value in the litigation and represent an easy means for deeper-pocketed litigants to drive delay and increase costs, thereby limiting access to justice and engendering frustration with and cynicism about the civil justice system.

Consider whether case conferencing of non-dispositive interlocutory motions of 2 hours or less might offer a quicker, more cost-efficient means of addressing those matters.

1. Should we consider requiring certain non-dispositive interlocutory issues (for example, production and discovery issues) to be dealt with by way of a case conference attendance rather than a full motion?

   Yes ☐ No ☐ No Opinion ☐

2. Alternatively, should we consider developing a "gatekeeper" role for the bringing of motions, whether through case management or otherwise?

   Yes ☐ No ☐ No Opinion ☐

Consider whether all non-dispositive interlocutory motions ought to be presumptively addressed in writing, as a quicker and more cost-efficient means of addressing them, with the judicial officer hearing the motion deciding whether and to what extent oral submissions are necessary.

3. Should we consider requiring that certain non-dispositive motions proceed in writing, subject to a judicial officer's request for oral submissions?

   Yes ☐ No ☐ No Opinion ☐

Consider whether there are other amendments to the rules governing non-dispositive interlocutory motions that might result in a reduction of delay and costs generally associated with those types of motions.

4. Should we consider replacing notices of motion, affidavits, and factums with a single motions brief, the contents of which the filing party certifies are true, or streamlining the necessary filings for motions in some other manner?

   Yes ☐ No ☐ No Opinion ☐

5. Should we consider the imposition of page limits on written evidentiary materials? For example, limits that are proportional to the motion's length.

   Yes ☐ No ☐ No Opinion ☐

6. In an effort to eliminate the scheduling of "placeholder motions", which may never actually proceed, should we consider requiring the moving party to serve and file their motion record before the motion is scheduled, and requiring responding parties to deliver responding materials (as well as requiring moving parties to deliver reply materials, and completion of remaining steps) within a set time from the date the motion record is served and filed?

   Yes ☐ No ☐ No Opinion ☐

7. Should we consider placing time limits on oral submissions?

   Yes ☐ No ☐ No Opinion ☐

8. Should we consider capping the number of non-dispositive motions a party may bring in a proceeding, without leave?

   Yes ☐ No ☐ No Opinion ☐

9. Should we consider compelling certain types of motions (e.g. undertakings motions) to be addressed with a "yes/no" disposition (i.e. without requiring reasons)?

   Yes ☐ No ☐ No Opinion ☐

10. In the alternative, should we consider whether refusals and undertakings motions should not be permitted at all?

    Yes ☐ No ☐ No Opinion ☐

Comments

## B. Dispositive Motions

Dispositive motions, particularly under Rules 20 and 21, serve an important function by providing a potential route to an early determination of a proceeding, or an important issue in a proceeding, without the need for a trial or other costly and time-consuming steps.

The amendments to Rule 20, introduced in 2010, and the Supreme Court of Canada's subsequent decision in *Hyrniak v. Mauldin*, 2014 SCC 7, have resulted in a marked increase in the number of summary judgment motions being filed. Together with Rule 21 motions, they comprise a substantial amount of the court's motions work and are a significant factor in the delays presently being experienced on long motions lists throughout the province.

There is an obvious concern about the current delay to obtain a hearing date for a dispositive motion. There is a further concern that not all dispositive motions result in a disposition that meaningfully advances the litigation. A "meaningful disposition", in the context of a dispositive motion, is one that resolves the litigation or an issue in the litigation on a final basis.

Consider what procedural changes might be implemented to reduce long motions lists and increase the likelihood of meaningful dispositions being achieved on dispositive motions.

Consider, for instance, whether Rules 20, 21, and 22 should be folded into one overarching dispositive motions rule. And consider whether such a rule should require that a case conference be conducted prior to the motion proceeding, with the process to be followed on the motion to be established by the case conference judge.

1. Should we consider folding Rules 20, 21, and 22 into a single dispositive motions rule, which would allow for the resolution of one or more issues in the action?

   Yes ☐ No ☐ No Opinion ☐

2. Should we consider imposing a requirement that all dispositive motions be subject to a case conference prior to being scheduled?

   Yes ☐ No ☐ No Opinion ☐

3. Should we consider investing the case conference judge with a discretion to set procedures for the motion that will lead to a meaningful disposition, including what, if any, evidence is to be filed and whether the motion should be converted to a form of summary or express trial?

   Yes ☐ No ☐ No Opinion ☐

4. Should we consider limiting parties to one dispositive motion in the litigation?

   Yes ☐ No ☐ No Opinion ☐

5. Should we consider whether Rule 20, or a broader rule covering dispositive motions, should articulate the circumstances in which partial summary judgment may be appropriate?

   Yes ☐ No ☐ No Opinion ☐

Currently, the test to be applied to a motion to strike a pleading on the ground that it discloses no reasonable cause of action or defence is whether it is plain and obvious, assuming the facts as pleaded are true: *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959. There is concern that the test allows too many claims with only a remote chance of success to proceed.

6. Should we consider restating the test on a motion under Rule 21, to eliminate the standard of "plain and obvious"?

   Yes ☐ No ☐ No Opinion ☐

7. If you answered "yes" to question 6, what standard should replace "plain and obvious"?

   ☐

8. Should the judge hearing a Rule 21 motion be required to determine legal issues in the same manner as a trial judge who had just found that all of the plaintiff's allegations had been proven?

There is concern that too many claims are being struck under Rule 21 with leave to amend, resulting in the need for multiple Rule 21 motions in a single proceeding.

9. Should we consider a rule that eliminates a right to amend if a pleading is struck under Rule 21?

   Yes ☐ No ☐ No Opinion ☐

10. In the alternative, should we consider a rule that affords a responding party to a Rule 21.01(1)(b) motion an opportunity to amend prior to the hearing of the motion, and eliminates any right to amend if the pleading is subsequently struck?

    Yes ☐ No ☐ No Opinion ☐

11. Where a pleading is struck under Rule 21.01(1)(b) but the party would otherwise be granted leave to amend that pleading, should the judge hearing that motion have the discretion, as an alternative to amendment, to identify any triable issue(s) and make an order giving directions for the trial of those issue(s)?

    Yes ☐ No ☐ No Opinion ☐

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### C. Dismissals for Delay

There is concern that some cases languish in the system for many years and that the test to dismiss such cases for delay is too forgiving, resulting in further costs and delays.

1. Should we consider imposing more stringent automatic dismissals by the Registrar under Rule 48.14?

   Yes ☐ No ☐ No Opinion ☐

2. Should we consider amending the *Rules* to provide more clarity about when a pleading may or shall be dismissed for delay under Rule 24?

   Yes ☐ No ☐ No Opinion ☐

Comments

## VI. DEFAULT PROCEEDINGS

There are concerns that the rules governing default proceedings permit delays, including the failure to meet specific deadlines, without sufficient consequences.

1. Should we consider reinforcing the rules regarding default and related consequences?

   Yes ☐ No ☐ No Opinion ☐

2. Should we consider a rule that automatically requires a party seeking to set aside a default judgment to pay the plaintiff's costs thrown away and potentially an additional penalty?

   Yes ☐ No ☐ No Opinion ☐

Section 25 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (the "*CLPA*") provides that default judgment shall not be entered against the Crown without leave of the Court on an application served at least 14 days in advance of the hearing. There is a concern that too few litigants are aware of this provision, resulting in needless motions to set aside default judgments granted against the Crown.

3. Should we consider including a reference to s. 25 of the *CLPA* in any rule relating to default proceedings?

   Yes ☐ No ☐ No Opinion ☐

Comments

## VII. COSTS

The *Rules* employ a cost-shifting regime, whereby a successful party may anticipate receiving an award requiring the unsuccessful party to pay for some portion of its costs. The presumptive award is on a "partial indemnity" scale, though that scale is not defined with any precision.

There are concerns that the discretion to award costs is not exercised consistently, that cost awards frequently do not reflect the actual costs incurred or sufficiently deter bad behaviour, and that litigating over the amount of costs to be awarded adds another layer of expense and delay, taxing the court and parties' limited resources.

At the same time, there is a broader concern that the costs of civil proceedings are so high that they disincentivize plaintiffs of modest means from pursuing what may otherwise be meritorious claims. Civil justice fails when only deep-pocketed litigants can access the system.

Consider what changes to the current cost regime might improve access to justice for all litigants, and make cost awards more consistent and meaningful.

1. Should we consider fixing a different scale than "partial indemnity" as the presumptive measure of costs?

   Yes ☐ No ☐ No Opinion ☐

2. Should we consider the imposition of fixed recoverable costs in certain cases, capping at the outset the amount of costs a party might expect to recover at each stage of a proceeding?

   Yes ☐ No ☐ No Opinion ☐

3. Should we consider a revision or clarification of the Rule 57.01 factors?

   Yes ☐ No ☐ No Opinion ☐

4. Should we consider restricting cost submissions to the exchange and filing of a cost outline, addressing the Rule 57.01 factors?

   Yes ☐ No ☐ No Opinion ☐

5. Should we consider creating cost consequences for a party's failure to file a costs outline at the outset of a hearing, such as a denial of costs or deferring costs in the cause?

   Yes ☐ No ☐ No Opinion ☐

6. Should we consider creating a tariff or fixing costs or a range of costs, for particular steps in a proceeding?

   Yes ☐ No ☐ No Opinion ☐

7. Should we consider building fixed cost consequences into certain rules to incentivize compliance with the rule (e.g. a cost sanction of $X for missing a filing deadline)?

   Yes ☐ No ☐ No Opinion ☐

8. Should we consider promoting more "teeth" in cost awards to dissuade frivolous steps or to sanction bad behaviour?

   Yes ☐ No ☐ No Opinion ☐

9. Should we consider the establishment of a "no cost" regime for certain types of cases?

   Yes ☐ No ☐ No Opinion ☐

## Last Minute Adjournments

The last-minute adjournment of scheduled matters result in lost court time and contribute to delays in the justice system. For these reasons, the adjournment of matters that have been scheduled for hearing should, to the greatest extent possible, be minimized. Consider what changes might be made to the *Rules* to accomplish that end.

10. Should we consider the imposition of "systemic costs" (i.e. requiring the payment of costs "to the system") for last minute adjournments or other identified delay tactics?

    Yes ☐ No ☐ No Opinion ☐

11. Should we consider whether parties should only be allowed to book matters once their materials are served and filed?

    Yes ☐ No ☐ No Opinion ☐

12. Should we consider generally prohibiting adjournments in certain circumstances, such as where there has been non-compliance with the *Rules*?

    Yes ☐ No ☐ No Opinion ☐

13. Should we consider whether an adjournment should generally be prohibited after a certain point, for example where a motion has been confirmed?

    Yes ☐ No ☐ No Opinion ☐

14. Should we consider whether a party should be able to request a maximum number of adjournments in a proceeding?

    Yes ☐ No ☐ No Opinion ☐

Comments

## VIII. EXPERT EVIDENCE

There has been a noticeable increase in the use of expert evidence. This trend reflects the fact that many legal disputes involve complicated technical, scientific, or industry-specific issues beyond the knowledge of a judge or jury. The Court's reliance on expert evidence, which can be of central importance to the just determination of a dispute, underscores the need for expert evidence to be fair, impartial, and objective.

The need for expert evidence and its desirability in complex litigation is indisputable. However, the increased reliance on this evidence has created several systemic issues that impact the fair, proportionate, and timely resolution of civil matters. The systemic issues include: delaying scheduled trials or pre-trials; unnecessarily lengthening trials; unnecessarily complicating trials; and the use of "hired guns".

Consider whether requiring opposing experts to meet and consult on a without prejudice basis prior to trial (see Rule 20.05(2)(k)) or permitting out of court examination of experts prior to trial (see Rules 31.10(1) and 36.01) would assist in narrowing the issues between opposing experts?

1. Should we consider mechanisms for narrowing the issues between opposing experts?

   Yes ☐ No ☐ No Opinion ☐

Consider whether allowing expert reports to be admitted for the truth of their contents in non-jury trials, time limits for cross-examination of expert witnesses, or requiring advance notice of a party's intention to challenge an expert's qualifications or impartiality would reduce the length of evidence called at trial.

2. Should we consider methods to reduce the length of expert evidence called at trial?

   Yes ☐ No ☐ No Opinion ☐

3. Should we consider an expanded role for jointly retained experts or more regular use of Court-appointed experts (see Rule 52.03)?

   Yes ☐ No ☐ No Opinion ☐

4. Should we consider the use of expert panels at trial (i.e. implement concurrent expert testimony)?

   Yes ☐ No ☐ No Opinion ☐

5. In March 2023, amendments were made to Rule 53.08 and related rules to make it more difficult to adjourn a trial or pre-trial as a result of the late filing of expert reports. Should we consider additional mechanisms to ensure the delivery of expert reports does not cause unnecessary delay?

   Yes ☐ No ☐ No Opinion ☐

6. Should we consider additional mechanisms to ensure that experts adhere to their undertaking to the Court to be fair, objective, and impartial?

   Yes ☐ No ☐ No Opinion ☐

There are also concerns that Rule 31.06(3) requiring the disclosure, at discovery, of findings, opinions and conclusions of experts is an unnecessary infringement on litigation privilege and is not consistently interpreted by counsel.

7. Should we consider removing the requirement under Rule 31.06(3) regarding the disclosure of findings, opinions, and conclusions of a retained expert?

   Yes ☐ No ☐ No Opinion ☐

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## IX. PRE-TRIALS

Pre-trials are intended to serve two important functions: a forum for judicially mediated settlement discussions, and trial management. These are two distinct objectives.

Because of these dual objectives, the focus of pre-trials can be very judge-dependent—some judges will encourage the parties to settle and treat the pre-trial as a mediation, while others will primarily or exclusively deal with trial management issues.

Pre-trials also typically occur within a window of 30-120 days before the start of trial. Parties are required to provide pre-trial briefs a week in advance of the pre-trial setting out key issues in dispute, their respective positions, anticipated lists of witnesses, and estimates for trial time. The timing of the pre-trials and the contents of the information that parties deliver to the trial judge may further impact on their overall effectiveness.

1. Should we consider whether the settlement conference and trial management components of pre-trials should be 'decoupled' in a way that promotes greater efficiency and/or ensures that each of these objectives are being achieved?

   Yes ☐ No ☐ No Opinion ☐

2. Should we consider whether the settlement function of pre-trials ought to be outsourced, in some cases, to external mediators or other judicial officers and whether this could improve the likelihood of resolving cases?

   Yes ☐ No ☐ No Opinion ☐

3. Should we consider whether the current timing of pre-trials (30-120 days before the start of trial) is suitable from the perspective of: ensuring that cases are ready for trial (and are less likely to be adjourned at the last-minute); promoting settlement; encouraging the parties to define and narrow issues; and any other considerations that would be likely to improve efficiency, decrease costs, and ameliorate delay?

   Yes ☐ No ☐ No Opinion ☐

There is a concern that pre-trials are often focused primarily on resolution, at the expense of the trial management function, resulting in a missed opportunity to narrow issues, address admissions, and otherwise impose directions for a more focussed and efficient trial. Consider whether there are any processes that might be established to assist in the trial management function of a pre-trial.

4. Should we consider what other information, beyond what is currently provided in a pre-trial brief, could be mandated to assist the pre-trial judge in assessing the anticipated length of trial or giving other directions to the parties for the orderly and timely conduct of the trial?

   Yes ☐ No ☐ No Opinion ☐

5. Should we consider establishing a standard template for an Agreed Statement of Facts addressing, for instance, the identity of the parties, chronologies of significant events and joint documents briefs, which parties will be compelled to discuss and complete prior to a pre-trial?

   Yes ☐ No ☐ No Opinion ☐

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## X. MEDIATION

Under Rule 24.1, most civil lawsuits in Toronto, Windsor and Ottawa must go to mandatory mediation. This regime has been in place for about 25 years (in Toronto and Ottawa), and about 20 years (in Windsor). There have been recommendations in the past by certain groups to expand mandatory mediation to other parts of the province or to a broader range of cases.

1. Should we consider reforms to the existing regime for mandatory mediation?

   Yes ☐ No ☐ No Opinion ☐

2. If you answered "yes" to question 1, how would you reform it?

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The Superiour Court of Justice has developed an alternative dispute resolution mechanism for family proceedings known as Binding Judicial Dispute Resolution ("Binding JDR"), on a pilot basis. Binding JDR hearings, which require the consent of the parties, include both the settlement and adjudication parts of the process. While not appropriate in all cases, Binding JDR offers a relatively speedy, cost-efficient route to a final order, whether through a mediated settlement or an adjudication.

A specific rule governing Binding JDR for family proceedings in the Superiour Court of Justice is under development. A copy of the Practice Advisory concerning Binding JDR can be found here. See also *M.D. v. C.S.*, 2022 ONSC 667 for a description of the process as used in the Family Court.

3. Should we consider adopting the Binding JDR process as an available option in some civil proceedings?

Yes ☐ No ☐ No Opinion ☐

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## XI. TRIALS

Civil trials are one of the most resource-intensive and costly elements of the civil justice system. With limited judicial resources, shortening trials and making them run more efficiently serves the purposes of increasing access to justice and reducing complexity, cost, and delay. Potential strategies or measures could include:

(i) Requiring chess clocks for all trials, *i.e.*, imposing time limits pre-determined at the beginning of a trial or at a pre-trial conference.

(ii) Eliminating Requests to Admit.

(iii) Obligating parties to file an Agreed Statement of Facts, agreed-upon chronologies, or other aids for the trial judge to narrow issues, with greater enforcement and/or costs consequences for failing to do so.

(iv) Codifying rules and requirements for joint books of documents.

(v) Creating a presumption that all documents are deemed to be authentic other than those to which a party has objected.

(vi) Requiring parties to submit direct evidence of secondary witnesses or witnesses giving uncontentious evidence in affidavit form (or creating a presumption that such evidence will be delivered by affidavit).

(vii) Requiring opening statements presumptively in writing.

(viii) Eliminating an adverse inference for not calling a witness.

(ix) Streamlining the summons process, including changing (or eliminating) fees paid to witnesses.

(x) Listing trials earlier in the process.

1. Should we consider how to streamline the duration of trials and increase their efficiency?

   Yes ☐ No ☐ No Opinion ☐

2. Which, if any, of the steps outlined above might assist in that regard and are worth exploring as part of Phase 2?

   (i) ☐ (ii) ☐ (iii) ☐ (iv) ☐ (v) ☐ (vi) ☐ (vii) ☐ (viii) ☐ (ix) ☐ (x) ☐

Listing trials earlier in the process has the potential to create greater predictability and a quicker resolution of disputes. Consider whether preventing parties from deviating from Court-assigned timelines might benefit all parties and improve confidence in the civil justice system.

3. Should we consider whether to assign the trial date at an early case conference and establish measures and incentives to preserve the dates?

   Yes ☐ No ☐ No Opinion ☐

4. Although legislative change is outside the scope of the CRR's mandate, do you have views about whether the availability of jury trials in civil cases should be amended in any way? If yes, please comment.

   Yes ☐ No ☐ No Opinion ☐

| Comments |
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## XII. APPEALS

Appeals—in particular, interlocutory appeals—can be a source of considerable delay in the life of an action. There are concerns about existing appeal routes under the *Courts of Justice Act* and uncertainty around which Court is the proper forum for an appeal.

1. Should we consider separating the Appeal Rules into its own set of rules?

   Yes ☐ No ☐ No Opinion ☐

2. Should we consider whether the distinction between interlocutory and final appeals could be further simplified, clarified, or subject to declaration by the judge at first instance?

   Yes ☐ No ☐ No Opinion ☐

3. Alternatively, should we consider whether the determination of whether an order is interlocutory or final could be made by a single judge of the Court of Appeal?

   Yes ☐ No ☐ No Opinion ☐

4. Should we consider how to expedite leave to appeal interlocutory decisions such that the leave process does not unduly delay proceedings?

   Yes ☐ No ☐ No Opinion ☐

5. Should we consider an amendment clarifying that a proceeding may continue while an interlocutory appeal is pending?

   Yes ☐ No ☐ No Opinion ☐

6. Notwithstanding that legislative reform is outside of the CRR's mandate, should we consider recommending that the ability of parties to seek interlocutory appeals be limited, including restricting or limiting the availability of interlocutory appeals on certain issues?

   Yes ☐ No ☐ No Opinion ☐

7. Should we consider rule changes to permit appeals to be heard in writing, for example on the consent of the parties, by *sua sponte* order of the Court of Appeal (based on published criteria) or on a motion to a single judge of the Court of Appeal?

   Yes ☐ No ☐ No Opinion ☐

8. Should we consider targeting an expedited appeal process for appeals in writing?

   Yes ☐ No ☐ No Opinion ☐

9. Should we consider rule changes to permit appeals to be heard closer to the rendering of the judgment or order of the lower Court, such as eliminating the need to file an issued and entered order to perfect an appeal?

   Yes ☐ No ☐ No Opinion ☐

10. Should we consider reducing the availability of panel reviews of orders made by a single judge of the Court of Appeal to ensure efficient use of court resources, including prioritizing panel time for hearing appeals on the merits?

    Yes ☐ No ☐ No Opinion ☐

There is a concern that cost awards being imposed by the Court of Appeal are not reflective of the actual costs incurred in prosecuting or defending an appeal.

11. Should we consider a rule that appeal costs are to be awarded on a reasonable scale, i.e. a similar scale to that provided for in the Superior Court?

    Yes ☐ No ☐ No Opinion ☐

| Comments |
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## XIII. ENFORCEMENT

There are concerns that enforcing orders is costly and time-consuming. Consider whether the following types of changes might support the enforceability of court orders:

(i) Providing judgment creditors with increased access to information, such as tax returns, financial statements and bank statements.

(ii) Streamlining the paperwork necessary to issue a garnishment and amend a debtor's name on a writ of seizure and sale.

(iii) Eliminating the need to renew writs of seizure and sale every six years.

(iv) Setting deadlines by which directions to enforce must be followed (e.g. within 30 days of receipt), sale of land proceedings must be commenced, and reports to creditors given (both by the Sheriff and the party served with a direction).

(v) Increasing the number of allowable examinations in aid of execution within a one-year period.

(vi) Allowing the examination of a third party in aid of execution to occur before the examination of the debtor.

(vii) Increasing the ease with which a creditor may obtain a contempt order.

(viii) Eliminating the need to bring a motion to seek to enforce an order that is more than six years old.

(ix) Issuing garnishments without expiration dates.

1. Should we consider how to make court orders easier, faster, and less expensive to enforce?

   Yes ☐ No ☐ No Opinion ☐

2. Which, if any, of the steps outlined above might assist in that regard and are worth exploring as part of Phase 2?

   (i) ☐ (ii) ☐ (iii) ☐ (iv) ☐ (v) ☐ (vi) ☐ (vii) ☐ (viii) ☐ (ix) ☐

3. Should we consider whether litigants with outstanding judgments or costs awards should be prevented from commencing new litigation (either with or without leave)?

   Yes ☐ No ☐ No Opinion ☐

| Comments |
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## XIV. VEXATIOUS LITIGANTS

The ability of Ontarians to access the civil justice system is a fundamental part of a healthy democracy. The Vision Statement of the Ontario Superior Court of Justice is "Independent, responsive justice, open to all." The Vision statement is not an invitation, however, for vexatious litigants to abuse the civil justice system to harass others.

Vexatious litigants are a growing burden on the court's limited resources. They cause aggravation, frustration, and cost to those directly impacted by their conduct.

Concerns have been voiced that the existing mechanisms to attenuate the impact of vexatious litigants are not easily accessed nor stringent enough. Bill 157, *Enhancing Access to Justice Act, 2024*, which received Royal Assent on March 6, 2024, amends s. 140 of the *Courts of Justice Act* to allow judges of both the Superior Court and Court of Appeal to make orders related to vexatious proceedings. Once the amendments are proclaimed into force, these orders will be available on motion, application, or on a judge's own initiative. The new Act can be found here. The amendments provide for the procedure to be set out in the rules of court.

1. Should a rule be developed that identifies the hallmarks of a vexatious litigant and establishes a clear threshold to be met before a litigant is declared vexatious?

   Yes ☐ No ☐ No Opinion ☐

2. Should such a rule provide guidance as to the types of remedies that may be available where a defendant or respondent, as opposed to a plaintiff or applicant, is declared a vexatious litigant?

   Yes ☐ No ☐ No Opinion ☐

3. Should we consider establishing a summary procedure to trigger a judge's review of a party's conduct (potential vexatiousness) such as a letter to the Registrar, as opposed to requiring a formal motion?

   Yes ☐ No ☐ No Opinion ☐

4. Should the wording of Rules 2.1.01 and 2.1.02 be amended to make it mandatory that a proceeding or motion be stayed or dismissed if it appears on its face to be frivolous, vexatious or an abuse of process?

   Yes ☐ No ☐ No Opinion ☐

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## XV. THE FORM OF THE RULES

There is concern that the *Rules*, in their present form, are too long and complicated, and not laid out in a manner that is reasonably accessible to all litigants, whether represented or self-represented.

Consider whether simplifying and re-ordering the *Rules* might align with the Guiding Principles.

1. Should we consider simplifying and re-ordering the *Rules*?

   Yes ☐ No ☐ No Opinion ☐

2. Should we consider re-drafting the *Rules* in plain language at the literacy level of a grade 10 high school student?

   Yes ☐ No ☐ No Opinion ☐

| Comments |
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## XVI. MISCELLANEOUS

### Partial Settlements

There is a concern that, in multi-party litigation, defendants who are peripherally involved and have proportionately less culpability may be dragged through the legal process despite a willingness to settle early in the proceedings. This may result from a perceived disadvantage to a plaintiff to settle with such defendants early due to the current approach to Pierringer Agreements in Ontario.

Under a Pierringer Agreement, there is always the possibility of over- or under-compensation. With the current approach, the non-settling defendant receives credit for the amount settled between the plaintiff and the settling defendant without the risk of being liable to the plaintiff beyond their several liability. Meanwhile, the plaintiff bears the risk of being under-compensated if the verdict against the non-settling defendant is low. This rewards the non-settling defendant, improves the non-settling defendant's bargaining position, increases the risks of trial

on the plaintiff and penalizes the reasonable defendant who wants to settle. As a result, Pierringer agreements are rare, trapping peripherally-involved defendants and leading to longer and more complex trials.

Should we consider a rule change that incentivizes settlement by re-thinking how Pierringer Agreements will be treated?

Yes ☐ No ☐ No Opinion ☐

### Court Approval/Capacity Assessments

There is concern that Rule 7, which governs claims by or against a party under a disability, lacks direction regarding the requirements to establish mental incapacity. The Civil Rules Committee has recently consulted on aspects of Rule 7.

1. Should we consider an amendment articulating the applicable criteria to be applied to capacity assessments?

   Yes ☐ No ☐ No Opinion ☐

A parent typically acts as litigation guardian for a minor plaintiff. There is concern that a counterclaim against the parent (e.g. for alleged negligent supervision) may create a conflict of interest resulting in the removal of the parent as litigation guardian, resulting in additional cost and delay.

2. Should we consider an amendment to expressly permit the parent to remain as a litigation guardian despite an apparent conflict of interest?

   Yes ☐ No ☐ No Opinion ☐

3. Similarly, should we consider allowing a lawyer of record to continue acting even if s/he represented both the parent and the minor plaintiff?

   Yes ☐ No ☐ No Opinion ☐

4. Should we consider streamlining the process to appoint or replace a litigation guardian?

   Yes ☐ No ☐ No Opinion ☐

There is concern that the process for approving a settlement involving a party under a disability is too cumbersome and expensive.

5. Should we consider simplifying the process for court approval of a settlement involving a party under a disability?

   Yes ☐ No ☐ No Opinion ☐

6. Should we consider permitting the sealing of otherwise privileged materials filed in support of a motion to approve a settlement involving a party under a disability?

   Yes ☐ No ☐ No Opinion ☐

### Technological Solutions

There has been a dramatic shift in the ability and willingness of justice system participants to leverage technological solutions to increase efficiency and maximize the effective use of court resources. The rapid digital transformation necessitated by the pandemic resulted in numerous changes to the way participants interact with the justice system, including the introduction of electronic filing, Zoom hearings, and CaseLines.

Although the CRR's mandate is limited to a consideration of the *Rules*, consider whether recommendations might nevertheless be made regarding whether technological solutions, such as the following, could be leveraged, if available, to promote the Guiding Principles identified on p. 3:

(i) Delivery of auto-generated reminders to litigants concerning upcoming deadlines in a proceeding.

(ii) Service of documents other than originating processes effected by auto-generated communications once a document is electronically filed with the Court. For instance, consider a rule clarifying that the uploading of a document to CaseLines constitutes good and sufficient service.

(iii) A central scheduling platform to provide real-time access to court availability, either on a court-by-court, regional, or province-wide basis.

1. Which, if any, of the listed technological solutions should we consider further in Phase 2:

   (i) ☐ (ii) ☐ (iii) ☐

2. Should we consider incorporating an express and overarching requirement that counsel leverage available technological solutions to secure the most just and efficient determination of a dispute on its merits?

   Yes ☐ No ☐ No Opinion ☐

3. Should we consider mandating the use of available technological solutions in connection with certain steps of a proceeding (e.g. parties must bookmark records delivered in PDF)?

   Yes ☐ No ☐ No Opinion ☐

4. Should we consider whether there is a need to incorporate express prohibitions or limitations concerning the use of artificial intelligence in litigation?

   Yes ☐ No ☐ No Opinion ☐

5. Should we consider a rule that provides an option for parties to access AI-assisted adjudication and establishes guidelines to govern such a process?

   Yes ☐ No ☐ No Opinion ☐

6. Should we consider whether the *Rules* (and/or forms) should prescribe the manner of production of electronic records and the data fields that must be provided in the context of documentary discovery?

   Yes ☐ No ☐ No Opinion ☐

7. Should we consider codifying the guidelines and associated overarching principles for determining the presumptive manner of proceeding with hearings and other steps in litigation (i.e. virtual, in person or hybrid)?

   Yes ☐ No ☐ No Opinion ☐

8. Should we consider formalizing the practices applicable to the conduct of virtual examinations?

   Yes ☐ No ☐ No Opinion ☐

9. Are there other technological solutions that you believe may be leveraged to promote the Guiding Principles set out above?

   Yes ☐ No ☐ No Opinion ☐

| Comments |
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## XVII. OTHER

Are there are other aspects of the *Rules of Civil Procedure* that you believe should be the subject of consideration for reform, based on an application of the Guiding Principles set out above? If so, please identify the specific Rule(s) that you believe should be looked at and provide brief comments on the need for reform.

Comments