Federation of Ontario Law Associations
Fédération des associations de barreau de l'Ontario

"The Voice of the Practising Lawyer in Ontario"

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Refusals Motions Subcommittee of the Civil Rules Committee
The Honourable Madam Justice Darla A. Wilson
Superior Court of Justice
Court House
361 University Avenue
Toronto, Ontario M5G 1T3

Via Email (laura.craig@ontario.ca)

Dear Justice Wilson:

Re: Proposed amendments to Rule 34.12 and Rule 30.03 of the Rules of Civil Procedure

Thank you for requesting comments from the Federation of Ontario Law Associations (FOLA) regarding the proposed amendments dealing with refusals motions. This is welcome reform and would have a positive impact on both legal costs and the use of judicial resources. The implementation of mandatory productions would be a step forward. Here is our response to your questions.

Question 1: Do you agree that the ability to bring a refusals motion should be limited to parties that have met the mandatory document production requirements under the Rules?

Yes, we agree that the restriction of refusal motions to parties that have met their mandatory document production would be productive within the context of a new mandatory production regime.

Question 2: Is it appropriate to discourage inappropriate refusals motions with cost consequences, such as those in subrule (5)?

Yes, the use of cost consequences to discourage inappropriate refusal motions is appropriate.

Question 3: Do you agree with imposing mandatory documentary disclosures in personal injury cases?

Yes, the type of productions in personal injury cases are the same in the vast majority of cases and a minimum mandatory production would help eliminate inefficiencies in these claims.

Question 4: Do you have any concerns with the proposed mandatory disclosures under new subrules (2.1) and (2.2)?

We are generally in agreement. However, the production of cell phone records for the defendant needs some clarification. It can be difficult to obtain these records in a timely manner. In addition these records can be as simple as a list of calls with dates, times, and phone numbers (call log), or more fulsome including text records, data usage, and cell phone pings. For example, call logs can be helpful to prove liability, such as establishing that a phone call was made during the time of a motor vehicle accident. Meanwhile text records and data usage can help prove damages when a plaintiff reports their state of well-being and activity levels to others (and can range from a short amount of time to very extensive), or can help prove liability in social host cases or describing events leading up to an incident.

Question 5: Do you have any concerns with the timing of disclosures?

No concerns with the suggested timing. There does not seem to be a timeline for defence disclosures in the proposed amendments. It would not be much longer than the plaintiff, as it typically consists of information the insurer possess in the adjuster's file.

Question 6: Are there additional disclosures that you would recommend? For example, should disclosure of social media be required or an obligation to maintain social media (i.e. not deleting it)?

An obligation to preserve social media is a bare minimum.

Mandatory production of social media would be even more welcome – and more interesting. Social media can provide compelling evidence about a plaintiff's damages through posts, videos, and messages. At the same time, the disclosure must balance the probative value against the plaintiff's privacy concerns, especially in regards to private messages. A social media account on Facebook, for example, typically contains different levels of privacy: public-facing content, semi-private content which only "friends" can access, and private content in messages to particular individuals. A difficulty arises when different social media companies, such as TikTok in contrast with Facebook, have different levels of privacy and present potentially different challenges distinguishing between public and private content. A rule that is too specific would fail to keep up with changes in social media, and a rule that is too general may leave too much discretion and uncertainty to lawyers, although the "relevance" standard may suffice.

Nonetheless a standard disclosure requirement with minimum boundaries would be a step forward. It may also spur social media companies to address production of records in an efficient manner, as there can be significant delay depending on the social media company. An effective method may be something like Google's "takeout" service, which allows users to select and download materials to "takeout".

Those that do not have social media accounts should provide a sworn declaration saying so.

Question 7: The list of required disclosures is not meant to be an exhaustive list. Rather, at the very least, the listed items must be disclosed in any case involving personal injury. Do you agree with this approach?

Yes. We are in complete agreement.

Question 8: Additional amendments would also indicate that if there have been redactions to a document, the fact of a redaction must be made clear. As well, a procedure for reviewing redactions would be introduced. Namely, if the opposing party questions the legitimacy of a redaction, the unredacted version of the document would be provided to the Court for determination regarding whether the redacted information is relevant to the case and should be disclosed.

Yes. Perhaps the purpose of the redactions can be set out in a sworn declaration.

Question 9: The amendments would also provide that only relevant excerpts of the transcript of evidence should be included in the party's compendium (i.e. the full transcript should not be provided). Do you have concerns with this approach?

No concerns.

Question 10:
Should the rules specify that, where the plaintiff intends to argue threshold, when setting the matter down for trial the plaintiff must confirm that they have served a threshold report on the defendant?

While the plaintiff bears the overall burden of proof, it is not typical that a plaintiff must produce a report specifically addressing threshold. Typically, in the course of a proceeding the plaintiff would produce expert reports regarding damages such as the extent of a physical or psychological injury, and, in so doing, the reports include a paragraph opining that the plaintiff meets threshold. These are damages reports from experts, but not a "threshold report" where the report is made for the sole purpose of establishing threshold.

Instead, it is typically the defendant that takes the first step by announcing an intention to challenge threshold and subsequently producing an expert report solely for this purpose, which is called a "threshold report". The plaintiff may then, in response, produce an expert report addressing the defendant's threshold report, a "responding threshold report". But it is not necessarily always the case that the plaintiff must produce a responding threshold report, if other expert reports already contain opinions that support threshold.

Therefore, upon setting a matter down for trial, we recommend that the *defendant* must confirm that they have served a threshold report on the plaintiff, and that the plaintiff has served a report which contains an opinion supporting threshold (but not necessarily a responding threshold report).

Question 11:
In conjunction with question 10, if the defendant is served with the plaintiff's threshold report and intends to respond, should the rules specify a timeline for the defendant's response (e.g. within six months of receiving the plaintiff's threshold report)?

As above, the roles of defendant and plaintiff are typically reversed than as assumed in the question. That said, a timeline is helpful, such as six months.

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

Sincerely,

Douglas W. Judson
Chair

C. County and District Law Association Presidents