

THE HONOURABLE
MADAM JUSTICE DARLA A. WILSON
SUPERIOR COURT OF JUSTICE

COURT HOUSE
361 UNIVERSITY AVENUE
TORONTO, ONTARIO M5G 1T3
Tel 416-327-5284
Fax 416-327-5417



L'HONORABLE
JUGE DARLA A. WILSON
COUR SUPÉRIEURE DE JUSTICE

PALAIS DE JUSTICE
361, AVENUE UNIVERSITY
TORONTO, ONTARIO M5G 1T3
Tél. 416-327-5284
Télééc. 416-327-5417

Our Reference No.: COM-CIVRC

March 14, 2024

Via Email: info@douglasjudson.ca

Douglas Judson
Federation of Ontario Law Associations
731 9th Street West,
Owen Sound, ON N4K 3P5

Dear Mr. Judson,

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

I write to you in my capacity as Chair of the Refusals Motions Subcommittee of the Civil Rules Committee. I understand that you or your organization are experienced users of the civil justice system in Ontario.

As you may be aware, in recent years the Superior Court of Justice's ability to assist in settling and in trying civil cases has been under increasing pressure. The reasons are many, but two of the most significant are the Supreme Court of Canada's requirement that criminal cases be tried expeditiously as a matter of priority and the increasing allocation of system resources to family law cases. The impact of the COVID-19 pandemic in increasing court backlogs has added to this pressure.

The demands for judicial time and attention make it critical for the civil justice system to operate as efficiently as possible to the benefit of the parties who are entitled to timely justice that focuses on the true issues between them. One area under consideration is an amendment to subrule 34.12 (3), which provides that a ruling on the propriety of a question that is objected to and not answered during an examination for discovery may be obtained on motion to the court ("refusals motions").

The cost and delay caused by refusals motions was raised in the Advocates' Society's Report, [*Delay No Longer: The Time to Act is Now: A Call for Action on Delay in the Civil Justice System*](#) and in Justice Myers and Jerred Kiss's article, *Shifting Discovery Culture: Is it Time to End Refusals Motions?* Amending the rules to curtail unnecessary refusals motions is one tool that could free up time to allow the judiciary to focus on matters that will bring cases to resolution. The goal of the amendments is not to eliminate all refusals motions, but to reduce the number of inappropriate refusals motions. Closely related to refusals motions are documentary disclosure obligations in the rules of court. Where appropriate documentary production is made, examinations for discovery

may be shorter and will proceed much more quickly, thereby reducing or eliminating associated refusals motions. Amendments to Rule 30.03 are proposed below for mandatory documentary disclosure in actions involving personal injury (e.g. slip and fall claims, medical malpractice, and motor vehicle accidents), as the bulk of refusals motions arise from these cases.

Consultation

The purpose of this letter is to ask for information from you, as a user of the civil justice system, to assist in the formulation of recommendations to the Civil Rules Committee designed to address the problems identified.

I would ask you or your organization to prepare a written response to several questions. The response need not be longer than about five pages. I would ask that these submissions be sent electronically to Laura Craig, Counsel, Office of the Chief Justice, at: Laura.Craig@Ontario.ca.

In preparing your response, I would be grateful if you would use the sequence of questions below so that the responses from various organizations can be efficiently combined:

Current Rules

Rule 34.12 of the *Rules of Civil Procedure* provides as follows:

34.12 (1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.

(2) A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing.

(3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the court.

Rule 30.03 provides as follows:

Party to Serve Affidavit

30.03 (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power.

Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

- (a) that are in the party's possession, control or power and that the party does not object to producing;
- (b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and
- (c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit.

Lawyer's Certificate

(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,

- (a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and
- (b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

Affidavit not to be Filed

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial.

Proposed Amendments

It is proposed that Rule 34.12 be amended by adding new subrules (4) and (5) below, with the exact wording to be provided by legislative counsel at a later date:

(4) No motion under subrule (3) may be brought by a party unless that party has produced a sworn affidavit of documents that includes the mandatory productions listed in Rule 30.03 and has fully complied with their undertakings.

(5) Costs of a motion under subrule (3), shall be ordered on a substantial indemnity basis, subject to the overriding discretion of the court in determining costs. In fixing costs, the court may fix costs on a per question basis.

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?

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

It is further proposed that Rule 30.03 be amended by adding new subrules (2.1) and (2.2) below, with the exact wording to be provided by legislative counsel at a later date:

(2.1) In an action involving a claim for personal injury, the plaintiff shall include the following in a sworn affidavit of documents and produce the documents within six months of issuance of the statement of claim:

- a) where the party has such coverage, a decoded Ontario Health Insurance Plan summary that covers the time period of three years prior to the incident that gave rise to the claim;
- b) the clinical notes and records of the plaintiff's family doctor, primary medical care provider, or clinic for the time period of three years prior to the incident that gave rise to the claim;
- c) the clinical notes and records of all doctors who provided treatment in connection with the injuries being claimed in the statement of claim;
- d) a copy of any police report related to the incident that gave rise to the claim;
- e) a copy of any statement given to the police by the party;
- f) the file from the Statutory Accident benefit provider;
- g) any disability claims file or other collateral benefit provider file arising from the incident;
- h) all hospital and ambulance records in relation to the injuries being claimed in the statement of claim;
- i) 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 prior to the incident giving rise to the claim;
- j) if loss of income or loss of earning capacity is being claimed, at least three months before the pretrial and three months before the trial, provide any additional as-filed tax returns and/or the notice of assessment from the Canada Revenue Agency; and

- k) any video evidence in the possession of the plaintiff that depicts the circumstances of the incident that gives rise to the claim.

(2.2) In an action involving a claim for personal injury, the defendant shall include the following in a sworn affidavit of documents and produce these documents:

- a) the insurance policy and declaration page of any policy that affords coverage to the defendants for the incident alleged in the statement of claim;
- b) a statement of any party and/or a will-say statement of any witnesses to the incident or any witness having relevant evidence to the issues in the pleadings;
- c) a copy of the police report;
- d) a copy of any statement given to the police by the party;
- e) surveillance evidence of the plaintiff that is being used substantively to defend the plaintiff's claim;
- f) any video evidence in the possession of the party that depicts the circumstances of the incident that gave rise to the claim; and
- g) cell phone records for the day of the accident, with telephone numbers redacted.

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

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

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

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)?

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?

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.

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?

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?

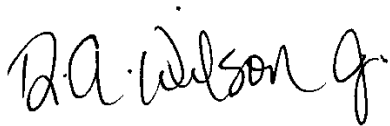
Question 11: In conjunction with question 10, if the defendant is served with the plaintiff's threshold report and intends to respond, should the rules specify a timeline for the defendant's response (e.g. within six months of receiving the plaintiff's threshold report)?

Timeline for Feedback

We are seeking your input by April 30, 2024.

As noted above, responses should be made to Laura Craig, Counsel, Office of the Chief Justice, at: Laura.Craig@Ontario.ca.

Yours truly,

A handwritten signature in black ink that reads "D.A. Wilson" followed by a stylized flourish.

Justice Darla Wilson

cc. Justice Lauwers, Chair, Civil Rules Committee