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

"The Voice of the Practising Lawyer in Ontario"

731 9th Street West,
Owen Sound, ON
N4K 3P5

(519) 270-4001

www.fola.ca

June 16, 2025

The Civil Rules Review Working Group
Attn: The Honourable Justice Cary Boswell and Allison Speigel

The Honourable Douglas Downey
The Attorney General of Ontario

The Honourable Justice G. Morawetz
Chief Justice of the Superior Court of Justice

Via Email (jennifer.smart@ontario.ca, cary.boswell@scj-csj.ca, allison@ontlaw.com, doug.downey@ontario.ca, geoffrey.morawetz@scj-csj.ca)

Dear Civil Rules Review Working Group, Mr. Downey, and Chief Justice Morawetz:

Re: Civil Rules Review – Phase 2

Thank you for requesting comments from the Federation of Ontario Law Associations (FOLA) regarding Phase 2 of the reform to the *Rules of Civil Procedure*. We recognize the work the Civil Rules Review ("CRR") Working Group has put into this important matter. We share the common belief that our civil justice system is in need of reform, with the primary goals of efficiency and access to justice. It is with this common objective that FOLA provides our feedback on the Phase 2 Civil Rules Reform proposal as well as our constructive suggestions.

FOLA represents Ontario's 46 county and district law associations, and through them, their members. We are the voice of the practicing lawyer in Ontario. Our members serve the people of Ontario, helping to resolve disputes in the most common areas of civil litigation: small and medium-sized business, personal injury, real estate and estates.

I. INTRODUCTION AND CONTEXT

An effective system of civil justice must balance three factors: speed, cost, and fairness. Putting aside speed and cost, the current civil justice system in Ontario is perhaps the fairest and most accurate civil justice system in the world. In our current system, all relevant evidence comes to the fore prior to trial through the discovery process, including full documentary disclosure and oral examination of the parties. This evidence is further vetted by the parties to the litigation through the ability to bring motions before a judge. This means the settlement of a civil matter reflects a fair and accurate assessment of the case by all parties to the action, arriving as close to the truth as can be achieved in an adversarial civil justice system. Our civil justice system must be about this single hallmark principle: truth-seeking. When parties are able to effectively seek truth and engage in the civil justice system as we have just described, the high settlement rate of civil claims that currently exists in Ontario is unsurprising. While FOLA does not have access to these statistics, a common point often stated by civil lawyers is that typically "99% of (civil) cases settle". This high rate of settlement of civil cases necessarily alleviates the burden on the Courts, as relatively few cases actually see the lights of a courtroom and proceed to trial. There are few rivals in terms of fairness and accuracy in any justice system, in support of the rule of law. Ontario's system of civil

justice is not perfect, but it is the envy of the world. We must not lose sight of this reality when engaging in a review of how to improve the speed and cost of improving our civil system of justice.

Any reform proposal that sacrifices the fairness and accuracy of our civil justice system should be considered with extreme caution and corroborated with accurate quantitative or verified qualitative evidence. Originating from common law tradition, for more than 100 years our justice system has been effective, though imperfect. Delays are a problem in any justice system, and in recent years, especially post-COVID, our Courts have experienced further delay, despite the fact that there has not been a noticeable increase in cases commenced.[1] The reason for the delay is plainly because there are insufficient Court resources – specifically there are not enough judges and court staff to handle the workload of a growing population. According to Statistics Canada, over the past 30 years the population of Ontario has grown by 26% but judicial positions and courthouse staffing have not kept pace. We understand this issue is beyond the scope of the CRR committee, but would point out that the Ontario Ministry of Finance website forecasts that, by 2051, Ontario's population will grow by another 41.7% and will surpass 21,000,000 million people. As such, both the federal and provincial governments must begin planning to expand courthouse services accordingly. Simply trying to find efficiencies (as we have done for the past 30 years) will not suffice. Failure to address demographics will ultimately result in deterioration in the justice system's ability to enforce the rule of law and Canadians' faith in our justice system. The consequences of such failure will undoubtedly have serious economic consequences for Ontario and Canada.

Despite the obvious cause of the problems in our civil justice system – that being the lack of Court resources – the mandate of the Civil Rules Reform Phase 2 report, to alleviate delays, appears to focus solely on the *users* and not the *providers* of the justice system. The proposed changes to the civil justice system impose upon lawyers and their clients – the people of Ontario – the burden to cure the delays that have manifested over time and worsened through a global pandemic. The proposed changes may improve the speed of civil claims in Ontario (although we are not aware of any actual evidence to corroborate this), but they are entirely unlikely to reduce costs of civil justice and they will almost certainly reduce the fairness and truth-seeking aspects of our civil justice system.

FOLA's submission is that the trade-off presented by the proposed Phase 2 changes - sacrificing cost, fairness and truth-seeking at the altar of speed - is unacceptable. A fair and cost-accessible justice system is paramount. Delay can and should be repaired by means which do not harm access to justice in this province.

We support the concerns expressed in submissions by the individual county and district law associations, the Ontario Trial Lawyers Association, the Canadian Defence Lawyers, and the submission of 10 Bay St law firms (dated June 9, 2025). In broad strokes, FOLA supports the Better Civil Rules Collaborative's civil justice system proposal (copy attached). In addition to our prior comments on the Phase 2 report (letters dated April 5, 2024; April 22, 2025; and April 28, 2025), we also have some specific recommendations, further described below. In the following, we discuss how the proposed changes to the civil rules proposed in the Phase 2 report may harm fairness, reduce access to justice, and increase the strain on judicial resources. We will then make recommendations that minimally harm fairness and cost, while alleviating delay and promote the truth-seeking nature of our civil justice system.

[1] See *Ontario Superior Court of Justice: Modernizing the Justice System, 2019-2023 Report* at page 65 and 66. Note that in 2019 the Superior Court of Justice heard 366,363 events; in 2023 it heard 299,348 events.

II. CONCERNS WITH THE PROPOSED MODEL IN THE PHASE 2 REPORT

1. The average person cannot afford to hire a lawyer due to the proposed model's up-front costs

The CRR Working Group acknowledges there is no research literature comparing the average cost of litigation in the current model with the proposed model set out in the Phase 2 report. While the CRR did not attempt to make such a comparison, it is illustrative to attempt the exercise in the context of a typical dispute. FOLA members include litigators with many years of experience. They litigate for small and medium-sized businesses, personal injury actions, as well as real estate and estates law disputes. These types of civil actions represent *the vast majority* of civil litigation in Ontario. Marshalling this expertise, FOLA has prepared a comparison budget for a small business litigation dispute from start to finish (resolved at pre-trial), attached to this letter as Appendix A. We have confidence in these figures as they are based on breaking down commonly performed tasks and summing their associated costs.

In drafting these comparative litigation budgets, one important consideration not apparently taken into account by the CRR Working Group is the time and expense that will be necessary to draft sworn witness statements for every anticipated trial witness. We anticipate lawyers will devote a significant amount of time and expense to this step – locating witnesses, working with those witnesses on different versions of their sworn statements, and spending hours ensuring that the information is accurate. This does not even take into account the logistical impossibility of tracking down professional witnesses such as doctors, contractors and other professionals whose evidence would be critical at trial, but obtaining that evidence in such a short time period might be a very costly disbursement and/or logistically impossible. This aspect of the proposed changes cannot be underestimated.

The enclosed draft litigation budget is illustrative of the disproportionate weight that the up-front model of litigation endorsed by the CRR Working Group will place on individuals, as well as small and medium-sized businesses when they become litigants. There is no doubt that the proposed changes to the civil rules **will** present a significant barrier to entry and harms access to justice because of the significant up-front costs. An unacceptable solution to addressing the delays in our civil justice system, would be to simply price-out any individual or business who cannot afford paying a trial retainer at the outset of a civil action. This “falling through the cracks” proposal to relieving an overburdened justice system is an implicit result of the CRR's recommendation. We do not believe this is acceptable, nor is it consistent with our profession's obligation to facilitate access to justice, nor the constitutional requirement for there to be meaningful access to the courts.

To further illustrate, in the current typical practice, a client might hire a lawyer and pay an initial retainer between $3,000 to $5,000 to start the action, and really to commence the process of negotiating the settlement of the action. This reflects the cost of litigation in the first year. Under the proposed model of civil rules endorsed by the CRR Working Group, this initial retainer may well rise to $20,000 or more. The increase in up-front costs is prohibitive. Most people in Ontario, from small and medium-sized business owners to employees, from homeowners to renters – from Kenora to Kitchener – cannot afford these types of up-front litigation costs. The inevitable result of implementing the proposed changes to the civil rules endorsed by the CRR Working Group is that many Ontarians who deserve justice will have no avenue to pursue their claims. Another inevitable result of adopting the proposed changes will be that those individuals who feel “priced-out” of litigation will act for themselves, increasing the number of self-represented litigants in the civil justice system and creating a

further drain on Court resources. Additionally, the up-front costs hurdle will make new legal proceedings more difficult to resolve – even at an early stage – in light of the plaintiff's expectation of cost recovery and the defendant's knowledge that a prospective plaintiff has to spend significant funds before there is any real compulsion to seriously consider resolution of a dispute.

While the result of adopting these proposed changes to the *Rules* would be fewer civil disputes in the judicial system, it is not the result of a more efficient civil justice system. Rather, it is an undesirable consequence of a high barrier to entry to that system.

2. Judicial resources may be strained even more

Judicial resources may increase under the proposed model for two reasons.

First, more cases will go to trial because, without the truth-seeking benefit of discoveries, litigants will not have the evidence required to measure risk adequately. This will further decrease access to justice, as the cost of trial is many times more than litigation that settles before trial. Under the proposed changes, trial costs will be borne by litigants up-front, and without any opportunity to meaningfully test the credibility of witnesses or properly assess risk, trials will become the only mechanism of achieving that end. The costs have already been paid – running a trial will become more palatable for many litigants seeking justice. FOLA questions whether the present complement of judges and courthouse staff can manage more civil trials. If not, then litigants may move through the new interlocutory process quickly only to be left in limbo waiting for a judge or a courtroom to become available. FOLA representatives asked the CRR committee to address this issue during an educational forum on April 16, 2025. The proposed changes may well result in an increase number of civil trials.

Second, a mandatory One-Year Scheduling Conference for some 60,000 civil cases every year would impose a large burden on judicial resources.[2] With 221 judges, plus 57 supernumerary judges, this would mean every judge would hear one scheduling conference every working day of the year.[3] To put this into context, 60,000 One-Year Scheduling Conferences dwarfs the 38,336 court events *heard over 2 years from 2022 and 2023 put together* of all case conferences, trial scheduling and assignment courts, and pre-trials.[4] It is FOLA's submission that the courts would have difficulty taking on this additional burden.

It appears the CRR's biggest concern for judicial resources are motions. To this extent, reform should focus on making motions more efficient and less costly. Eliminating discoveries to reduce the burden of motions would be a case of throwing the proverbial baby out with the bathwater.

3. Loss of truth-seeking discoveries reduces justice and increases risk

The current discovery process provides the best opportunity to find the truth and advance a civil action in Ontario – both for plaintiffs and defendants. Prior to trial, examinations for discovery will uncover witness credibility issues, buried memories, and unwritten practices

---

[2] See *Ontario Superior Court of Justice: Modernizing the Justice System, 2019-2023 Report* at page 69, and from pages 86 to 93. In 2023, there were 66,212 new civil proceedings: in Central East, 12,610; in Central South, 7,500; in Central West, 10,252; in East Region, 5,472; in Northeast, 1945; in Northwest, 727; in Southwest, 5,963; and in Toronto, 21,743.
[3] From the Office of the Commissioner for Federal Judicial Affairs Canada website "Number of Federally Appointed Judges As Of June 1, 2025".
[4] See *Ontario Superior Court of Justice: Modernizing the Justice System, 2019-2023 Report* at p.71. Over the two year period 2022-2023, the total events add up to: trial scheduling and assignment court (13,379), case conferences (13,776), and pre-trials (11,181).

and policies. Every experienced lawyer can recount a discovery when a witness revealed a key fact that not even their own lawyer knew; or remembered something that changed the course of the case; or was caught in a lie that plummeted credibility. The formal setting of a discovery, with a court reporter, an opposing lawyer, an oath administered live, and all eyes on one witness, introduces a level of seriousness that cannot be replicated by witness statements written in the cozy confines of a lawyer's office. There is no substitute for discoveries. They are the best tool in the justice system to seek the truth. And importantly, they help resolve cases.

Discoveries allow the parties in a dispute to assess a case properly and ultimately settle files confidently. This means a dispute can be settled within a narrow range. Take for example a small business dispute where the parties determine it can be reasonably settled between $250,000 and $300,000. Without the aid of discoveries, this range could be much wider, between $150,000 and $400,000. Unable to meaningfully assess risk, the parties would elect to go to trial. Spread across thousands of cases, this means more trials and a further burden on judicial resources.

4. Changes are not evidence-based

Will the proposed changes achieve their stated goals? The CRR Working Group admits they are not acting based on any quantitative data or assurances that the proposed changes could be successful. The system-wide changes proposed appear to be based on anecdotal evidence. Throughout consultations, the CRR has assured Ontario lawyers that the proposed changes work in other jurisdictions, and thus they will be effective in Ontario. At the same time, both the bar[5] and bench – including FOLA – have asked time and again for court data to be collected and used to make system-wide changes. Furthermore, *no other jurisdiction in the world* has enacted a civil justice system with the mandatory pre-litigation protocol for *every case*, as recommended by CRR. Given the sea-change presented, and the potential pitfalls highlighted in this submission and others, FOLA is deeply concerned about the lack of data and the speed with which the proposed changes are being implemented.

5. Hot-tubbing Experts Takes Decision-Making Away from the Trier of Fact

The proposal to require "hot-tubbing" of experts is problematic in several ways.

First, it takes away the decision-making power from the trier of fact. Experts are not advocates, and should not be put in a position where they must advocate against each other. The envisioned collaboration, while commendable, is unlikely to occur. Experts should not capitulate to each other simply because one or other expert has better advocacy skills. Furthermore, different standards of care apply to different issues. Experts should not be put in a position to argue against each other over whether a standard of care is met. These decisions should be made by a trier of fact observing live expert testimony.

Second, experts are expensive – much more expensive than a full day of discovery. Hot-tubbing would at least double the already exorbitant costs of experts. A joint expert report, which would include a number of meetings between experts, followed by drafting and revision after revision, would represent a truly astronomical cost to the litigation.

[5] See *FOLA Calls on Ontario Government for Broader Representation and Data-Driven Reform of Ontario's Civil Litigation Rules*.

III. RECOMMENDATIONS

FOLA supports the proposals of the Better Civil Rules Collaborative. We also have specific recommendations below regarding the CRR's proposed changes, including interim rules, limitation periods, simplified procedure monetary limits, and motions. We will outline these recommendations below.

1. Transition Rules and Lawyer Malpractice Claims

FOLA recommends the proposed rules should apply only to new claims. Implementation of the proposed model should allow the profession to catch up to a new way of doing things. Top of mind issues are potential malpractice claims due to new steps and associated timelines, and the absence of precedent law governing these new steps, including pre-litigation protocols, witness statements and replies, and so on.

FOLA recommends that the civil limitation period should not run until a criminal prosecution is completed. In the current model a claim can be commenced with very little evidence, preserving the limitation period. When a related criminal prosecution is ongoing at the same time, the civil action can be held in abeyance until the criminal prosecution is over, allowing for the evidence gathered therein to be used in the civil action. The up-front model would not allow a civil action to be commenced for the purposes of saving the limitation period, as the evidence from a criminal prosecution may not be available at the outset of a civil claim. As such, the limitation period should not run until the criminal prosecution is completed. This may require legislative amendments to the *Limitations Act, 2002*. Alternatively, the up-front model should allow for an exception to commence a claim, but not provide evidence, until the criminal prosecution is complete and the crown/police have provided productions.

2. Increase Simplified Procedure Limit to $350,000

FOLA recommends the simplified procedure monetary threshold be increased from $200,000 to $350,000.[6] The $200,000 limit was implemented five years ago in 2020 and has not increased with inflation. The small claims court monetary threshold will be increased from $35,000 to $50,000. An appropriate increase to simplified procedure would also alleviate the pressure for larger claims, while retaining the use of discoveries.

3. Motions – Determining Evidence

FOLA recommends that the "Direction" type of relief recommended by CRR, allowing for informal evidence, should be implemented with additional categories of motions, namely, consolidation, validation of service, extending time for service, security for costs, setting aside note in default, and Norwich/Wagg/rule 30.10 motions for the production of Crown documents. These motions are procedural, routine, and do not typically require substantial affidavit evidence. They could be dealt with by the Registrar's office. On the rare occasion when the court requires more, the court should have the jurisdiction to request more fulsome evidence. Cutting down these kinds of motions would significantly reduce the court docket and costs.

FOLA recommends clear categories be created for "Motions Order", including a category for Estates matters, where a formal motion and fulsome evidentiary record is required. Estates

[6] See also *A Modest and Principled Proposal for Civil Justice Reform in Ontario* by Bill Hourigan, Michael Wilson and Preston Jordan Lim. The authors recommend increasing to $500,000 and adopting a "Rocket Docket" system. These are reasonable to consider.

matters should fall into this category. Estates disputes are typically resolved by applications and motions, and require a full evidentiary record given frequent allegations of misused funds, elderly abuse and undue influence.

FOLA recommends that Norwich and Wagg orders should compel third parties like the Ministry of Attorney General to release evidence immediately. Typically requests for Norwich and Wagg documents take a long time to be produced. Norwich orders should be able to compel production immediately, especially in the context of the up-front model. Otherwise limitation periods and the timelines therein cannot be realistically met. Similarly, a Wagg order typically allows the Crown to hold evidence back when a criminal matter is ongoing, and documents are not disclosed until the criminal matter is resolved. This can also result in limitation periods and timelines that cannot be met. Appropriate safeguards should be put into place to ensure the evidence is kept in complete confidence by the parties.

IV. CONCLUSION

FOLA's chief concerns are to ensure justice is fair, timely, and affordable. We are especially hesitant to embrace steps which will decrease fairness. The hallmark of Canadian law and jurisprudence is the opportunity for all parties to be heard and to know the case before them, and ultimately to arrive at truth. It is perhaps the best system in the world at achieving this. Our comments are aimed at decreasing delay and costs, while minimally impacting fairness. We thank you for considering our comments.

Please do not hesitate to contact me or Ian Hu, our Director of Policy and Advocacy (ian.hu@fola.ca) if you have any questions or would like to discuss further. We are happy to engage with any issue and look forward to the CRR Working Group's final recommendations.

Sincerely,

Allen Wynperle

Allen Wynperle
Chair

C. County and District Law Association Presidents
Chief Justice Geoffrey B. Morawetz
The Honourable Doug Downey, Attorney General of Ontario

Appendix A

Litigation Budget of a Typical Small Business Dispute
Current Model vs. Proposed Model

	Current Model	
	Stage of Proceeding	Cost
Year 1	Meeting with client, prepare initial report, gather documents, draft demand letter, communications with counsel	$2,000
	Prepare Statement of Claim, review Statement of Defence	$1,000
	TOTAL COST OF YEAR 1: $3,000	
Year 2	Prepare and Attend Examination for Discovery of plaintiff and defendant	$6,000
	Draft Discovery Report	$2,500
	Day to Day Management of file; Responding to Answers to Undertakings; Further Investigative Efforts	$2,500
	Prepare Pre-Trial Conference Brief and Attend Pre-Trial	$4,000
	TOTAL COST OF YEAR 2: $15,000	
	FINAL TOTAL COST: $18,000	

Proposed Model	
Stage of Proceeding	Cost
Meeting with client, prepare initial report, gather documents, draft demand letter, communications with counsel	$2,000
Prepare Claim Form and Appendix A, review Statement of Defence	$1,500
Meet with witnesses, draft witness statements, review statements with witnesses, finalize and commission	$10,000 - $12,000
Review opposing party's witness statements and documents, draft report	$5,000
TOTAL COST OF YEAR 1: $18,500 - $20,500	
Prepare for and attend One Year Scheduling Conference	$1,000
Review reply witness statements and supplementary documents	$3,000 - $5,000
Draft Final Witness Statements & Supplementary Documents Report	$5,000 - $7,000
Day to Day Management of file; Responding to further requests; Further Investigative Efforts	$1,500 - $2,500
Prepare Pre-Trial Conference Brief and Attend Pre-Trial	$4,000
TOTAL COST OF YEAR 2: $14,500 - $19,500	
FINAL TOTAL COST: $33,000 - $40,000	