

June 16, 2025

**The Honourable Mr. Justice Cary Boswell, Co-Chair**  
**Allison Speigel, Co-Chair**  
**Civil Rules Review Working Group**  
Superior Court of Justice  
75 Mulcaster Street  
Barrie, ON L4M 3P2

**Via Email:** [Jennifer.Smart@Ontario.ca](mailto:Jennifer.Smart@Ontario.ca); [cary.boswell@scj-csj.ca](mailto:cary.boswell@scj-csj.ca) ; [allison@ontlaw.com](mailto:allison@ontlaw.com)

Dear Mr. Justice Boswell and Ms. Speigel,

**RE: Civil Rules Review Working Group (“CRRWG”)  
Phase 2 Consultation Paper**

I am writing to you on behalf of the Toronto Lawyers’ Association (“**TLA**”). The TLA represents the interests of more than 3,700 members who practice law in all disciplines in the Toronto Region. Our membership, and our Board of Directors, represents the full diversity of our profession in Ontario. Among our members are many lawyers who practise regularly before the Superior Court of Justice.

I write to provide the TLA’s response to the CRRWG’s Phase 2 Consultation Paper. The TLA has taken an active role in the Civil Rules Review project since its inception in September 2023. On April 5, 2024, we responded to the CRRWG’s Phase 1 Consultation Paper.<sup>1</sup> After the release of the Phase 2 Consultation Paper, we mobilized our Association’s resources in preparation for responding to the CRRWG’s proposals.

Members of our Executive Committee, Board of Directors and Advocacy Committee have participated in informal stakeholder meetings and Town Hall presentations with the CRRWG’s co-Chairs. We struck a Task Force comprised of lawyers with diverse civil litigation practices to assist in preparing these submissions.<sup>2</sup> Our Association issued a survey to our members to obtain their views on the various reforms proposed by the CRRWG. Finally, on May 21, 2025, the TLA

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<sup>1</sup> TLA’s [letter](#) dated April 5, 2024, to CRRWG’s Phase 1 Consultation.

<sup>2</sup> The Task Force was led by Jennifer Arduini, Assistant Secretary of TLA’s Board and Chair of TLA’s Advocacy Committee. Members of the 7-person Task Force include Jordan Dunlop, Conner Harris, Matthew Howe, Surina Sud, and Dan Zacks.

hosted a Town Hall webinar with the CRRWG's co-Chairs, which was attended by over 500 lawyers and is available on our Association's website.<sup>3</sup>

Our participation in the Civil Rules Review initiative has given us an appreciation of the complexity of the CRRWG's mandate and the importance of finding reasonable and practical solutions to the problems of delay and prohibitive expense plaguing our civil justice system. The TLA commends the CRRWG on its important work.

We agree that our civil justice system is in need of reform to improve access to justice in Ontario. More specifically, the TLA supports the CRRWG's aims to modernize the process of initiating claims; encourage early disclosure of important information and production of documentation to opposing parties; decrease the overall time between the initiation of a claim and its resolution (whether by way of settlement or dispositive hearing); reduce the incidence of unnecessary interlocutory motions; and promote communication and cooperation between litigants at all stages of a proceeding.

The TLA is committed to working with the CRRWG, the Ministry of the Attorney General and the Chief Justice of the Superior Court of Justice to find reasonable and practical solutions to the procedural issues impacting our civil justice system's ability to deliver justice in a timely and cost-effective way. Having carefully considered the CRRWG's proposals, in these submissions, we aim to recognize the proposals for reform that are likely to enhance access to justice and provide constructive input in relation to proposals that may not necessarily further the CRRWG's stated goals for reform.

### ***Concerns Regarding the Phase 2 Consultation Process***

Following the release of the Phase 2 Consultation Paper on April 1, 2025, the TLA received a significant amount of solicited and unsolicited feedback from our members regarding the consultation process implemented during this phase of the CRRWG's work. The CRRWG's proposals contemplate wholesale revamp of civil procedures. If accepted, they will have a profound impact on the practice of civil litigation in Ontario. Given the profound impact, a user-centered engagement process, one that takes the time to hear what lawyers who are firsthand users of the system have to say, is essential. Many of our members have echoed the concerns raised by other legal associations and stakeholders that the consultation process provided insufficient time to consider the proposed reforms and provide comprehensive submissions.<sup>4</sup>

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<sup>3</sup> Video of TLA's [Town Hall](#) on May 21, 2025.

<sup>4</sup> See, for example, FOLA's letters dated April [22](#) and [28](#), 2025; the Middlesex Law Association's [Media Release](#) dated May 21, 2025; Canadian Defence Lawyers' [letter](#) dated April 16, 2025; and the Ontario Trial Lawyers Association [letter](#) dated April 22, 2025.

The TLA is concerned that the proposed reforms are not sufficiently informed by empirical evidence and a holistic understanding of user needs, perspectives and experiences.<sup>5</sup> The lack of data around the functioning of our civil justice system, and corresponding inability to quantitatively and objectively identify processes in need of improvement, suggests that the exercise of reflecting on and critically analyzing the CRRWG's Phase 2 proposals ought not be rushed.<sup>6</sup> To the extent that the CRRWG's co-Chairs are committed to accessible and respectful engagement and to ensuring that changes to the system incorporate the perspectives of frontline actors, our members' concerns regarding an insufficient consultation process are all the more relevant.

In addition to concerns regarding the length of the Phase 2 consultation period, our members have raised concerns regarding the constitution of the CRRWG. While the CRRWG is constituted by experienced and well-respected individuals, our members are concerned that the CRRWG members' practice areas are predominantly limited to commercial litigation and that their proposals do not reflect an adequate understanding of certain areas of practice. To account for this apparent gap, we encourage the CRRWG, the Attorney General and the Chief Justice to consider the broad range of perspectives offered by our members and other stakeholders.

The Phase 2 Consultation Paper contemplates that Phase 3 of the CRRWG's work will involve refinement, drafting and implementation of the policy proposals that the Attorney General and Chief Justice have approved.<sup>7</sup> We understand that Phase 3 is set to begin in July 2025, with December 2025 being the target date for filing approved regulations.<sup>8</sup> In light of the sweeping nature of the proposed reforms, the TLA urges the Attorney General, the Chief Justice and the CRRWG to delay the start of Phase 3 to allow for further research and consultation on the proposed reforms before they are approved for implementation.

### ***Comments on the Proposed Reforms***

In the absence of data that would indicate otherwise, there is a concern that the proposed reforms will not achieve the objective of providing faster, cheaper and more accessible justice in the broad range of cases that come before the Court. In many ways, the proposed reforms are built around increased judicial intervention in civil litigation. The feasibility of the proposed reforms—particularly the proposed increase in judicial intervention through Directions Conferences—must be considered in the context of the limited judicial resources available in our

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<sup>5</sup> The Phase 2 Consultation Paper does not cite statistics. The co-Chairs acknowledged the dearth of data during Town Hall webinars, including the Town Hall conducted on [April 10, 2025](#).

<sup>6</sup> See, for example, Professor Noel Semple's May 17, 2025, paper entitled "[Look before you Leap: Why Ontario's Civil Rules Review Needs a Research Phase](#)."

<sup>7</sup> Phase 2 Consultation Paper at p.5.

<sup>8</sup> Civil Rules Review's [Terms of Reference](#).

system. The investment in resources required to successfully shift from a party-driven to a more court-driven process remains an open question.

### The “Duty to Cooperate” and the State of Civility in the Legal Profession

The Phase 2 Consultation Report emphasizes a general duty to cooperate as a foundational component of a smooth-functioning civil justice system. The duty proposed to be introduced as a new Rule mandates that all parties and their legal representatives engage in litigation with honesty, integrity, and a commitment to efficiency. The success of the CRRWG’s proposed reforms depends heavily on lawyers’ adherence to the duty to cooperate. Indeed, the reforms, particularly those around the production of documents adverse to the producing party’s interests, assume that lawyers will appropriately discharge their duty to cooperate.

While the TLA applauds the incorporation of this core duty as an overarching foundational principle, the TLA’s work since 2023 on the state of civility in our profession demonstrates that there is currently a civility gap that requires addressing to advance this foundational principle. For example, TLA’s 2023 Report on Civility and Professionalism<sup>9</sup> surveyed the profession and found that 70% of the lawyers surveyed reported either directly experiencing or witnessing uncivil or unprofessional behaviour in the past year. Common uncivil behaviour included unresponsiveness to communications, rigid negotiation stances, inappropriate interruptions, sarcasm, and aggressive or rude communications. These findings suggest that while the incorporation of the duty to cooperate as a cornerstone principle is a commendable goal, its practical implementation faces challenges due to the existing gap in the state of civility in the profession.

The TLA’s most recent 2025 report on civility<sup>10</sup> reflected on these challenges in its engagement with law firm leaders, and recommended a framework for advancing civility in the profession. In light of this work, the TLA agrees that a general duty to cooperate should be clearly codified in the Rules. Compliance with the duty should be reinforced by a zero-tolerance approach to breaches enforced through judicial practice (citing the duty to cooperate in motions/orders<sup>11</sup> – especially when breaches of such obligation cause delay or expense). The TLA has advocated for province-wide measurement of the state of civility in the profession at frequent intervals. The CRRWG may wish to incorporate a recommendation to measure the state of the duty to cooperate as a means of implementing metrics surrounding lawyers’ perception of actual

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<sup>9</sup> [TLA Report on Civility and Professionalism in the Legal Profession](#) (December 2023).

<sup>10</sup> [TLA Report on Advancing Civility in the Legal Profession](#) (2025).

<sup>11</sup> See, for example, *Marrese v. Moscone*, [2023 ONSC 5857](#) (CanLII) at para. 28 where Myers J. stated “Like the courts, lawyers are duty-bound to provide a fair and efficient hearing to all. That includes cooperating on scheduling and process matters to ensure that all parties (plural) receive a fair hearing.”

collaboration, which may well assist in achieving the core goal of efficiency underpinning the new civil litigation framework proposed in the Report.

### The Proposed Up-Front Evidence Model

The CRRWG's proposed up-front evidence model will require litigants to produce important information and documents through three phases of disclosure (initial, primary and supplementary). It contemplates that the exchange of information between parties will occur much earlier and faster than in our current system.

The TLA agrees that early exchange of information and documentation can move the parties toward settlement or dispositive hearing earlier. As such, the TLA agrees that there is value to having parties exchange as much information and documentation as early as possible in the proceedings. However, we note our members' concerns with the CRRWG's proposed requirement for early exchange of affidavits of documents and sworn (or affirmed) witness statements that will form the party's case in chief, and do not think this requirement should form part of the reforms. The requirement with respect to sworn witness statements which are to serve as examination in chief at trial is especially concerning.

It must be underscored that in cases where not all of the important facts have been discovered and damages have yet to crystallize, the parties will be unable to comply with some of the proposed early disclosure requirements. Our members are concerned that many claims, including personal injury claims, will fall into this category of cases.<sup>12</sup> Given that the vast majority of actions commenced each year are personal injury actions<sup>13</sup>, a significant number of actions will necessarily require a longer trajectory from start to finish than is contemplated in the CRRWG's proposals.

It must also be recognized that in some cases, "front-loading" the disclosure of evidence to be relied upon at trial is likely to negatively impact access to justice. For many litigants, the costs of preparing for trial are largely mitigated or avoided altogether by reaching settlement at a relatively early stage in the proceedings (often around the time of examinations for discovery or pre-trial). In cases where counsel are retained on a contingency fee basis, claimants may recover a greater proportion of the settlement amount if the claim is resolved early in the proceedings before counsel have devoted significant time and resources to the case.

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<sup>12</sup> In particular, there is a concern that the up-front evidence model is ill-suited for motor vehicle accident claims (to which s. 267.5 of the *Insurance Act*, R.S.O. 1990, c. 1.8 applies) and medical malpractice claims involving birth injuries.

<sup>13</sup> [Ontario Superior Court of Justice: Modernizing the Justice System \(2019-2023 Report\)](#) at p. 65.

Requiring litigants to put their complete case forward too early in the action can be cost-prohibitive and impede access to justice. Our members have expressed concerns that the upfront evidence model will require lawyers to spend considerably more time preparing documents, including witness statements. This is particularly true in certain types of cases, including personal injury and fraud cases, where a significant amount of evidence is not already reduced to writing or memorialized in documents. Requiring delivery of sworn witness statements (which would form a party's evidence-in-chief) at an early stage will require extensive upfront evidentiary investigation; even then, early-prepared statements may still be inadequate as facts may subsequently come to light as the case matures. Our members are concerned that sole practitioners and lawyers in small law firms in particular may have difficulty meeting the deadlines contemplated in the proposed reforms and will therefore be unable to accept certain types of cases.

Some of our members have also expressed their concern with the CRRWG's proposed reforms to shift documentary disclosure from the existing relevance-based standard to a modified reliance-based standard. The concern stems from the fact that many litigants are not well-placed to determine whether their opponent has properly disclosed documents that are adverse to their interests. An untestable reliance on the new duty to cooperate may not be enough to ensure that parties and their lawyers disclose all adverse documents in their possession. Our members doubt that, in the absence of oral examinations for discovery, the written interrogatory process will be sufficient to uncover information and documents that have not been appropriately disclosed by an opponent.

While we appreciate that in some cases, the discovery process has become more burdensome due to an increase in electronic data and communications, this is not true in all legal disputes. Even where litigants are faced with the task of sorting through a significant amount of electronic data to meet disclosure requirements, it is anticipated that increased use of e-discovery tools and artificial intelligence will make these processes easier in the future. Eliminating the truth-seeking opportunities provided by our current relevance-based discovery process is unlikely to enhance access to substantive justice.

#### The CRRWG's Proposal to Abolish Oral Examinations for Discovery

The CRRWG's proposal to abolish oral examinations for discovery ("EFDs") has been much debated since the release of the Phase 2 Consultation Paper. Our members are particularly concerned with this aspect of the proposed reforms. In the Phase 2 Consultation Paper and during the Town Hall presentations conducted over the past few months, we have heard the CRRWG share its perspective on the purpose of oral EFDs and their value (or lack thereof) in the conduct of an action. Much of the discussion on the CRRWG's part has focused on the perception

of oral EFDs as a means of uncovering the proverbial “smoking gun” or “needle in a haystack.”<sup>14</sup> While securing admissions is an important objective during oral EFDs, it is not the primary objective.

The Phase 2 Consultation Paper acknowledges that oral EFDs serve several key objectives, including: facilitating the gathering of evidence and assessing its quality; improving a party’s understanding of their opponent’s theory of the case; narrowing the issues in dispute; avoiding trial by ambush; and facilitating settlement.<sup>15</sup> Indeed, it is a common occurrence at the conclusion of oral EFDs for counsel conduct informal settlement discussions and move cases closer to resolution without the need for judicial intervention. The CRRWG suggests that its proposed model of discovery and up-front production of evidence, including the abolition of oral EFDs, will meet these objectives. Our members have expressed their disagreement with this proposition. Our members also disagree that the abolition of oral EFDs will advance the CRRWG’s goals of promoting access to justice and reducing the delays and costs associated with litigation.

The TLA agrees that in some cases, the time and expense associated with conducting oral EFDs pose barriers to accessing justice. These are cases are likely limited to disputes in which the evidence is predominantly based on documents. To the extent that oral EFDs unnecessarily increase delays and expense in these actions, the TLA agrees that forgoing oral EFDs may increase access to justice. However, our members have expressed their concerns that the CRRWG’s proposal to eliminate oral EFDs in other types of cases will have the opposite effect.

In many cases, oral EFDs are essential to the litigation process. A fundamental purpose of oral EFDs is to provide the parties an opportunity to test the evidence and evaluate the case in a manner that cannot be accomplished through the documentary discovery process. Oral EFDs provide an efficient process for clarifying information obtained through documentary disclosure. Our members are concerned that the written interrogatory process proposed by the CRRWG cannot replace the value that will be lost from the elimination of oral EFDs, particularly in fraud, personal injury and medical malpractice cases. The elimination of oral EFDs will likely increase the number disputes related to the adequacy of documentary productions and result in a greater need for judicial intervention. These effects are contrary to the stated objectives of the CRRWG’s proposed reforms.

During the recent Town Hall webinars, there was much discussion around oral EFDs as a means of assessing the parties’ credibility. Our members remain concerned that the elimination of oral EFDs will deprive litigants of the opportunity to assess their opponents’ credibility and the likelihood of their evidence being accepted by the trier of fact. Oral EFDs also provide a valuable

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<sup>14</sup> Phase 2 Consultation Paper at p. 34.

<sup>15</sup> Phase 2 Consultation Paper at p. 33.

opportunity for counsel to evaluate their own clients' credibility and potential performance during trial testimony. As a result, the elimination of oral EFDs will result in parties' reduced ability to assess the strengths and weaknesses of not only their case but also their opponent's case.

In practice, oral EFDs provide a unique opportunity for each party present the narrative of their case in the face of scrutiny from opposing counsel. This exercise cannot be performed through production of an affidavit or witness statement prepared by a lawyer. Often, the process of hearing evidence directly from an opposing party provides humbling insight into the strength of their case that may not be appreciated through a review of documents. From a risk management perspective, oral EFDs present a unique opportunity to understand the opponent's case and potentially move the parties closer to settlement.

The TLA recognizes that the current rules around oral EFDs can give rise to undertakings and refusals motions. The CRRWG appears particularly concerned with the strain that such motions exert on limited judicial resources and the delays visited upon litigants when there are long wait times for motion dates. Although no data has been provided to support the extent of what the CRRWG describes as "the problem of the 'motions culture'",<sup>16</sup> the TLA agrees that it is desirable to reduce the need for judicial intervention around the discovery process. Discovery-related disputes can be addressed with minimal—or even without—judicial intervention during the discovery process. One option for achieving this is, as the CRRWG suggested, limiting the basis for parties to refuse to answer questions and having the admissibility of any evidence given under objection determined by the hearing judge.<sup>17</sup> The TLA encourages the CRRWG to consider other ways to minimize or eliminate undertakings and refusals motions, including pursuing proposals to ensure greater judicial enforcement of existing rule 31.07(2). Other options include permitting undertakings and refusals motions to proceed in writing only and resolving the relatively more straightforward of such disputes by way of case conference as opposed to formal motions. The TLA notes the Civil Rules Committee's March 2024 consultation on proposed changes to rules 34.12 and 30.03 aimed toward reducing the incidence of refusals motions.<sup>18</sup> As an alternative to eliminating oral EFDs, the TLA encourages the CRRWG to confirm the extent to which undertakings and refusals motions are consuming judicial resources and explore ways to relieve their strain on our system.

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<sup>16</sup> Phase 2 Consultation Paper at p. 48.

<sup>17</sup> Phase 2 Consultation Paper at p. 45.

<sup>18</sup> Civil Rules Committee's [March 14, 2024, Consultation Request](#) re Rules 34.12 and 30.03.

## The CRRWG's Proposed Reforms to Expert Evidence

The Phase 2 Consultation Paper identifies the need for reforms around the number and timing of expert reports delivered in an action and the manner in which experts provide evidence to the trier of fact. While the TLA agrees that there is room for improvement in these areas, our members have expressed concerns with the specific proposals put forward by the CRRWG.

Our members are concerned about the proposal to mandate the use of joint experts and the parameters around which they may communicate. We agree that more can be done to reduce the use of experts as “hired guns” and to encourage greater impartiality, however our members are of the view that the proposed reforms amount to shift away from the adversarial system. We agree that narrowing the issues in dispute between experts is a desirable goal that will likely save on trial time and costs, however our members disagree that the use of joint experts is an acceptable method of accomplishing this goal. To the extent that a Directions Conference may be held to determine if the use of joint experts is not suitable in any given case, we note that this process will result in the further use of judicial resources.

We note the CRRWG's proposed default timeline for the delivery of expert reports<sup>19</sup> and express our concerns regarding its practicality. Simply put, in most cases, it is unlikely that parties will be able to comply with the requirement to produce initial reports at least 90 days before court-ordered mediation, and responding expert reports at least 60 days before mediation (which could be within 30 days following receipt of their opponent's initial expert report). Stringent default timelines such as these will cause parties to seek judicial intervention through Directions Conferences, which will undoubtedly put further strain on judicial resources. Depending on the type of proceeding, it may require a responding party a significant period of time to prepare responding expert evidence. For example, in some construction and infrastructure disputes, it may take 4-6 months in order for a responding delay report to be prepared. This type of circumstance appears to have been overlooked by the CRRWG's proposal.

The TLA agrees that narrowing issues through expert input can streamline trials. However, many of our members have serious concerns about the CRRWG's proposal mandating that opposing experts meet in all cases in the absence of counsel to narrow the issues in dispute. Adding this requirement is unlikely to reduce litigation costs. It may result in further delay, depending on the experts' availability to prepare for and attend a meeting. There is also concern that some experts might abandon their positions during such a meeting not out of genuine agreement, but because they feel pressured by the other expert to do so. In our view, the process of narrowing

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<sup>19</sup> Phase 2 Consultation Paper at p. 69.

the issues in dispute is an exercise to be conducted by lawyers, with some oversight by the judiciary as necessary (e.g., at a Directions Conference for trial scheduling purposes).

We recognize that there is potential for improved efficiencies at trial, particularly in the area of expert witness testimony. The TLA supports the CRRWG's proposal that for non-jury trials, expert reports be admitted into evidence as the expert's evidence-in-chief, with the opportunity for cross-examination by opposing counsel.

### Potential Impacts on Other Legislation

The CRRWG's proposals may have implications for the limitation of contribution and indemnity claims.

The limitation period for an action seeking contribution and indemnity commences no earlier than the date of service of the statement of claim on the party seeking contribution and indemnity.<sup>20</sup> Previously, the limitation period commenced on the date of judgment. This change reflects a policy decision to "encourage the first wrongdoer to commence proceedings for contribution as soon as possible".<sup>21</sup>

If the basic limitation period is extended to three years, defendants will have at least three years from the date of service of the statement of claim to commence an action for contribution and indemnity. If, as the proposals contemplate, an action reaches trial within two years, a contribution and indemnity claim will remain timely after the plaintiff has obtained judgment against the party with the contribution and indemnity claim. Increasing the risk of actions for contribution and indemnity being commenced following judgment is inconsistent with the proposed reforms' goal of improving efficiencies in our civil justice system. It is much more efficient for the facts of a dispute to be adjudicated in a single action by a single trier of fact. Not only does this reduce the risk of inconsistent findings, it also minimizes the need for judicial intervention in any given dispute. On this basis, the TLA encourages the CRRWG to reconsider its proposed two-year timeline for the resolution of claims from commencement to dispositive hearing.

The TLA notes that the "frontloading" requirement contemplated in the proposed reforms may induce defendants to await judgment before claiming for contribution and indemnity. Assuming judgment is delivered within six months following the completion trial, a defendant may have a further six months from judgment to commence a timely action for contribution and indemnity. While it may prove more cost effective for a party to defer the costs of the contribution and indemnity action until its value is certain, a subsequent action based on the same dispute may give rise to inconsistent findings of fact and increased strain on judicial resources. These outcomes are not consistent with the goals of the proposed reforms.

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<sup>20</sup> *Limitations Act, 2002*, S.O. 2002, c. 24, Sched B, s. 18.

<sup>21</sup> Limitations Act Consultation Group, [Recommendations for a New Limitations Act](#) (Toronto: Ministry of the Attorney General, 1991) at 42-43.

The TLA is committed to contributing to the important work being done by the CRRWG. Our Executive Committee would be pleased to discuss the enclosed response at the CRRWG's convenience, should it find additional consultation beneficial.

Yours very truly,



Anna Wong  
President  
Toronto Lawyers' Association

- cc. The Hon. Doug Downey, Attorney General for Ontario ([Doug.Downey@ontario.ca](mailto:Doug.Downey@ontario.ca))  
The Hon. Geoffrey Morawetz, Chief Justice of the Superior Court of Justice for Ontario  
([geoffrey.morawetz@scj-csj.ca](mailto:geoffrey.morawetz@scj-csj.ca))  
TLA's Advocacy Committee, c/o Jennifer Arduini, Committee Chair ([jarduini@mccarthy.ca](mailto:jarduini@mccarthy.ca))