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Civil Rules Review Working Group (“CRR Working Group”)

Attn: The Honourable Justice Cary Boswell, Allison Speigel and Jennifer Smart

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Dear Minister Downey and the Members of the CRR Working Group:

Re: Response to the Phase 2 Consultation Paper of the Civil Rules Review

We write with respect to the release of the CRR Working Group’s Phase 2 Consultation Paper (the “CRR Consultation Paper”), and the associated request for consultation and feedback to the proposed changes to the *Rules of Civil Procedure* contained within the CRR Consultation Paper.

The following is submitted on behalf of the members of the Frontenac Law Association (“FLA”). Since the release of the CRR Consultation Paper on April 1, 2025, members of our association have had the opportunity to gather on two occasions for the purposes of reviewing the proposal set out in the CRR Consultation Paper. The FLA members who gathered together to review the CRR Consultation Paper, practice civil litigation in

Kingston and the surrounding area, including throughout the East Region and indeed across Ontario. These members practice in a variety of areas of civil litigation, including (but not limited to): personal injury and insurance defence, construction litigation, and estate litigation. There were several mediators who attended these sessions, as well as academics from Queen's University School of Law.

While the various FLA members who have offered their perspectives on the CRR Consultation Paper have their own viewpoints on certain aspects of the proposed changes set out therein, collectively the concerns and positions set out below were shared by those who have provided feedback on the proposed changes to the *Rules of Civil Procedure* set out in the CRR Consultation Paper.

The FLA response will be set out as follows:

- A) Positive Feedback of the FLA Membership to the CRR Consultation Paper
- B) General Concerns of FLA Members with the CRR Consultation Paper Proposals
- C) Specific Concerns with the CRR Consultation Paper Proposals
 - i. Up-front Costs of Litigation
 - ii. Lack of Examinations for Discovery
 - iii. Increasing Use of Courts by Self-represented Litigants
 - iv. Lack of Judicial Resources to Implement Proposed Changes
- D) Alternative Options for Improving the Civil Justice System

FLA Response to the CRR Phase 2 Consultation Paper

A) Positive Feedback of the FLA Membership to the CRR Consultation Paper

Broadly, the FLA members are encouraged by the intentions of the CRR Working Group and the Attorney General to update the Rules of Civil Procedure. The proposed changes require more co-operation between counsel – while this is very likely possible in Kingston amongst members of our association, FLA Members are dedicated to cooperation and the encouragement of more collegiality amongst counsel. This is viewed as a positive aspect of these proposed changes.

There is general agreement in the efforts to speed up litigation timelines and work towards eliminating the delays that are very apparent in the civil justice system. Codifying these timelines is well received by FLA members, although this codification must be in concert with the realities of a busy civil litigation practice.

The modifications to the requirements for service under the *Rules* were viewed as a positive and necessary step. Some of the suggestions with respect to allowing counsel to accept service on behalf of clients were viewed as “logical” and “common sense”.

There was broad discussion about evidence-first principles. The approach, in theory, is practical. There were perspectives shared amongst FLA members that front-end loading the exchange of documents can create efficiencies conceptually, as it will require counsel to assemble their case earlier. Knowing your case early is a positive. There are **significant concerns about up-front costs with these proposed changes, which will be further described below.**

Some of the FLA members who practice estate litigation were encouraged about the Scheduling Conference proposal and indicated that this practice is used in Toronto for estate matters. This conference, in some FLA members' view, can assist in starting resolution discussions.

The required documentary disclosure described in the CRR Consultation Paper is helpful, although most counsel engaging in best practice will produce this documentation in any event. Nevertheless, it is helpful to attempt and codify these requirements.

While the inclusion of a requirement for mandatory mediation was generally viewed as positive, there is **strong opposition to evaluative mediation.**

B) General Concerns of FLA Members with the CRR Consultation Paper Proposals

The general view of FLA members is that the timelines set out in the CRR Consultation Paper are, in many instances, unrealistic. This would only be underscored when attempting to engage third parties for their productions. WAGG motions for example, are required to be advanced often in civil claims, and parties can wait in excess of a year for productions of certain files. Both Plaintiffs and Defendants generally want access to these types of records, and neither are in control of the timelines required to obtain this documentation. There was also concern expressed about obtaining files and witness statements from family doctors and other medical professionals (physiotherapists, massage therapists, chiropractors, etc.), who are already overworked and generally unavailable on short notice.

There is no plan for a transition to these proposed *Rules* that has been articulated. There is a current backlog of civil files that exists presently. Meeting the new timelines with the existing backlog is going to be challenging from a procedural standpoint, to say the least. There is a concern that some civil matters will proceed under one set of *Rules*, while others will be governed by an entirely different set of *Rules* and procedural timelines. These types of wholesale changes are ripe for mistakes to be made by lawyers, and an increase in professional negligence claims. It is also entirely likely that matters governed by the new *Rules* will "leap frog" older cases, exacerbating delay in existing matters commenced under the current *Rules*.

The proposed changes will create a **significant access to justice** issue in Ontario. The proposed changes set out in the CRR Consultation Paper are silent on matters

dealing with self-represented litigants and limited-scope retainers. More critically, the initial up-front expense of litigation will be an overall barrier to commencing a claim. FLA Members are at near consensus in that initial retainers will effectively need to be increased dramatically and might better be described as “trial retainers” which are to be paid up-front. This will make advancing a civil claim impossible for many individuals as well as small and medium-sized businesses resulting in an increase of self-represented litigants and having the effect of preventing access to justice for others. The “one-size-fits-all” approach cannot be applied to every civil claim in Ontario. One FLA member gave an example of an exceptionally document-laden file – under the proposed *Rule* changes, an initial retainer of \$300,000 would have been necessary to comply with the up-front work that would be required to disclose relevant documentation and prepare all witness statements.

The work capacity of lawyers to comply with the articulated *Rule* changes is of significant concern to FLA members. In Kingston, the Law Clerk program at St. Lawrence College has recently been cancelled. We understand this has also occurred at several other colleges in Ontario. The up-front work in litigation that would be required by these *Rule* changes, would be implemented at a time where access to law clerks and assistants are less available. Burnout in this profession is real – these proposed changes will only magnify the issue.

Preparing witness statements without the benefit of knowing the entire case, or even having a full appreciation of damages if they have not yet crystallized, is generally viewed as a problematic requirement of these proposed changes to the *Rules*. These witness statements will clearly be prepared by counsel – there is concern about inaccuracies in these witness statements, either because a lawyer does not appreciate the context of the evidence at the early stage of litigation, or that the deponent is not being truthful. Under these changes, there would be no means to test credibility prior to trial. Honest mistakes or misapprehension in the evidence can also occur, and this might not be appreciated prior to trial. FLA members are concerned about an increase in professional negligence claims resulting from early preparation of witness statements, a time when all evidentiary disclosure will be incomplete, including if counsel either inadvertently misrepresent evidence in witness statements, or if they omit crucial evidentiary details in the witness statements that have a direct impact on the outcome of a case.

The “one-expert / one-issue” requirements were generally confusing to FLA members. It is not viewed as workable in complex injury cases, especially when comorbidities are a factor.

Replacing pre-trials with mandatory mediation is viewed by FLA members as a “huge mistake”. In-person pre-trials require “buy-in” from all parties. Removing judicial opinions on civil cases will be a significant loss and will lead to a further barrier to potential resolution.

The timelines and up-front cost requirements will effectively incentivize parties to proceed to trial. There will be little risk-assessment conducted on each case, other than documentary exchanges and self-serving witness statements. Without credibility testing, and with significant costs already devoted to litigation, many parties might see the trial as an inevitable requirement, as opposed to engaging in a meaningful consideration of resolution.

FLA members acknowledge that there are limited judicial resources – both judges and court staff. These proposed changes will require judicial involvement in **every** civil file once advanced. Civil trials will become more likely; criminal and family law trials will still (understandably) be prioritized. The proposed changes to the *Rules* will rush the parties to a civil action to a trial date, when there are limited resources to actually facilitate the trial occurring.

FLA Members who practice in specialized areas of personal injury practice like medical malpractice as well as sexual assault cases, have significant concerns about the up-front evidence model and the *Rule* changes in general. They are not viable in these specialized areas of personal injury practice.

There is also concern that the proposed changes to the *Rules* have been developed with a commercial litigation and Toronto-centric focus. The proposed changes seek to resolve issues that are not problems in the vast majority of civil claims. The practitioners on the CRR Working Group are mostly comprised of commercial litigators from Toronto – the FLA acknowledges that one of the practitioners does not work at a Bay Street office, but rather practices commercial litigation in London. There is no East Region representation on the CRR Working Group. The practitioners consulted practice almost exclusively in the area of commercial litigation. We understand through consultation with the CRR Working Group, that they take issue with this perspective. We will simply have to agree to disagree as to whether the CRR Working Group is regionally and practice diverse. However, FLA members are hopeful that it can generally be accepted that **broader and more regionally-diverse perspectives should have been engaged throughout this process.**

C) Specific Concerns with the CRR Consultation Paper Proposals

i. Up-front Costs of Litigation

As described above, the up-front costs of litigation with these proposed changes to the *Rules*, will have an immeasurable impact on access to justice. Resolving the delays that have developed in the civil justice system cannot be resolved by pricing-out potential litigants from the civil justice system.

Minister Downey, in his recent address to FOLA at their annual plenary in May 2025, an event attended by several FLA members, highlighted the intent of these changes was to **increase** the accessibility of the civil justice system. To “take a

system designed by lawyers and make it more accessible for the people". These proposed *Rule* changes achieve the exact opposite of Minister Downey's stated intention. If these *Rule* changes are adopted as currently constituted, the civil justice system will be more expensive and less accessible for every day Ontarians.

ii. *Lack of Examinations for Discovery*

The CRR Consultation Paper proposes the complete elimination of examinations for discovery. The proposal is grounded in the argument that discoveries are not utilized in other jurisdictions. The inherent problem is that the Ontario system has been founded on the use of this litigation tool, and the notion that examinations for discovery can be removed from the established system without significant issue is not tenable.

Discoveries are a truth-seeking device that encourages all parties to better understand their case, but more importantly their risk. Evaluating credibility, a crucial aspect of risk assessment, encourages settlement.

FLA members who practice in specialized areas of injury litigation, including medical malpractice claims and sexual assault claims, are particularly concerned about this proposal, and are unable to fathom how their cases can be advanced under the proposed changes. Evolution of evidence from examinations for discovery through to trial, are crucial in these types of claims and important to all sides.

Examinations for discovery also assist in understanding where unnecessary parties can be released from an action, based on discovery evidence provided. An entirely likely outcome of eliminating examinations for discovery, is that more parties will end up at trial than necessary. Similarly, incorrect parties could be introduced into the litigation which might only become clear as the matter proceeds to trial.

Substituting sworn witness statements for discoveries is untenable, especially in personal injury litigation where family doctors and other practitioners do not have time to complete these tasks. A likely outcome is that medical practitioners will engage their own counsel before swearing a witness statement, making compliance with the timelines set out in the CRR Consultation Paper impossible to achieve.

Eliminating examinations for discovery in favour of sworn witness statements will increase litigation costs, not decrease these costs. Lawyers will devote hours to preparing sworn witnesses statements, as opposed to engaging in examinations for discovery that are capped in time by the *Rules*. It is unrealistic to suggest that requiring sworn witness statements to be served in lieu of examinations, will result in cost savings.

iii. Increasing Use of Courts by Self-represented Litigants

When Ontarians are priced-out of litigation, they will choose an alternative path to achieve justice – they will self-represent. The CRR Consultation Paper is entirely silent on the issue of self-represented litigants and how they might be impacted by these proposed changes to the *Rules*.

There is a general expectation and professional obligation for Counsel to assist self-represented litigants with procedural matters, to the extent that it would not compromise our clients' own case. There was broadly held concern by FLA members that the increased number of self-represented litigants that will result if these proposed changes are implemented, will further complicate this dynamic. Our duty remains to our clients; however our members envision incomplete productions being served and inadequate witness statements being authored (not in all cases involving self-represented litigants, but very likely in many situations). Without any ability to test credibility, it is difficult to envision how these cases can be resolved without the need for a trial.

More specifically, expecting self-represented litigants to comply with the pre-litigation protocols, while addressing legal issues and facts in the sworn witness statements is an unrealistic expectation. If legal issues and legal tests are not properly raised in witness statements by self-represented litigants, opposing parties will be further incentivized to proceed to trial as opposed to meaningfully engaging in settlement discussions.

Plainly stated – more self-represented litigants will mean more trials. And FLA members are greatly concerned that there are not sufficient judicial resources to meet these demands.

iv. Lack of Judicial Resources to Implement Proposed Changes

This issue has been highlighted above however the FLA cannot overstate the serious concerns held with actually implementing the proposed changes to the *Civil Rules*.

While Motions culture exists in other jurisdictions, it does not exist in Kingston and the surrounding area. In many instances, the only judicial engagement with a file would be at Trial Scheduling Conference and Pre-Trial. The FLA does not have current court data (neither did the CRR Working Group), but the general consensus amongst FLA members is that many civil claims resolve without the need of judicial involvement at all. Under the proposed changes to the *Rules*, every file will utilize scarce judicial resources, and the number of trials will undoubtedly increase. This will create undue strain on judicial resources that are already taxed.

D) Alternative Options for Improving the Civil Justice System

Generally, the FLA agrees with the positions advanced by FOLA in their response to the CRR Consultation Paper; an FLA member has also engaged in the Better Civil Rules Collaborative (“BCRC”), which has proposed an alternative system of Civil Rules reform, that addresses many of the concerns highlighted by the FLA members as set out above.

A major concern is that the proposed changes to the Ontario civil justice system are not based on any data whatsoever. This has been confirmed during consultations with the CRR Working Group. Sweeping changes such as those proposed in the CRR Consultation Paper cannot be introduced without this important data. Additionally, a pilot project should be launched to explore the efficacy of any proposed changes. Otherwise, these drastic changes will be implemented based on the practice-specific and regionally-limited views of those practitioners on the CRR Working Group.

In addition to endorsing the proposed changes set out by FOLA and the BCRC, there is other “low hanging fruit” (as described by some FLA members), that might assist in resolving some of the issues with delay that plague the current civil justice system, including, but not limited to, the following:

- Increasing the monetary jurisdiction of Rule 76 to a higher amount.
- Further increasing the monetary limits of the *Small Claims Court*, with associated increases to the costs consequences currently in place.
- Eliminating oral argument of Undertakings and Refusals Motions. Any disputes can be resolved through a Redfern Request, in writing with a cap of five written pages. Costs should be dramatically increased for unsuccessful parties on these types of requests to negate any strategic step associated with improperly refusing an undertaking request.
- Eliminating the need for judicial involvement on procedural motions.
- Enforce the *Rules* with respect to Discovery Plans – any deviations from the plans can result in a cost award for non-compliant parties, where appropriate.
- Creating a codified timeline for examinations for discovery to take place – if the parties do not “use it, they lose it”.
- There are specialized courts for commercial matters – create a specialized court for injury/insurance claims, construction claims, etc. The particulars of this suggestion clearly extend beyond the scope of this brief response to the CRR Consultation Paper, but it is a proposal that should be meaningfully considered.

Concluding Comments

The FLA and all of their members wish to acknowledge time and effort that the members of the CRR Working Group have devoted to this project. The passionate

responses from FLA members, and indeed from legal practitioners across Ontario to these proposed changes to the *Civil Rules*, should be appreciated for what they are – a common passion for improving the civil justice system and addressing the efficacy and cost of that system. Here in Frontenac County, we share the underlying desire of the CRR Working Group and the Attorney General to make the civil justice system an effective and accessible, truth-seeking tool for all Ontarians.

We wish to extend our thanks to the CRR Working Group and all of those who consulted on the proposed changes to the *Rules*. We are hopeful that the concerns expressed above, as well as the proposed suggestions, might be helpful in some way in charting a path forward towards a better, more accessible and cost-effective system of civil justice in this province.

We remain available to discuss any of the above with you, at your convenience. The FLA and their members remain committed to improving the civil justice system and are prepared to engage in any further consultation as necessary.

Yours very truly,



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FLA Civil Rules Committee Co-Chair



Todd Storms
FLA Civil Rules Committee Co-Chair



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