

THE HAMILTON LAW ASSOCIATION

The Hamilton Law Association exists to enable its members to become successful, respected and fulfilled in their profession.

45 Main Street East, Suite 500
Hamilton, Ontario L8N 2B7
Telephone (905) 522-1563
Fax (905) 572-1188
Website: <http://www.hamiltonlaw.on.ca>



The Honourable Douglas Downey
The Attorney General of Ontario
McMurtry-Scott Building, 11th Floor
720 Bay Street
Toronto, ON M7A 2S9

Via Email: Doug.Downey@ontario.ca

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

Via Email: Jennifer.Smart@Ontario.ca

Re: The Hamilton Law Association's Response to the Civil Rules Review Phase Two Consultation

To whom it may concern:

On behalf of the Hamilton Law Association, I am writing in response to the Civil Rules Review Phase Two Consultation. We appreciate the opportunity to contribute meaningfully to this consultation process.

Incorporated in 1879, The Hamilton Law Association is one of the oldest county and district law associations in the province. It was created by the hard work and inspiration of Britton Bath Osler with the purpose of supporting a law library located within the Court House, promoting the general interests of the profession, and encouraging and maintaining the good feeling and harmony of its members.

The Hamilton Law Association continues to strive to educate and support its membership in the practice of law as well as to advocate for their interests as lawyers. With over 900 members at the end of 2024, it has one of the highest rates of participation of any of the forty-seven county and district law associations in the province.

In order to advocate for our members, the Hamilton Law Association has conducted a survey of our membership in order to prepare this response to the Civil Rules Review Phase Two Consultation.

The purpose of the survey was to gather the views of the membership on the potential impacts, benefits, and concerns associated with the proposed changes.

Below, we have summarized key findings for each section of our survey, which corresponds to the noted sections in the Civil Rules Review Phase 2 Consultation Paper.

Part 3: Setting the Tone – General Principles

In our survey, we asked for feedback in two areas: section 3.B. with respect to the proposed “Representation Rules” and section 3.C. regarding the duty to cooperate. The majority of our members agreed with these proposed changes. Commentary also included a cautionary note that practitioners will need to be mindful about potential conflicts between these proposed changes and lawyers’ Rules of Professional Conduct and duty of zealous advocacy for clients.

Part 4: Claims

We asked our members if they agreed with the proposed Pre-Litigation Protocols outlined in section 4.A. Based on the responses, it is clear our members are divided in their support for this proposal with 53.7% disagreeing with the proposal. Many members indicated that this proposal would front-load costs which would lead to undue burden on the parties and raised access to justice concerns. There is also a concern that the costs incurred by parties in complying with Pre-Litigation Protocol may be beyond the reach of the Court. Protections should be in place to allow parties to recoup their costs associated with Pre-Litigation Protocol compliance from an unsuccessful party consistent with prevailing costs principles.

We also asked our members if they supported the single point of entry into the system as set out in section 4.B. Again, our members are split in their support of this proposal with 25.9% noting their position as ‘neutral’.

We also asked our members if they agreed with section 4. C. which proposes a one-year scheduling conference. The majority of our members are in support of this proposal.

In response to our survey regarding section 4.D. where changes to service of an originating process were proposed, our members again were split in their support of this proposal.

However, the significant majority of our members disagreed with the proposal that a lawyer “whether retained to defend the litigation or not” should have an obligation to provide the claim to the client and confirm they have done so. The concerns raised include the ethical responsibilities this obligation would place on the lawyer if not retained, the potential conflict with lawyers’ Rules of Professional Conduct and in particular duties of confidentiality and also potential liability and LawPro complications it could raise.

Part 5: Discovery and the Up-Front-Evidence Model

We asked our members if they supported section 5 and the elimination of oral discovery. **88.9% of our members disagreed with this proposal** and 86.8% disagreed that the up-front evidence model could offer the same or better process than oral discoveries.

Comments in response to these questions highlight significant access to justice issues and increased up-front costs that the elimination oral discoveries would cause. Other considerations included an inability to assess a party's credibility prior to a trial, which is hugely influential to strategy, and impacts whether a case can move more quickly towards resolution. Further, the absence of oral discoveries will move our system towards one of "trial by ambush" and will likely increase the number of proceedings that ultimately go to trial versus resolving on the basis of oral examination evidence. We note that this would ultimately result in the increased use of the Court where cases would have otherwise settled without judicial involvement.

Recommendations for alternative solutions included reducing time limits for oral examinations, elimination of undertakings particularly where pre litigation protocols have been implemented, make discoveries "optional" or more informal, and requiring that they occur prior to the one-year case conference proposed.

Finally, on the issue of discovery motions, we note that Rules are *already* in place and at the Honourable Court's disposal. A stricter and more forceful use and implementation of existing Rules would deter non-compliance with undertakings or discovery obligations. Presently, Courts are reluctant to order costs against a party on interim motions such as motions for undertakings. That practice could and should be revised.

Part 6: The Up-Front-Evidence Model

We asked our members if they agreed with the "Up Front Evidence Model" proposed in sections 5 and 6. The responses indicated split support for these proposals. Again, some comments indicated this would cause access to justice issues due to the up-front costs and increased work involved with these proposals. One consideration is that in cases it may take additional time for certain documents to become available, making this model impractical. Further, without guidelines on documentary disclosure it will be up to counsel to determine which documents are "adverse" which could be problematic in the absence of examinations for discoveries when parties may determine which documents the opposing party has or may obtain.

Regarding the use of Redfern Schedules, again our members' positions were split. This process was likened to "administrative busywork" with comparison to the previous discovery plans which are not often utilized. Comments also included the suggestion that these schedules would create increased work for lawyers with the increased costs associated in drafting and maintenance. The Redfern schedules were compared with undertakings charts, with certain comments noting their utility should they be combined with oral discovery.

Part 7: Summary Hearings and the Paper Record+ Process

We asked our members their position regarding the proposed summary hearings and paper record+ process. Our members responses were split, notably with 35.2% indicating a neutral position.

Members suggested a reluctance to move to a model with a “one size fits all” approach, emphasizing support for an approach that encouraged counsel to agree on the format the case should proceed with. Of concern was the application of summary proceedings to estates matters where there are a host of statutes that would require amendment. Some comments noted that these changes would not assist with the judicial resource scarcity, however, one member noted that this could work in certain circumstances. Overall, member commentary repeated the general theme echoing concerns of access to justice with the elimination of oral evidence.

Part 8: Reforming Motions Practice

We asked our members if they believed Hamilton has a “motions culture” as referenced in the proposals.

77.8% of our members indicated they believe Hamilton **does not** have a “motion culture”.

We also asked if there were long wait times for short motions and long motions in Hamilton. 81.1% said there is not a long wait time for short motions and 62.3% said the same for long motions. It is notable that in Hamilton our civil short motions are heard every Tuesday and Thursday and there is no limit on the number of motions that can be brought on any motion day. There is no delay in accessing a motions date.

Many of our members indicated they do not bring motions or bring 1-2 a year without delay unlike other jurisdictions.

Part 9: Pre-Trial and Trial Procedures

We asked our members if they agreed with the recommendation to have mandatory mediation across all matters. Again, our members were split in their responses.

The majority of our members however were in support of the proposed Trial Management Conference (“TMC”) ahead of a trial and requirement for chronologies of key facts and joint document briefs ahead of the TMC. There were, however, comments with concerns surrounding judicial resources in terms of scheduling and completing the TMC.

Mandatory mediation drew some comments noting that this requirement would not be conducive to settlement as parties were not opting to participate. There were also concerns regarding the cost associated with mediation.

Part 10: Expert Evidence

With respect to the proposed recommendations for expert evidence, our members were again equally split in their agreement or disagreement with these proposals. Comments in support of this noted that it may be appropriate for certain cases, with the suggestion that flexibility be available. Conversely, it was noted that the proposed reforms would add increased costs and are impractical in an adversarial system.

Part 11: Delays and Costs

Our members were split in their support or lack of with regard to the proposed reforms for fixing hearing dates and consequences for same. There were comments regarding the practicality of having fixed hearing dates and the potential effect on judicial resources where cases are settled and a trial vacancy occurs. It was noted that this is not an issue with rolling lists. However, conversely it was suggested that fixed trial dates are effective for settlement.

The majority of members support the proposed definition of partial and substantial indemnity costs.

Part 12: Post-Trial Processes

With respect to the appeal-related rule reforms, the majority of our members were neutral or agreed with the proposals. There was however the suggestion that the distinction between interlocutory and final should be decided by the Court.

General

In addition to quantitative data, members provided a range of qualitative comments, which are summarized in the attached report. A complete dataset and analysis are also enclosed for your review.

Conclusion

It is clear that our members are split overall in their response to this consultation for most of the proposed reforms. However, it is very clear that our members do not support the elimination of oral discoveries. This is also supported by the consultation process as detailed in the Phase 1 report where two-thirds (2/3) of the stakeholders consulted did not support the elimination of oral discoveries. Our members have expressed concerns regarding the disconnect between the Phase 1 report and Phase 2, as well as the make-up of the consultation committee overall. As one of the largest legal communities outside of Toronto and Ottawa, many of our members have also expressed concern that Hamilton was not considered in the consultation process. Our members have expressed that our jurisdiction does not have a “motions culture” and does not experience the delays seen in other jurisdictions. Many have also expressed concern that these proposals are not based on any statistical data, as confirmed in the Phase 2 report and by many of the committee who have spoken at length on this issue since the release of the Phase 2 report.

The Hamilton Law Association is also concerned that the Law Society of Ontario has not been consulted in this process. There are Rules recommendations that potentially impact and conflict with the Rules of Professional Conduct to which all licensees are bound. We believe that the Law Society's consideration and input in this matter is of paramount importance.

We also endorse and support the position and commentary of the Federation of Law Associations and commend them for speaking up and out on this consultation on behalf of our association and all law associations across Ontario. When the collective speaks in opposition to a proposed reform, significant consideration must be given to their collective voices.

We urge your office to consider these perspectives. Our members are committed to compliance and transparency, and they seek regulations that are both practical and supportive of their work.

Please do not hesitate to contact us should you require further details. We remain available for continued dialogue and appreciate the opportunity to contribute to this process.

Yours sincerely,



Laura Dickson,
President, Hamilton Law Association

Attachments:

1. Full Survey Data and Analysis

CC: Peter Wardle, Treasurer of the LSO;
Michael Winward, LSO Regional Bencher