



Waterloo Region Law Association
Waterloo Region Courthouse
85 Frederick Street
Kitchener, ON N2H 0A7

Telephone: (519) 742-0872
Fax: (519) 742-4102
www.waterloolaw.org

June 16, 2025

The Honourable Douglas Downey

The Attorney General of Ontario
McMurtry-Scott Building, 11th Floor
720 Bay Street
Toronto ON M7A 2S9
doug.downey@ontario.ca /patrick.schertzer@ontario.ca /anthony.galea@ontario.ca

Civil Rules Review Working Group

Attn: The Honourable Justice Cary Boswell, Allison Speigel and Jennifer Smart
jennifer.smart@ontario.ca

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

We write on behalf of the Waterloo Region Law Association (WRLA) which was incorporated on December 21, 1894. The WRLA is the sixth largest law association in Ontario with membership of over 635 lawyers and paralegals in Waterloo Region, encompassing Kitchener, Waterloo, Cambridge, New Hamburg and Elmira.

We acknowledge the hard work undertaken by the Civil Rules Review committee and the concerns raised in the report about improving access to justice in Ontario and agree that the current system needs to be improved so that litigants in our province have timely and meaningful access to justice.

We appreciate the opportunity to provide you with our thoughts, concerns, and proposed suggestions with respect to the proposals outlined in the report. We must say that we regret that the requests of so many of those impacted by these proposed changes for additional consultation time were not granted. As a result of this very short time period for review, consultation, and comment, our comments to you in respect of the Phase 2 consultation paper are limited by the review time permitted and so we are only in a position to address some of the proposed changes in a general way.

Generally speaking, the Phase 2 report identifies access to justice, reduction of litigation costs and timely resolution as the central objectives of civil justice reform in Ontario. In a recent podcast on Canadian Lawyers' Talk, Chief Justice Morawetz identified one of the key concerns as the need to compress the litigation timeline: "It just takes far too long... four to five years. To me, that

means that the system almost becomes irrelevant.” We agree that enhancing access to justice, making litigation more affordable, and having faster trials is a laudable and necessary objective.

In our view, however, the changes proposed by the Civil Rules Review committee in its Phase 2 report will not meaningfully advance those goals, but instead will negatively impact access to justice and equity and will disproportionately harm low-income individuals, self-represented parties, and vulnerable parties. Further, we are of the view that the proposed changes overlook regional needs and practices outside the GTA, could deter legitimate claims due to cost, complexity and the rigidity of the process and may reduce the ability for ordinary persons to access our justice system.

We agree with the concerns raised by the Federation of Ontario Law Associations (FOLA) in its letter dated April 28, 2025, including that the proposed changes are not evidence based, are generally designed for “Bay Street” type law firms and not “Main Street” law firms and on a narrow scope of civil practice, that the front loading of costs creates a barrier to access to justice and may well result in the destruction of smaller law firms and that the proposals require judicial resources that are not available.

As set out in more detail below, we suggest that the goals sought to be attained by the Phase 2 consultations can be reached without such drastic and potentially catastrophic changes as those proposed by the Rules Review Committee. As noted above, our scope of review and comment has been limited by the truncated timeline for response to a report that was over a year in the making. We will therefore highlight our concerns in relation to three primary issues (1) elimination of oral discoveries, (2) the upfront evidence model, and (3) proposed changes involving experts. In doing so we have reviewed each of these proposed reforms, considered the rationale for the proposed changes, identified our concerns regarding the proposed changes, and the impact on the proposals on access to justice, litigation costs and timeliness of adjudication. Finally, we considered our suggestions as to how the goals of reform identified by the Rules Review Committee can be met without making the changes proposed.

Proposed Elimination of Oral Discovery

We think it can safely be said that the Committee’s proposal to eliminate oral discovery has been roundly condemned by the litigation bar. This proposal has raised significant concerns, not only amongst litigators at the WRLA, but in submissions and comments made throughout the Province.

As noted in the submissions of practitioners in the area of complex/commercial litigation of prominent large law firms dated June 9, 2025 (“Bay Street Submissions”), oral discovery has been an essential feature of the litigation process in Ontario for over 170 years and is a bedrock element of the process that promotes timely settlement and efficient trials. Discovery has been

described as a critical forum in the process of developing a persuasive case which often renders trial unnecessary.¹ Oral discovery does not use court resources. It allows parties to narrow the issues in dispute, clarify the strength of positions, and thus promote settlement, determine the number of witnesses, and find facts and evidence. It is often the only chance for litigants to understand the other side's evidence and legal positions, and to explore important credibility disputes and the adequacy of documentary disclosure. It is our view that discoveries are needed for the fair and efficient administration of justice, to develop the evidence needed to obtain a just result, and to promote settlement.

The Rules Review Committee's suggestion that oral discovery be eliminated is not new. As noted in the Bay Street Submissions, oral examinations were initially eliminated from the Simplified Rules procedures. However, the resulting issues, including increased cross examination time at trial, ultimately resulted in the reintroduction of time limited oral examination as a result of the problems created by eliminating discovery. There have been no reasons given as to why the elimination of oral discovery as proposed will not result in similar problems and a similar result.

The Rules Review Committee's report, while appearing to acknowledge the importance of oral discovery, suggests it is over burdensome, leads to a glut of motions in relation to undertakings and refusals which clog and delay the system, and can be adequately replaced by the proposed pre-litigation protocols which we will address in more detail below. We disagree. It may be that there is an issue in Toronto related to undertakings and refusal issues. There has not been data provided to suggest it is a systemic problem across the board. We note the anecdotal evidence of one lawyer consulted in respect of our submissions who noted that in over 35 years of a busy civil litigation practice they had been required to attend two motions in relation to undertakings and refusals; the first as an articling student and the second recently when undertakings were given at discovery but the lawyer subsequently refused to answer them. In our view, in such a situation there should be access to the Courts for redress. This may not require a full motion in the normal course. We agree that motions of this type can likely be adequately addressed in writing or at case management and so facilitate less expensive, faster decision making.

In our view, the elimination of oral discovery will lead to a loss of truth finding (credibility matters) and transparency, and will prevent early settlement sending more matters to trial. These changes may increase rather than reduce costs, undermine fairness in litigation, and harm access to justice. This is especially problematic in personal injury, medical malpractice, abuse claims, and complex cases and will likely disproportionately affect vulnerable parties.

¹ Archibald, Campbell, Fournie, *Discovery as a Forum for Persuasive Advocacy*, 2019 Annual Review of Civil Litigation, Ninth instalment of The Art and Science of Persuasion, Carswell.

By eliminating oral discovery, particularly in the proposed change of documentary production from a relevance based standard to a reliance based standard in conjunction with the elimination of oral discovery, the proposal will reduce meaningful opportunities to avoid trial by ambush and, as a result of not having the opportunity to assess the credibility of the witness as well as determine a full and clear picture of the events in issue, reduce the likelihood of settlement leaving more matters to go to trial which would impact trial efficiency. Moreover, as noted in comments of personal injury practitioners, in areas like medical malpractice, sexual assault, and nursing home abuse claims there is usually no adverse document to describe what happened. This information can only be obtained from oral examinations. Lawyers working on these and other personal injury claims on contingency will be less able to assess the strength of cases in the absence of documentary and oral discovery which will result in less cases being taken on in this manner. Again, in our view, this will result in a loss of access to justice by many vulnerable parties who are now able to obtain redress from the courts.

We note that concerns about eliminating oral discovery are not restricted to personal injury litigation. The Bay Street Submissions take the position that elimination of oral discovery will have a negative impact on the viability of Ontario as a forum for choice for commercial litigants, including national class actions involving parties from multiple jurisdictions. We agree with their conclusions that this would have a chilling effect on the development of the common law in Ontario and adversely impact litigants who seek to avail themselves of the Ontario justice system.

Finally, the impact of the elimination of oral discoveries on the development of the profession and, particularly, the development and mentoring of young lawyers is of fundamental importance. Often, examinations for discovery and interlocutory motions are the primary manner in which young lawyers learn the essential skills of examination and cross-examination.

Rather than eliminate oral discoveries, in our view there are less intrusive steps which can be taken which do not attract the above noted negative consequences.

Firstly, we suggest that there should be a presumptive timeline for when oral examinations are to take place, which may be extended by a judge at a case conference if the circumstances of the case warrant it. These timelines should be strictly enforced with counsel providing evidence of compliance to the Court.

The length of oral discovery should presumptively be shortened, unless otherwise agreed to by the parties or upon court order. This may be done by an across-the-board time limit or by increasing the amount under which cases may be brought within the Simplified Rules procedures.

The existing provisions within the current Rules should be used to require all questions to be answered except for narrow exceptions, such as privilege, with the consequence of prohibiting evidence at trial on answer refused on discovery.

The process for addressing undertakings should be by way of presumptive timeline, unless another order is made at a case conference. Any motions in relation to undertakings and/or refusals should be by way of a simplified process, either by way of written motion or at a case management conference.

Insofar as there is a process for determining whether undertakings motions should be permitted, that process should be enforced. Again, some of our members have had the experience in Toronto where they were required to provide a 10-page case conference brief, the moving party was told that the proposed motion had no merit and was not likely to succeed and then it was left up to them whether they would bring the motion. The determination of whether a motion can or cannot succeed should take place in reality rather than in theory.

Up Front Evidence Model

The Civil Rule Review committee has recommended a robust protocol of pre-litigation documentary production as well as the exchange of documents, sworn witness statements, and expert statements shortly after the commencement of litigation. These witness statements and affidavits would be generally prepared by the lawyer acting for the party. The documents to be produced and exchanged would not be based on the standard of relevance, as now, but on a less inclusive standard of reliance as well as the production of adverse documents in the party's possession. The term 'adverse' is not as yet defined. At a CBA continuing legal education program regarding these proposals, a member of the Rules Review Committee said that this area was still under review but that there should not be a requirement of extensive searching by an individual to help the other side prove their case as that did not seem fair. Respectfully, that is the basis of our judicial system. Proffered evidence should be put forward and adequately tested, so that a case can proceed to adjudication based on credible evidence rather than the 'tailored truth' fashioned by parties with the assistance of their counsel.

We have significant concerns regarding this proposed 'up front' evidence model.

The first, and most obvious issue, is that this manner of proceeding will involve significant upfront cost burdens on litigants and witnesses which will likely impede access to justice for most Ontarians. As noted by some members of the personal injury bar, many cases currently before the courts are there only because the plaintiffs have access to contingency fee arrangements. These proposed procedures put the ability of lawyers and parties to enter such arrangements at risk. Moreover, in our view, such an approach reduces the prospect of resolution after pleadings, given the amount of time and money required to comply with these proposed procedures. There has been no evidence presented that the burden of producing relevant documents outweighs their probative value. Surely our justice system should not rest adversarial adjudication on creative writing.

The proposed approach risks procedural unfairness because of evolving or incomplete information. This is a particularly challenging issue in certain types of cases such as personal injury and medical malpractice actions where the case develops over time. It may be more amenable in commercial type cases where the parameters of litigation scope and damages may well have crystallized at the time of breach. It is unrealistic to expect defendants to identify all necessary witnesses at the beginning of case, or those that will still be employed by a corporate defendant by the time of trial. Moreover, in our view, the proposed timing of the delivery of witness statements is backwards. The production of documents and the further development of the case will help identify proper witnesses. We also have concerns about the value of witness statements developed so early in the process, particularly where they may be used as evidence in chief at trial. Interestingly, at a CBA seminar held on April 28, 2025 about the perspectives from foreign counsel as to the proposed reforms, one of the speakers expressed skepticism about the value of witness statements, which in his view led to surprises at trial which were less likely to happen where oral discovery is permitted. He noted that the courts in Western Australia had recently stopped using witness statements as evidence in chief.

Concerns have been raised by the personal injury bar about privacy issues raised by the pre-litigation disclosure proposals, in which sensitive and personal medical and other similar documents will have to be exchanged with individual litigants. It is also not at all clear how much of a demand on judicial time will result because of these proposed new procedures and issues and further costs that might arise in terms of dealing with additional requests for production, evidentiary issues in relation to the sworn witness statements, particularly if they are used at trial, and the likelihood that lawyer crafted statements will essentially skew reality, with deviations in evidence not being truly apparent until trial.

When this pre-litigation documentary production model and the elimination of oral discoveries is combined with the change from relevance-based to reliance-based productions, in our view the possibility of settlement before trial will be reduced and the likelihood of trial by ambush and longer trials will increase. Interestingly enough, at the CBA program with foreign lawyers referred to above, the comment from the lawyer from England was that relevance remained as the standard of documentary production. Here, the safeguards for a full and fair hearing are eroded by not only removing the fact finding and settlement inducing process of oral discovery, but by also reducing the ambit of production to allow the party to properly know the case it has to meet.

Finally, it is not clear how achievable these changes are in practical terms given the accelerated timeline for implementation suggested. At a recent MAG seminar regarding the roll out of the new process for inputting and commencing cases into the court system, the speaker noted that while MAG is anticipating rolling this process out in Toronto by the end of 2025, there were large areas of the province in which roll out dates had not even been determined but they would be years down the line.

Experts

The Civil Rules Review committee has proposed substantial changes in relation to expert witnesses, including requirements for joint experts, for experts to meet and confer outside the presence of lawyers and parties, for experts to create a joint report which will be admitted as evidence at trial, and for re-sequencing expert testimony at trial.

We have significant concerns about these proposed changes. Firstly, the effect of the proposed changes will impact the ability of parties to obtain the expert of their choice. This raises questions about procedural fairness. This is problematic in an adversarial system. Moreover, experts do not have the impartiality of judges, and some types of cases are presumptively unsuited to the use of a joint expert. Hot-tubbing of experts and joint reports is unrealistic, costly, and may add significant cost in the litigation process and extend timelines. A single joint expert may not fully capture each party's perspectives. If the adversarial process is to be a 'crucible' for the testing of the truth, a single expert could deprive the trier of fact from hearing counsel's testing of the other party's expert.

It is not clear what role, if any, parties and their counsel may play in the creation of the proposed joint report. Moreover, the increased Court oversight and codified duties, standardization of formats, and mandatory expert conference may, in fact, add to the strain on court resources and increase procedural complexity and costs, particularly for smaller firms or self-represented litigants. Codification of expert duties could heighten experts' reluctance to take strong positions, and the joint expert framework may cause experts to soften opinions to find middle ground.

The proposed expert provisions, together with other procedural burdens, will increase up-front costs, disproportionately so in smaller value cases.

In our view, the suggested testimony sequencing at trial is unfair to defendants who are entitled to know the plaintiff's case before they respond to it. It is also unclear what the impact of these proposed changes will be on motions to dismiss or non-suits at trial. The proposed sequencing suggestions deprive both parties of the ability to design the flow of their evidence to be able to persuasively tell the story of their case- the hallmark of effective advocacy at trial.

The imposition of strict deadlines for serving initial, responsive, and supplemental expert reports with inadmissibility consequences for delays can become pronounced barriers for complex medical or technical evidence cases, and, particularly, for personal injury litigation where extended time is required for expert analysis, especially if the injured plaintiff's condition has changed from the outset of the case.

It is our view that the discussion and reasons of the ONCA in *Westerhof v. Gee Estate* are more helpful in dealing with the procedural admissibility of expert evidence than the concurrent expert

testimony (hot-tubbing) model proposed. Trial judges, as judicial gatekeepers, should have the opportunity to exercise their broad discretion to limit repetitive expert evidence, control the scope of expert testimony to prevent overlap, and manage proportionality, albeit within the conventional adversarial (and time-tested) model.

Conclusion

In our view, there is a considerable opportunity to achieve the objectives of the Rules Review Committee without the destructive impacts of the above three proposals.

Firstly, the existing timelines in the Rules should be presumptive with counsel or self-represented litigants being required to demonstrate compliance with the timelines by filing declarations with the Registrar. The Courts, through case management conferences available to all litigants in the province, should ensure that timelines are met and there should be cost consequences for failure to abide by these timelines. When the interest of justice requires a modification of the timeline, this should be the subject to judicial approval.

Oral discoveries should continue with shorter allotted times and a presumption, as now provided for in the Rules, that all questions (except privilege issues) shall be answered at the discovery with issues of admissibility to be determined at a case conference or trial. Motions for undertakings/refusals should at a minimum be completed in writing with the potential for determination at a case management conference on an appropriate evidentiary record.

In summary, we suggest that significant improvement can be created through the increased enforcement of existing rules, including with regard to presumptive deadlines and costs with consequences for delay tactics and abuse.

We respectfully suggest that the proposed changes, if implemented, should be rolled out in a pilot project in a limited geographic area, such as Toronto, and restricted to certain practice areas to which these processes will allow real time assessment. In our view, personal injury cases, even though they make up the majority of cases before the courts, are not well suited to the proposed changes without significant risk of a failure to Ontarian's access to justice and should not be part of such a roll out at this time.

We conclude by noting that the geographic areas of the Province in which counsel frequently engage with each other do not appear to have the same problems with abuse of the Rules and the bringing of unnecessary motions as raised in the Phase 2 report.

In our view, many of the problems in our justice system are the result of systemic resource failures, which are real barriers to timely resolution. There are too few judges and courtrooms, delays in trial scheduling (sometimes a two or three year wait after a matter is set down), together with lack of staff and regional inconsistencies. There are significant issues of uneven

impact and regional realities, particularly in the more rural areas outside of Toronto, as our areas generally lack mediators, judges, and a robust administrative infrastructure.

We are concerned that the proposed changes will require significant additional judicial resources to administer, with the result that there will be even further delays in finding the needed resources.

We will be pleased to answer any questions you may have.

Yours truly,

Jennifer Bolduc

Jennifer Bolduc, President

Milena Protich

[Milena Protich \(Jun 16, 2025 16:43 EDT\)](#)

Milena Protich, Chair, Legislative Committee







WRLA Letter to D. Downey re Civil Rules Changes 16 June 25

Final Audit Report

2025-06-16

Created:	2025-06-16
By:	Jennifer M. Bolduc (bolduc@mgdlawyers.ca)
Status:	Signed
Transaction ID:	CBJCHBCAABAAfl-Pa9zaVCK6OJPQH1VRrx_xy2MSKUvC

"WRLA Letter to D. Downey re Civil Rules Changes 16 June 25" History

-  Document created by Jennifer M. Bolduc (bolduc@mgdlawyers.ca)
2025-06-16 - 8:41:11 PM GMT
-  Document emailed to Jennifer M. Bolduc (bolduc@mgdlawyers.ca) for signature
2025-06-16 - 8:41:14 PM GMT
-  Document emailed to Milena Protich (milena.protich@leellp.com) for signature
2025-06-16 - 8:41:15 PM GMT
-  Email viewed by Jennifer M. Bolduc (bolduc@mgdlawyers.ca)
2025-06-16 - 8:41:45 PM GMT
-  Document e-signed by Jennifer M. Bolduc (bolduc@mgdlawyers.ca)
Signature Date: 2025-06-16 - 8:42:02 PM GMT - Time Source: server
-  Email viewed by Milena Protich (milena.protich@leellp.com)
2025-06-16 - 8:42:59 PM GMT
-  Document e-signed by Milena Protich (milena.protich@leellp.com)
Signature Date: 2025-06-16 - 8:43:56 PM GMT - Time Source: server
-  Agreement completed.
2025-06-16 - 8:43:56 PM GMT