Ontario Superior Court of Justice

Ministry of the Attorney General

CIVIL RULES REVIEW

PHASE ONE REPORT

May 2024

CIVIL RULES REVIEW: Phase One Report

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I. TERMS OF REFERENCE

On September 28, 2023, Attorney General Downey (the "AG") and Chief Justice Morawetz of the Superior Court of Justice (the "Chief Justice") announced the launch of the Civil Rules Review (the "CRR"). The CRR reflects their shared vision for a civil justice system that is effective, relevant, responsive, and timely.

The CRR's mandate is set out in its January 29, 2024 Terms of Reference. Specifically, it is to identify, through consultation, areas where targeted change to the *Rules of Civil Procedure* may increase efficiency and access to justice for both represented and unrepresented litigants in Ontario, reduce complexity of the civil justice system, reduce costs for litigants, maximize the effective use of court resources, reduce delay, and/or leverage technical solutions.

The CRR is being carried out by a Working Group representing the judiciary, the private and public bar, and academia. Its work will proceed through the following three phases.

Phase One - Scoping (January 2024 - May 2024): The goal is to identify potential areas of reform through targeted consultation with justice system participants. The Working Group will deliver its Phase One Report to the AG and Chief Justice for their consideration by May 31, 2024. The AG and Chief Justice will determine whether each potential area of reform should be referred for further study and the development of a detailed policy proposal in Phase Two.

Phase Two: Study and Policy Proposal Development (June 2024 – June 2025): Based on direction from the AG and Chief Justice, the CRR's Co-Chairs, together with its Project Coordinator, will create a workplan to carry out the development of detailed policy proposals for each area approved for study and development.

Phase Two will involve both extra-jurisdictional research and consultation with relevant justice system participants in Ontario. It will culminate in a Phase Two Report to be delivered to the AG and the Chief Justice by June 30, 2025. Policy proposals will be developed and advanced throughout this Phase to promote early and progressive implementation of reforms where possible.

Phase Three: Approval and Implementation (July 2025 – December 2025): All detailed policy proposals and draft regulations will be processed in accordance with the provisions of the *Courts of Justice Act*. The target date for completion of Phase Three is December 31, 2025, or earlier if feasible. As indicated above, Phase Three may begin sooner for some proposals if study and policy development for that area is completed earlier.

Rule reforms will come into force on dates to be set out in regulations, having regard to the need for sufficient notice to be provided to justice system participants, other necessary public communications, system programming, and the training of court staff.

II. MEMBERS OF THE REVIEW

Co-Chairs

- The Honourable Justice Cary Boswell - Ontario Superior Court of Justice
- Allison Speigel - Speigel Nichols Fox LLP

Project Co-Ordinator

- Jennifer Hall - Senior Counsel, Deputy Attorney General's Office

Working Group Members

- John Adair - Partner, Adair Goldblatt Bieber LLP
- Tamara Barclay - Senior Counsel, Ministry of the Attorney General, Civil Law Division
- The Honourable Justice Jennifer Bezaire - Ontario Superior Court of Justice
- Professor Suzanne Chiodo - Osgoode Hall Law School
- Chantelle Cseh - Partner, Davies Ward Phillips & Vineberg LLP
- Jacob Damstra - Partner, Lerners LLP
- Trevor Guy – Senior Counsel, Office of the Chief Justice of the Superior Court
- Rebecca Jones - Partner, Lenczner Slaght LLP
- Sunil Mathai - Senior Counsel, Ministry of Attorney General, Civil Law Division
- Zain Naqi - Partner, Lax O'Sullivan Lisus Gottlieb LLP
- Jeremy Opolsky - Partner, Torys LLP
- Darcy Romaine - Partner, Boland Romaine LLP

Administrative

- Jennifer Smart - Ministry of the Attorney General

III. EXECUTIVE SUMMARY

A. The Need for Civil Justice Reform

The CRR was not tasked with determining whether civil justice reform is warranted. Indeed, the creation of the CRR – a joint initiative of the AG and Chief Justice – is a manifestation of the obvious need for change. It remains worthwhile, however, to make several observations.

In their current form, the *Rules of Civil Procedure* (or "the Rules") were introduced in 1985, with limited amendments having been made since.[1] Much has changed in the ensuing 40 years. Civil cases have become increasingly complex. The digital age has resulted in an explosion of the nature and volume of documents required to be disclosed on a relevance-based standard. And the number of self-represented litigants attempting to navigate their way through complex court processes has ballooned. Costs are climbing, as is the duration of the average civil proceeding.

Civil justice in Ontario is experiencing an existential crisis. A decade ago, in *Hryniak v. Mauldin*,[2] the Supreme Court concluded that ordinary Canadians cannot afford to access the civil justice system. Moreover, even those who can are confronted with the troubling reality that many civil cases are not economically rational to pursue. There is consensus that the problem of access to timely and affordable civil justice has only gotten worse since *Hryniak*. As a result, litigants are increasingly turning to private arbitrations to resolve their disputes. Our civil justice system, in its present form, risks becoming irrelevant.

It is imperative that every effort be made to ensure that a robust civil justice system remains available to all Ontarians. The stakes are high. As Professor Dame Hazel Genn aptly described in her 2008 Hamlyn Lecture, *Judging Civil Justice*:[3]

> The machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured, and for the power of government to be scrutinized and limited.

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[1] The Rules were first enacted by O. Reg. 560/84 dated June 20, 1984, and came into force January 1, 1985.

[2] 2014 SCC 7.

[3] The Hamlyn Lectures are given annually in the U.K. on one legal topic. The quotation referenced was cited in Stephen Clark and Sir Rupert Jackson, *The Reform of Civil Justice*, 2nd Ed. (London: Sweet and Maxwell, 2018), at ¶ 1-010.

In short, the civil justice system plays an integral role in a functioning economy. As the Organisation for Economic Co-operation and Development (OECD) explains, the ability to properly protect contractual and property rights "encourages savings and investment while promoting the establishment of economic relationships, bringing positive impacts on competition, innovation, the development of financial markets and growth".[4] The World Bank similarly concludes that "[e]fficient contract enforcement is essential to economic development and sustained growth".[5] Without confidence that one's legal rights are capable of being protected, people are less likely to transact, leading to a reduction in economic activity.

The central concern, faced by the CRR and prior iterations of civil justice reform in Ontario,[6] is how to balance the goal of fair and just outcomes with an efficient and affordable process delivered with limited resources. Any re-imagining of the Rules must proceed on the premise that litigants must be able to access processes that are consistent, understandable, fair, affordable, and timely.

The challenge is a significant one. It is necessary, to borrow the language of Justice Karakatsanis in *Hryniak*, to critically examine the values and choices that underlie our civil justice system and the ability of Ontarians to access that justice. A practical balance must be struck between procedural fairness, which has arguably become too complex for most non-legal participants to grasp, and the imperative of resolving disputes promptly and cost-effectively. Currently, the Rules tend to prioritize the idea of "perfect" procedural fairness at every juncture. This pursuit of perfect procedural fairness, however, significantly contributes to the unsustainable cost and duration of civil actions and impairs the ability of litigants to access a publicly-funded system capable of resolving their civil disputes in a timely and economically rational manner. The quest for "perfect" procedural fairness for those few litigants capable of affording it should, in our view, be eschewed in favour of a system guided by the overarching principle of proportionality – one that will be better positioned to try to deliver justice for all.

The challenge can only be met if all justice system participants pull on the same rope. Civil justice reform requires a shift in litigation culture. The same culture of complacency that compelled the Supreme Court, in *R. v. Jordan*[7], to call upon all criminal justice system participants to contribute to meaningful change, plagues the civil justice system. Unacceptable delays have been tolerated for too long and all participants, including counsel, the judiciary, and the government must jointly accept responsibility. Unnecessary adjournments and procedural steps that do little, if anything, to

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[4] https://www.oecd.org/competition/judicialperformance.htm/

[5] https://subnational.doingbusiness.org/en/data/exploretopics/enforcing-contracts/why-matters#1 (citation omitted).

[6] We refer here to two major reviews conducted in the past 30 years. In particular, (1) the Civil Justice Review in 1994 whose mandate was to develop a speedier, more streamlined, and more efficient structure to maximize the use of public resources allocated to civil justice; and (2) the Civil Justice Reform Project tasked, in 2006, with proposing options to make the civil justice system more accessible and affordable for Ontarians. There have, additionally, been several other, more focused, task groups convened in the interim, also mandated to find ways to reduce wait times, increase access to justice, and reduce the costs associated with civil justice in Ontario.

[7] 2016, 1 SCR 631, at paras. 40-45.

advance a case towards resolution perpetuate delay, drive up costs and deprive other litigants of timely access to justice. It is imperative that all justice system participants work together to implement processes "that can achieve practical results in a reasonable time and at reasonable expense."[8]

B. An Overview of Phase One

Phase One of the CRR was launched with the first meeting of the Working Group on February 2, 2024. Thereafter, the Working Group met weekly until March 8, 2024 to identify areas of potential reform. The Working Group then developed a Phase One Consultation Paper (the "Consultation Paper"), the aim of which was to obtain feedback from a targeted group of civil justice system participants about the CRR's proposed areas of potential reform.

The Working Group wrote to each of the targeted consultees on February 15, 2024, advising that the Consultation Paper would be circulated during the week of March 11, 2024 and inviting them to think about reforms that might best serve the CRR's objectives.

The Working Group circulated the Consultation Paper to each of the targeted consultees on March 13, 2024. The Consultation Paper was prepared in a reader-friendly, survey-style format that invited consultees to provide their views as to whether certain areas of potential reform should be the subject of deeper study in Phase Two. A copy of the Consultation Paper is attached as **Appendix "A".** The list of Phase One consultees is attached as **Appendix "B"**.

Given the limited scope and short timeframe of Phase One, we sought responses to the Consultation Paper by April 5, 2024, and received responses from approximately half of the targeted consultees, many of whom provided detailed comments and identified additional areas of potential reform for the Working Group to consider.

This Phase One Report (the "Report") tracks the areas of potential reform identified in the Phase One Consultation Paper. For each such area, we:

a) Identify the rationale for including the issue for further study in Phase Two;

b) Enumerate the questions posed in the Consultation Paper and indicate how many consultees agreed that the area was worth further study, how many disagreed, and how many had no opinion;

c) Provide a summary of the relevant comments offered by consultees; and

d) List our recommendations regarding further study.

Like the Consultation Paper, the Report invites a yes/no response to each area of proposed reform. Only those areas receiving positive responses will be the subject of further study and the creation

[8] *R. v. Jordan*, as above, at para. 44.

of a detailed policy proposal in Phase Two. The Report also provides room for comments and/or further directions in relation to each area of proposed reform.

C. Themes Emerging from Phase One

Several themes emerged from the Working Group's discussions and from the responses and comments of the Phase One consultees. They are worth noting as they tend to inform the recommendations made in the balance of this Report. They include:

a) Responses received from consultees tend to reflect the interests of the constituents for whom they advocate. Given that the Phase One consultation was designed to target consultees across a range of justice system participants, we have the benefit of a cross-section of different viewpoints;

b) There is overwhelming agreement that the Rules need to be transformed, not tweaked. There is consensus that, in their present form, the Rules do not adequately serve the requirements of the modern civil litigant, nor do they sufficiently reflect or leverage technological advances introduced since 1985;

c) "Overwhelming agreement" does not mean "universal agreement". There are some consultees – for example, some members of the personal injury bar – for whom the current iteration of the Rules appears to be working reasonably well. In their view, reforms should be constrained to limited tweaking. We believe it crucial to recognize, however, that the justice system's resources are limited. If we are able to reduce or limit the system's resources utilized by all parties – even those willing and able to engage the "full machinery" of the current iteration of the Rules – more resources will be available for others and the litigation process would become overarchingly more affordable and, thus, more affordable;

d) Consultees overwhelmingly want the civil justice system to be simpler, faster, easier to understand, and more focused on the resolution of substantive disputes as opposed to procedural ones;

e) There is significant support among consultees for a more robust system of case management with as much judicial continuity as is reasonably possible, as a means of identifying live issues, keeping cases on track, reducing gamesmanship, addressing procedural issues as they arise, and alleviating some of the challenges faced by self-represented litigants;

f) There is broad support for a system that allows processes to be customized in a manner that best suits a particular case. The nature and extent of discovery (both documentary and oral), the type of pre-trial management, and the format of the ultimate dispositive hearing are all aspects of the litigation process that consultees suggested should be flexible and proportionate to the nature and requirements of the case;

g) There is consensus that one of the principal drivers of cost and delay is non-dispositive motions. There is significant support for reforms that will rein in the proliferation of such motions; and

h) We are alive to the constraints on judicial resources and make the recommendations set out in this Report with that in mind.

D. A Holistic Approach to Change

Although the potential reforms set out below are addressed on an issue-by-issue basis, our approach to developing ideas for reforming the Rules has been holistic. Many areas are interconnected such that making changes in one area may have practical or resource implications for another. As such, we ask that consideration be given to the proposed reforms in the same holistic manner.

Our proposed reforms for further study in Phase Two are centered around two key features. The first is a transition to the use of flexible, proportionate processes that can be tailored to meet the needs of individual cases. The second is an increased use of case management (with as much judicial continuity as is reasonably possible), particularly implemented at the outset of a case, to identify issues, direct the processes to be utilized, and fix timelines.

Resourcing for increased case management is an issue of significant concern. Over the past five years, an average of 63,222[9] new civil proceedings have been commenced annually in the Ontario Superior Court. Viewed in isolation, the imposition of mandatory, front-end case management may arguably place an impossible burden on the court's existing resources. Considered in the context of all the reforms that we propose to study in Phase Two, however, such a reform is, in our view, worth considering. The following four key features should facilitate the court's ability to increase case management:

a) As a practical matter, not every case will require hands-on case management. The expectation is that, in many cases, the litigants will be able to agree to an initial order giving directions regarding the processes that will apply to the case;

b) Significant judicial resources are currently used to hear and determine non-dispositive motions. If the volume of these motions can be significantly reduced, additional judicial time will be available to conduct case management;

c) Reforms that would streamline and control the length of civil trials could free up additional judicial resources; and

d) Increased case management is considered a key component of the cultural shift envisioned for Ontario's civil justice system. Provided justice system participants

[9] https://www.ontariocourts.ca/scj/news/annual-reports/#2019-2023

are prepared to embrace necessary change, increased case management should reduce motion practice, the taking of unreasonable positions, and litigation gamesmanship. Moreover, increased judicial continuity within a matter (where possible) will increase the number of instances in which a judge's familiarity with a matter could serve to reduce the length of interactions with the court.

Providing parties with options for processes proportionate to their needs requires that case management judges have those options available. We propose studying, among other things:

a) Embracing a simplified form of pleading, similar to that used in the U.K. (discussed below), either as a replacement of existing originating processes or as a supplement to them;

b) Broadening the range of discovery options available, including the use of an ask-based system for documentary discovery where appropriate;

c) Rationalizing dispositive motions to ensure they will result in the litigation's termination, whether in whole or significant part;

d) Introducing the option of Judicial Dispute Resolution, similar to that used in Family Courts, as a form of consensual mediation/arbitration;

e) Increasing the use of mediation and, in appropriate cases, using mediators and/or dispute resolution officers to conduct substantive pre-trial conferences; and

f) Requiring the parties and court to consider what processes should govern the dispositive hearing to ensure that the case is resolved in a proportional manner.

E. The Phase Two Process

Areas of reform approved for further study in Phase Two will be assigned to a study group led by one or more of the Working Group's members. It is anticipated that a detailed policy proposal will be created for each proposed reform that will:

a) Identify the relevant rule, as well as its history and purpose;

b) Identify the proposed context and whether there has been any previous related consideration by the Civil Rules Committee (CRC) in accordance with the *Courts of Justice Act*;

c) Summarize the results of any related research, including jurisdictional scans for best practices;

d) Propose a solution, including suggested language for new rules and/or form changes, including the transition approach and proposed transition rules;

e) Describe the intended outcomes, including anticipated advantages of any suggested solution and potential risks including anticipated stakeholder reaction;

f) Identify how any proposed amendment would impact the Rules as a whole and whether there will be any consequential changes required, including identifying any conflicts with other legislation or regulation;

g) Include input from the Court Services Division of the Ministry of the Attorney General regarding operational, resource, or implementational considerations; and

h) Recommend the nature and scope of consultation that might be appropriate.

Following a consultation phase, it is expected that the CRR's Co-chairs will work with the CRC to finalize any resulting policy proposal, which the Ministry of the Attorney General will then use to draft proposed regulation amendments.

F. Co-ordinating with the CRC

There are several areas of reform that we have identified for potential further study that are also currently being studied by the CRC. Amongst others are the areas of expert evidence, refusals, partial settlement agreements, and vexatious litigants. We have worked closely with the Chair of the CRC throughout Phase One and will continue to work closely and cooperatively with the CRC throughout Phase Two to ensure maximum efficiency, transparency, a sharing of resources where possible, and minimum duplication of effort.

G. Co-ordinating with the Court's Digital Transformation ("CDT") Team

We are aware that the Superior Court is currently undergoing a wholesale digital transformation of its processes. That transformation may present opportunities for the processes established by the Rules to be implemented more easily and/or efficiently. Any amendments to the Rules must be in synch with the CDT. In the result, we have consulted with and will continue to consult with the CDT team to ensure a seamless transition.

IV. AREAS PROPOSED FOR FURTHER STUDY

A. STARTING A CASE

1. Rationale for Including the Proposed Reforms in Phase Two Study

The current iteration of the Rules provides for two forms of originating processes: statements of claim (actions) and notices of application (applications). Ideas for reform within this topic are somewhat disparate, but generally fall into three categories:

1. Some litigants, often self-represented ones, have difficulties navigating the Rules and the principles that govern pleadings. Drafting deficiencies and a lack of understanding regarding which claims warrant initiation through action versus application can lead to an inadequate identification of the live issues, motions to strike under Rules 21 or 25, and/or motions to convert an application into an action. Our proposal, which should be considered in the context of an up-front case management framework, is to consider the potential benefits of creating a standard, fillable (online) form to initiate a civil case. An example is Form N1 used in the U.K., a copy of which is attached as **Appendix "C."** This kind of form would enable a party to initiate a claim by identifying the relief sought, the amount involved, and the general facts in support of the claim. It would also enable a case management judge to identify the live issues and establish a proportionate process to guide the case to conclusion.

2. Amendments to pleadings are common. They are presently permissible as of right until the close of pleadings and, thereafter, permitted on consent or with leave of the court. We propose to explore the circumstances in which amendments may be made as of right to reduce the need for motions for leave.

3. Generic or broadly-framed claims have a tendency to broaden the contours of discovery and blur the real issues in dispute. One change that could potentially attenuate this concern could be to require a form of merits certification at the outset. In other words, a certification about the truth or accuracy of the contents of the claim. Again, an example may be found in the Statement of Truth found in the U.K.'s Form N1.

Through the consultation paper, we explored ideas to streamline the initiation of a case and promote opportunities for litigation to proceed on the optimal path for a fair, efficient, and just resolution on its merits.

2. Questions Included in the Consultation Paper

1.	Should we consider a broader role for applications, as a paper-based, discovery-free, alternative proceeding? Yes 8 No 6 No Opinion 6

2. Alternatively, should we consider the use of a single, simplified form of originating process for all civil matters?

   Yes 12 No 5 No Opinion 3

3. If using a single originating process, should we consider the application of different process models, depending on the relief sought and the complexity of the issues? Consider perhaps whether an order might be made at an early case conference customizing the process to be utilized from the outset of the case to its completion.

   Yes 13 No 4 No Opinion 3

4. Should we consider a process requiring counsel or parties to certify that a pleading is true or meets some evidentiary threshold as a means of discouraging overly broad or speculative pleadings and, in turn, improving efficiency and/or reducing cost and delay?

   Yes 11 No 9 No Opinion 0

5. Should the process to amend a pleading be made easier, for instance by permitting more amendments (or some identified number of amendments) as of right?

   Yes 14 No 5 No Opinion 1

3. Summary of Consultees' Comments

The consultees' responses were sufficiently diverse, such that it is difficult to discern common themes.

There was tepid support for the expanded use of applications and greater support for the creation of a single form of pleading for all claims. There was stronger support for a simplified form of claim, particularly from consultees who advocate for the interests of self-represented litigants.

There was support in theory for the use of a tailored process crafted via early case management, but a certain amount of scepticism about (a) the feasibility of such a process from a resourcing perspective; (b) the limited appreciation parties often have about the issues and complexity of a case at the outset; and (c) the challenges lawyers may face advising clients about the process and the costs of the process in a "tailor-made" world.

Consultees were sharply divided on the question of whether to require a merits-based (or similar) certification at the outset of a lawsuit. Those in favour suggested that such certifications would reduce frivolous claims and help limit the breadth of meritorious claims. Those opposing were of the view that such certifications would be impossible to give at the outset of many cases (e.g., medical negligence claims) or lead to greater risk and difficulty for lawyers.

There was a general consensus that pleadings amendments should not require motions, but that any reform to permit amendments without motions should be framed in a way to ensure that we do not have endless iterations of amendments.

4. Our Recommendations and Request for Approval

We are of the view that the proposed reforms may increase access to justice and maximize the efficient use of court resources. There may be a need to develop a new form if these proposals are accepted. We recommend considering all five questions set out above as part of Phase Two.

B. SERVICE

1. Rationale for Including the Proposed Reforms in Phase Two Study

The way people communicate with one another has changed dramatically in the last two decades, with digital communications becoming increasingly commonplace. The rationale for service-related reforms aims to leverage available technology and better align the Rules with modern methods of communication. Digital methods of service arguably offer fast, effective, and cost-efficient solutions, minimizing the cost and inconvenience associated with serving documents in a civil proceeding.

2. Questions Included in the Consultation Paper

1.	Should we consider permitting a wider range of digital service options, including for originating processes?				
	Yes	17	No	3	No Opinion 0
2.	Should we consider expanding the options or ways in which personal service may be effected, for instance, by allowing for alternative service on certain parties, without the need for a motion?				
	Yes	18	No	2	No Opinion 0
3.	Should we consider providing that all documents filed with the court are to include an email address, where available, for service on that party and that service of documents may be effected by email to the address provided?				
	Yes	19	No	1	No Opinion 0

3. Summary of Consultees' Comments

There was overwhelming support for digital forms of service, including of an originating process. Digital forms of service could include email, text, social media, or even the CaseLines platform.

Concerns were expressed about the need to retain personal service in circumstances where extraordinary remedies are sought, such as a contempt motion. In addition, advocates for self-represented individuals argued that personal service should remain an option so that litigants without access to, or fluency with, technology can effect service personally.

4. Our Recommendations and Request for Approval

We are of the view that changes to the service rules could make service of documents easier, faster, and less expensive, without compromising the need to ensure that litigants receive litigation-related documents. While we advocate for a comprehensive consideration of all proposed reforms, we note that the proposed reforms to the service rules should be evaluated in conjunction with the proposed reforms to the default proceeding rules. We recommend considering all three questions set out above as part of Phase Two, in addition to the following questions:

(i) Should personal service continue to be required for certain motions or orders that have dire consequences for a party (e.g., contempt motions; motions by a lawyer to be removed from the record)?

(ii) Should personal service remain an option so that litigants without access to or fluency with technology can use personal service?

C. CASE MANAGEMENT

1. Rationale for Including the Proposed Reforms in Phase Two Study

There are concerns that civil cases take too long to complete, that some litigants abuse the system, and that the processes employed often exceed what is necessary to achieve the objective of delivering a proportional, cost-efficient, and fair result.

The implementation of an early procedural case conference may reduce, if not eliminate, the rigid, one-size-fits-all approach to civil litigation that currently exists. An early case conference could be used to identify a bespoke process tailored to a case's unique requirements, taking into consideration factors such as the amount at stake and the complexity and nature of the issues involved. This approach could enable litigants to interact with the system in a more proportionate and efficient manner. An early procedural case conference could also be used to set a firm timetable, whether for the action as a whole or in part, which could enhance accountability, minimize delays, and increase the likelihood of early settlements. If the litigation process is carefully managed from the beginning, it may be less likely to spiral out of control.

Active case management (with increased judicial continuity where possible) throughout a case could also enhance efficiency, minimize strategic manoeuvring, discourage the adoption of unreasonable positions, and help parties narrow the issues in dispute, thereby reducing the time and costs associated with litigation.

2. Questions Included in the Consultation Paper

1.	Should we consider providing for mandatory, active, or more robust case management?				
	Yes	17	No	2	No Opinion 1
2.	Should we consider a rule requiring the establishment of a firm timetable at the outset of a case?				
	Yes	17	No	2	No Opinion 1

3. Summary of Consultees' Comments

There was very strong support for increasing the availability of case management, particularly in cases involving self-represented litigants. Case management is generally seen as an effective way to increase accountability, narrow the scope of the dispute, enhance proportionality, and efficiently address issues as they arise. It is also seen as a way to potentially bolster a self-represented litigant's access to justice. Offering continuing guidance may help to minimize the risk of procedural missteps and delays due to self-represented litigants' unfamiliarity with the process.

Those who expressed concerns noted that increased case management will require additional resources, which may not be available. They also noted that it may not be necessary in every case and emphasized the need to avoid creating a new bottleneck in the litigation process.

There was also widespread support for establishing a firm timetable at the beginning of a case. This is perceived as providing certainty and predictability, expediting proceedings, and maintaining their trajectory. Those expressing concerns highlighted several points:

- The need to obtain a firm timetable could potentially add an extra and unnecessary step;
- The time required to litigate a claim is often unclear at the outset. In addition, delays can occur that are beyond the parties' control. Firm timetables with consequences for non-compliance could result in additional motion practice;
- Existing dismissal for delay procedures already incentivize parties to advance actions at a reasonable pace. (We suggest this contention may not be accurate); and
- Circumstances may warrant holding actions in abeyance, such as when damages are not fully crystallized or when another related action should take precedence.

4. Our Recommendations and Request for Approval

Our preliminary views with respect to some of the consultees' concerns are as follows:

- If our proposed reforms are considered holistically, resources currently being used on motion practice can hopefully be reallocated to case management;

- Active case management should not lead to bottlenecks if it is sufficiently resourced. Parties could still proceed on consent and formalize their agreement in a short endorsement, with the benefit of being able to hold parties to account down the road; and

- Concerns with respect to setting a timetable can be alleviated by establishing sensible rules with built-in flexibility to accommodate the natural evolution of each case and unforeseen delays.

The introduction of upfront case management, leading to Orders Giving Directions for processes tailored to the needs and complexity of the matter, is a core element of the reforms that we propose for study in Phase Two. The same can be said for implementing a process of establishing trial dates at an early stage in the proceedings.

Active case management (with increased judicial continuity where possible) throughout a case could also enhance efficiency, minimize strategic manoeuvring, discourage the adoption of unreasonable positions, and help parties narrow the issues in dispute, thereby reducing the time and costs associated with litigation.

We recommend considering both questions set out above as part of Phase Two. The Working Group holds varying perspectives on the level of case management that is feasible within the constraints of the court's existing resources. This is an issue that we recognize will require careful consideration and significant consultation with stakeholders.

We anticipate that, should further study of case management be approved, a suite of standard process endorsements will be considered and developed to ease the burden on judicial officers performing that work. Our preliminary view is that active case management, together with constraining the availability and use of non-dispositive procedural motions, are the main areas of reform that will improve access to civil justice and reduce litigation delays and costs.

D. DOCUMENTARY DISCOVERY

1. Rationale for Including the Proposed Reforms in Phase Two Study

The modern trend in civil litigation has been strongly in favour of full disclosure. Despite recent efforts to recognize the need for proportionality and fairness while managing the scope of disclosure, documentary disclosure remains a time consuming and expensive process in many cases. Further, the digital age, particularly within the last two decades, has seen an enormous rise

in the medium of documents routinely created. While the Rules require that parties be mindful of and apply proportionality standards to disclosure obligations, the nature of documents that are "relevant to any matter in issue" can lead to voluminous disclosure with associated delay and expense. Often, large volumes of productions are made that have little or no value to determining the issues in dispute.

Our goal is not to stifle disclosure. Rather, it is to explore disclosure models that prioritize the production of records that have at least some minimal probative value to the live issues in dispute or that might otherwise rein in the time and costs associated with unnecessarily high-volume disclosure. These models may include, among others:

(a) In the context of certain types of claims (e.g. motor vehicle accidents), generating automatic disclosure orders to provide for the production of standard documents;

(b) The application of a more stringent standard than "relevance" to trigger disclosure in certain cases;

(c) The application of an "ask-based" model of disclosure in certain cases; and

(d) The elimination of mandatory discovery plans in favour of a discretion (on the part of the case management judge) to compel parties to complete a discovery plan or to engage in some other form of consultation intended to lead to an agreement on a discovery process proportionate to the needs of the case.

2. Questions Included in the Consultation Paper

1.	Should we consider changing the standard for production of documents from relevance to a higher threshold?						
	Yes	8	No	11	No Opinion	1	(+ 1 y/n)
2.	Should we consider ways to reduce the volume of documents produced in litigation?						
	Yes	17	No	3	No Opinion	0	(+ 1 y/n)
3.	Should we consider a requirement that, prior to documentary production, the parties meet (with attendees who have knowledge of the parties' claim or defence and are empowered to make decisions) and confer on the scope of documentary discovery, being mindful of the overarching goals of proportionality and time efficiencies?						
	Yes	12	No	8	No Opinion	0	(+1 y/n)
4.	Should we consider whether the requirement that parties agree on a discovery plan should remain in the Rules?						
	Yes	19	No	1	No Opinion	0	(+1 y/n)

5. Should we consider the use of an ask-based system of discovery?

Yes 11 No 9 No Opinion 0 (+1 y/n)

6. Should we consider whether disclosure obligations should be dependent on the nature of the case?

Yes 18 No 2 No Opinion 1

3. Summary of Consultees' Comments

The consultees were roughly split over whether the standard for production of documents should be changed from "relevance" to a higher threshold. However, those consultees who provided comments were overwhelmingly in support of "relevance" continuing as the standard. They cited difficulties with determining a different suitable standard and expressed concern that reconsidering the standard could complicate the discovery process and increase costs through the need for judicial input and the evolution of a new body of case law. Consultees cautioned that, if the scope of discovery is changed, the amended Rules must provide as much guidance as possible to mitigate additional adjudication.

There was very strong support to consider ways to reduce the volume of documents produced in litigation. Despite the guiding principle of proportionality, consultees described "drowning in productions" and receiving "document dumps." Although litigants want disclosure to be rational and proportionate, there was a lack of consensus on how to achieve that goal. There was, however, overwhelming support to consider revisions making disclosure obligations dependent on the nature of the case.

There was also overwhelming support to consider whether discovery plans should be mandatory. That said, there were deeply divided views on whether discovery plans should be entirely eliminated. Comments tended, overall, to support some means of encouraging parties – particularly self-represented ones – to engage in discussions intended to result in an agreement on what form of disclosure might be proportionate to the needs of the case.

4. Our Recommendations and Request for Approval

A common theme of the reforms being proposed for study in Phase Two is a move away from a "one-size-fits-all" approach. There are some cases, perhaps many, where a relevance-based standard of disclosure and production works well and causes little, if any, conflict or delay. There are other cases where the standard may lead to the production of vast amounts of useless disclosure. And still others where it may require the expenditure of considerable time and expense on productions that are simply "not worth the candle."

We recommend further studying the development of alternative discovery models that may be agreed upon by parties or imposed by a case management judge to reduce the costs and delays associated with a relevance-based standard of disclosure. We request approval to study each of the questions outlined above as part of Phase Two.

E. ORAL DISCOVERIES

1. Rationale for Including the Proposed Reforms in Phase Two Study

There are concerns that (a) oral examinations for discovery may not be proportionally justifiable in every case (i.e., less complex cases) notwithstanding the existing time limits in the Rules, and (b) refusals motions take up a disproportionate amount of the court's resources, particularly in the Toronto region, and result in disproportionate delays and expense to the parties.

2. Questions Included in the Consultation Paper

1.	Should we consider the elimination of the right to oral examinations for discovery in certain cases?				
	Yes	6	No	11	No Opinion 2
2.	Should we consider replacing oral examinations for discovery with written interrogatories in certain cases?				
	Yes	7	No	10	No Opinion 2
3.	Should we consider eliminating the right to refuse questions on an oral examination for discovery, except for questions where privilege (or another identified limited exception) is asserted?				
	Yes	8	No	9	No Opinion 1
4.	Should we consider a presumptive adverse inference arising from improper refusals?				
	Yes	13	No	5	No Opinion 2

3. Summary of Consultees' Comments

Most consultees objected to the idea of eliminating oral examinations and replacing them with written interrogatories, particularly in personal injury actions where credibility is a key issue. They stressed that oral examinations play an important role in civil litigation, allowing parties to learn the case they must meet, assess the opposing party's credibility, and promote opportunities for

settlement. They noted that written interrogatories are often drafted by lawyers and have the potential to be time-consuming and costly.

There was, however, support for eliminating or limiting oral examinations in less complex cases, possibly with a monetary threshold. Consultees suggested that the current experience of limited oral discovery and related limitations that apply to Rule 76 actions be studied and perhaps expanded or revised. Some consultees also suggested that the Rules could allow for a combination of oral and written interrogatories where appropriate and on consent of the parties.

Consultees were split as to whether we should consider eliminating the right to refuse to answer questions on oral examination for discovery. Those opposed were concerned with the potential for abuse, questioned whether it would positively impact efficiency or cost, and noted that it would increase the duration of discoveries (as parties may be forced to entertain irrelevant questions) and trials (as refusals would be dealt with at trial). Among those who favour eliminating the right to refuse to answer questions, one consultee indicated that the only way to effect real change is to eliminate this right.

If the right to refuse to answer questions in discovery remains, there was strong support for a presumptive adverse inference if the question was improperly refused.

4. Our Recommendations and Request for Approval

We recommend considering all four questions set out above as part of Phase Two.

F. NON-DISPOSITIVE MOTIONS

1. Rationale for Including the Proposed Reforms in Phase Two Study

Presently, there are significant delays in obtaining both short and long motion dates across the province's judicial regions. Non-dispositive procedural motions consume disproportionate time, expense, and systemic resources relative to their value in the litigation and represent an easy means for deeper-pocketed litigants to create delay and increase costs. This can limit access to justice and give rise to frustration with and cynicism about the civil justice system. The system's focus should be on resolving substantive disputes, not procedural ones.

The goal of the proposed reforms is to reduce the time, costs, and resources being spent on non-dispositive motions. They can be grouped into three categories:

- Reforms that may reduce the existing motions practice culture (e.g., mandating presumptive adverse inferences arising from improper refusals, imposing a cap on the number of non-dispositive motions, etc.);

- Reforms that may reduce the judicial resources being used on non-dispositive motions (e.g., reducing oral argument, permitting yes/no judicial decisions, allowing more decisions to be made at case conferences without the need for formal motions, etc.); and

- Reforms that may reduce the complexity of procedural motions (e.g., requiring motion materials to be submitted in a single brief, etc.).

2. Questions Included in the Consultation Paper

1. Should we consider requiring certain non-dispositive interlocutory issues (for example, production and discovery issues) to be dealt with by way of a case conference attendance rather than a full motion?

   Yes 18 No 2 No Opinion 0

2. Alternatively, should we consider developing a "gatekeeper" role for the bringing of motions, whether through case management or otherwise?

   Yes 16 No 3 No Opinion 1

3. Should we consider requiring that certain non-dispositive motions proceed in writing, subject to a judicial officer's request for oral submissions?

   Yes 17 No 3 No Opinion 0

4. Should we consider replacing notices of motion, affidavits, and factums with a single motions brief, the contents of which the filing party certifies are true, or streamlining the necessary filings for motions in some other manner?

   Yes 16 No 1 No Opinion 3

5. Should we consider the imposition of page limits on written evidentiary materials? For example, limits that are proportional to the motion's length.

   Yes 17 No 3 No Opinion 0

6. In an effort to eliminate the scheduling of "placeholder motions," which may never actually proceed, should we consider requiring the moving party to serve and file their motion record before the motion is scheduled, and requiring responding parties to deliver responding materials (as well as requiring moving parties to deliver reply materials, and completion of remaining steps) within a set time from the date the motion record is served and filed?

   Yes 17 No 1 No Opinion 2

7.	Should we consider placing time limits on oral submissions?					
	Yes	17	No	2	No Opinion	1
8.	Should we consider capping the number of non-dispositive motions a party may bring in a proceeding, without leave?					
	Yes	12	No	8	No Opinion	0
9.	Should we consider compelling certain types of motions (e.g. undertakings motions) to be addressed with a "yes/no" disposition (i.e. without requiring reasons)?					
	Yes	10	No	8	No Opinion	2
10.	In the alternative, should we consider whether refusals and undertakings motions should not be permitted at all?					
	Yes	5	No	13	No Opinion	1

3. Summary of Consultees' Comments

There was a strong consensus that the volume of non-dispositive motions needs to be reduced, and that motion procedures need to be simplified.

There was strong support for hearing motions in writing and/or by case conference. There were, however, concerns that contested motions in writing can be less efficient and can create a backlog. Some consultees proposed a hybrid system whereby counsel make submissions in writing and then the judge asks any outstanding questions at a short oral hearing. Almost all consultees supported a limit on oral submissions at motion hearings.

Some asserted that case management would reduce the need for refusals and undertakings motions. Others expressed concern that case conferences would not have the same evidentiary standards, precedential value, or rights of appeal as a full motion, and may be insufficiently resourced.

There was a general acknowledgement that 'placeholder' motions unnecessarily consume court resources and that there should be a deadline for filing materials from the date of booking (as currently exists in Toronto). Several consultees, including those working with self-represented litigants, requested that motion procedures and scheduling be standardized across the province.

There was widespread support for a cap on the number of non-dispositive motions that a party can bring, although a few consultees state that this could lead to substantive injustice. One consultee suggested that parties could seek leave to bring additional motions.

There was general support for imposing page limits on documentary evidence for motions, with the possibility of seeking leave to increase that limit. There were concerns that page limits will

increase the administrative burden on court staff. Consultees supported the concept of a single motions brief, but some stated that complex motions should still require affidavit evidence.

A narrow majority of consultees supported the idea of addressing certain types of motions with a "yes/no" disposition. Several stated that reasons are required for the purposes of precedent as well for any appeals, but that parties can opt for a "yes/no" disposition if they want a quicker decision. Others suggested a digital equivalent of a written endorsement on the back of the motion record.

4. Our Recommendations and Request for Approval

We are of the view that any fundamental change to the civil justice system necessitates a corresponding fundamental shift in the culture surrounding non-dispositive motions. We recommend that Phase Two involve a consideration of all options to reduce the time, costs, and resources devoted to non-dispositive motions, including the reforms presented in the questions outlined above.

G. DISPOSITIVE MOTIONS

1. Rationale for Including the Proposed Reforms in Phase Two Study

Dispositive motions, particularly under Rules 20 and 21, serve an important function by providing a potential route to an early determination of a proceeding, or an important issue in a proceeding, without the need for a trial or other costly and time-consuming steps. Such motions, however, comprise a substantial amount of the court's motions work and significantly contribute to the delays being experienced on long motions lists throughout the province.

The 2010 amendments to Rule 20 and the Supreme Court of Canada's subsequent decision in *Hryniak v. Mauldin*, 2014 SCC 7 resulted in a marked increase in the number of summary judgment motions being filed. Many of these motions fail, however, which only adds time and cost to proceedings without advancing them.

The proposed reforms aim to (a) streamline the process governing dispositive motions, thereby reducing the time, costs, and resources spent on such motions; and (b) increase the likelihood that such motions meaningfully advance the litigation (i.e., resolve the litigation or an issue in the litigation on a final basis).

2. Questions Included in the Consultation Paper

1.	Should we consider folding Rules 20, 21, and 22 into a single dispositive motions rule, which would allow for the resolution of one or more issues in the action?					
	Yes	16	No	2	No Opinion	2

2. Should we consider imposing a requirement that all dispositive motions be subject to a case conference prior to being scheduled?

   Yes 17 No 2 No Opinion 1

3. Should we consider investing the case conference judge with a discretion to set procedures for the motion that will lead to a meaningful disposition, including what, if any, evidence is to be filed and whether the motion should be converted to a form of summary or express trial?

   Yes 18 No 1 No Opinion 1

4. Should we consider limiting parties to one dispositive motion in the litigation?

   Yes 8 No 10 No Opinion 2

5. Should we consider whether Rule 20, or a broader rule covering dispositive motions, should articulate the circumstances in which partial summary judgment may be appropriate?

   Yes 18 No 0 No Opinion 2

6. Should we consider restating the test on a motion under Rule 21, to eliminate the standard of "plain and obvious"?

   Yes 3 No 12 No Opinion 5

7. If you answered "yes" to question 6, what standard should replace "plain and obvious"?

   Limited responses were received to this question. The OBA suggested that the plain and obvious standard has been interpreted too stringently by the Court of Appeal and should be eased through clear directions in the Rules.

8. Should the judge hearing a Rule 21 motion be required to determine legal issues in the same manner as a trial judge who had just found that all of the plaintiff's allegations had been proven?

   Due to a technical issue in the Consultation Paper there is no data in response to this question. Specifically, the "yes/no" response boxes were inadvertently omitted.

9. Should we consider a rule that eliminates a right to amend if a pleading is struck under Rule 21?

   Yes 8 No 11 No Opinion 1

10.	In the alternative, should we consider a rule that affords a responding party to a Rule 21.01(1)(b) motion an opportunity to amend prior to the hearing of the motion, and eliminates any right to amend if the pleading is subsequently struck?					
	Yes	12	No	8	No Opinion	0
11.	Where a pleading is struck under Rule 21.01(1)(b) but the party would otherwise be granted leave to amend that pleading, should the judge hearing that motion have the discretion, as an alternative to amendment, to identify any triable issue(s) and make an order giving directions for the trial of those issue(s)?					
	Yes	15	No	4	No Opinion	1

3. Summary of Consultees' Comments

There was overwhelming support to consider changes that will streamline the dispositive motion process and reduce the number of motions that do not meaningfully advance the proceeding. There were varying levels of support for each of the suggested approaches toward achieving these goals.

As an example, there was almost unanimous support for requiring parties to attend a case conference in connection with bringing a dispositive motion. Case management is seen as an effective way to manage the dispositive motion process and assist self-represented litigants in navigating it.

There was far less support for the idea of limiting parties to one dispositive motion or eliminating a right to amend if a pleading is struck. There was, however, strong support for alternative ideas such as giving judges the discretion to identify triable issues and make orders directing the trial of those issues as an alternative to granting leave to amend.

4. Our Recommendations and Request for Approval

Given the importance of dispositive motions and the extent to which they are contributing to costs and delays, we recommend thoroughly exploring all avenues that may streamline the dispositive motion process and increase the likelihood that such motions meaningfully advance litigation. This would include considering all the reforms proposed in the questions set out above. While we agree that the consultees' concerns should be considered as part of Phase Two, we note that, to effect fundamental change, the system should aim to balance procedural fairness against the court's ability to deliver proportionate justice.

H. DISMISSALS FOR DELAY

1. Rationale for Including the Proposed Reforms in Phase Two Study

There are two rules concerning dismissal for delay: Rule 24 (dismissal for delay by way of a motion) and Rule 48.14 (dismissal for delay by the registrar after five years). There are concerns that some cases languish in the system and that the test to dismiss such cases for delay is not sufficiently stringent. There are also concerns that the Rules do not align with how they are applied in practice, creating confusion for litigants, particularly self-represented litigants.

2. Questions Included in the Consultation Paper

1.	Should we consider imposing more stringent automatic dismissals by the Registrar under Rule 48.14?				
	Yes	12	No	8	No Opinion 0
2.	Should we consider amending the Rules to provide more clarity about when a pleading may or shall be dismissed for delay under Rule 24?				
	Yes	18	No	2	No Opinion 0

3. Summary of Consultees' Comments

Most of the consultees indicated they are in favour of more stringent automatic dismissals by the Registrar under Rule 48.14. Some consultees proposed a grace period post-dismissal, during which time a party could seek to set aside the automatic dismissal. Another consultee remarked that a five-year period prior to administrative dismissals is excessive. One consultee noted that the passage of time should be enough to establish presumptive prejudice.

Those who expressed concerns about imposing more stringent conditions noted that (a) self-represented litigants are prone to delay due to their inability to navigate the system; (b) there are valid reasons why certain cases languish in the system (e.g., when damages take time to crystallize); (c) the current five year deadline is sufficiently stringent; and (d) a more stringent approach could result in more professional liability claims.

There was almost unanimous support among consultees for making changes to the Rules to provide more clarity about when a pleading should be dismissed for delay. Consultees noted that the current Rules are confusing, especially for self-represented litigants.

4. Our Recommendations and Request for Approval

We recommend considering both questions set out above as part of Phase Two, within the framework of a case-managed litigation process. We also recommend exploring the possibility of

consolidating dismissals for delay into a single rule that could be triggered by the court or a defendant.

I. DEFAULT PROCEEDINGS

1. Rationale for Including the Proposed Reforms in Phase Two Study

There are concerns that the rules governing default proceedings permit delays without sufficient consequences. There are also concerns that the relevant case law no longer aligns with the rules as they are presently drafted.

The ideas proposed for study aim to clarify the default proceedings framework, taking into account established case law. They also aim to deter the wilful disregard of the deadlines stipulated in the Rules by imposing more significant consequences for doing so. The overarching goal is to reduce delays and foster a culture of compliance.

Section 25 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (the "CLPA") provides that default judgment shall not be entered against the Crown without leave of the court on an application served at least 14 days in advance of the hearing. There is a concern that this provision is not sufficiently known among litigants, resulting in unnecessary motions to set aside default judgments improperly granted against the Crown. Including a reference to this section in the default proceedings rules may increase awareness of this requirement and, thus, decrease the number of motions to set aside improperly obtained default judgments.

2. Questions Included in the Consultation Paper

1.	Should we consider reinforcing the rules regarding default and related consequences?				
	Yes	14	No	4	No Opinion 2
2.	Should we consider a rule that automatically requires a party seeking to set aside a default judgment to pay the plaintiff's costs thrown away and potentially an additional penalty?				
	Yes	12	No	7	No Opinion 1
3.	Should we consider including a reference to s. 25 of the *CLPA* in any rule relating to default proceedings?				
	Yes	15	No	1	No Opinion 4

3. Summary of Consultees' Comments

There was broad support for clarifying the Rules to ensure a comprehensive description of the default judgment process and the consequences for non-compliance. Most consultees also agreed that a rule should be considered mandating that a party seeking to set aside a default judgment pay the plaintiff's costs thrown away. Concerns were raised, however, that an automatic requirement to pay such costs might be unfair in cases where the plaintiff's motion for default judgment was improperly brought (e.g. when the defendant had not defended because it was awaiting a response to a demand for particulars). One proposed suggestion, which seems reasonable, is to create a rebuttable presumption that the defendant be required to pay costs thrown away (as opposed to an automatic requirement to do so).

Some consultees were opposed to the imposition of a penalty alongside the payment of costs thrown away. They argued that such a penalty might hinder access to justice, especially for self-represented litigants. They also contended that the imposition of a penalty could trigger a hearing, potentially requiring alternate legal counsel, thereby inadvertently introducing a new form of motion practice.

One consultee noted that relaxing service requirements for an originating process may have implications on the ability to reliably note a party in default.

The Insurance Bureau of Canada commented that any reform to the Rules governing default proceedings should be treated with caution. It asserted that any rule that makes it easier to obtain default judgment could prejudice insurers, who might not know that a claim had been commenced. This concern, however, could be addressed by including a rule requiring a plaintiff to provide notice of the claim to a defendant's insurance company. It is noteworthy, however, that the Insurance Bureau of Canada also advocated against allowing service on insurance companies as an alternative to personal service.

There is almost unanimous support for including a reference to section 25 of the *CLPA* in the rules governing default proceedings.

4. Our Recommendations and Request for Approval

We recommend considering all three questions set out above as part of Phase Two. As previously noted, we agree that proposed reforms to the service rules should be considered simultaneously with proposed reforms to the default proceedings rules. With respect to the introduction of a potential penalty, we are of the view that the consultees' concerns should be considered with the ultimate question being whether the benefits of a modest penalty outweigh its associated costs.

J. COSTS

1. Rationale for Including the Proposed Reforms in Phase Two Study

The Rules employ a cost-shifting regime whereby the successful party, in most cases, receives a cost award requiring the unsuccessful party to pay for some portion of its costs. The presumptive award is on a "partial indemnity" scale, though that scale is no longer defined with any precision.

There are concerns that, among other things: (a) cost awards often fail to reflect the actual expenses incurred, making it economically impractical to pursue smaller claims; (b) costs awards do not sufficiently deter bad behaviour; and (c) litigating costs adds another layer of expense and delay, taxing the limited resources of the court and parties. In the vast majority of civil claims, it is crucial to acknowledge that costs, which constitute another type of monetary award, hold equal significance to the damages awarded.

There are additional concerns regarding the prevalence of adjournments, which exacerbate delays and escalate litigation costs.

The ideas proposed for study aim to align costs awards with actual expenses, discourage misconduct, enhance adherence to deadlines, and, ultimately, diminish both costs and delays.

2. Questions Included in the Consultation Paper

1.	Should we consider fixing a different scale than "partial indemnity" as the presumptive measure of costs?				
	Yes	8	No	8	No Opinion 4
2.	Should we consider the imposition of fixed recoverable costs in certain cases, capping at the outset the amount of costs a party might expect to recover at each stage of a proceeding?				
	Yes	13	No	7	No Opinion 0
3.	Should we consider a revision or clarification of the Rule 57.01 factors?				
	Yes	7	No	9	No Opinion 4
4.	Should we consider restricting cost submissions to the exchange and filing of a cost outline, addressing the Rule 57.01 factors?				
	Yes	17	No	3	No Opinion 0

5. Should we consider creating cost consequences for a party's failure to file a costs outline at the outset of a hearing, such as a denial of costs or deferring costs in the cause?

   Yes 14 No 6 No Opinion 0

6. Should we consider creating a tariff or fixing costs or a range of costs, for particular steps in a proceeding?

   Yes 10 No 8 No Opinion 3

7. Should we consider building fixed cost consequences into certain rules to incentivize compliance with the rule (e.g. a cost sanction of $X for missing a filing deadline)?

   Yes 12 No 6 No Opinion 2

8. Should we consider promoting more "teeth" in cost awards to dissuade frivolous steps or to sanction bad behaviour?

   Yes 15 No 3 No Opinion 2

9. Should we consider the establishment of a "no cost" regime for certain types of cases?

   Yes 10 No 8 No Opinion 2

Last Minute Adjournments

10. Should we consider the imposition of "systemic costs" (i.e. requiring the payment of costs "to the system") for last minute adjournments or other identified delay tactics?

    Yes 9 No 10 No Opinion 1

11. Should we consider whether parties should only be allowed to book matters once their materials are served and filed?

    Yes 15 No 3 No Opinion 1

12. Should we consider generally prohibiting adjournments in certain circumstances, such as where there has been non-compliance with the Rules?

    Yes 8 No 9 No Opinion 3

13. Should we consider whether an adjournment should generally be prohibited after a certain point, for example where a motion has been confirmed?

    Yes 7 No 11 No Opinion 2

14. Should we consider whether a party should be able to request a maximum number of adjournments in a proceeding?

Yes 11 No 7 No Opinion 2

3. Summary of Consultees' Comments

While there was strong support for giving more "teeth" to the existing costs rules, consultees expressed concerns that penalizing non-compliance with the Rules would disproportionately affect self-represented litigants, fail to sufficiently deter bad behaviour, drive up costs, and/or hamper early resolution of disputes.

There was strong support for strengthening the rule that costs outlines should be filed at the outset of a hearing (on penalty of having costs decided in the cause or denied altogether), or even requiring parties to agree on costs in advance of a hearing.

There was very limited support for bringing back cost tariffs, primarily because of variations between procedural steps, litigant circumstances, regional practices, and the tendency of tariffs to become outdated. There was mixed support for implementing a "no-costs" regime or a presumption in favour of substantial/full indemnity costs. There were concerns that this move could negatively impact access to justice.

There was considerable pushback against prohibiting adjournments generally. Although some consultees acknowledged that late adjournments result in significant cost and should therefore be deterred (if not prohibited), they noted that there may be legitimate circumstances warranting a last-minute adjournment. Perhaps for that reason, consultees repeatedly stated that the approach to this issue should remain discretionary, taking into account the relevant circumstances, with judges being able to grant adjournments on a peremptory basis. Moreover, two consultees stated that a more extensive system of case management would significantly reduce the number of adjournments. There was also strong support for requiring parties to complete and file their motion materials before they can obtain a motion date.

4. Our Recommendations and Request for Approval

Given the central role that costs play and their potential to influence litigation conduct, we recommend exploring all avenues that could help to better align cost awards with actual expenses, discourage misconduct, enhance adherence to deadlines, and ultimately diminish both costs and delays. This would include considering all the ideas for reform proposed in the questions set out above.

K. EXPERT EVIDENCE

1. Rationale for Including the Proposed Reforms in Phase Two Study

Expert evidence remains a staple in modern litigation where disputes involve complicated technical, scientific, or industry-specific issues beyond the trier of fact's knowledge. While expert evidence is often necessary for the fair adjudication of disputes, there are concerns that expert evidence is overused, potentially biased due to its origin from hired individuals, and otherwise contributes to delay and cost.

The ideas proposed for study aim to narrow issues between opposing experts; expand the use of jointly retained experts; reduce the complexity, cost, and delays associated with proffering expert evidence; and promote more robust enforcement of an expert's undertaking to the court.

2. Questions Included in the Consultation Paper

1. Should we consider mechanisms for narrowing the issues between opposing experts?

   Yes 17 No 2 No Opinion 1

2. Should we consider methods to reduce the length of expert evidence called at trial?

   Yes 14 No 2 No Opinion 4

3. Should we consider an expanded role for jointly retained experts or more regular use of court-appointed experts (see Rule 52.03)?

   Yes 13 No 4 No Opinion 3

4. Should we consider the use of expert panels at trial (i.e. implement concurrent expert testimony)?

   Yes 6 No 8 No Opinion 6

5. In March 2023, amendments were made to Rule 53.08 and related rules to make it more difficult to adjourn a trial or pre-trial as a result of the late filing of expert reports. Should we consider additional mechanisms to ensure the delivery of expert reports does not cause unnecessary delay?

   Yes 15 No 2 No Opinion 3

6. Should we consider additional mechanisms to ensure that experts adhere to their undertaking to the court to be fair, objective, and impartial?

   Yes 14 No 3 No Opinion 3

7. Should we consider removing the requirement under Rule 31.06(3) regarding the disclosure of findings, opinions, and conclusions of a retained expert?

   Yes 5 No 9 No Opinion 6

3. Summary of Consultees' Comments

There was strong support for most of the proposed reforms outlined above.

There was overwhelming support to consider methods to reduce the length of expert evidence called at trial, but different ideas on how to do so.

With respect to the early production of expert reports and possible amendments to Rule 53.08, one consultee noted that early delivery of expert reports may have the unintended consequence of reports being out-of-date by the time of trial, thereby requiring the production of an updated report at an additional cost. Other consultees noted that early case management and the ability to produce pre-trial and trial dates may be key to ensuring the timely exchange of expert reports.

Self-represented advocacy groups commented that the technical nature of expert evidence requirements can be difficult for self-represented litigants to navigate and that excessive reliance on experts creates a power imbalance that works against the fair administration of justice. Another consultee observed that the use of expert brokers has increased the cost, length, and complexity of expert reports and is a breeding ground for "hired guns."

There was less support for two of the ideas explored: (a) the use of expert panels, which one consultee claimed would only work within a judge-alone trial and (b) removing the requirements under Rule 31.06(3).

4. Our Recommendations and Request for Approval

We are of the view that the current approach to expert evidence significantly increases the costs and duration of civil proceedings, and that it is essential to explore how the Rules can effectively guide experts to fulfill their intended role of aiding the court, rather than advocating on a party's behalf.

We recommend considering all seven questions outlined above as part of Phase Two. Although not included in the Consultation Paper, we also recommend exploring the potential value of a three-strike rule to disqualify experts who repeatedly fail to demonstrate impartiality.

L. PRE-TRIALS

1. Rationale for Including the Proposed Reforms in Phase Two Study

Pre-trials are intended to serve two important functions: (i) provide a forum for judicially mediated settlement discussions, and (ii) facilitate trial management. These are two distinct objectives. Because of these dual objectives, the focus of pre-trials can vary: some judges may encourage the parties to settle and treat the pre-trial as a mediation, while others may primarily or exclusively deal with trial management issues.

Pre-trials typically occur 30-120 days before the start of trial. Parties are required to provide pre-trial briefs a week before the pre-trial setting out key issues in dispute, their respective positions, anticipated lists of witnesses, and estimates for trial time. The timing of the pre-trial and the nature of the information set out in the parties' briefs can have implications for the pre-trial's overall effectiveness.

The ideas proposed for study seek to ensure that the pre-trial process is as effective as possible at (a) settling matters and (b) facilitating trial management.

2. Questions Included in the Consultation Paper

1. Should we consider whether the settlement conference and trial management components of pre-trials should be 'decoupled' in a way that promotes greater efficiency and/or ensures that each of these objectives are being achieved?

   Yes 12 No 7 No Opinion 1

2. Should we consider whether the settlement function of pre-trials ought to be outsourced, in some cases, to external mediators or other judicial officers and whether this could improve the likelihood of resolving cases?

   Yes 8 No 10 No Opinion 2

3. Should we consider whether the current timing of pre-trials (30-120 days before the start of trial) is suitable from the perspective of: ensuring that cases are ready for trial (and are less likely to be adjourned at the last-minute); promoting settlement; encouraging the parties to define and narrow issues; and any other considerations that would be likely to improve efficiency, decrease costs, and ameliorate delay?

   Yes 16 No 2 No Opinion 1 (+1 y/n)

4. Should we consider what other information, beyond what is currently provided in a pre-trial brief, could be mandated to assist the pre-trial judge in assessing the anticipated length of trial or giving other directions to the parties for the orderly and timely conduct of the trial?

   Yes 16 No 2 No Opinion 2

5. Should we consider establishing a standard template for an Agreed Statement of Facts addressing, for instance, the identity of the parties, chronologies of significant events and joint documents briefs, which parties will be compelled to discuss and complete prior to a pre-trial?

   Yes 18 No 2 No Opinion 0

3. Summary of Consultees' Comments

Most consultees supported the idea of "decoupling" the settlement and trial management components of pre-trials. One consultee noted that combining settlement and trial management conferences into a single event can create issues where the court runs out of time to conduct effective trial management after attempting to resolve a case. However, consultees also questioned whether having two separate pre-trial events would be feasible in the context of limited judicial resources and might result in further delays in getting to trial.

Consultees who were not in favour of "decoupling" suggested that a single appearance is beneficial to litigants, counsel, and the court, while noting that sufficient time must be allocated for the pre-trial to complete all required steps. As an alternative to "decoupling", it was suggested the parties could elect the nature/focus of the pre-trial conference, whether settlement, case management, or both. Another suggestion was to consider whether trial management functions could be accomplished in writing rather than by way of an appearance.

Finally, some consultees suggested that trial management could be carried out by the trial judge assigned to the case, if appointed early enough in the process, to allow trial management issues to be canvassed and addressed well in advance of trial.

Most consultees did not support "outsourcing" pre-trials. Some consultees expressed the view that, in terms of settlement, the opinion of a judge carries considerable weight with litigants and is influential in promoting resolution. There were concerns that eliminating or limiting this judicial function would decrease the volume of cases settled before trial. The idea of "outsourcing" was also criticized from the perspective of litigants who may not be able to readily access private mediation.

With respect to the timing of pre-trials, some consultees expressed the view that there should be an option for earlier pre-trials or "early resolution conferences", where appropriate, to promote settlement sooner. Some consultees noted that an impending trial (within 120 days or less) can help focus the parties' attention on opportunities for settlement.

Consultees proposed the need for more consistency in how pre-trial dates are set (e.g., Chambers appointments to schedule pre-trials instead of using Calendly), and it was suggested that there should be more uniformity province-wide regarding time between pre-trials and trials.

Consultees were overwhelmingly in favour of mandating templates or standardized approaches to the materials that parties are required to prepare and submit in advance of a pre-trial to enhance their efficiency and effectiveness. For example, several consultees were supportive of parties being required to collaborate on providing chronologies of key events, agreed statements of facts, and joint document briefs (noting any authenticity issues), as well as identifying key factual issues in dispute. However, one consultee noted that requiring agreed statements of facts may be appropriate for parties who are represented by counsel but may not be appropriate for self-represented litigants.

It was also suggested that there be a Rules-based mechanism requiring parties to agree on the time required for opening/closing statements, the elimination/restriction of oral testimony on issues that can be decided on written materials, and other trial time-saving measures.

4. Our Recommendations and Request for Approval

We recommend considering all the questions outlined above as part of Phase Two, with a view to proposing reforms to promote fair settlements and to facilitate active trial management, keeping in mind factors that may be relevant to represented and unrepresented parties.

M. MEDIATION

1. Rationale for Including the Proposed Reforms in Phase Two Study

Under Rule 24.1, parties to civil lawsuits in Toronto, Windsor, and Ottawa must attend mandatory mediation. This regime has been in place for about 25 years (in Toronto and Ottawa), and about 20 years (in Windsor). In the past, some have called for the expansion of mandatory mediation to other parts of the province and/or to a broader range of cases.

2. Questions Included in the Consultation Paper

1.	Should we consider reforms to the existing regime for mandatory mediation? Yes 14 No 4 No Opinion 2
2.	If you answered "yes" to question 1, how would you reform it? *Many consultees who provided comments supported the expansion of mandatory mediation across the province.*

3.	Should we consider adopting the binding Judicial Dispute Resolution (JDR) process as an available option in some civil proceedings? Yes 13 No 3 No Opinion 4

3. Summary of Consultees' Comments

A significant majority of consultees supported the idea of province-wide mandatory mediation. Even where a case is unlikely to settle, some consultees suggested that mediation may be helpful as a mechanism to narrow issues in dispute or to reach an agreement on matters such as the quantum of damages (in the event liability is found at trial). However, some consultees noted that mandatory mediation could be a financial hardship on low-income litigants and create an unlevel playing field among parties that have different access to, and familiarity with, available mediators. One consultee suggested we explore reforms that would involve presumptive mandatory mediation with an "offramp" on the consent of all parties.

Some consultees proposed that the Rules should provide flexibility for the parties to determine the most appropriate time to mediate, noting frequent non-compliance in practice with timelines under the current rule.

With respect to the idea of exploring binding Judicial Dispute Resolution (JDR) for civil litigation matters, consultees generally agreed it may yield significant cost savings to parties and free up judicial time and resources. Consultees noted it could be helpful in less complex, lower-value, or low-stakes matters, on consent of all parties, if structured in a manner that promotes uptake and fairness.

4. Our Recommendations and Request for Approval

We recommend studying Ontario's experience with mandatory mediation and related options for Rules reform to promote mediated settlements. We also recommend studying the feasibility of incorporating binding JDR into the civil litigation context. In other words, we recommend studying questions 1 and 3 above.

N. TRIALS

1. Rationale for Including the Proposed Reforms in Phase Two Study

Civil trials are one of the most resource-intensive and expensive elements of the civil justice system. Streamlining processes, ensuring the duration of trials is commensurate with the needs of the case, and improving their overall efficiency would serve the aims of increasing access to justice and reducing complexity, costs, and delay.

2. Questions Included in the Consultation Paper

1. Should we consider how to streamline the duration of trials and increase their efficiency?

   Yes 17 No 1 No Opinion 2

2. Which, of the following steps might assist in that regard and are worth exploring as part of Phase Two?

   (i) Requiring chess clocks for all trials, *i.e.*, imposing time limits pre-determined at the beginning of a trial or at a pre-trial conference: (Yes - 8)

   (ii) Eliminating Requests to Admit: (Yes - 4)

   (iii) Obligating parties to file an Agreed Statement of Facts, agreed-upon chronologies, or other aids for the trial judge to narrow issues, with greater enforcement and/or costs consequences for failing to do so: (Yes - 13)

   (iv) Codifying rules and requirements for joint books of documents: (Yes - 14)

   (v) Creating a presumption that all documents are deemed to be authentic other than those to which a party has objected: (Yes - 15)

   (vi) Requiring parties to submit direct evidence of secondary witnesses or witnesses giving uncontentious evidence in affidavit form (or creating a presumption that such evidence will be delivered by affidavit): (Yes - 13)

   (vii) Requiring opening statements presumptively in writing: (Yes – 8)

   (viii) Eliminating an adverse inference for not calling a witness: (Yes - 5)

   (ix) Streamlining the summons process, including changing (or eliminating) fees paid to witnesses: (Yes - 7)

   (x) Listing trials earlier in the process: (Yes - 9)

3. Should we consider whether to assign the trial date at an early case conference and establish measures and incentives to preserve the dates?

   Yes 13 No 4 No Opinion 3

4. Although legislative change is outside the scope of the CRR's mandate, do you have views about whether the availability of jury trials in civil cases should be amended in any way? If yes, please comment.

   Yes 14 No 1 No Opinion 5

3. Summary of Consultees' Comments

There was greater than a 2/3 majority positive response to the idea of streamlining trials, including requiring parties to file agreed statements of fact, agreed chronologies, and other aids, with greater consequences for failing to do so; a codification of the rules and requirements for joint books of documents; a presumption of the authenticity of documents other than those to which the opposition objects; and a presumption that uncontentious evidence will be submitted in affidavit form.

Regarding whether there are efficiencies to be gained at trial by eliminating or curtailing the use of civil juries, as has been done in other jurisdictions, consultees were split. Slightly more than half were of the view that jury trials add complexity and time and noted jury verdicts do not add to the jurisprudence. Consultees who were opposed to eliminating or limiting the use of civil juries focussed on the role juries can play in assessing credibility, providing a diversity of opinion, applying community standards of reasonableness, and avoiding the concentration of decision-making in a select few, as well as the absence of statistical data to inform such a change.

Regarding other trial efficiencies, consultees noted the enhanced benefit of case management in avoiding in-trial motions. Some recommended that parties should provide written opening statements and a "mini charge" at the outset of the trial to assist in orienting the jury on applicable legal tests.

With regard to the idea of "chess clock" budgeting of time for witnesses, there was general support, with some consultees arguing against a strict application and preferring the trial judge to have discretion.

Regarding experts, it was suggested there should be a requirement that a party provide advance notice if it intends to challenge an expert's qualification.

4. Our Recommendations and Request for Approval

We recommend studying all questions set out above in Phase Two to identify and assess options for reform that would promote more efficient, less costly trials. Though we were interested to hear consultees' views on the issue of jury trials, we believe that any reform of the civil jury process will require more significant consultation than will be possible within the CRR's project timeframe. Accordingly, we do not propose to engage in further study of civil jury trials in Phase Two.

O. APPEALS

1. Rationale for Including the Proposed Reforms in Phase Two Study

Appellate review is an essential component of the civil justice system. However, appeals from interlocutory decisions and trial or appellate decisions can add costs and delay to the resolution of claims. Some preliminary ideas expressed in the questions put to consultees (e.g., whether appeals should have their own rules and changes in the costs regime) were designed to explore whether there are better ways to balance the goals of expedition, access to justice, and fairness.

2. Questions Included in the Consultation Paper

1.	Should we consider separating the Appeal Rules into its own set of rules?				
	Yes	14	No	2	No Opinion 4
2.	Should we consider whether the distinction between interlocutory and final appeals could be further simplified, clarified, or subject to declaration by the judge at first instance?				
	Yes	19	No	1	No Opinion 0
3.	Alternatively, should we consider whether the determination of whether an order is interlocutory or final could be made by a single judge of the Court of Appeal?				
	Yes	17	No	0	No Opinion 3
4.	Should we consider how to expedite leave to appeal interlocutory decisions such that the leave process does not unduly delay proceedings?				
	Yes	20	No	0	No Opinion 0
5.	Should we consider an amendment clarifying that a proceeding may continue while an interlocutory appeal is pending?				
	Yes	19	No	0	No Opinion 1
6.	Notwithstanding that legislative reform is outside of the CRR's mandate, should we consider recommending that the ability of parties to seek interlocutory appeals be limited, including restricting or limiting the availability of interlocutory appeals on certain issues?				
	Yes	13	No	6	No Opinion 1

7.	Should we consider rule changes to permit appeals to be heard in writing, for example on the consent of the parties, by *sua sponte* order of the Court of Appeal (based on published criteria) or on a motion to a single judge of the Court of Appeal?				
	Yes	14	No	3	No Opinion 3
8.	Should we consider targeting an expedited appeal process for appeals in writing?				
	Yes	16	No	2	No Opinion 2
9.	Should we consider rule changes to permit appeals to be heard closer to the rendering of the judgment or order of the lower court, such as eliminating the need to file an issued and entered order to perfect an appeal?				
	Yes	17	No	2	No Opinion 1
10.	Should we consider reducing the availability of panel reviews of orders made by a single judge of the Court of Appeal to ensure efficient use of court resources, including prioritizing panel time for hearing appeals on the merits?				
	Yes	15	No	1	No Opinion 4
11.	Should we consider a rule that appeal costs are to be awarded on a reasonable scale, i.e. a similar scale to that provided for in the Superior Court?				
	Yes	13	No	4	No Opinion 3

3. Summary of Consultees' Comments

Overall, consultees supported procedural changes making the appeal process more timely, accessible, and efficient. However, there is no clear agreement as to how that can be best achieved.

Consultees largely supported the idea of separating out the Appeal Rules. A concern was raised that doing so risks creating duplication and inconsistencies among the different sets of rules. The proposal to sever off the Appeal Rules into their own separate set of Rules has the support of members of the Court of Appeal. It will aid in shortening and simplifying the trial court Rules.

Consultees and appellate judges alike are strongly in favour of simplifying the means to distinguish between final and interlocutory orders.

Consultees generally agreed that the following ideas were worth exploring: (a) clarifying that a matter can proceed while an appeal of an interlocutory order is pending; and (b) limiting the right to appeal. They noted, however, that they would need additional details to provide more meaningful input.

The idea of appeals occurring in writing raised more concerns than support. Consultees noted there may be a disadvantage to unrepresented parties unaccustomed to written advocacy and discomfort with the potential for the court to order written hearings over the objections of a party.

Consultees agreed that the time needed to obtain transcripts can be a cause of significant delay in having appeals heard.

Consultees supported reducing the availability of panel review, however they noted the importance of having parameters around which orders would be limited to single judge review.

4. Our Recommendations and Request for Approval

We recommend studying the questions set out above in Phase Two to assess whether there are opportunities for Rules reforms related to interlocutory and final appeals that would promote more efficient, less costly proceedings.

P. ENFORCEMENT

1. Rationale for Including the Proposed Reforms in Phase Two Study

Enforcing court orders is costly and time-consuming. It can be profoundly discouraging for a litigant to invest substantial time and resources in a civil legal proceeding only to discover that its hard-won judgment holds little practical significance. The ability to flout court orders with apparent impunity undermines public confidence in the civil justice system and the perceived value of such orders.

The ideas proposed for study aim to make the process of enforcing court orders faster, less expensive, and more effective.

2. Questions Included in the Consultation Paper

1. Should we consider how to make court orders easier, faster, and less expensive to enforce?

   Yes 15 No 0 No Opinion 5

2. Which, if any, of the following steps might assist in that regard and are worth exploring as part of Phase 2?

   (i) Providing judgment creditors with increased access to information, such as tax returns, financial statements and bank statements: (Yes - 1)

   (ii) Streamlining the paperwork necessary to issue a garnishment and amend a debtor's name on a writ of seizure and sale: (Yes - 13)

(iii) Eliminating the need to renew writs of seizure and sale every six years: (Yes - 11)

(iv) Setting deadlines by which directions to enforce must be followed (e.g. within 30 days of receipt), sale of land proceedings must be commenced, and reports to creditors given (both by the Sheriff and the party served with a direction): (Yes - 7)

(v) Increasing the number of allowable examinations in aid of execution within a one-year period: (Yes - 6)

(vi) Allowing the examination of a third party in aid of execution to occur before the examination of the debtor: (Yes - 9)

(vii) Increasing the ease with which a creditor may obtain a contempt order: (Yes - 6)

(viii) Eliminating the need to bring a motion to seek to enforce an order that is more than six years old: (Yes - 8)

(ix) Issuing garnishments without expiration dates: (Yes - 9)

3. Should we consider whether litigants with outstanding judgments or costs awards should be prevented from commencing new litigation (either with or without leave)?

Yes 16 No 1 No Opinion 3

3. Summary of Consultees' Comments

There was very strong support for making court orders easier, faster, and less expensive to enforce. There were varying levels of support for each of the suggested approaches toward achieving this goal. Additional suggestions were put forth, such as eliminating the need for judgment creditors to file writs in multiple jurisdictions in Ontario, while some comments suggested variations on the enumerated ideas.

There is also widespread support for exploring whether litigants with outstanding judgments or cost awards should be barred from initiating new legal proceedings (with or without leave). Those who raised concerns noted that such a rule could impede access to justice and indicated that it may be important to consider the nature of the dispute and how the unpaid judgment or cost award was obtained.

4. Our Recommendations and Request for Approval

We recommend exploring all reforms that could potentially simplify the enforcement process and incentivize litigants to comply with court orders, including those identified in the questions set out above. In doing so, we recommend that consideration be given to any access to justice implications and possible mitigation strategies.

Q. VEXATIOUS LITIGANTS

1. Rationale for Including the Proposed Reforms in Phase Two Study

One of the CRR's central aspirations is to improve access to civil justice in Ontario. A rule designed to restrict access to the courts for some litigants may appear, superficially at least, antithetical to that aspiration.

Unfortunately, some litigants use the courts for improper purposes, including to abuse, harass, or annoy others. Some launch claims that are frivolous, vexatious, or abusive of the court's processes. Others engage in similarly meritless and abusive behaviours when defending or responding to proceedings. When they do, they increase costs for other parties and divert court resources that would otherwise be available to address legitimate proceedings. Restricting the ability of vexatious litigants to harass others and waste court resources are, in the result, objectives that are harmonious with the CRR's overarching goals.

The Rules already contain a provision (Rule 2.1) empowering the court to stay or dismiss a proceeding if it appears on its face to be frivolous, vexatious, or otherwise an abuse of process. Moreover, Bill 157 - *Enhancing Access to Justice Act*, 2024, S.O. 2024, c. 2, which received Royal Assent on March 6, 2024, amends s. 140 of the *Courts of Justice Act* ("*CJA*") to provide more flexibility for judges of both the Superior Court and Court of Appeal to make orders related to vexatious proceedings. In particular, judges have the discretion to prohibit further litigation by a vexatious party, subject to leave of the court.

The ideas proposed for study in Phase Two aim to fill what we perceive to be several gaps in the Rules relating to identifying and managing vexatious litigants and proceedings, including:

(a) The absence of a rule to govern the exercise of the court's discretion under s. 140 of the *CJA*;

(b) The lack of a clear threshold to be met before a litigant is declared vexatious; and

(c) The absence of specific remedies to be applied where a defendant or respondent is determined to be conducting the litigation in vexatious manner.

2. Questions Included in the Consultation Paper

1.	Should a rule be developed that identifies the hallmarks of a vexatious litigant and establishes a clear threshold to be met before a litigant is declared vexatious?				
	Yes	19	No	0	No Opinion 0

2.	Should such a rule provide guidance as to the types of remedies that may be available where a defendant or respondent, as opposed to a plaintiff or applicant, is declared a vexatious litigant?					
	Yes	18	No	1	No Opinion	0
3.	Should we consider establishing a summary procedure to trigger a judge's review of a party's conduct (potential vexatiousness) such as a letter to the Registrar, as opposed to requiring a formal motion?					
	Yes	14	No	4	No Opinion	1
4.	Should the wording of Rules 2.1.01 and 2.1.02 be amended to make it mandatory that a proceeding or motion be stayed or dismissed if it appears on its face to be frivolous, vexatious or an abuse of process?					
	Yes	14	No	4	No Opinion	1

3. Summary of Consultees' Comments

There was extremely strong support for the further study of the ideas proposed above, and particularly keen interest, including from organizations advocating for the rights of self-represented litigants, in the establishment of a clear threshold for a determination of vexatiousness.

There is also support for establishing a summary procedure for the determination of vexatiousness. One consultee suggested a standard form requisition, which would trigger an inquiry by the court. Consultees agreed that it is imperative that the alleged vexatious litigant be provided notice of the inquiry and an opportunity to be heard.

4. Our Recommendations and Request for Approval

We recommend studying the questions set out above in Phase Two. As noted earlier, we understand that the CRC is already examining the development of a rule relating to the court's discretion under s. 140 of the *CJA*. We propose to work with them to expedite the creation and implementation of such a rule.

R. THE FORM OF THE RULES

1. Rationale for Including the Proposed Reforms in Phase Two Study

The current iteration of the Rules has been in place, with amendments from time to time, for roughly 40 years. In their present form, the Rules are not comprehensible for many self-represented

litigants who are untrained in the general processes of the court and may be unfamiliar with legal language and concepts such as relevance, evidence, discovery, and so on.

Plain language drafting, particularly if coupled with interpretative guidelines, and a simplification and reordering of the Rules may serve the following objectives: (i) making the order of the Rules more intuitive; (ii) improving the comprehensibility of the Rules for lawyers and non-lawyers alike; (iii) levelling the "procedural playing field" between represented and unrepresented litigants; and (iv) focusing litigation on substance over process.

2. Questions Included in the Consultation Paper

1.	Should we consider simplifying and re-ordering the Rules?				
	Yes	12	No	4	No Opinion 3
2.	Should we consider re-drafting the Rules in plain language at the literacy level of a grade 10 high school student?				
	Yes	11	No	5	No Opinion 3

3. Summary of Consultees' Comments

There was reasonably strong support for a plain language re-drafting and re-ordering of the Rules, particularly from organizations who advocate for self-represented individuals (e.g., Pro-Bono Ontario and The National Self-Represented Litigants Project).

There was also support for the creation of interpretive guidelines outside of the Rules themselves that could assist members of the public, and suggestions about possible forms. They could, for instance, be compiled in a stand-alone document available in hard-copy or a digital online copy or hyperlinked to the regulation.

Those opposed to the ideas proposed for study cite concerns that include (i) the absence of empirical data establishing that amendments will make the Rules more comprehensible to self-represented litigants and (ii) the potential to render decades of jurisprudence irrelevant and create fertile new ground for further litigation.

4. Our Recommendations and Request for Approval

Our view is that it is axiomatic that plain language drafting will make the Rules more comprehensible to self-represented and represented litigants alike. It is certainly not our goal to undermine established jurisprudence, but we note that such jurisprudence tends to be of little assistance to self-represented litigants who often lack the ability to locate and interpret it. Moreover, it should be possible, through careful drafting, to avoid unintentionally upending settled jurisprudence and, similarly, to draft rules that are clear and specific enough that they do not create fertile ground for new litigation over their interpretation.

We note that redrafting the Rules is a substantial undertaking, as is the creation of an interpretive guide. Our view is that it is worthy of consideration and is consistent with the CRR's aspirations. We recommend that the two questions set out above be approved for further study. We also recommend that the Ministry of the Attorney General consider engaging plain language expertise to assist with this undertaking.

S. PARTIAL SETTLEMENTS

1. Rationale for Including the Proposed Reforms in Phase Two Study

Encouraging timely settlements, even partial settlements, is one obvious means of reducing both the cost to litigants and the demands on the civil justice system.

A Pierringer Agreement is a type of partial settlement agreement, often referred to as a proportional share agreement. It reflects a plaintiff's settlement with one (or some) but not all the defendants in a multi-party action. The settlement, although partial, results in a guaranteed recovery for the plaintiff, and it reduces the number of parties in the litigation and potentially the number of issues to be resolved. Our view is that agreements of this nature should be encouraged.

The current treatment of Pierringer Agreements tends, however, to disincentivize plaintiffs from entering into them. A plaintiff who enters into a Pierringer Agreement with one or more defendants takes a risk that the settlement may result in under-compensation. The plaintiff, however, does not reap the benefit if the settlement results in over-compensation. Instead, that benefit inures to the non-settling defendants because the current practice in Ontario is for any amounts received by the plaintiff under a Pierringer Agreement to be deducted from any damages awarded at trial. In the result, the non-settling defendants benefit from either a lower damage award or a differing liability distribution between the settling and non-settling defendants.

The goal of exploring this idea for reform is to incentivize early settlements.

2. Questions Included in the Consultation Paper

1.	Should we consider a rule change that incentivizes settlement by re-thinking how Pierringer Agreements will be treated? Yes 14 No 2 No Opinion 3

3. Summary of Consultees' Comments

There was substantial support for "rethinking" the manner in which Pierringer Agreements are treated, which tends to support the need for further study and consideration.

There were, however, very limited comments offered by consultees on this issue. LawPro expressed a concern, not about the deductibility issue, but about the current state of the law

surrounding the obligation to make timely disclosure of a concluded Pierringer Agreement. Currently, a failure to do so is deemed to be an abuse of process, which calls for the granting of a stay of proceedings against the defaulting party. LawPro would prefer that the granting of a stay be a matter of judicial discretion. We understand that the CRC has already developed a policy proposal with respect to this issue.

The Insurance Bureau of Canada commented that the current treatment of Pierringer Agreements sometimes leads to forced trials and unintended cost consequences. They suggested that the best way to address this problem would be to create a requirement to disclose the amount of the Pierringer Agreement (contrary to current appellate authority). Other attempts to reform the rules relating to Pierringer Agreements may, they fear, lead to a risk of double recovery. This would, of course, be a central issue for consideration in Phase Two.

As noted, we understand that the Civil Rules Committee has been studying the issue of partial settlements and may have consulted with justice system participants on the issue. We propose to work closely with them on this issue.

4. Our Recommendations and Request for Approval

We recommend studying the question set out above in Phase Two.

T. COURT APPROVAL/CAPACITY

1. Rationale for Including the Proposed Reforms in Phase Two Study

There are concerns about the need to simplify the Rules governing proceedings involving parties under a disability. The goal of the ideas proposed for study is to make it easier and less expensive to initiate and resolve a civil proceeding involving a party under a disability.

2. Questions Included in the Consultation Paper

1.	Should we consider an amendment articulating the applicable criteria to be applied to capacity assessments?				
	Yes	15	No	2	No Opinion 2
2.	Should we consider an amendment to expressly permit the parent to remain as a litigation guardian despite an apparent conflict of interest?				
	Yes	6	No	3	No Opinion 10
3.	Similarly, should we consider allowing a lawyer of record to continue acting even if s/he represented both the parent and the minor plaintiff?				

	Yes	7	No	3	No Opinion	9
4.	Should we consider streamlining the process to appoint or replace a litigation guardian?					
	Yes	11	No	2	No Opinion	6
5.	Should we consider simplifying the process for court approval of a settlement involving a party under a disability?					
	Yes	9	No	4	No Opinion	6
6.	Should we consider permitting the sealing of otherwise privileged materials filed in support of a motion to approve a settlement involving a party under a disability?					
	Yes	14	No	1	No Opinion	4

3. Summary of Consultees' Comments

There was strong support for some of the proposed areas of study and weaker support for others. Consultees appeared particularly supportive of studying an amendment to Rule 7 to articulate the preconditions to a finding of mental incapacity; streamlining the process to replace a litigation guardian; and permitting the sealing of privileged materials filed in support of a motion to approve a settlement involving a party under disability.

Though many of the consultees who responded expressed no opinion about the prospect of a parent continuing to act as a litigation guardian despite an apparent conflict of interest, several of the consultees who responded negatively expressed particularly strong concerns that allowing a parent to act, despite a conflict of interest, would dilute protections in place for the benefit of the party under disability. As for question number 3, regarding a lawyer's ability to continue to act despite an apparent conflict, some consultees thought this is a matter best left to the Law Society of Ontario.

There were mixed views expressed regarding simplifying the process to obtain approval of a settlement under Rule 7 where a party is under a disability. Strong views were expressed by some consultees that the process under Rule 7 should not be diluted in any way. Others thought the process could be somewhat simplified by permitting *ex parte* applications to approve settlements, by removing the requirement that any materials on such applications be uploaded to CaseLines, and by permitting the redaction or sealing of otherwise privileged materials.

4. Our Recommendations and Request for Approval

Our view is that the concerns expressed regarding the application of Rule 7 do not reflect issues that significantly drive cost and delay in the civil justice system. That said, there may be room to clarify the evidentiary requirement for establishing mental incapacity and to simplify the process

for approval of settlements where a party is under a disability. As a result, we recommend studying questions 1, 4, 5, and 6 set out above in Phase Two.

U. TECHNOLOGICAL SOLUTIONS

1. Rationale for Including the Proposed Reforms in Phase Two Study

Civil litigation has been fundamentally impacted by the use and availability of technological solutions, particularly in the wake of the pandemic. Electronic filing, Zoom hearings, and CaseLines have become mainstays in the post-pandemic world due to the time and cost that these technological solutions save the courts, counsel, and litigants. But there remains uncertainty as to how and when some technological solutions should be employed, as well as which technological solutions are permitted and available, leading to a lack of predictability in the civil litigation process.

Technological solutions could be leveraged further to simplify and improve litigants' interactions with the court. Implementing easily amendable guidelines may be preferable given the pace at which technology develops. Doing so may serve the following objectives: (i) creating certainty and predictability in the civil litigation process; (ii) improving the accessibility of the court system to all by reducing the cost and time needed to litigate; and (iii) levelling the "procedural playing field" between represented and unrepresented litigants.

2. Questions Included in the Consultation Paper

1. Which, if any, of the listed technological solutions should we consider further in Phase Two:

   (i) Delivery of auto-generated reminders to litigants concerning upcoming deadlines in a proceeding: (Yes - 14)

   (ii) Service of documents other than originating processes effected by auto-generated communications once a document is electronically filed with the court. For instance, consider a rule clarifying that the uploading of a document to CaseLines constitutes good and sufficient service: (Yes - 13)

   (iii) A central scheduling platform to provide real-time access to court availability, either on a court-by-court, regional, or province-wide basis: (Yes - 15)

2. Should we consider incorporating an express and overarching requirement that counsel leverage available technological solutions to secure the most just and efficient determination of a dispute on its merits?

   Yes 13 No 4 No Opinion 2

3. Should we consider mandating the use of available technological solutions in connection with certain steps of a proceeding (e.g. parties must bookmark records delivered in PDF)?

Yes 14 No 4 No Opinion 1

4. Should we consider whether there is a need to incorporate express prohibitions or limitations concerning the use of artificial intelligence in litigation?

Yes 14 No 4 No Opinion 1

5. Should we consider a rule that provides an option for parties to access AI-assisted adjudication and establishes guidelines to govern such a process?

Yes 9 No 7 No Opinion 3

6. Should we consider whether the Rules (and/or forms) should prescribe the manner of production of electronic records and the data fields that must be provided in the context of documentary discovery?

Yes 16 No 1 No Opinion 2

7. Should we consider codifying the guidelines and associated overarching principles for determining the presumptive manner of proceeding with hearings and other steps in litigation (i.e. virtual, in person or hybrid)?

Yes 12 No 4 No Opinion 3

8. Should we consider formalizing the practices applicable to the conduct of virtual examinations?

Yes 16 No 1 No Opinion 2

9. Are there other technological solutions that you believe may be leveraged to promote the Guiding Principles set out above?

No suggestions were made.

3. Summary of Consultees' Comments

There was a good deal of enthusiasm for the court's adoption of technological solutions that will improve the ways in which litigants interact with the court.

Overall, there was reasonably strong support for amending the Rules to mandate the use of certain, available technological solutions. Concerns were raised, however, that mandating the use of technology may constitute a barrier to accessing justice for some self-represented individuals.

Other concerns included the addition of cost and effort required to meet certain minimum standards, such as the requirement to hyperlink or bookmark documents uploaded to CaseLines.

There was strong support for standardizing the presumptive manner and practice of virtual hearings. Certainty about the manner of proceeding in each Region will assist counsel in booking matters in Regions throughout the province.

4. Our Recommendations and Request for Approval

Our view is that (a) litigants would benefit from clarification of the types of technological solutions available and required by the courts and (b) there may be a role for related Rules reform.

Given that a full review of technological change is outside of the CRR's mandate, we request approval to (a) engage the Court's Digital Transformation team to explore how the proposed reforms may interact with the digital transformation that is underway and (b) conduct further study into questions 2, 3, 6, 7, and 8 in Phase Two.

V. RULE BY RULE REVIEW

Finally, as part of the CRR's overarching goals, we recommend a rule-by-rule review to ensure that each of the existing Rules, not otherwise identified in this Phase One Report, are consistent with and serve those goals.