CIVIL RULES REVIEW

PHASE 2 CONSULTATION

Submitted to: Civil Rules Review Working Group

Submitted by: Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The OBA appreciates the difficult work undertaken by the Civil Rules Review Working Group ("**CRR Working Group**") in developing the Phase 2 Consultation Report (the "**Report**") proposals. We agree that a meaningful reform of the Rules of Civil Procedure (the "**Rules**") is necessary, and we welcome a bold approach to change.

As a legal organization committed to ensuring access to justice, procedural fairness, and the effective administration of justice, we recognize the scale and ambition of the proposed changes. The current Rules, though foundational, have become increasingly complex, and in some areas, outdated. Reform offers a timely opportunity to modernize procedures, promote efficiency and fairness, and improve the user experience for litigants, counsel, and the courts alike. There is virtue in making changes to improve efficiency, fairness, affordability, and processes. There is also virtue in maintaining processes where the current system is more efficient and fairer than those being borrowed from.

While we support the overarching goals of simplification and modernization, several of the proposals would benefit from further clarification and refinement to ensure they achieve their intended impact without creating new ambiguities or unintended consequences.

In our response, we aim to provide constructive feedback that builds on the strengths of the Report while identifying areas where additional consideration and changes may be warranted. In reaching consensus, some issues required different treatment or considerations depending on needs within specific practice areas. Finally, we wish to emphasize the importance of taking these comments seriously, and that disagreements, recommended enhancements, or refinements should not be misinterpreted as being resistant to change.

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 17,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by the OBA's Civil Rules Review Taskforce ("**OBA Taskforce**"). The OBA Taskforce was a purpose-built group of experienced practitioners from every region in Ontario, from small towns to large cities in the Greater Toronto Area to the far north, from small firms to the largest firms in Canada, and plaintiff and defence counsel from across practice areas, including the personal injury bar, mediation/ADR, commercial litigation, labour and employment, civil litigation, class actions, trusts & estates, construction law, and more. The OBA Taskforce reflected a diversity of lived experience, practice locations, practice areas, and firm sizes, to ensure the broadest perspective of the bar was included. We also solicited feedback from our 40 practice sections, many of whom provided general and practice-area-specific advice and recommendations to inform the OBA Taskforce's discussions.

With well over a century of combined experience, the OBA Taskforce was uniquely positioned to evaluate the proposed changes to the Rules through a practical, informed, and forward-looking lens—grounded in the day-to-day realities of practice as well as the broader implications for access to justice, procedural fairness, and efficiency in the civil justice system. Lawyers on the OBA Taskforce donated considerable time and expertise in formulating our response, all while balancing busy practices and personal commitments. We are very grateful for their generosity.

Comments & Recommendations

As previously noted, this submission is intended to support and inform the recommendations that the CRR Working Group will ultimately make to the Attorney General and the Chief Justice. We trust that the proposals adopted will be practical to implement and will advance the broader goal of improving the civil justice system. With that in mind, we've intentionally presented our comments in a user-friendly manner, organized into two distinct categories, as outlined below.

Categories of Comments	Page Range
(1) Proposals that the OBA supports with refinements	Pages 6-24
(2) Proposals that the OBA does not support which require further policy development	Pages 24-34

Importantly, the categories present advice on implementation and suggested policy solutions, respectively. Moreover, the structure of our comments generally follows the same order and headings used in the Report to make the material easier to follow and, if necessary, cross-reference.

Proposals That the OBA Supports with Refinements

Setting the Tone - General Principles

The Court requires significant judicial resources and time to effectively implement the proposals

The CRR Working Group's comprehensive reform of the civil litigation process includes measures aimed at promoting fair litigation, the early resolution of disputes, and ensuring all Ontarians have access to timely and cost-effective civil justice. While these objectives are commendable and broadly supported, the OBA cautions that their achievement will largely depend on the availability of sufficient judicial resources. Accordingly, these policy changes will require a significant investment by the federal and provincial governments in judicial resources and the civil court system. Our entire response is premised on the assumption that these investments will be made.

Without such, there is a risk that the backlog problems currently experienced under Ontario's motions culture will simply shift to different parts of the new civil process, such as the scheduling of Directions Conferences. Consequently, there is a risk that these reforms, even though substantial, will merely reconfigure the delay in our civil justice system rather than meaningfully reduce it. To effectively conduct the case management and likely increase in trials contemplated by the proposals in a timely manner, there must be an increase in Court resources–including available judges and courtroom personnel.

Moreover, it is important to note that clear and thoughtful transitional provisions will be essential to ensure the effective implementation of the Working Group's proposals. Importantly, any future reforms must be cognizant of the inevitable learning curve and provide practitioners with sufficient time and resources to understand and meet the new procedural requirements. Guidance and resources should be provided by the Ministry and Courts, as well as through partnerships with legal stakeholder organizations like the OBA, which provides Continuing Legal Education to thousands of members of the bar.

With that in mind, such transitional guidance should clarify the potential retroactivity of the proposals and provide concrete answers to procedural questions that will impact litigants and lawyers immediately, such as whether pleadings would have to be re-drafted to use the new Claim Form. Would existing discovery plans have to be revised to comply with the new Rules? For actions where oral discoveries have already occurred, would the parties also be allowed to use Redfern requests and written interrogatories? And would filed motion materials and expert reports have to be revised to comply with the new requirements?

Furthermore, there will be extensive changes to court administrative staffing and processes as well as law firm processes and business models to accommodate the new Rules. Before all system players make those necessary changes, it is advisable to pilot the proposed civil changes to assess how the new system meets its intended Goals of Reform and how parties and the Courts are adapting to the new requirements. There will inevitably be lessons to learn and issues to overcome, and it would be wise to address this before a province-wide rollout. To that end, in order to ensure the most robust results and learn valuable lessons, the pilot should be two years and conducted in a busy urban centre, where the larger caseload will offer greater opportunities to assess the impact of

the reforms. Given that Toronto will be implementing a new computer system as part of the Courts Digital Transformation in Summer 2025, it may not be the most effective place to pilot the process. Rather, it would be prudent to learn and implement the lessons from an independent civil procedure pilot before grafting it on to the new electronic case management system.

Advice for Implementation

Increase court resources; specify transitional provisions; provide guidance and resources, including through partnerships with legal stakeholder organizations; and start by implementing changes through a regional pilot program.

Claims

A single point of entry will simplify the process of initiating a claim

The CRR Working Group has proposed a single point of entry into the civil justice system through a standardized claim form, anticipated to be available in a fillable online format and accessible for individuals with accessibility challenges. As indicated on page 25 of the Report, the reform will "[provide] a single point of entry and [guide] prospective claimants through the claim drafting process through a series of questions." The OBA applauds this initiative, which strongly aligns with past OBA efforts to simplify legal processes and enhance the accessibility of the civil justice system, particularly for self-represented individuals.

The proposed timelines will increase efficiency of the civil justice system

On page 45 of the Report, the CRR Working Group outlines a "standard timetable", thereby recommending several ambitious timelines to govern the civil litigation process, many of which support the goal of expediting proceedings that strive for settlement or final resolution within two years or less from the date of commencement. In principle, the OBA supports these proposals, as current delays in civil matters are having a significant impact on clients and their interests. If implemented, these timelines could help reduce the time required to dispose of civil cases and lower litigation costs, both of which remain substantial barriers to access to justice. Notably, the current rules already prescribe timelines for the exchange of documents, which are frequently disregarded.

Thus, the effectiveness of the proposed reform will ultimately depend on its implementation and enforcement.

Proposed rules should be clarified to avoid penalizing reasonable beliefs held at the time of pleadings

In an attempt to improve the expediency of civil proceedings, on page 19 of the Report, the CRR Working Group proposes new rules concerning representations made to the Court (the "**Representations Rules**"), which aim to curb statements made without factual support or that are patently indefensible. More specifically, the proposal requires parties, or their lawyer on their behalf, to certify, amongst other things, that: (c) "the factual contentions advanced [in their pleadings or other documents] are, or likely will be after a reasonable opportunity for further investigation, supported by evidence" and (d) "the denials of factual contentions are warranted in the circumstances."

While the OBA supports the objectives and implementation of these new Representations Rules, there is concern that a party may hold a reasonable belief in the truth of a statement or denial at the time a pleading is filed. Ultimately, however, those statements may not be accepted by the Court. In the ordinary course, this should not cause a violation of a representation to the Court.

Advice for Implementation

Clarify Representations Rules (c) and (d) to state that the requirement may be satisfied *if* a statement or denial made in a pleading or other document represents a reasonably held belief/information *at the time the statement is made,* even if that statement or denial is not ultimately accepted at trial.

Service via email is cost-effective and may reduce unnecessary delay

The OBA welcomes the proposal, presented on page 26 of the Report, to "include service by email as an alternative to personal service of a Claim." However, the Rules should define a class of email addresses on which service will be effective. There should also be an opportunity for corporations and other institutions to clearly designate a service email address on their website (e.g.,

"legal@123.com"), in which case initial email service would only be effective under this proposed new rule if the material is sent to that specific email address.

It should be noted that service by email would not comply with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the *Hague Convention*). A rule based on this proposal should make clear that it only applies to service within Canada.

While the OBA supports the goal of efficient service, we have concerns about the proposal that service of a Claim can be effected by providing the claim to a lawyer "who has been communicating with the claimant (or the claimant's counsel) regarding the issue that is the subject of, or gives rise to, the litigation." There are a number of reasons why it may not be appropriate to serve a lawyer who communicates early on a file – the lawyer may be making an early attempt to resolve matters on behalf of a client to whom they provide general advice or as part of a limited retainer, whereas the ultimate choice of counsel for the particular litigation may be made after a Request for Proposals or similar selection process. Lawyers may be discouraged from reaching out to a prospective defendant in an attempt to resolve or otherwise simplify matters if that lawyer will then have the responsibility of accepting service of a claim in a matter on which they are not ultimately acting. This early resolution or limited retainer activity should not be discouraged. Whether or not the lawyer engaging in pre-litigation discussions or the formal pre-litigation protocols ("**PLPs**") is the appropriate lawyer for service should be explicitly discussed as a matter of course at the PLP rather than assumed.

Advice for Implementation

(1) Specify in the Rules classes of email addresses on which service will be effective.
(2) Service on an 'info@' or generic contact point email address within a corporate domain should not be sufficient unless specified.
(3) The Rules should also clarify that email service only applies to parties in Canada to comply with the *Hague Convention*.
(4) Service should be discussed as a matter of course during the PLPs and the lawyers can, at that time, indicate whether it is appropriate for them to accept service.

Pre-litigation protocols are practical tools to improve efficiency

Introduced on page 21 of the Report, PLPs aim to encourage parties to make meaningful efforts to resolve their disputes before starting Court proceedings. Where resolution is not possible, PLPs can help narrow the issues in dispute, thereby streamlining the Court process and promoting more efficient use of judicial resources. The CRR Working Group proposes "that the Court adopt a limited series of dispute-specific PLPs [where] each PLP will delineate the conduct that the Court requires prospective parties to follow before commencing Court proceedings in the context of a particular type of dispute."

While the OBA recognizes that jurisdictions such as the United Kingdom use PLPs regularly, there are ambiguities surrounding the proposed use of PLPs in Ontario. Although the Report states that the protocols would apply to "(i) personal injury claims (other than claims to which the *Crown Liability and Proceedings Act* applies), (ii) disputes related to the collection of liquidated debts, and (iii) disputes about the validity of a testamentary instrument," these categories require clearer and more comprehensive definitions. For example, it is unclear whether PLPs would include cases where these issues constitute a small part of the dispute.

Likewise, the Report's definition of "personal injury cases" is overly broad and arguably applies to many class actions about mass casualties, product liability, including those about drugs and medical equipment, and institutional abuse, where stock PLPs may not be appropriate.

If the CRR Working Group intends for PLPs to apply to class actions, the OBA suggests more discussions and greater consideration on such application. Furthermore, as outlined in the attached Appendix, certain trusts and estate matters contemplated under the proposal would require early judicial intervention in order for PLPs to function effectively.

Advice for Implementation

The proposed PLPs categories should be comprehensively defined and clarify:

- Whether they include cases where these issues constitute a small part of the dispute;

- If they require third-party production (i.e., documents from banks, professionals, etc.). And if so, whether the CRR Working Group appreciates that amendments to legislation that concern third-party documents (e.g., motor vehicle and Will challenges) will be required;
- That the deemed undertaking rule applies to documents received through these protocols so that these protocols are not abused; and
- That there is a distinct carve-out for class actions and necessary judicial intervention for trusts and estates matters.

Moreover, the CRR Working Group should consider the expansion of PLPs to additional areas and the development of robust ADR processes, including mediation, within PLPs. Further, as recommended in the Report, where pre-litigation mediation has taken place, this should count as "mandatory mediation" for the purposes of pre-trial processes.

Parties should retain the right to amend pleadings as of right until the hearing is scheduled

As described on page 27 of the Report, the CRR Working Group has proposed reforms, wherein "any party will be able to amend its pleading as of right until the date it delivers its witness statements and documents." After which, parties are only entitled to amend their pleadings: (i) on consent, (ii) with leave, (iii) and, as in the current system, with leave of the Court for an amendment that includes or requires the addition, deletion, or substitution of a party.

The OBA acknowledges that clear timelines governing amendments are consistent with the important objective of maintaining trial dates and reducing delays. However, there is concern that, if adopted, parties will no longer be able to amend their pleadings as of right following the exchange of witness statements. This approach risks locking in a party's position too early in the process, before the case has been properly developed.

Advice for Implementation

Allow amendments, subject to cost consequences, to pleadings *as of right* up until the hearing is set. Notably, this should not apply if adding a new cause of action outside the limitation period.

Discovery and the Up-Front Evidence Model

The new rules must clearly define "adverse document"

As described on page 31 of the Report, the proposed up-front evidence model provides transitions from a relevance-based standard of disclosure to a modified, reliance-based standard. Specifically, during primary disclosure, "[t]ogether with their witness statements, parties will be required to prepare and serve the documents upon which they intend to rely to prove their case (including those documents provided as part of initial disclosure) and any known adverse documents."

The OBA appreciates that the question of what constitutes a "known adverse document" has been the subject of ongoing debate in the CRR Working Group. However, we urge the CRR Working Group to recognize the importance of clearly defining this term in a manner that *does not* allow for unilateral interpretation by the producing party. Importantly, both parties must have a shared understanding of what qualifies as an adverse document to ensure fairness and consistency in disclosure.

Accordingly, a clear definition must be developed. Without this, the integrity of the disclosure process risks being significantly undermined.

Advice for Implementation

The word "known" should be removed as it makes it too easy to hide documents. It also raises questions, e.g., in a corporation, who must *know* about the document?

With respect to the reliance standard, we propose using a hybrid of Federal Court Rule 222(2) and the UK Rule: parties should produce any document that (1) they intend to rely on; (2) tends to adversely affect any party's case; or (3) tends to support another party's case. The parties should not be required to specify which of the three categories documents fall into.

This would accomplish the move to reliance while allowing parties to rely on the extensive Federal Court and UK jurisprudence to determine what documents must be produced.

Clarity required to enhance the effectiveness of the supplementary disclosure standard

During the initial disclosure phase, as set out on page 32 of the Report, "each party [must] produce, at the time the pleading is served, all non-publicly available documents referenced in the pleading that are in the party's possession, *custody*, or control." Similarly, during the supplementary disclosure phase, parties may request (i.e., Redfern Schedule requests) additional documents from an opposing party, provided certain criteria are met, including that the documents are within the possession, *custody,* or control of the requested party. Notably, this terminology departs from the current Rules, which refer to documents in a party's "possession, *power* or control." The replacement of "power" with "custody" introduces potential ambiguity.

Advice for Implementation

Provide clarity on the following:

- What was the policy objective for removing documents in a person's "power" from being producible in supplementary disclosure?
- What is the difference between a document being in a person's "custody" vs. it being in their "power"?

Documents ought to be exchanged before witness statements

As detailed on pages 32-35 of the Report, plaintiffs must produce documents and witness statements first, then defendants produce documents and witness statements, and only then will Redfern requests be allowed. There is concern that this order is unfair and inefficient. Instead, Redfern requests should be allowed at any time, and documents should be exchanged before witness statements because they may:

(1) induce settlement, or a mediation, avoiding the large cost of witness statements; and

(2) make witness statements more informed, fair and focused, narrowing the issues.

Accordingly, it is recommended that the CRR Working Group consider a more balanced approach that recognizes the need for efficiency as well as the disparity of information between the two parties.

Advice for Implementation

Exchange documents at the same time consistent with current practice, and *before* witness statements.

- Allow Redfern requests at any time for the reasons above, and because key documents may be necessary to produce witness statements.
- We note that under the proposal, the standard for Redfern requests is narrower than the standard for primary disclosure, and as a result, there is minimal risk that permitting Redfern requests earlier in the discovery process will cause duplication or undermine the evidence-first model. In many, if not most cases, allowing such requests earlier would be appropriate. We have considered the potential impact of these changes to the proposed schedule and believe that they would still allow the parties to finish discovery by the One-Year Scheduling Conference.

Other considerations for the up-front evidence model

The OBA welcomes ideas that will lead to speedier dispositions. However, it is important to consider that the larger up-front investment required by the up-front evidence model may have access to justice implications for vulnerable clients. Solutions will have to be developed in order to ensure vulnerable litigants are not priced out of the market. Where a group of clients can no longer afford legal services, those lawyers who provide access to justice across a broad range of clients, particularly in rural and remote areas, may no longer be able to provide services, thus further exacerbating the negative effects on access to justice.

Updating and correcting witness statements

Consideration needs to be given to how witness statements can be updated or corrected after delivery and as litigation proceeds. Witnesses may have their memory refreshed from documents or otherwise. It will be important to ensure that any changes to a witness statement are provided to parties in advance of trial in order to avoid unfairness or delays in the commencement or continuation of trial.

Advice for Implementation

Provide clarity on the circumstances that would permit a witness statement to be corrected or updated, and the process for doing so.

Reforming Motions Practice

Proposals to simplify the Working Group's approach to curbing Ontario's motions culture

The OBA supports the CRR Working Group's objective to drastically curb the pervasive motions culture that currently plagues Ontario's civil justice system. We recognize the value of the Working Group's proposed new rules to govern interlocutory matters that are modelled, in part, on the case management approach being used in Toronto. As part of this reform, the proposal introduces three categories of interlocutory proceedings, as elaborated on page 55 of the Report:

(i) Relief that is more procedural in nature and that will be presumptively decided at a Directions Conference. The resulting decision will be called a "Direction." Examples include but are not limited to: requests to bifurcate, requests for production of additional documents (unless contested on the grounds of privilege), and requests to proceed by way of a Summary Proceeding (as discussed in Part 7);

(ii) Relief that requires a more fulsome evidentiary record or legal submissions and that will be presumptively decided at a formal motion. The resulting decision will be called a "Motions Order". Examples include but are not limited to: requests for security for costs, and contested requests for a certificate of pending litigation; and

(iii) A residual category of "Relief", for which no presumption will apply and that may be decided at a Directions Conference or a formal motion. Examples include but are not limited to: requests to strike a claim on the grounds that it discloses no reasonable cause of action, and requests for production of additional documents contested on the grounds of privilege.

While the foregoing approach for dealing with contested requests for relief is well-intended, the same goals could be achieved through a structure that provides more certainty to litigants.

Advice for Implementation

The CRR Working Group should consider streamlining the proposal into:

1. A list of presumptive matters:

    a. To be resolved by way of Directions
    b. To be resolved by a formal motion
    c. To be resolved by a motion in writing *(e.g., Enforcement motions, production motions and motions for undertakings, motions for default judgment, motions seeking intervenor status, production from non-parties, and motions for surveillance evidence in personal injury cases)*

2. For all other matters, the Directions Conference Judge would determine how the matter/issue would be resolved.

This would provide certainty as to the presumptive treatment of specific issues, and a catch-all category providing for judicial discretion as to the treatment of anything outside of those explicit lists. Importantly, such a list should not include certain estate matters (See Appendix).

Finally, in an attempt to reduce repetition in motion records, on page 58 of the Report, the proposal replaces affidavits with "Facts Documents" on formal motions, as described below:

(a) The Facts Documents will be drafted in the third person;
(b) Each fact included in a Facts Document must include a footnote to a witness who has firsthand knowledge of the fact and/or, where helpful, a document;
(c) Multiple witnesses can be cited as having firsthand knowledge of the same fact;
(d) Each witness will be required to swear that each fact included in a Facts Document being attributed to them is true (just as they do in an affidavit). All witnesses will sign the same Facts Document attesting to the truth of the facts attributed to them;
(e) As is the case under the existing Rule 39.01(4), the Facts Documents may contain statements of a witness's information and belief, if the source of the information and the fact of the belief are specified in the footnote;

Again, although well-intentioned, this issue can likely be addressed in a simpler manner that does not require changing the way evidence and arguments are prepared and presented to the Court. While lawyers and judges are adapting to a new set of rules, the continuity of key documents will help foster stability and familiarity and reduce process friction, particularly during the transition period. We also anticipate that the proposal as currently worded may cause problems such as: (1) the facts documents will not be in each witness' words, which will make cross-examination difficult;

and (2) where multiple witnesses are cited for a point, cross-examination may become difficult and repetitive.

Advice for Implementation

Maintain the established use of affidavits and factums but include a word or page limit to address the risk of repetition. Address concerns relating to cross-examinations.

Pre-Trial and Trial Procedures

Clarity is required concerning the introduction of testimony that strays outside witness statements

Pursuant to pages 45 and 70 of the Report, witness statements are to be provided early in the process, and evidence in-chief at trial is through oral testimony, subject to a restriction that the witnesses remain "within the four corners of their witness statements." On page 43 of the Report, there is reference to the need for a mechanism to permit supplemental witness statements in certain circumstances due to the dynamism of litigation. However, there remains ambiguity on how testimony that strays outside of the "four corners" would be treated, and the circumstances that would permit it. While this makes sense as a general rule, it should not be overly rigid, and both parties should know the scenarios when an exception would apply.

Advice for Implementation

Provide clear rules on how testimony that strays outside the "four corners" of witness statements would be treated, and predictable factors, circumstances, or mechanisms that would permit it.

Delays and Costs

Proposed changes to address delays and costs must be more flexible and account for pressure on counsel

The proposals make a strong effort to address delays in the civil justice system, with the aim of reducing the time it takes to resolve disputes, minimizing the increased costs associated with delay, preventing administrative dismissals, and restoring public confidence in the civil justice system. These are important objectives, and the OBA fully supports efforts to advance them. However, the CRR Working Group's proposals would benefit from a more balanced approach, one that values efficiency and timeliness while also recognizing that lawyers are human, and their lives or practices are subject to unpredictable circumstances. Accordingly, we recommend that the proposals aimed at reducing delays and costs incorporate greater flexibility, as detailed below.

Fixed hearing dates

On page 84 of the Report, the CRR Working Group proposes "all requests for an adjournment of a fixed court appearance date (whether for a Scheduling Conference, Directions Conference, motion, trial, or other dispositive hearing) be made to the Regional Senior Judge, or his or her designate, and will only be granted in exceptional circumstances."

Respectfully, the proposal that all requests for adjournment go to the Regional Senior Judge is unwieldly. If an urgent adjournment is needed because of an emergency, these requests will need to be dealt with very quickly. We are concerned that the RSJ will not have the capacity to deal with the volume of these requests on a daily basis. We are also concerned about the pressure this will impose on small firms and sole practitioners, who may have to find agents to appear in Court on their behalf at the last minute.

Advice for Implementation

There should be a distinction between dispositive hearing dates and conferences. Counsel should retain the ability to cancel or adjourn a scheduling or Directions Conference, on consent. Requests to adjourn a trial or motion should go to the Regional Senior Judge.

Missed interim deadlines and Delay Penalty

We understand the intention to move to a stricter litigation system. However, there must be some flexibility built into the system in order to acknowledge the pressure this new system will put on lawyers, particularly those at smaller firms or sole practitioners. The 'Duty to Cooperate' does not require parties to agree to non-prejudicial adjournments. The *Rules of Professional Conduct* do.

On page 86 of the Report, the CRR Working Group proposes a delay penalty that, subject to the notice requirement, "if a party fails to meet an Interim Deadline, the breaching party will be presumptively required to pay to the non-defaulting party a penalty of a fixed amount imposed for each day the defaulting party is in breach (e.g. $500 per day)." Because the Delay Penalty is presumably owed to the client, there is a concern that it may be difficult for counsel to agree to reasonable extension requests without the client's authority to waive the Delay Penalty. To the extent that counsel have a personal emergency that prevents them from complying with a deadline, we are worried that the proposed changes will mean lawyers will need to fund the Delay Penalty for their clients.

Advice for Implementation

The notice period should be extended from two days to seven days, before the Delay Penalty applies. Address concerns regarding reasonable extension requests and the *Rules of Professional Conduct*.

Presumptions

On page 90 of the Report, the CRR Working Group proposes "codifying a presumption (the "**Full Indemnity Presumption**") that Full Indemnity Costs in favour of the successful party will apply" in listed circumstances. There is concern that the Full Indemnity Presumption as written does not consider a responding party's frivolous response to a motion.

Advice for Implementation

The Full Indemnity Presumption on page 90 in part (iii) should be refined to include a presumption of Full Indemnity Costs where a party's "*response* to a proceeding, motion or other request for relief is found to be frivolous, vexatious, or an abuse of process."

Costs outlines

Page 91 of the Report concerns cost outlines wherein the CRR Working Group proposes to introduce a multi-pronged rule governing costs of interlocutory matters, aimed at reinforcing the practice of disclosing costs in advance of a hearing, discouraging unreasonable positions on costs, and encouraging the settlement of costs. Part (iii) of the proposed rule requires parties to: file a standard form two days before the Court appearance. The standard form will require the party seeking relief to (a) certify that it has conferred or attempted to confer with the opposing party about costs and (b) indicate the terms of any agreement reached or attach the parties' respective costs outlines if no agreement was reached. If the responding party disagrees with the contents of the completed form, it will be required to complete and file its own form. However, it is unclear whether the confirmation forms will still be required for motions and other matters. If additional forms are required to be filed on the eve of a motion, the margin of error and possibility of missing the filing deadline increases. This applies to all parties, but particularly to self-represented litigants.

Advice for Implementation

Only one form should be required to be filed one day before the hearing of the motion. This form will confirm a) that the motion is proceeding, b) the materials for the motion, and c) the details described in the proposal.

Costs at conferences

On page 92 of the Report, the CRR Working Group "proposes to introduce a 'baseball arbitration' model for Directions Conference costs assessments. Under that model, each side will propose an amount for costs. The presiding justice will pick whichever of the two numbers he or she considers to best reflect the fair and reasonable costs of the appearance and impose that number on the unsuccessful party." Importantly, this model assumes there is one winner and one loser at a Directions Conference, and it obligates the Court to award costs on that basis. However, in practice, there may be times when there are no winners or success may be divided.

Advice for Implementation

The Court should maintain its discretion to decide that neither party was entirely successful at the Directions Conference, and if so, be required to order no costs or some other split of the costs as deemed appropriate by the Court.

Post-Trial Processes

Proposed appeal reforms require clarity

The OBA applauds the CRR Working Group's commitment to reforming appeal-related rules which we agree will help the appeal process be more accessible and help prevent unnecessary costs and delays. However, we note that the following proposals would benefit from enhanced clarity and additional considerations:

- ***Final vs. Interlocutory*** - There is a conflict between the interlocutory order list, on page 95 of the Report, "orders dismissing a motion to dismiss an action because the action is statute-barred" and

the final order list (iii) which includes orders "that define the liability of a party with respect to any one cause of action, for example, a dispositive motion (whether successful or not)," on page 94.

- ***Leave Standard*** - The commentary on the proposed change to the leave standard suggests that the new standard will be "relaxed". Specifically, on page 96 of the Report, the CRR Working Group proposes to:

  > "[R]evise rule 62.02 to amend the leave standard for interlocutory orders. Drawing from the current leave standard in British Columbia, the new standard would provide for leave to be granted based on the court's consideration of the following factors: (i) the appeal's significance to the case itself and the broader practice of law; (ii) whether there is good reason to doubt the *correctness* of the decision below; and (iii) most importantly, whether the appeal will unduly hinder the action's progress."

However, the proposal imposes a correctness standard to be used at the leave stage. This does not relax the standard. We note that the British Columbia Rules are different than those described in the proposal.[1]

- ***Active Case Management*** - Welcome for contempt hearings, as outlined on pages 101-102 of the Report. However, we encourage a review of *Sutherland Estate v. Murphy,* 2025 ONCA 227, which confirmed that that section 11(c) *Charter* rights apply to civil contempt proceedings and protect individuals from being compelled to testify against themselves. Such review may help ensure that any changes to the way contempt proceedings are heard conform with the *Charter*.

Advice for Implementation

Clarify the conflict between the interlocutory order list and the final order list. In regard to the leave standard, we recommend the more relaxed standard used in British Columbia which assesses the following factors: (1) Whether the point on appeal is of significance to the practice; (2) Whether the point raised is of significance to the action itself; (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and (4) Whether the appeal will unduly hinder the progress of the action. The Working Group should also ensure civil contempt proceedings conform with the *Charter*.

[1] *Vancouver Shipyards Co. Ltd. v. Canadian Merchant Services Guild*, 2023 BCCA 77 at para 20.

Miscellaneous

Access to judgement debtor's bank accounts should require a good faith certification

The OBA, generally, welcomes the CRR Working Group's suggested amendments, on pages 100-101 of the Report, to make the collection of judgments easier and more efficient. That said, there are concerns over the following requirement: "To address this problem, we propose to introduce a multi-pronged rule:…(ii) To obtain the order, the judgment creditor will be required to (a) establish that a valid and final judgment exists against the judgment debtor (i.e. the appeal period has passed), (b) provide the judgment debtor's date of birth, and (c) attest that the judgment debt has not been paid…" Specifically, we have concerns that the foregoing requirements for the new Rule permitting access to a judgment debtor's banking information are too lax and may lead to creditors writing to every bank for this information.

Advice for Implementation

An additional criterion should be added to (ii) so that to obtain the order, the judgment creditor must certify that "(d)… the judgment creditor has a good faith basis to believe that the judgment debtor holds or held an account at that institution.

Proposals That the OBA Does Not Support Which Require Further Policy Development

Some of the proposals, while well-intentioned, raise concerns about feasibility, clarity, or unintended consequences. In these cases, we believe further consultation, testing, or revision is necessary before proceeding. Our comments in this section are aimed at identifying potential challenges and offering suggestions for refinement to better align the proposals with their objectives.

Pre-trial and Trial Procedures

Mandatory mediation should be implemented, but not be made evaluative

For all the reasons set out in the OBA's 2020 submission to the Attorney General on mandatory mediation[2], we commend the CRR Working Group for its recommendation to expand mandatory mediation province-wide, a program that has been proven to reduce costs and time to resolution while increasing satisfaction for lawyers and litigants. In addition, the OBA welcomes the corresponding idea that pre-trial judges would not be required to engage in settlement discussions at pre-trials.

Nonetheless, while the OBA supports the CRR Working Group's proposal for mandatory mediation, it is important to clarify that the OBA does not support the introduction of *evaluative* mediation. In that regard, the comments below address the CRR Working Group's invitation, at page 68 of the Report, to hear consultees' view of the proposal to import an evaluative element to mandatory mediation.

This proposal would be both unjust and unworkable for several reasons, including:

- **Confidentiality is a cornerstone of mediation.** In making costs awards pursuant to this proposal, a judge would have to refer to the confidential mediator recommendation in their reasons, undermining mediation confidentiality.
- **Different concepts.** A mediator's settlement recommendation (based on what both parties might accept) may not be the same as an assessment of a likely trial outcome (based on the merits).
- **Mediators lack resources to make evaluations.** A mediator (particularly from roster on a 3-hour case) will not have the time, information and potentially the expertise to form a sufficiently accurate view of a trial outcome justifying cost consequences for parties.
- **Rules already encourage reasonable settlement via costs.** Rule 49 cost consequences already drive reasonable settlement assessments by the people who best know the case – the parties. Accordingly, there is no need for this additional procedure.

[2] Available at: https://oba.org/Our-Impact/Submissions/OBA-Submission-regarding-mandatory-mediation-in-Ontario

- **Negative effect on mediation dynamics.**. If parties feel that their mediator will be recommending a settlement number with financial consequences, they may spend their time trying to influence the mediator rather than negotiating with the other party and fail to reveal best offers, knowing some mediators simply find a mid-point between offers for final settlement recommendations.

- **Lawyer mediators cannot give legal advice and are uninsured to do so**. Under the *Rules of Professional Conduct,*[3] lawyers acting as mediators are prohibited from providing legal advice to parties during the mediation process. If required to provide an evaluation on the merits in a mediation involving unrepresented litigants, the lawyer mediator would effectively be required to provide legal advice regarding how they believe the causes of action will be resolved at trial and the likely damage award(s), based on their assessment of the applicable law and disclosed facts. LAWPRO does not provide coverage for lawyers acting as mediators, and mediator's insurance does not provide coverage for legal advice.

Similarly, the OBA does not support the proposal provided on page 68 of the Report wherein the CRR Working Group recommends the implementation of binding judicial dispute resolution ("**JDR**") within the civil justice system. Mainly, we believe that JDR would increase costs and cause delays. Such beliefs are supported by the fact that judges are the scarcest resource in our Court system, and JDR would add more work to scarce judicial dockets by introducing a new time-consuming mediation process prior to hearings, thus increasing hearing time per case. In addition, judges are experts at judging, whereas mediation requires specialized, unique skills that are developed via education and practice. JDR asks judges, experts in adjudication, to use their scarce time in furtherance of a process in which they may have little training or expertise, making it a poor use of their specialization and time.

[3] Commentary [1] on Rule 5.7-1 affirms that: In acting as a mediator, generally a lawyer should not give legal advice as opposed to legal information to the parties during the mediation process. This does not preclude the mediator from giving information on the consequences if the mediation fails.

Policy Solution

Implement mandatory mediation, but without the inclusion of any evaluative or JDR components. To ensure the most effective implementation of mandatory mediation, the CRR Working Group should consider the following additional recommendations:

- Mandatory mediation should be required for all matters and should thus be a pre-condition to scheduling a summary hearing on the merits (in the same way that it is a pre-condition to scheduling a trial date).
- Support the necessary "culture shift" to ensure mediation/ADR be thought of not just as a step in the pre-trial process. Rather, the new rules should be crafted to encourage ADR early and often throughout the litigation process. For instance, at the commencement stage of new matters, the Court should encourage "diversion" to ADR processes to resolve disputes through amendments to court information and forms.
- Replace the term "mandatory mediation" with "mediation," corresponding with all other required court processes.
- The Roster Rate for mandatory mediation was set in 1999, 26 years ago. There is a need for a review of the prescribed rate.

Discovery and the Up-Front Evidence Model

Complete elimination of oral discovery

The OBA recommends that opportunities for oral discovery be available in the right circumstances.

As is evident from the other sections of this submission, the OBA is eager to see significant reform in the civil justice system and is aligned with the CRR Working Group on the need to ensure that every aspect of the civil litigation process is scrutinized along these intersecting lines (referred to as the "**Goals of Reform**"):

1. Efficiency;
2. Affordability for the system and the parties;
3. Fairness between the parties; and
4. The extent to which it assists the court in its ultimate job of determining the truth.

The OBA has taken the time to carefully consider all of the recommended reforms and to build a broad consensus that welcomes effective change. However, we must all be cautious about change

for the sake of change. We have the opportunity to build a system that combines the most effective tools from around the world, and that should include effective tools from Ontario – while such tools should not be preserved simply to avoid change, they should not be sacrificed simply to bolster the narrative of drastic change. While advisors from other jurisdictions expressed surprise at the availability of oral discoveries and questioned their effectiveness, lawyers in Ontario, who have used the tool for decades, are better qualified to advise on its effective use.

In determining its approach to the CRR Working Group's recommendation to eliminate oral discoveries in favour of a written discovery process, the OBA considered the Goals of Reform and also the following considerations:

- **Bilateral consensus** - Of the many recommended changes, this one has drawn the most prolific and vociferous concerns from the bar. It is significant that, while there is not unanimity in any practice area, in those practice areas that are most concerned, there is an atypical – if not unique – level of consensus among the practitioners from both "sides". In the areas of personal injury and medical malpractice, for example, groups who specifically represent the plaintiff bar and groups who specifically represent the defence bar have advised that some opportunity for oral discoveries should be maintained. This degree of bilateral alignment provides some assurance that the advice to maintain some opportunity for oral discoveries is not motivated by an attempt to gain unfair advantage for either side, undermine speedy disposition or increase costs.

- **Not easily reversed or modified** - The wholesale elimination of oral discoveries is not something that can be the subject of a "just try it" approach. The OBA Taskforce erred on the side of being open to change and agreed that the bar should try the vast majority of the recommended reforms, even where the efficacy was uncertain. We are open to an iterative process in which reforms are implemented and then perfected or changed as we learn more about their ability to promote the Goals of Reform. The issue of oral discoveries, however, has a unique consideration. If the wholesale elimination of oral discoveries is found to undermine the Goals of Reform, reversal or further iteration would be difficult, as the people and businesses that support oral discovery, specifically court reporting services, will no longer be readily available. It is worth noting that, while elimination of the livelihood of some justice-sector partners should not perhaps be a determining factor in reform decisions, it is a factor that justifies a higher degree of care and certainty.

- **Oral discoveries themselves are not a drain on judicial resources.** We acknowledge that motions arising from discoveries could be a drain on judicial resources if they are brought with regularity. It should be recognized, however, that requests for judicial orders to compel a party to answer a question or to excuse them from answering are equally likely to arise with written questions. There should be further discussion about a fair way to eliminate refusals and undertakings motions without depriving parties of necessary

information or requiring a party to provide sensitive information that is not relevant to the case. These determinations could perhaps be made at trial and be the subject of cost-consequences.

- **No opportunity to provide advice at Phase 1:** The Phase 1 consultation asked whether consideration should be given to the elimination of oral discovery "in certain cases." The bar would have provided different and more substantial advice had the wholesale elimination of oral discoveries been suggested. As described more completely below, focused consultation on this expanded issue would, therefore, be appropriate.

The fact that the most significant concern and the most prevalent bilateral consensus tended to be from particular practice areas suggests that there may be characteristics endemic to those areas of practice that generally make some opportunity for oral discoveries more effective in balancing the Goals of Reform. This, in turn, suggests that a set of factors and circumstances can be devised to assist MAG and the Civil Rules Committee in developing a predictable and tailorable test, which could be efficiently applied by a judge at a Directions Conference. Further, focused consultation with the bar is necessary in order to generate a thorough list. Once the applicable factors have been delineated more thoroughly, they will give MAG and the CRC options for drafting an effective rule:

(a) if the complete list of factors are ones that would virtually always be present in particular categories, a categorical test for the availability of oral discovery could be developed; and
(b) the complete list of factors could form a principled test to be applied in any case where there is a request for oral discovery and the other parties do not consent. A judge could direct that oral discoveries be conducted where the factors are present; or
(c) the complete list of factors could be considered in the application of a more flexible test that would permit a judge to direct oral discoveries where to do so would further the Goals of Reform/interests of justice.

While the optimal approach cannot be chosen until the factors are thoroughly reviewed, it should be noted that:

(i) Option (a) can be combined with options (b) or (c) such that oral discovery can be directed in the appropriate cases outside the pre-determined categories; and
(ii) Options (a) and (b) would allow for more predictable and efficient decisions, at least in the early stages of implementation.

While, as indicated above, further discussion is necessary with respect to what factors should be included in a tailorable but predictable test, we have outlined a few such factors below:

- **Documents** – where the case is primarily based on documents or where documents tell a significant portion of the story, witness statements and written interrogatories will generally be a sufficient process.
- **Where Capturing the Spontaneous Utterances of a Party Verbatim is of Particular Importance to a Central Issue** – Where a party's characterization of the circumstances should be captured in their own words, oral discovery may be appropriate. The issues to be explored should be central to the case. This factor should not be mistaken for a desire on the part of the examining party to determine the strength of the witness. It is about substance, not the individual.
- **Party's Answers on Written Interrogatories are Non-Responsive**
- **Can be Scheduled to Comply with Timelines** – Oral discoveries will be scheduled by the parties, or can be reasonably scheduled by a judge at Directions Conference, to ensure that the two-year timeframe isn't jeopardized, preferably before the one-year Directions Conference. This is crucial in ensuring that oral discoveries do not unduly delay proceedings.

Process

We would be pleased to further discuss an efficient process for determining when oral discoveries should be available. Below are some initial suggestions.

If the parties determine that oral discoveries are the superior process and **consent** to proceed that way, that should be determinative. Given that the actual scheduling of oral discoveries has, in some jurisdictions, led to delays, each party that agrees to oral discoveries would have to commit to scheduling them such that the overall trial timeline is not jeopardized. Where oral discoveries are on consent, they should proceed after documents are exchanged.

Where a party requests oral discoveries and the others **do not consent**, judges could include oral discovery in their directions with respect to the conduct of the proceedings.

Absent consent, a request for oral discoveries should be made *after* the disclosure of documents and *before* the one-year conference. The scope and nature of oral discovery, including the parameters of questioning (on a discrete issue or more broadly), should be determined at an early directions or scheduling conference. This will provide a good opportunity to reduce the potential for disputes over the appropriateness of questions, and to narrow the overall issues. The judge should, in giving these directions, also consider how the remaining processes may be altered to maintain fairness, efficiency and affordability. Written interrogatories and witness statements

should still be required when oral discoveries are allowed, subject to directions provided by a judge at a Directions Conference.

A later Directions Conference can be requested where non-responsive answers on written interrogatories or the need for follow-up on written interrogatories are the issue.

Transcripts of oral discoveries will be used at trial in the same manner they are now.

Policy Solution

The OBA recommends that opportunities for oral discovery be available in the right circumstances. Further focused consultations need to be had to develop a thorough list of factors that would assist in formulating a predictable and tailorable test for determining when an opportunity to conduct oral discoveries would appropriately balance the Goals of Reform. These factors could include:

- **Documents** – where the case is primarily based on documents or where documents tell a significant portion of the story, witness statements and written interrogatories will generally be a sufficient process.
- **Where Capturing the Spontaneous Utterances of a Party Verbatim is of Particular Importance to a Central Issue** – Where a party's characterization of the circumstances should be captured in their own words, oral discovery may be appropriate. The issues to be explored should be central to the case. This factor should not be mistaken for a desire on the part of the examining party to determine the strength of the witness. It is about substance, not the individual.
- **Party's Answers on Written Interrogatories are Non-Responsive**
- **Can be Scheduled to Comply with Timelines** – Oral discoveries will be scheduled by the parties, or can be reasonably scheduled by a judge at Directions Conference, to ensure that the two-year timeframe isn't jeopardized, preferably before the one-year Directions Conference. This is crucial in ensuring that oral discoveries do not unduly delay proceedings.

Each party that agrees to oral discoveries would have to commit to scheduling them such that the overall trial timeline is not jeopardized.

If the parties **consent** to proceed by way of oral discoveries, that should be determinative.

Where there is **no consent**, judges could include oral discovery in their directions with respect to the conduct of the proceedings.

Expert Evidence

Joint experts should not be presumptively required

The proposal presumptively requires joint litigation experts for a fixed list of issues, which are set out on pages 77- 78 of the Report: "namely, ones that are standardized, involve mathematical calculations, or are otherwise amenable to a joint litigation expert", as well as several other issues "being considered as potentially amenable to such a presumption." Respectfully, for the following reasons, this recommendation is unworkable:

- The list includes highly controversial issues.
- Parties are unlikely to agree on whom to retain, what questions to ask, what facts to assume, what documents the expert should receive, which scenarios to consider, etc.
- The Court will have to decide these issues before seeing the evidence, when it is not equipped to do so.
- It may also be unfair to require a party to pay for a more expensive expert proposed by a wealthier party.

Moreover, in the case of class actions, there are several practice-specific reasons that joint experts should not be required. For instance, expert evidence is often used at certification to establish "some basis in fact." Under that standard, the existence of a serious dispute between experts is sufficient. Depriving the court of the ability to hear from competing experts makes it impossible for the court to assess whether there is a serious dispute. If a defendant-friendly expert is chosen, plaintiffs have no opportunity to contest their evidence. Moreover, at certification, parties often dispute whether there is a viable methodology to calculate aggregate damages, which may fall under the proposed presumptive list. Requiring a joint expert for that issue is unworkable as parties invariably use different assumptions.

As outlined on page 80 of the Report, "[w]ith the use of the Attestation, the parties will have the option of tendering the expert's report as his or her evidence in chief." There is concern that this proposal precludes the opposing party from raising objections to the admissibility of the report prior to its introduction as evidence.

Thus, for the reasons outlined above, we recommend that the CRR Working Group reconsider their proposal to mandate joint experts. Instead, we propose the consideration of a more flexible approach.

Policy Solution

Joint experts can be helpful in certain cases. Accordingly, parties should be *encouraged* to retain joint experts, and the Court should have discretion to consider the failure to agree to a joint expert when assessing costs.

Clarify whether a joint expert report must present a single opinion, or whether it can summarize the arguments on both sides of an issue. Consider practice areas where joint experts would be inappropriate.

The proposal establishing a standard form expert report should remain. However, the CRR Working Group should remove the reference to "or their representatives" in (viii)(d) of the proposed rules as this language may require experts to disclose previous retainers with counsel, even if those retainers were for different parties or lawyers at the firm and had nothing to do with the case. Notably, firms rarely keep track of how many times they have used experts, so it may not be possible to include this information.

At the outset of trial, objections to the admissibility of expert reports should be made. Absent that, the expert reports are accepted as read for purposes of examination in chief.

Resequencing the presentation of evidence at trial risks undermining the adversarial process

The CRR Working Group proposes reforms that aim to make expert evidence more readily comprehensible, reduce the number of experts appearing at trials, and to make the introduction of expert evidence less time-consuming and more accessible for the trier of fact. To that end, on page 82 of the Report, it is recommended that, "evidence at trial be re-sequenced so that, to the greatest extent possible and unless otherwise ordered, the fact witnesses on all sides of the dispute are presented first, followed by the expert evidence from all sides. More specifically:

(i) The plaintiff(s) will present their fact witnesses, including any participant and non-party experts;

(ii) The defendant(s) will present their fact witnesses, including any participant and non-party experts; and

(iii) The parties' litigation expert evidence will then be presented sequentially on each issue.

There is concern that the proposed change in the order of expert testimony could unjustly undermine defence strategy and plaintiff rebuttal evidence. In the case of the former, for instance, a defendant may lose the opportunity to seek a directed verdict or might be forced to call evidence it would not otherwise need to. Parties have the right to know the case against them before being required to respond and denying them that choice is unjust.

Policy Solution

Defendants should have access to *everything* before responding. If not, a defendant may unnecessarily disclose information when there is no case against them.

Pierringer Agreements should not be included in the revised Rules

As described on pages 104-105 of the Report, in order to encourage parties to enter into Pierringer Agreements, the CRR Working Group is proposing to "revert to the pre-*Laudon v. Roberts* litigation scheme where the settlement monies paid under a Pierringer Agreement are not deducted from the damages awarded at trial." We agree with the CRR Working Group's assertion that the use of Pierringer Agreements, and all forms of settlement, should be encouraged. However, the Rules should focus on procedure rather than altering substantive rights of the parties. Consequently, we do not support building into the new Rules the proposed changes to how Pierringer Agreements are or should be interpreted by the Courts.

Policy Solution

Encourage the use of Pierringer Agreements, but do not include this amendment in the revised Rules.

Conclusion

We appreciate the opportunity to contribute to this important consultation on changes to the Rules of Civil Procedure and the civil justice system. These reforms represent a substantial and ambitious effort to modernize civil litigation in Ontario. Throughout this submission, we have approached the proposals with an open mind and a shared commitment to improving efficiency, clarity, affordability, fairness, and access to justice.

Where we have proposed modifications or raised concerns, our intention is not to resist change, but to support reforms that are practical, effective, and responsive to the realities of legal practice. A successful modernization of the Rules requires a careful balance between innovation and the proven value of existing procedures. It also demands a process that is inclusive and responsive to the experience of those who use the system daily.

We urge ongoing and meaningful engagement with the bar to ensure that the proposed reforms are workable across all practice areas and truly serve the interests of litigants and the justice system. In particular, as previously noted, we recommend that any significant systemic changes be preceded by a pilot phase. This will allow for testing, evaluation, and refinement, and will help build the confidence of the courts, the profession, and the public in the long-term success of the initiative.

Finally, we extend our thanks to the CRR Working Group for their leadership and dedication in undertaking this important project. We likewise acknowledge our OBA Taskforce of experienced and committed practitioners, who contributed considerable time and expertise to this response. As such, we trust that the comments and recommendations offered by the OBA Taskforce will be of significant value to the CRR Working Group as they refine and prepare their detailed policy proposal for referral to the Attorney General and the Chief Justice for approval.

APPENDIX

Table One: The OBA's CRR Taskforce conducted a multi-region, multi-practice-area review of the Phase 2 Report and provided feedback that reflects the consensus of this group. Throughout this process, specific advice applicable to the unique aspects of particular practice areas was provided by the relevant expert practitioners. These are not inconsistent with the general consensus in the submission but are included in an appendix in order to preserve the useful specificity of the advice without adding complexity to the submission.

CRR Working Group's Proposal	Practice Area	Practice-Specific Issue	Advice for Implementation/Policy Solution
Part 4 Claims: One Year Scheduling Conference	Class Actions	There is ambiguity concerning the impact the proposed changes will have on the scheduling of the Certification Motion. It is unclear how the "One Year Scheduling Conference" affects the scheduling of the Certification Motion. Under the *Class Proceedings Act*, section 29.1 mandates a one-year deadline to avoid dismissal for delay.	Provide clarity on how the proposed change will impact the scheduling of certification motions.
Part 8 Motions: Certification Motions	Class Actions	It is unclear whether the new rules on motions apply to Certification Motions. These motions differ significantly from other interlocutory motions. More specifically, they are often the most contested aspect of the proceedings and typically involve extensive expert evidence. Even the possibility of a judge deciding such motions without evidence or submissions would fundamentally reshape the practice area. A 20-page factum is also unrealistic. Moreover, the proposal would change some motions to "directions" or "relief", which can be decided summarily or on a reduced record. However, at several places, *the Class Proceedings Act*, 1992 gives the court powers "on the motion" of a party.	The new motions rules should not apply to Certification Motions. They should proceed by formal motion and be exempt from the page limit for factums (or have a higher page limit). Confirmation is needed to ensure that the court will have the same powers in "directions" or when seeking "relief".
General Application of Phase 2 Proposals and Section E	Construction and Infrastructure	The Construction and Infrastructure Section supports the creation of a specialized construction court staffed by Associate Judges and/or Judges experienced in construction law. A specialized construction court would be well positioned to efficiently manage construction lien litigation in Ontario	

CRR Working Group's Proposal	Practice Area	Practice-Specific Issue	Advice for Implementation/Policy Solution
Construction Lien Proceedings		and adjudicate substantive and procedural issues unique to the *Construction Act*. Provided the Phase 2 Proposals are implemented, the *Construction Act*'s Procedures for Actions Under Part VIII (O. Reg 302/18) should implement the same changes. Lien actions and regular civil actions should follow the same *Rules of Civil Procedure* and processes. To reflect the fact that lien actions are akin to class actions, and that claims for priority to the holdback or the property must be adjudicated together, the regulations requiring notice of trial should be amended to provide for notice of trial to be served ahead of any Directions Conference. In light of a move to a standard process providing for trial within two years of the issuance of a claim, section 37 of the *Construction Act* should be repealed. It will serve no useful purpose in expediting matters and will not fit within the scheme of the new *Rules*. Any continuation of section 37 in a different form may continue to be a source of prejudice to lien claimants if counsel inadvertently fail to comply with some technical requirement ahead of trial. Consideration should be given to how motions that may be made as of right under sections 45, 46 and 47 will fit within the new scheme of the *Rules*, so that such motions can still be brought without unnecessarily delaying a trial.	
General Application of Phase 2 Proposals	Trusts and Estates	There are unique aspects of trust, estate and capacity litigation that must be considered and accommodated when reforming the rules: 1. These proceedings are not always adversarial proceedings with opposing parties. For example, requests for a declaration of death, or applications to prove a Will in solemn form, typically have no respondent/defendant. Estate, trust and capacity proceedings are not always party-party (adversarial), and they benefit from the current application process, which provides for an inquisitorial model, without the need for an opposing party. The single-entry claim form must be drafted to accommodate this. 2. The documents and information necessary to have useful discussions about a proceeding are not always in the hands of the parties. They are often obtained by a court order (e.g., documentary production of the records of the deceased or incapable person). This should be considered when determining whether and how PLP would work in the context of trust, estate and capacity litigation. 3. There are a number of legislative provisions in this area that require proceedings to be commenced by application. The drafting of the single-entry route should make clear the path for application required	

CRR Working Group's Proposal	Practice Area	Practice-Specific Issue	Advice for Implementation/Policy Solution
		by legislation, or the legislation itself may require change to update the language. Legislation that requires proceedings to be commenced by application include: ▪ Dependent support claims, which are required to be commenced by application under the *Succession Law Reform Act* ▪ These should not be presumptively summary disposition, as these matters are highly contentious, party-party matters, with material facts in dispute. ▪ Legislation that sets out specific procedures for estate, capacity and trust disputes ○ e.g., applications under r. 75.06, guardianship applications under the *Substitute Decisions Act*	
Part 4 – Prelitigation Process	Trusts and Estates	If PLPs are meant to be applied in the context of trust, estate and capacity claims, some procedure or arrangement will have to be developed to ensure the necessary parties and documents are available for PLP discussions. Currently, judicial intervention is needed to appoint estate trustees during litigation and ensure the preservation and production of documents. There are matters that could be well-suited for PLPs, however, further analysis is required to determine to which proceedings PLPs can be productively applied and how this can be facilitated. See Table 2 of three typical estate and capacity matters and how PLPs could apply. The extension of the *Limitations Act* limitation period to 3 years to allow for PLPs is not appropriate in certain estate matters. Slowing the administration of the estate could have a particularly harsh adverse effect on dependents, beneficiaries and administrators of estates.	Early judicial intervention to enable PLPs. Thorough analysis as to whether an extension of the limitation period is appropriate.
Part 7 - Summary Hearings and the Paper Record + Process	Trusts and Estates	As many estate, trust and capacity matters are currently commenced by application, they would fall under the Presumptive Summary Proceeding route, which allows for an early Directions Conference after issuance of the	Directions Conference after pleadings completed.

CRR Working Group's Proposal	Practice Area	Practice-Specific Issue	Advice for Implementation/Policy Solution
		claim, but before a defence is delivered. In the context of trust, estate and capacity litigation, a later Directions Conference would be preferable either instead of or in addition to the one currently contemplated. At the earliest stage, the claimant will not know whether the defendants oppose the relief and whether material facts are in dispute. A Directions Conference should take place after the completion of paper pleadings, which will allow an informed approach as to whether the matter is summary, or requires a full evidentiary record, including affidavits and third-party productions.	
Part 8-Reforming Motions Practice: Direction Conference	Trusts and Estates	Specific estate proceedings would benefit from the requirement of an early direction conference, with the ability to bring motions required to address the evidentiary issues specific to this area, some of which are: 1. Appointment of estate trustee during litigation requires a motion, if not proceeding on consent, because the wishes of the testator are being overridden, which the court has established should not be done lightly. 2. Production of an alleged incapable or deceased person's medical, financial, and legal documents, and the waiver of privilege and confidentiality that attaches to those records, requires a court order. Entitlement to these documents is not automatic; rather a party must prove that the minimum evidentiary threshold has been met, as set out by case law, on motion. 3. In Will challenges, the examination of the drafting solicitor provides essential evidence, however, this too requires a court order to address solicitor-client privilege, the scope of examination, and the protection afforded to the solicitor.	Require early Directions Conference, with ability to bring motions.

Table Two: The following table provides a non-exhaustive list of typical estate matters to highlight the issues that will arise under the proposed model. The CRR Working Group should take a nuanced approach to estate, trust, and capacity matters to ensure effective implementation and feasibility.

	Will Challenge	**Dependent Support Application**	**Challenge of *inter vivos* transfers of deceased or incapable person's property**
General Considerations	These are generally commenced as an application, under rule 75, which has a comprehensive procedure set out, with timelines. However, it is possible to bring a Will challenge as an action. It is unclear whether Will challenge would fall under r. 14.05(3), and therefore subject to presumption of summary disposition.	These are generally commenced by application under ss. 58 and 60 of the *Succession Law Reform Act*. These are generally high conflict matters that cannot be determined on a paper record. Also, the limitation period under s. 61 would need to be amended if PLPs were imposed as the distribution of the estate is stayed pending determination of dependent support and a three-year limitation period is not appropriate.	While these can be commenced by application under r. 14.05(3), they can also be commenced as actions. It is unclear whether these would be subject to the presumption of summary disposition.
PLPs	The claimant is challenging the validity of the Will, which includes the authority of the estate trustee named in the Will – therefore there is no one with recognized authority to act as estate trustee. Accordingly, provided the minimum evidentiary threshold is met, a court order is required early in the process: ▪ to authorize disclosure of third-party medical, financial and legal	In many cases, the alleged dependent opposes the appointment of the estate trustee named in the Will and/or the Will itself is challenged. Question of who would be able to authorize disclosure of financial records of the deceased and who would have authority to enter settlement.	A deceased or an incapable person can't consent to disclosure of documents that are private and confidential (financial, medical) or subject to privilege (legal). The "validity" of a transfer is not a matter that can be settled by parties (it is an *in rem* declaration, with title changes that are also *in rem*), although

	Will Challenge	**Dependent Support Application**	**Challenge of *inter vivos* transfers of deceased or incapable person's property**
	records of the deceased to determine capacity, undue influence, suspicious circumstances, etc. ▪ to provide for the administration of the estate pending determination of the Will challenge. The "validity" of a will is not a matter that can be settled (it is an *in rem* declaration).		monetary relief can be settled.
Pleadings	There is a question of who the defending parties are, and therefore who should deliver a defence. An early Directions Conference would be needed to determine parties: ▪ claimant: Will challenger; ▪ defendant: (Will proponent - estate trustee or beneficiaries or other next of kin?)	There is a question of who the defendants are (estate trustee/beneficiaries/next-of-kin), and therefore who should deliver a defence.	
Summary Disposition	Could be determined on a paper record, with the availability of live evidence process in matters involving credibility issues and dispute of material facts.	Could be determined on a paper record, with the availability of live evidence process in matters involving credibility issues and dispute of material facts.	Could be determined on a paper record, with the availability of live evidence process in matters involving

	Will Challenge	**Dependent Support Application**	**Challenge of *inter vivos* transfers of deceased or incapable person's property**
			credibility issues and dispute of material facts.
Affidavits and Discovery	Provided the claimant has satisfied the minimum evidentiary threshold, the evidence of the drafting solicitor is generally needed, by non-party oral discovery.		Provided the claimant has satisfied the minimum evidentiary threshold, the evidence of the solicitor who prepared and registered the Transfer is generally needed, by non-party oral discovery.
Motions	Case law has established that a minimum evidentiary threshold must be met. Preservation of property is generally sought early in the process by motion. Moreover, a motion may also be required for appointment of an estate trustee during litigation, if appropriate Case law has established that the removal of a named estate trustee and the appointment of someone in place has a high bar and should not be lightly granted. Thus, this should not be determined on a Directions Conference or a case conference.	An order for interim support should be determined by motion, as it is a fact driven and therefore evidentiary-based determination. They should not be determined at a Directions Conference. Preservation of property is generally sought early in the process by motion. Moreover, a motion may also be required for appointment of an estate trustee during litigation, if appropriate	Case law has established that a minimum evidentiary threshold must be met, on motion, to allow confidential or privileged records of a deceased person or an incapable person to be released.
Appeals		Any appeal of Part V orders is heard by the Divisional Court.	

	Will Challenge	**Dependent Support Application**	**Challenge of *inter vivos* transfers of deceased or incapable person's property**
		Thus, legislation would need to be amended.	

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The OBA would be pleased to discuss this further and answer any questions that you may have.