Canadian Defence Lawyers (CDL)

Response to Phase 2 Consultation Report of the Ontario Civil Rules Review

June 16, 2025

Preamble

Canadian Defence Lawyers (CDL) is the sole national association representing litigators who practice insurance defence litigation.

At the request of the Civil Rules Review Working Group, CDL has reviewed the Civil Rules Review Phase 2 Consultation Paper dated April 1, 2025 (the "Proposal") and submits the following observations. CDL, like the Working Group, encourages a full reading of these submissions.

The Working Group's mandate was to critically examine Ontario's civil litigation processes to enhance efficiency and reduce delays and costs, recognizing that additional resources are not forthcoming. The Proposal aims to create a civil justice system that is accessible, fair, efficient, and economically rational.

However, CDL is deeply concerned with the Working Group's process. The lack of transparency, inadequate consultation, and reliance on unsubstantiated beliefs have resulted in a Proposal that fails to meet its stated objectives. It is particularly troubling that the Group proceeded despite longstanding concerns about insufficient data—an issue persisting since before 2019.

The Proposal rests on an unfounded assumption: that a "maximalist culture of litigating" is a primary cause of inefficiency, high costs, and delays. The Working Group also cites under-resourcing as a contributing factor, which it deems unchangeable. Based on these premises, the Group proposes sweeping reforms, including an "up-front evidence model," elimination of oral discoveries, a shift away from motions, and a fundamental change to the full compensation principle in tort law regarding Pierringer Agreements.

The Working Group attributes the alleged culture of maximalism to the current *Rules* and, by implication, to the Bar itself. It suggests that the system works well only for a select few who resist change, while others find it broken. These assertions, including the suggestion that some parties act selfishly in the administration of justice, are not only unfounded, but offensive.

Throughout the Proposal, the Working Group continues to criticize the Bar, offering speculative explanations for why the 2010 reforms codifying proportionality have had limited impact. It concludes that the Bar's conduct has entrenched a maximalist culture, allegedly driven by broad discovery rights and excessive interlocutory disputes.

CDL strongly rejects these characterizations. The criticisms directed at counsel are unsubstantiated and inappropriate. The claim of a "maximalist approach to litigating" lacks

evidentiary support and should be withdrawn. The Working Group has regrettably failed to fulfill its mandate.

As discussed further in each of the Chapters:

- The Working Group's mandate is based on a recent amendment to the *Courts of Justice Act* which now gives the civil court rule-making authority to the Attorney General. Coupled with the recent amendment to the *Enhancing Access to Justice Act, 2024*, which provides for the sheltering of any records and information collected, prepared, maintained or used by the Ministry in relation to the business of the Civil Rules Committee, this is deeply concerning in light of the Proposal.
- While the literature clearly indicates a concern over the lack of data, CDL says that any data upon which the Working Group relied ought to be produced. In particular, CDL requests any data that led to the Working Group's unfounded characterization of a "maximalist approach to litigating" and all data on which the Working Group relied to show that its Proposal is more efficient, affordable and fair (and in which areas of law) be produced.
- CDL further requests that proper data be obtained before substantial changes to the Rules are made
- The Working Group has failed to recognize the tripartite relationship that defence counsel has vis-à-vis the insured and insurer, and the many insurance consequences that will increase costs and compromise insureds as a result of its Proposal.
- The Pre-Litigation and the Up-Front Evidence Model increases costs and creates inequality, and it particularly impacts women and those citizens who are disenfranchised and fall into the category the Law Society of Ontario characterizes as racialized minorities.
- The Up-Front model impacts other sectors of the public. For instance, it places an increased burden on our healthcare system, which impacts Ontarians as a whole.
- The simplistic solution to remove oral discoveries fails to appreciate the role and impact of discoveries. It fails to acknowledge that the costs associated with Examinations for discovery are nominal in the context of litigation as a whole, and particularly when compared to the increased costs associated with written interrogatories. The Working Group fails to recognize the increased number of trials and increased trial costs that will result from the elimination of examinations for discovery. Examinations for discovery promote a fair and just outcome, and promote access to justice.
- The Working Group's proposed change from the "relevance" standard to the "reliance" standard causes unnecessary confusion in light of the definition of "reliance" as contained in the *Federal Court Rules*. Further, its suggestion of the Redfern Schedule is nothing more than the current practice of exchanging Affidavits of Documents and productions, and exchanging undertakings and refusals charts. Its Proposal for written interrogatories will increase costs and cause unnecessary delay.
- The Working Group's reference to other jurisdictions is misguided. They have failed to undertake a proper and complete analysis of those very systems on which the Working Group rely in support of its Proposal, which systems have clearly

encountered problems and increased judicial intervention due to the "reliance" model. Moreover, they have completely failed to consider the U.S. system which involves a more robust procedure of oral examinations without encountering delays.

- The Working Group's simple lateral transfer of Motions to Case Conferences without reducing the workload is impractical.
- The recommendations related to experts has a net-effect of increasing costs and impacting other sectors of our system.
- The recommendation regarding Pierringer Agreements violates the full compensation principle underlying tort (as confirmed by the Supreme Court of Canada and the Ontario Court of Appeal), increases the number of trials, increases costs and increases insurance policy premiums.

The Proposal cites Justice Rosalie Abella (as she then was), that "[w]e have moved from being a society governed by the rule of law to being a society governed by the law of rules." However, a change in the rules that results in inequality, increased costs, unfairness and instability, and which fundamentally impacts the compensation principle in tort, makes us into a society that is governed by rules, not by the Rule of Law. This cannot have been Justice Abella's intent.

The Proposal, when read as a whole, is premised on unfounded overarching statements. The Working Group sadly fails to meet its mandate, while violating the Rule of Law and being economically irresponsible.

Rule changes must be based on consultation with stakeholders and rooted in data and reliable information. Throughout this response, where possible, CDL proposes recommendations based on the scant data provided and the limited time available to respond to the Working Group's Proposal.

CDL is also working with the newly-formed Better Civil Rules Collaborative (BCRC), a bipartisan group of Ontario personal injury and medical negligence litigators. Its submission does not offer a critique of the proposal, but rather offers an alternative proposal for negligence and personal injury cases. CDL looks forward to continuing to work with this group on reforms going forward.

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Government's New Rule-Making Ability Instead of Civil Rules Committee

On November 20, 2024, Bill 227 was introduced which, amongst other things, amends the *Courts of Justice Act.* On December 4, 2024, it received Royal Assent.

The amendment gives the civil court rule-making authority to the Attorney General. This is a significant change. Prior to the amendment, the Civil Rules Committee made court rules in respect of all non-family civil matters, which rules were subject to the approval of the Attorney General. However, the amendment now empowers the Attorney General with the same rule-making authority as the Civil Rules Committee, which the Attorney General can exercise subject only to prior consultation with the relevant Chief Justice and the presiding member of the Civil Rules Committee. While the Civil Rules Committee retains its rule-making powers, the rules made by the Attorney General prevail over those made by the Civil Rules Committee in the event of a conflict.

On January 25, 2024 - approximately one year prior to Bill 227 receiving Royal Assent - the Attorney General and Chief Justice Morawetz launched the Civil Rules Review, consisting of 14 individuals identified as the Working Group. Phase 1 was completed in May 2024. There was no mention of eliminating oral discoveries in Phase 1. The CRR Phase 2 Report was released on April 1, 2025 - an approximate four months following Bill 227 coming into force.

Moreover, under last year's *Enhancing Access to Justice Act, 2024,* confidentiality and new *Freedom of Information* protections were enacted. "Any records or other information collected, prepared, maintained or used by the Ministry in relation to the business of the Civil Rules Committee" will now be sheltered from a request made under the *Freedom of Information and Protection of Privacy Act*.[3] This protection also includes a retroactive transition provision that applies to the period before the bill was enacted.

Phase 1 Consultation Report

As set out in the *Civil Rules Review: Phase 1 Report* May 2024:

> "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 parties credibility, and promote opportunities for settlement."[5]

During Phase 1, the Working Group recommended "studying alternative discovery models that can be agreed upon by the parties or imposed by a case management judge." The Phase 1 report did not set out a foundation for, nor did it seek a mandate allowing, the abolishment of examinations for discovery in all cases. Phase 1's own (surprisingly small sample size) survey shows more "no" answers to two short questions regarding "eliminating right to oral examinations for discovery in certain cases" and replacing them

with written interrogatories. Something changed by the time the Phase 2 report was released April 1, 2025.

Immediately upon receiving the Proposal on April 1, 2025, CDL wrote to the Working Group Co-Chairs ("Re: Lack of Meaningful Consultation, Ontario Civil Rules Review Phase 2")[29] and had previously requested participation by an insurance defence counsel on the working group (which request was denied). CDL has always participated in government and Law Society of Ontario consultations and regrets its inability to be involved in the CRR, especially given the preponderance of personal injury and insurance cases in our court system.

Along with many other bar associations, CDL wrote to the Attorney General on April 16, 2025[4] requesting an extension of the June 16, 2025 deadline to permit adequate time for stakeholders to provide constructive input on the proposed changes. Ten (10) weeks (from April 1, 2025 to June 16, 2025) is insufficient time to respond. The CRR had been operating since Fall 2023 and the Working Group was constituted in early 2024, but April 1, 2025 was the first mention of the CRR's intention to abolish examination for discovery in all cases. This news took Ontarians and litigators by surprise – even those who had participated in Phase 1 of the CRR.

Absence of Data in the Civil Rules Review Policy-Making

CDL supports the calls for a realistic and reasonable consultation period in which policy decisions can be informed by data, such as those made by:

- Professor Noel Semple, Faculty of Law, Windsor University in his paper, *Look Before You Leap: Why Ontario's Civil Rules Review Needs a Research Phase;*[6] and,
- Federation of Ontario Law Associations' *FOLA Calls on Ontario Government for Broader Representation and Data-Driven Reform of Ontario's Civil Litigation Rules*.[7]

The Working Group attempts to reduce cost and delay without any information as to what causes either. The Working Group co-chairs publicly admit the group did not consider any data. Since their Proposal's release, it has been observed that "the working group was handicapped by the courts' near complete ignorance of its own operations…"[8]

The lack of data is perplexing, especially since the *Terms of Reference* of the Civil Rules Review Working Group specifically provide:[9]

> "The SCJ Member(s) of the Working Group will facilitate requests for SCJ court data. The CRR will be supported by a Project Coordinator who is Senior Counsel with the Ministry of the Attorney General. The Project Coordinator will facilitate requests for information from the Ministry."

Denied Access to Court Data

The Working Group is not alone in this information desert - Ontarians cannot access data about the civil justice system. As noted by the Auditor General for Ontario, the data is available to the Ministry of the Attorney General, and the government is aware of this unacceptable lack of transparency:

- As J.A. Hourigan stated in 2025: "the days when courts could operate opaquely, cloistered from the people they serve, are long past."[10] "Comprehensive statistics on the functioning of the court system" should "already be publicly available."[11]

- When an Ontario legal researcher challenged this secrecy, the Court itself refused to permit transparency:[12] the public and the bar have "no right to know how many cases were reaching trial in our public court system or how long they were taking to get there. While that information was readily available in the court's Frank database (and published by most other court systems), it is not published or utilized…"[13]

- The Auditor General for Ontario was denied access to civil justice data for her 2019 civil justice system report[14] (*as of December 2023 no steps had been taken to correct this denial):[15] "After all, taxpayers fund the administration of the court system and the building of courthouses and Ministry employees can readily access the information that we were denied access to."[16]

As reported by the Government of Canada in *Justice, Efficiencies and Access to the Justice System*:

> "There is a large body of national data at the Canadian Centre for Justice Statistics that is supplemented by local data in many jurisdictions… the information currently available is extensive and valuable. It appears a major impediment is lack of demand for the information or lack of capacity to utilize it. This should change. The Justice Information Council, composed of the provincial deputy ministers responsible for justice in Canada, should attach a higher priority to the collection and dissemination of information about the justice system generally and case flow in particular, and jurisdictions should ensure they fully exploit the potential of CCJS."[17]

Bar Associations Call for Data to Inform Policy Decisions

Bar associations in Ontario – upon which the Working Group is now relying for rushed free advice on its proposed changes – have uniformly demanded data to inform their input on civil justice reform and policy.

On April 4, 2025, CDL requested from the Working Group all data it relied on.[18] The main source of information cited in the Proposal is the subjective "belief" of the individual members of the Working Group which is not representative of Ontario's litigators.[19]

In 2023, the Advocates' Society's number one Call to Action was to "measure delay and set targets:"[20] "Data collection and analysis can help locate pain points in system and develop remedies… collecting data about delay in the justice system is an essential first step to developing and targeting policies to improve access to justice over the long-term."

The Advocates' Society's *Key Metrics: Unlocking the Power of Court Data* in March 2025 – written on the eve of the release of the Proposal (released April 1, 2025) says:

- "Court data can supplement stakeholder input and other types of information that courts consider when proposing amendments to their rules."[21]

- "Without court data, those seeking to address delays in the justice system are left to make assumptions based on anecdotal evidence or incomplete information."

This is what the Working Group has done.[22] The Working Group did not cite *any* data apart from there being "66,212 new civil proceedings commenced in Ontario" in 2023.[23] However, Statistics Canada's Civil Court Survey (which aims to "maintain a national civil court database to collect comparable, national level baseline data"), states that, from 2018/9 to 2023/4, Ontario recorded "an average of 119,000 new actions issued annually."[24] The Working Group fails to reference Statistics Canada, which is particularly concerning given that this only piece of data the Working Group cites is inconsistent with Statistics Canada.[25][26] Regardless, the Civil Rules Review Working Group stated personal injury claims "represent the majority of civil cases commenced in the Superior Court of Justice."[27][28]

<u>Canadian Defence Lawyers Ontario Members Survey – Some Data</u>

Instead of relying solely on anecdotal evidence, to respond to this consultation, CDL conducted a survey of its Ontario members[30], most of whom practice insurance defence litigation.[31] The following data was obtained from members participating in the survey:

- 96% said oral examinations for discovery are "very important" or "important"
- 94% said documentary disclosure cannot replace examinations for discovery
- 90% said abolishing examinations for discovery will result in increased trials

CDL members said what other bar association members have also said – there are not enough judges in their region. This is not merely a complaint requesting more judicial appointments. It is a known fact that if there are not enough judges now, there will not be enough judges to handle the massive increase in judicial workload proposed by the CRR Working Group:

- 96% said there are insufficient judges in their region to permit more trials
- 94% confirmed there are insufficient judges in their region for an annual court attendance for timetabling

CDL members helped inform the discussion about why the CRR Working Group seeks to mandate case management on a system which is largely out of court and does not require any court resources for resolution of disputes:

- 60% of cases settle without any court timetabling or court intervention
- 71% of cases settle prior to trial scheduling
- 96% cases settle prior to trial

The Proposal is silent on personal injury litigation's experienced reality – those who practice in this area on both sides of the case know that the majority of cases settle because – not in spite – of examinations for discovery and the ability to move the case at the correct pace for the parties. The majority of CDL members surveyed (55%) said the court should not mandate court attendances to monitor an action's progress. Irrespective of counsel's views on whether the court needs to intervene in cases which are progressing in accordance with the parties' wishes, since it is a well-known fact that a significant number of cases settle before ever needing court assistance, why would any policy reform – especially without any attempt to gather and review actual data - detract from that private dispute resolution system?

Service and Insurance Issues

Tripartite Relationship of Insurance Defence Counsel

Insurance defence counsel in Ontario are in a unique position because they have a dual client relationship, also known as the "tripartite relationship," with their clients. Once retained by an insurer to defend an insured, insurance defence counsel owe professional obligations both to the insurer who is paying and instructing them, and the insured party whose rights they are retained to protect and defend in a lawsuit. The Ontario Court of Appeal has recently re-articulated this special relationship enjoyed by insurance defence litigators.[32] Unfortunately, the Working Group did not include an insurance defence litigator to address how the proposed changes would function within the tripartite client relationship.[33]

While the terms of liability insurance policies vary, at the core of the insurance relationship is the bargain that the insurer will defend and indemnify the insured for covered disputes in exchange for the insured's cooperation in defending such disputes. The insurer has the primary right to control the defence, but the insured's peace of mind is not free – they must assist defence counsel.

Personal Service on Defendant, Not Counsel

The service of an originating process on an insured defendant plays an important role that is jeopardized by the Proposal. Personal service *involves* the defendant personally; it reinforces the seriousness of the proceeding and necessity of cooperation. It also makes it clear that the obligation to defend is on the insured themselves; something that is important in the event that the insurer denies coverage for all or part of a claim, or if the

value of the claim is in excess of policy limits. Claims over policy limits are commonplace in Ontario's personal injury litigation landscape. An insured may also have multiple insurers with potentially overlapping coverage. Service directly on a defendant triggers their obligation under their insurance contracts to notify all potentially exposed insurers of the claim.

Cooperation of Insureds

In reality, not all defendants are insured, and not all insured defendants are cooperative. What defendants do (or do not do) when served with an originating process is an essential piece of the puzzle. Where an insured is non-cooperative with an insurer, the failure to act upon service of an originating process can be an early indicator and important evidence in any coverage dispute arising from a denial. In the "up-front evidence model"[34] proposed, if an insured is unwilling to cooperate, it will be impossible to prepare a meaningful witness statement, which will undermine the defence from the outset. There is a risk that delayed reporting by an insured to an insurer will result in denied coverage if the insurer is prejudiced due to violations of the Pre-Litigation Protocol.

Confirmation of Coverage

The Proposal cites no evidence or data suggesting that insurers delay in the confirmation of coverage or prolong the retainer of defence counsel when coverage is confirmed. Rushing the defendant's insurer through the process serves no purpose. While not impossible, a necessary coverage denial is difficult once defence counsel is on the record. The evidentiary burden for a coverage denial at this stage is high as the insurer may be equitably estopped from doing so. Even if that defendant is not owed a duty of defence or indemnity under their policy, the insurer may be estopped from denying them that coverage by virtue of defending the claim. Even if a denial is upheld, dealing with coverage issues after a defence is entered, rather than before, results in the insurer having to incur the cost of retaining two sets of counsel instead of just one: coverage and defence. The time from notification of the claim by the insured defendant to the confirmation of coverage is not wasted – rather, it is crucial in permitting the correct assessment of the claim and confirmation, or not, of coverage.

Primary concerns with the service model proposed by the Working Group are:

- Permitting service of an originating process on counsel rather than the parties themselves does not consider that personal service on insureds can be important in the liability insurance context as an early determinant and evidence of whether an insured defendant will cooperate with a defence, and therefore whether a defence is owed.
- In certain circumstances, a defendant may require multiple sets of counsel, for instance for covered and non-covered aspects of a defence, or for the amounts within and in excess of coverage. They may also have policies with potentially overlapping coverage. Service on the defendant triggers their obligation to notify all their insurers who may provide coverage.

- The short timeline, a mere 45 days, between the date of service of an originating process and the time a defence must be filed is insufficient for an insurer to conduct a coverage investigation prior to assigning defence counsel, and then have any time left for defence counsel to review the file and meet with an insured.
- The Working Group's model will lead to insurers defending parties who otherwise ought not to be owed a defence, and then risk being estopped from denying coverage for a defence

Statutory Reform Proposal – Amendments to the *Insurance Act*

If, despite these submissions, the Proposal permitting service by email and on counsel proceed, consideration should be given to the following safeguards:

- Permit defendants to serve a (new) Notice of Coverage Investigation, which would extend the time for filing a statement of defence by at least 90 to 120 days where there is a coverage issue.

- Recommend that the Attorney General introduce amendments to the *Insurance Act* to make it explicit that an insurer can deny coverage where an insured fails to assist in drafting or to swear a Pre-Litigation Protocol (PLP) witness statement and require the uncooperative insured to pay the costs of the motion to remove defence counsel.

Pre-Litigation Protocol for Personal Injury Claims

The proposed Pre-Litigation Protocol for Personal Injury Claims (PLP-PIC), by shifting litigation steps to an earlier stage, will increase costs and negatively impact both access to justice and the quality of justice in our Ontario courts. The Proposal takes the internally conflicting positions that litigants struggle to understand the current court process, but seeks to introduce a complex mandatory procedure with onerous timelines which must take place prior to issuing a claim and even before litigants are represented by counsel.

Several concerns must be addressed in regard to the Pre-Litigation Protocol:

1. No jurisdiction pre-litigation;

2. Privacy concerns; and,

3. Coverage concerns.

1. Jurisdiction Under the *Courts of Justice Act* for the Pre-Litigation Period, and Non-Parties

Under the *Courts of Justice Act*,[35] the Civil Rules Committee and the Attorney General are empowered to make rules for the Court of Appeal and the Superior Court of Justice

in relation to the practice and procedure of those courts in all civil proceedings. The Act does not define a "proceeding" and it does not authorize either the Civil Rules Committee or the Attorney General to impose pre-proceeding procedures on the public. The *Rules of Civil Procedure* apply only to proceedings , not to a time period before the proceeding is commenced.[36] CDL requests that it be provided with an opportunity to respond to any draft legislation that is considered.

2. Privacy Concerns

CDL endorses the concerns raised by the plaintiffs' bar including those set out by Ms. Simona Jellinek in her recent blog post: "Are the Proposed Changes to the Rules of Civil Procedure Trauma-Informed"[37] The production of documents to potential defendants who are likely not yet represented by counsel occurs without any legal safeguards, privacy controls, or institutional oversight.

The Proposal requires the production of documentary evidence of a "personal injury claim" *before* a civil action is commenced – the list is at Appendix B.[38] In personal injury cases nearly all evidence in document form contains sensitive personal, health and financial information. Any document that contains personal information of any kind (sensitive or not) attracts protection under our privacy laws. [39] The Proposal contains no consideration of the privacy rights of the parties who will be forced to disclose documents before litigation when protections are offered.

The Proposal defines "pre-litigation" as the period prior to a civil action being commenced, i.e. "before commencing proceedings."[40] The timing of the production requirement in their Pre-Litigation Protocol is what gives rise to concern.

a) Privacy Protection After Civil Action is Commenced

When a civil action is commenced, the current *Rules of Civil Procedure* and case law impose a deemed undertaking rule which prohibits the release or use of evidence obtained in the discovery process outside of the litigation or to any one not a party to the litigation. In addition, when the parties are represented by lawyers, those lawyers are subject to professionalism confidentiality requirements which are even broader than privilege.[41] The Proposal requires a Self-Represented Litigant (SRL) commencing their own claim (a "claimant") to comply with the Pre-Litigation Protocol.[42]

However, the *Rules of Civil Procedure*[43] do not apply to pre-litigation and cannot reach back retroactively to govern pre-litigation conduct. Neither can the *Rules of Civil Procedure* apply to "claims" that never result in civil litigation and which resolve in the pre-litigation stage. Despite this, the CRR Proposal suggests that the deemed undertaking should have that retroactive effect but proposes no method to bring that about. The Proposal is completely silent about the protection of personal information.[44]

b) No General Privacy Protection Before Civil Action Issued

Before a civil action is issued, neither party (potential plaintiff or "claimant" or potential defendant or "defendant"[45]) is equipped to protect personal information. As set out above,

the protections of *Rules of Civil Litigation* do not apply at this pre-litigation stage. If the parties to the claim fail to secure the personal information in private documents in their possession, they could be exposed to civil liability under the new tort of intrusion upon seclusion[46] as well as regulatory prosecution (if subject to privacy legislation). Even unintentional or inadvertent disclosure of personal information may attract legal consequences.

c) Pre-Litigation Disclosure in Automobile Tort Injury Cases

Automobile injury (tort) litigation comprises the majority of all civil actions in Ontario.[47] Despite expressly targeting personal injury claims, the majority of which are car accidents cases, the Proposal fails to mention the existing pre-litigation protocol already in effect for decades under s.258.3 of the *Insurance* Act and the regulation *Court Proceedings for Automobile Accidents that Occur On or After November 1, 1996*.[48] Under this system, documents are sent by the claimant in car accident cases to the defendant's insurer (not to the defendant directly) before an action is commenced. The purpose of this early disclosure is to permit accurate assessment of the value of the claim which facilitates early resolution. If the claim is not resolved and a civil action is issued, the documents are provided by the insurer to defence counsel and form part of the evidence in the litigation.

This pre-litigation evidence disclosure system contained within the *Insurance Act*, which only applies to car accident tort cases in Ontario, works from a privacy perspective because of the insured nature of the claims:

- Insurers are governed by privacy legislation;
- Insurers have robust modern data protection mechanisms for email servers and document-management and storage systems; and,
- Insurers are well-positioned to receive and protect confidential and personal information with systems which ensure regulatory compliance and privacy legislation adherence.

This *Insurance Act* process offers a fair balancing of interests: the private information is disclosed only once an insurer is involved, which information permits the insurer to assess the claim, while the insurer's protections ensure that the claimant's personal information is not disseminated inappropriately.

Unlike insurers, there is no assurance that any individual or corporate defendant can safeguard a plaintiff's personal information. As has been noted by the plaintiffs' bar association, Ontario Trial Lawyers Association (OTLA), there will be a chilling effect on the advancement of personal injury claims out of concern for the mandatory disclosure of personal information to unregulated potential defendants outside of the litigation process. They have also noted that unrepresented plaintiffs may risk disclosing more than they are obliged to, even under the Proposal which is broad.

d) Defendant's Personal Information

Individual defendants who are not lawyers or insurers and receive sensitive records are not subject to professional standards, confidentiality obligations, or privacy legislation.

CDL is concerned that the CRR's proposed PLP mandates the production of documents from a potential defendant to a potential plaintiff or claimant who may not be represented by counsel.

In personal injury cases, such documents typically relate to liability issues. However, even the Motor Vehicle Collision Report includes highly personal details – such as names, contact information, dates of birth, driver's license numbers, license plates, insurance details, and employer information. The mandatory disclosure of this personal information – defined as "recorded information about an identifiable individual, including… where the disclosure of the name would reveal other personal information about the individual"[49] – must be safeguarded.

Before litigation, an unrepresented claimant is not adequately equipped to protect the defendant's personal information, raising serious concerns about privacy.

CDL agrees that facilitating early resolution of all potential actions, not just car accident tort claims, should be encouraged and that the early production of evidence contributes to this goal. However, facilitating early resolution cannot take priority over the protection of personal information, as our concerns set out above.

3. Concerns Re Impact on Insurance Coverage

Admissions: The Proposal provides that any pre-litigation admission made by a party under the PLP-PIC will be binding on that party in any ensuing litigation. Further, the proposed Letter of Response requires a defendant to indicate, among other things, whether they admit liability, whether they accept the damages being claimed in whole or in part, provide the defendant's version of events, and indicate if the defendant intends to pursue a third party claim and the facts on which that claim would be based. Section 3.4 of the Ontario Automobile Policy[50] states that an insured is not to assume any liability for an accident. If an insured potential defendant admits liability, they will be in breach of their insurance policy which can result in a denial of coverage. Insurers who deny coverage bring a motion to add themselves as a Statutory Third Party under the *Insurance Act*.[51] This will increase the number of parties in the case, delaying the action pending the outcome of the motion (which is typically unopposed but never consented to). The defendant may find themselves uninsured and without access to sufficient limits to satisfy the claim, and now may find themselves personally liable to the plaintiff. This proposed change alone undermines the entire Ontario insurance regime, adds delay and costs, and risks significant unfairness.

Delayed Loss Reporting: The consequences of an insured reporting a potential claim late depend on the case. Some delayed reporting results in a coverage denial due to prejudice to the insurer based on a missed opportunity to investigate and preserve evidence. The potential for increased coverage denials, and therefore more uninsured losses (which risks undercompensating plaintiffs), increases if the PLP-PIC makes the consequences of slow reporting potentially more significant.

Statutory Reform Proposal – Increase Effectiveness of s.258.3 *Insurance Act*

For car accident matters, consideration should be given to improving section 258.3 of the *Insurance Act* and Ontario Regulation 461/96. Reviewing this procedure and the relevant case law would modernize the pre-litigation requirements and could include earlier disclosure obligations. Additionally, the regulation could be amended to require defendants to provide the information proposed in the Letter of Response and the documents identified as Defendants' Documents in the PLP-PIC. The Simplified Procedure under Rule 76.03(2) already mandates that parties list the names and contact information of witnesses in their Affidavit of Documents.[52] This language could be incorporated into the *Insurance Act* at s.258.3.

Personal Injury Specific Protocol and System for Post-Issuance Litigation Period

The consultative phase of the Phase 1 Report demonstrated widespread support for flexible procedures, using the best process for the case with discretion to use proportionate court assistance:

- "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"[53]

- "A Holistic Approach to Change: 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."[54]

- "A common theme of the reforms being proposed for study in Phase 2 is a move away from a 'one-size' fits all approach."[55]

Regrettably, in Phase 2 the Working Group forgot these directives from their first consultation with a "one-size fits all" mandatory and inflexible procedure with draconian costs and other sanctions.

CDL supports the implementation of a default timetable for personal injury actions, but not for the pre-litigation stage. There are simply too many reasons (preliminary issues like jurisdiction, privacy concerns, the evolving nature of damages in injury cases) that a presumptive timetable must start after the claim's issuance and not before. Aggressive control of the pre-litigation period is inappropriate in personal injury cases given the evolving nature of damages.

CDL supports the implementation of a minimum mandatory document disclosure for both parties as set out in the Proposal, but not prior to the issuance of the claim except for insured car accident cases (to ensure privacy compliance). CDL's April 2024 correspondence on reforms to documentary disclosure rules set out this agreement, in substance.

Better Civil Rules Collaborative (BCRC) Alternative Proposal for Personal Injury Claims

CDL has actively participated in the newly-formed Better Civil Rules Collaborative (BCRC), the bi-partisan group of Ontario personal injury and medical negligence litigators which strives to create a separate track for this special area of civil litigation. The BCRC also proposes a timeline which addresses and recognizes the evolution of damages in personal injury cases, a fact which makes these cases unique from other types of litigation. Out of concern both for privacy and prematurity, it proposes the same commencement date as does CDL – the close of pleadings. Creative solutions to persistent procedural bottlenecks will be addressed by this group.

Purpose of Examinations for Discovery

Oral examinations for discovery have been a cornerstone of the civil litigation process across the Commonwealth for over 100 years. This process of questioning the opposing party continues not merely as a relic of tradition, but because it has been consistently recognized for its proven effectiveness in uncovering truths that documents alone may not reveal. Examinations for discovery are not merely a practice cross-examination – they are primarily a fact-finding process which is critical to learning the case.

Documents Provide Incomplete Evidence

Documents can be misleading, incomplete, or compiled in a way that benefits the producing party, and it should be uncontroversial that a party does not necessarily know what has been omitted from records produced by the other party. The opportunity to question the other party not just about what has been produced, but what has not been produced, as well as filling knowledge gaps, should not be deleted from the tools available to parties simply because of a perception, based solely on anecdotes instead of data, which suggests that there might be a nominal saving of time and cost. This is simply not true for the majority of civil cases, and particularly untrue for cases involving personal injury.

The purpose of examinations for discovery has been long established as enabling a party to know the case they have to meet, obtaining admissions from the opposing party to narrow the issues, confirming positions of the opposing party, and avoiding surprise at trial. Contrary to the comments in the Proposal, oral examinations are an efficient vehicle for gathering this information. The Proposal accepts that increased knowledge creates an increased potential for settlement. Abolishing examinations for discovery will remove a key component in obtaining the evidence that directly leads to settlement of cases. It should be uncontroversial that because of its limited judicial resources, the Ontario civil justice system depends on the settlement of virtually all civil actions prior to trial.

Procedural changes should not risk causing a decrease in settlement rates and a corollary increase in trials. Along these lines, there is no reason to think that parties will be more inclined to settle when they have less evidence about the opposing party; indeed, the opposite is both reasonable and likely. If the only way to hear from the other party is to put them into the witness box and question them at trial, it is illogical to suggest that

eliminating discoveries will result in fewer trials. There is a real risk of not just more trials, but longer trials, as the witness testimony will need to be fulsome and detailed as the sole opportunity for parties to tell their stories.

There is also a psychological aspect to oral discoveries which allows litigants, and injured people specifically, to tell their story, not just by way of a written statement. With that opportunity completed, the parties are often in a better position to settle the file.

Every issue taken "off the table" during an examination for discovery is one less issue that will require formal proof: fewer documents that need to be obtained, a resulting lower cost of obtaining those documents, fewer witnesses at trial, and an overall reduction in time and cost of the overall proceeding.

Affirmative Defences and Statutory Bars – Dependent on Examination for Discovery Evidence

Sometimes, evidence obtained from examinations for discovery informs important affirmative defences. For instance, in circumstances where the Defendant pleads and relies upon the *Limitations Act*, or other defences such as fraud, voluntary assumption of risk, mitigation et cetera, the Plaintiff has the opportunity to explore and assess the merits of such defences. Without examinations for discoveries, however, the Plaintiff will not be able to do so until trial. At that time, if the defence is successful, the Plaintiff will bear significant costs and unnecessary court time will have been wasted.

Similarly, and as discussed below, evidence obtained at examinations for discovery assists in assessing statutorily barred defences which could remove the action from the court system entirely.

Statutory Bar - Threshold for Motor Vehicle Tort Cases

The majority of civil actions in Ontario are personal injury actions. The majority of those are car accident tort lawsuits. For these cases, under the *Insurance Act*, there is a statutory bar to the recovery of non-pecuniary general damages for pain and suffering and for healthcare costs if the plaintiff does not prove they have sustained a "permanent serious impairment of an important physical, mental or psychological function." This verbal "threshold" has been in place in Ontario since 1990 and forms the basis of our no-fault auto insurance system. The policy trade-off for the restricted right of an injured plaintiff to sue for damages arising from a car accident is the payment of no-fault accident benefits (Statutory Accident Benefits) to all individuals who are injured in car accidents in Ontario regardless of fault for the accident. In every motor vehicle case, a determination is made as to whether the plaintiff has sustained a threshold injury.

There is extensive caselaw from our courts, including from the Court Appeal for Ontario, as to the factors to be applied in a threshold determination. The factors require an examination of the plaintiff's pre- and post-accident personal and professional life. The regulation requires an evaluation of any accommodation attempts made to return the plaintiff to work or school. Insurance defence counsel are required to provide an opinion to insurers as to whether the plaintiff's claim meets the threshold.

In cases involving very serious injuries, the threshold assessment can often be based solely on documentary evidence. However, in the majority of cases, determining whether the threshold is met requires not only medical evidence but also personal testimony from the plaintiff about how the accident has impacted their life. This includes whether their impairment is serious and affects an important function, considering the plaintiff's personal circumstances.

Examinations for discovery of injured car accident plaintiffs allow the parties to determine if the specific statutory and regulatory criteria for the threshold have been met. Ultimately, the decision on whether the plaintiff meets the threshold is made by a judge alone, based on the trial evidence.

In cases where the threshold assessment is not clear, there can be an insurmountable hurdle for the parties to negotiate settlement. If the threshold is met, the plaintiff proceeds to a regular damage assessment (minus the statutory deductible in smaller cases), but if the threshold is not met, no damages are payable for pain and suffering and healthcare. The threshold effectively creates an all-or-nothing circumstance for these heads of damages for settlement negotiation of car accident tort actions. The threshold is the reason why lower-value car accident cases can often be some of the most difficult to resolve by way of settlement. If the parties lose the ability to gather the evidence which informs the threshold determination at examination for discovery, more actions will have to proceed to trial since that will be the only available forum to test that statutory defence.

For example, a plaintiff can still meet the threshold if they have returned to work, depending on evidence that can only accurately be expressed by the plaintiff directly. Without the examination for discovery, the documents will show that the plaintiff has returned to work and the threshold defence will be maintained. This case, which could have settled based on the discovery testimony of the plaintiff, will now proceed to trial where the defendants will, for the first time, hear the plaintiff’s testimony about how ongoing impairments, while not sufficient to disable them from work, impair all other important aspects of life, like family responsibilities, recreational activities or other educational or vocational undertakings.

The opportunity to settle this case will have been deleted from the procedure by the abolition of examinations for discovery. The cost of proceeding to trial, with its legal fees, expert evidence disbursements, court resources and judicial time, could all have been avoided if the examination for discovery remained. While the court schedules many car accident tort cases for trial with defensible threshold positions being advanced, the vast majority of car accident tort cases still settle out of court. The reason these questionable threshold cases settle is because the parties were able to obtain the evidence relevant to the threshold assessment at examinations for discovery.

Statutory Bar - *Workplace Safety and Insurance Act*

Often the information learned by the defence at examinations for discovery supports a defence that is founded in statutory authority. For example, in many personal injury cases there is an overlap with the workers compensation regime. Ontario’s *Workplace Safety*

and Insurance Act (*WSIA*) provides for no-fault compensation for workers injured in the scope and course of their employment. As part of the statutory scheme, the employers are protected from civil actions for damages by injured workers and their families. If a matter technically falls under our workers compensation system, the right for the injured worker to sue their employer is taken away. The Workplace Safety and Insurance Board (WSIB) has "exclusive jurisdiction" over any matter which falls under our workers compensation system.

When an injured worker sues an employer, that employer can bring an application to the Workplace Safety and Insurance Appeals Tribunal (WSIAT) for a determination, within its exclusive authority, as to whether the matter falls under the workers compensation regime. If so, the plaintiff worker's "right of action is taken away" by operation of the *WSIA.* These applications are commenced in writing and proceed to arbitration hearings before the tribunal. While documentary disclosure in a personal injury civil action may give rise to the production of relevant documents which inform whether this statutory bar defence can be used by the defendant, most of the evidence must come orally from the plaintiff on discovery. The employment file is often insufficient to determine this issue without oral examinations.

Often workers identify as "self-employed," as opposed to workers. However, the examination for discovery reveals facts that they are in fact not "independent contractors," but rather "dependent contractors," which is the equivalent of worker under the workers compensation regime. It is also not uncommon that the employer refuses to cooperate with the production of the employment file, or any other relevant documents that might inform the workers relationship. This is because frequently employers are in dereliction of their responsibility to make premium remittances to the WSIB and the consequences for failing to remit can include financial penalties. Similarly, plaintiffs do not voluntarily disclose the nature of their employment relationship, and the only way for an employer's defence counsel to uncover this information is through examination for discovery.

In the event that the facts of a case supports the statutory bar, the defendant requires the examination for discovery, transcript evidence, and undertakings that flow therefrom, in order to bring the application to the WSIAT. There are no examinations for discovery as part of the WSIAT procedure and a limited ability to seek interlocutory orders for production of documents.

Without examinations for discovery, a defendant worker or employer who has been wrongly sued and who has an available statutory defense would not know about it and would certainly not be able to act upon it. The strength of a WSIA defence cannot be properly assessed without examinations for discovery. As such, if the matter proceeds to trial where it is determined, for the first time, that there is a viable WSIA defence, the trial will need to be adjourned or stayed because the Court has no jurisdiction, resulting in costs thrown away by all parties, with particular costs exposure facing the Plaintiff. The matter will then proceed to the WSIAT. Alternatively, counsel may decide to apply to WSIAT before trial particularly given that there are no cost consequences. In such circumstances, a full hearing involving examinations/cross-examinations/reply will need to be held given that there is no discovery evidence upon which to rely.

Without discoveries, there is a real risk that more matters will proceed to the already overburdened tribunal and the length of each matter will increase. This will burden the tribunal and increase costs to the parties.

Statutory Bar - Consent and Vicarious Liability of Owner Under *Highway Traffic Act*

A vehicle owner is vicariously liable for the negligent driving of someone who had possession of their vehicle with consent pursuant to the Ontario *Highway Traffic Act*. In most cases, there is no issue as to consent because it has been given expressly. However, in cases where the keys were taken without the knowledge of the vehicle owner, there may still be implied consent, depending on the facts of the case. These facts are not found in documents, but often can only be obtained from the defendant driver and the defendant owner in an examination for discovery. If a consent defence is successful, there is no flow-through (vicarious) liability to the vehicle owner. Questions of implied consent turn on the specific nuances of the relationship between the owner and driver, and the specific circumstances by which the driver came into possession of the keys to the vehicle; these are not facts that can be determined solely by reviewing documents.

Not uncommonly, a driver violates the automobile insurance policy (for example, by driving without a license, driving with alcohol if a novice licensee, or driving while an excluded driver). Therefore, the defendant driver is not entitled to insurance coverage for damages arising from the accident the defendant caused. The plaintiff can still recover damages pursuant to the vicarious liability provision of the *Highway Traffic Act* as long as there was implied consent for the defendant driver to possess the defendant owner's vehicle. Implied consent can only be determined by the facts from the defendant driver and the defendant owner as to how the defendant driver came into possession of the vehicle. This inquiry can only take place at examinations for discovery as the evidence is not contained in any document.

A typical example is the case of a teenager taking the parent’s vehicle without consent; the implied consent might arise from the fact that the keys were left on the front hall table. Whether the teenager had a driver’s license or had previously taken the vehicle are issues to be explored on discovery with both the defendant teenaged driver, and the parent owner.

The consent defence is another common all-or-nothing situation triggered by a statutory bar. If no implied consent exists and the “consent defence” is successful, there is no payment to the plaintiff from the insurer of the involved vehicle because there is no vicarious liability on the defendant owner. This often necessitates the addition to the lawsuit of the plaintiff's own automobile insurer. This company faces liability only if the consent defence is successful. If implied consent is found, this company pays nothing to the plaintiff, and the plaintiff recovers damages from the owners’ insurer. If no implied consent is found, then the plaintiff’s uninsured motorist coverage is triggered.

Typically, when coverage is denied to a driver or an owner due to a policy breach, they do not retain their own counsel and become self represented litigants. Even if they do not defend the action and are noted in default their obligation to participate in the discovery

process is not obviated. This procedural reality recognizes the importance of the examination for discovery in informing this statutory defence. The consent defence can be assessed after discoveries, and the respective parties (especially two competing insurers) can gauge their risk at trial of funding 100% of the plaintiff's claim. Without discoveries, these consent defence cases will proceed more frequently to trial, consuming resources of the parties and of the court.

Statutory Bar - Limitation Period

Under the *Limitations Act*, *2002,* a plaintiff's right of action can be taken away as a result of the statutory bar to proceeding with actions issued after the expiry of the limitation period. An action issued out of time should presumptively be dismissed (with costs). This affirmative defence is not merely a mechanical date calculation. The limitation period statute codifies the "discoverability principle" - the limitation starts to run when the claim could reasonably and through the exercise of due diligence have been discovered. In all cases, this evidence is subjective and case-specific and can only be elicited by way of examinations for discovery.

Car accident tort claims involve an even more complex discoverability analysis. requires an analysis of whether the plaintiff meets the verbal threshold and whether the damages for pain and suffering exceed the *Insurance Act*'s no-fault deductible (which currently stands at $46,790). This question often determines if the plaintiff has a viable claim. If a claim is issued more than 2 years after the date of a car accident, the limitation period is a live issue, but the determination of whether the claim is proscribed depends on facts elicited at examinations for discovery. Questions regarding the plaintiff's disability experience, medical investigations and diagnoses and diligence in investigating their claim are crucial to the limitations defence and the discoverability analysis.

If, through examination for discovery, the case for discoverability is not made out and the limitation defence has merit, a defendant is likely to consider a summary judgment motion – the mechanism recommended by the Supreme Court of Canada. During this time, the plaintiff's counsel is afforded the opportunity to report the matter to the lawyer's E&O insurer, which may undertake a remediation in an attempt to salvage the claim or to resolve it by way of settlement. If discoveries are abolished, there is no way to learn or to test the merits of the discoverability facts and the case will proceed to trial where the limitation period motion will be heard at the conclusion of the evidence. The parties will learn the discoverability evidence for the first time at trial in a case that may require a report to the lawyer's E&O insurer, which insurer has lost the opportunity to attempt to remediate the claim to the benefit of the plaintiff. In the absence of examinations for discovery, all this would play out at trial.

Honest But Mistaken Belief – Insurance Coverage

Evidence obtained at examinations for discovery assists in determining the strength of coverage issues. For instance, even where there has been an unequivocal breach of the policy, an insured may have an honest but mistaken belief of not being in breach. In a car accident case where the plaintiff is suing a vehicle driver and owner where coverage is

denied due to policy breach, the evidence as to honest but mistaken belief can only be obtained with evidence from the insured defendants on examinations for discovery. To advance this excuse for the policy breach, without examinations for discovery, an insured will be required to personally retain counsel throughout the litigation, including trial, in an attempt to discharge the onus. The insurer will also be required to retain its own counsel. Two additional lawyers must be retained instead of permitting the matter to proceed to examinations for discovery where the coverage facts would become known. The honest but mistaken belief evidence will only come out at trial. Since the coverage denial cannot be adjudicated in that tort personal injury proceeding, the net result will be increased costs to insureds to deal with coverage issues separately.

Credibility

Examinations for discovery allow the parties to sit across from each other and assess credibility. The committee downplays this in the Proposal, yet the experience of civil litigators contradicts the committee's comments: during pretrial conferences, it is common for judges to ask the lawyers, particularly in cases which turn on credibility, to assess the credibility of the opposing party. In particular, it is common for pretrial judges to ask defence lawyers about the plaintiff's potential as a witness, underscoring the importance of assessing demeanor and credibility early in the process. There is a reason that appeal courts are so deferential to trial judges on questions of credibility: contrary to the conclusions of the committee, proximity to the witness, and the opportunity to see the party's demeanor, *does* provide an opportunity to assess credibility.

Voluntary Examinations for Discovery v. Mandatory Examinations for Discovery

A voluntary system is problematic and unlikely to be successful. When considering that a primary purpose is to assess credibility, it is illogical to suggest that a party who knows that their case is based on exaggerations if not fabrication, would ever volunteer to attend a process designed to reveal those issues. Such circumstances, which are *not* outlier cases, will inevitably lead to a directions conference and further pressure on judicial resources. Examinations for discovery must be maintained and must be mandatory for all litigants.

Documentary Production Cannot Replace Examinations for Discovery

Documentary production, while important, will not adequately replace the two-step system currently in place. In an ideal file, fulsome documentary production is made, and then the witnesses are questioned about those records and any knowledge gaps that need to be filled. There is potential to streamline the questioning, but to eliminate it altogether is not an appropriate solution. There is no reason the two cannot exist in harmony: an increased expectation, with actual consequences, of upfront documentary production, coupled with an opportunity to question the other party about what is, and what is not, contained in those records.

Cost of Attendance at Examination for Discovery

The Working Group's concern about the perceived time and cost associated with examinations for discovery are unfounded. No data is cited in the Proposal to support its anecdotal observations.

The time involved to conduct an examination for discovery is measured in hours, not days, weeks, or months as suggested by the Proposal. First, hourly rates in insurance defence practices in personal injury matters are strictly controlled by insurance-firm agreements. Typical hourly rates range from $200-$300 per hour. An examination for discovery in a typical Ontario personal injury case, with two parties examined, the plaintiff and the defendant, takes one day. It costs the defence, at most, $2,100 ($300/hr x 7 hours) for two parties.[56] Second, Plaintiff counsel are retained through a contingency fee agreement in almost all personal injury cases, which means there is usually no out-of-pocket legal fees incurred by the plaintiff for examinations for discovery.

The examination for discovery is a privatized, out-of-court component of our civil justice system where each party bears their own costs. In personal injury cases, examination for discovery transcripts are rarely ordered unless it is apparent the case is likely to proceed to trial. With almost all examinations for discovery taking place virtually on consent,[57] the only expense incurred by both parties is the minimal Official Examiner's (court reporter's) fee[58], now without a charge for room rental, and the parties and their counsel do not incur transportation costs.

The Working Group cites no evidence (even anecdotal) that the costs associated with an examination for discovery proportionately outweigh its benefits. It makes no analysis that the proposed up-front evidence model and written interrogatories, drastically increasing lawyer drafting and revision, would reduce costs or increase efficiency.

To the contrary, the cost of a typical examination in a personal injury matter is not cost prohibitive to either party. The elimination of examinations for discovery would increase costs, and the additional costs associated with the up-front evidence model and written interrogatories in proceedings that are not document driven are not only unworkable, but would outweigh the costs of examinations for discovery. The process of drafting witness statements for the up-front evidence model (back and forth with the witness for revisions), and drafting written interrogatory questions (back and forth with the other parties), receiving responses and drafting follow-up questions is obviously a costly process, cumbersome and inefficient which will take months. Most examinations for discovery are completed within a day. Virtual attendances have improved lawyers' work life balance, permitting lawyers to avoid costly and time-consuming commute to court reporters' offices and work from home options.[60]

Replacing examinations for discovery with upfront sworn affidavits and statements will easily take more time and cost more money, both of which are contrary to the stated goals of the proposed reforms. It also does not solve the problem of assessing the legitimacy of those documents, compounded by the fact that they will have been written by the lawyers, not by the parties themselves. During a trial, it is the witness, not their lawyer,

who is in the box giving their testimony, and it follows that it should be the witness, not the lawyer, giving their evidence prior to trial.

Accessibility with Virtual Examinations for Discovery - Disabled Plaintiffs

Disabled parties, including plaintiffs in personal injury cases, are no longer inconvenienced with a commute to the court reporter's office. With the advent of virtual examinations and mediations, disabled plaintiffs have much improved access to justice. The ability of a personal injury plaintiff to join the examination for discovery (and mediations) virtually was ignored in the court's directive mandating these out of court attendances to be in person as of 2022.[59]

Cost of Trials

If the Proposal goes ahead, including the abolition of oral examinations for discovery, the number of trials will increase. The length of trials will also increase. The costs estimate below is based on our current system where the cases that reach trial involve the parties accessing appropriate disclosure through the relevance standard. If the parties proceed to court without knowing the case they have to meet, due to the reliance standard's reduced access to important evidence and the abolition of examinations for discovery, the trial will not proceed as efficiently, it will last longer, and it will cost more. It will also take more time to prepare. The Working Group's Proposal would replace the nominal private costs to the parties of an examination for discovery attendance with a great public cost as well as substantially increased costs to the parties of more and longer trials.

Currently, the typical defence legal fees for attendance only at a three-week trial of an uncomplicated insurance defence or personal injury case with limited objective injuries is approximately $135,000 plus disbursements, plus preparation and experts disbursements:

Preparation for a three-week trial:	$60,000
Attendance for one senior and one junior counsel:	$45,000/week x 3 = $135,000
Expert Fees Disbursements:	$10,000/expert

If the trial is out-of-town for counsel, disbursements are estimated to be another $10,000.00 for accommodation and meals.

The cost in total for a typical personal injury trial is around $200,000 for one defence party alone.

"Causes of Delay" According to the Working Group

The Proposal, without evidence, stated that there are four main reasons for delay in civil cases, and we include our responses:[61]

1. *The claimant has no intention of proceeding with the matter in a timely manner* – while this unfounded statement may cause offence, it also ignores the vast majority

of civil actions, which settle before the court becomes involved in the action.

2. *The defendant actively tries to delay the case's progress* – in personal injury litigation when the defendants are insured, this is a categorically false statement as insurers mandate defence counsel to move cases expeditiously to resolution to keep defence costs down.

3. C*ounsel are busy* - the actual experience with scheduling examinations for discovery in the major of civil cases (personal injury cases) is that they proceed at a reasonable time after file opening in accordance with the lawyers' schedules and after the delivery of documentation.

4. *The civil justice system is insufficiently resourced* – agreed.

Motions for Undertakings and Refusals and Documentary Production

The Proposal cites no evidence that personal injury cases in Ontario are responsible for the overwhelmed motions lists in some regions. Most personal injury cases do not require documentary production motions (such as Affidavit of Documents, Further and Better Affidavit of Documents, Undertakings, or Refusals), which are rare in these cases.

As CDL has already made known in its support of mandatory disclosure in a letter to the Chief Justice of Ontario (attention Ms. Laura Craig) dated April 30, 2024,[62] it supports the proposed standard list of documents as recommended by the Ontario Civil Rules Committee (CRC). This standard list would help clarify the expected documents in cases, minimizing areas of disagreement. In most cases, there is no dispute regarding the relevance and producibility of evidence.

CDL agrees with the Proposal's focus on installing processes to compel parties to make upfront documentary production with actual consequences if they do not. It is unproductive to conduct an examination for discovery with limited or deficient records, and time is wasted while parties, typically defendants, wait for plaintiffs to make appropriate and fulsome documentary production.

New Penalty Costs Proposed and their Impact on Personal Injury Cases

Ontario has a loser-pays costs regime which limits unmeritorious claims and frivolous litigation, but also attempts to partially pay the costs of the successful litigant. The Proposal recommends – without data or analysis – to drastically increase cost awards, mandating "full indemnity" costs which are presently only considered as an extraordinary sanction, and adding unprecedented costs penalties for missed deadlines. In the context of personal injury claims, these provisions are tone-deaf and have no regard to under-resourced parties such as injured plaintiffs who are off work due to disability and reliant on disability benefits or nothing at all. These increased costs penalties, added to the increased costs of file handling under the up-front evidence model, will affect both plaintiffs and defendants in personal injury cases and limit access to justice. The penalties

will also make Ontario stand out in the North American common-law landscape as the only province with such aggressive and punitive cost sanctions.

Inadequate Judicial Resources for Case Conferences

The Proposal's central reform is to mandate a scheduling conference within one year of issuance of the claim – in every single action. There are over 66,000 new civil actions issued each year. At 15 minutes per scheduling conference, an additional 16,500 judicial hours per year will be required just for these conferences. The Proposal also mandates other judicial conferences to add to the burden. The public is not able to access information as to how many of Ontario's approximately 280 judges (Ontario Superior Court of Justice) will be allocated to this substantial judicial time commitment. It is obvious to any court user in any region in Ontario that this proposed One Year Case Conference will immediately clog the court schedule.

Reliance Standard to Replace Relevance Standard for Documentary Disclosure

The Proposal to reduce the scope of documentary discovery from the relevance standard to a new "reliance standard" will result in substantial unfairness and increased costs. The current scope of relevance is appropriate to ensure justice, and the mantra is well-established in law: relevance is defined by the pleadings. The Working Group has failed to produce data to support its recommendation, and its own Phase 1 report noted the majority of responses said no to changing the relevance standard and "consultees who provided comments were overwhelmingly and support of relevance continuing as the standard."[63]

Unintended Overlap with Federal Court Relevance Standard

Under the proposed reliance standard, a party must disclose any document upon which it intends to rely and any adverse document known to be in its possession. This is compared with the current system requiring the disclosure of all relevant documents "relating to any matter in issue." Strangely, the Working Group's definition of its new "reliance standard" is identical to Canada's Federal Court Rules, which define "relevant" as the following: "a document of a party is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case."[64] The proposed reliance standard as defined by the Working Group falls squarely within the very definition of "relevance standard" used by the Federal Court of Canada. The failure to explain the difference in scope and to address this procedural and jurisprudential overlap will lead to substantial and complex procedural litigation to clarify the discrepancy.

Unilateral Control if Examinations for Discovery are Abolished

Documents on which one relies must necessarily be a subset of relevant documents – documents relating to the action. If examinations for discovery are eliminated, a party has lost the opportunity to determine which documents 1) may exist, 2) may be relevant so as to determine which documents, and 3) may be adverse to the producing party. It is

prejudicial to permit the party in control of the documents to determine if a particular document is adverse to their own case. Without discoveries, one party can unilaterally control the theory of the case and the issues, including hiding relevant evidence. The committee should not fool itself into thinking that the intentional non-disclosure of harmful documents does not already occur in the current system. This proposed change will make it easier for that to occur. The current practice is that even with pre-litigation documentary disclosure rules (in car accident cases, pursuant to the *Insurance Act*) and the service of Affidavit of Documents, examinations for discovery are necessary to uncover relevant documents. With the party being examined under oath, the temptation to discount or even hide relevant documents – especially those not in that party's own possession but rather within that party's control – is overridden by the oath and the imperative of direct questioning. The very structure of the process permits truth-finding and the gathering of important evidence in the case.

The Problem of Inadequate Disclosure - Redfern Schedules Insufficient

The Working Group publicly acknowledges it does not have an answer to the very real problem that parties will not voluntarily disclose relevant documents and will hide documents harmful (known adverse documents) to their cases. It proposes a Redfern Schedule[65] - effectively a form used in arbitration cases whereby the opposite party 1) objects to the other side's inadequate disclosure, 2) conjures the documents that may exist but that have been hidden by the opponent, and 3) justifies the request for production of the same. This cumbersome "Redfern Schedule" – and the back and forth correspondence required to process it - is nothing more than a list of undertakings and refusals, which document is compiled (in chart form as required by the *Rules)* in every case at the conclusion of examinations for discovery.

The Proposal simply repackages and renames the process that is already in practice. Obliging parties to complete forms that attempt to buttress the reliability of a Redfern Schedule (like having them swear affidavits about their efforts to determine the known adverse documents) merely adds even more paperwork, time, and costs to the current process.

Documents Within Party's Control v. Possession

In personal injury litigation, a large number of relevant documents are not in the possession of the plaintiff but have to be obtained through request from a non-party. But, those documents, since they pertain to the plaintiff, are within the plaintiff's control. The Proposal is silent on this category of document. Instead, the Proposal only focuses on the party's own possession, which is a simplistic understanding of property and inapplicable to personal injury litigation.

Determination of "Adverse" – Simplistic Categorization of Important Evidence

The determination of whether a document is "adverse" cannot be made until the document is in one's possession and can be reviewed. As much of the documentary

evidence critical to a personal injury case is not in the parties' possession but must be obtained from non-parties, a party cannot be certain of the content of the file until it is 1) requested, 2) received, and 3) reviewed. For example, an employment file containing evidence of a personal injury plaintiff's employment history, earnings, absences, performance reviews and opportunities for advancement will hardly fall into the simplistic categorization of "adverse" or qualify as a document upon which the plaintiff seeks to "rely."

Written Interrogatories Are Costly

Written interrogatories are more costly than an examination for discovery. They have been incorporated in our *Rules* for decades and are used by counsel in appropriate cases. In personal injury cases especially, there is no rational purpose behind written interrogatories. The Proposal contemplates possible multiple written interrogatories (back and forth), the need to resort to a Directions Conference if there is any objection, and the return to further written interrogatories to comply with the result of the interlocutory ruling. The Working Group has failed to provide any data that supports the beneficial use of written interrogatories in civil disputes. From a common sense standpoint, it fails to show how this process is more efficient and less expensive than a one-day examination for discovery.

Comparison to UK and New Zealand – Superficial and Anecdotal

The Working Group briefly cited entirely anecdotal experiences of non-Canadian jurisdictions to justify the proposed reduction in the scope of documentary discovery and the abolition of examinations for discovery. Ontarians deserve a more detailed review.

The reliance-based standard was first adopted in the UK following the Woolf Report of 1996.[66] After several years of experience, the UK government acknowledged that these reforms failed to bring down the cost of litigation, especially in personal injury litigation. In response, it empowered Lord Jackson to complete a review in 2009. The resulting "Jackson Report" confirmed that, in most cases, the extent of disclosure had not decreased.[67]

The UK government's response to the Jackson Report was to require the parties in multi-track cases (which would encompass almost all personal injury lawsuits in Ontario) to complete a report that lists all documents "that may be relevant to the matters at issue in the case," where and with whom they are located, how the documents are stored and how much it would cost to obtain them.[68] The judge at the case management conference is then required to use these disclosure reports to make an order directing the appropriate level of disclosure. Importantly, the UK Rules instruct the judge to make an order that has regard to "the need to limit disclosure to that which is necessary to deal with the case justly."[69]

A recent briefing paper sent to the New Zealand rules committee concluded that the reliance-based disclosure regime had become unduly complicated. This group concluded

that New Zealand's discovery rules were "the enemy of pragmatism". The group recommended replacing several rules with an "obligation to cooperate to agree [to] proportionate disclosure." However, once again, the New Zealand group acknowledged that "[i]t may also be necessary to increase judicial involvement to ensure counsel are focused on this requirement."[70] The CRR's Proposal misguidedly asks Ontario to adopt the relevance standard used by the UK before it implemented reforms to return to the system we have in Ontario currently.

Foreign jurisdictions may have much to teach about how this model works in practice. The Proposal does not reference any papers or studies from the law reform commissions, academics or courts of the jurisdictions mentioned. Both UK and New Zealand rely heavily on case management. The lesson that should be taken from a high-level superficial comparison to those jurisdictions is that the Proposal to abolish examinations for discovery and narrow the scope of disclosure will necessitate a substantial increase in Ontario's judicial resources to obtain the level of case management seen in those other jurisdictions.

Scope of Discovery is Not Stagnant

The scope of discovery in personal injury cases is not stagnant. Despite CDL`s agreement to a standardized list of mandatory productions by the plaintiff, the procedural law continues to evolve as to what is required to prove and defend a personal injury action. This is illustrated by the recent (2024) Ontario Court of Appeal decision in *Aubin v. Synagogue and Jewish Community Centre of Ottawa (Soloway Jewish Community Centre)*.

The Court of Appeal held that in some circumstances the rate of pre-judgment interest (PJI) applicable to a plaintiff's claim for non-pecuniary damages is based on the rate of return of their investments over the duration of their litigation. This is meaningful evolution in the law, as courts have typically calculated PJI pursuant to the chart in the *Courts of Justice Act.* The SCC refused leave to appeal. Now, such rates vary depending on a claimant's investment history, which necessitates discovery on this new issue. This departure creates an entirely new area of discoverability of documents, and of the plaintiff, in order to assess and defend claims. Information regarding every claimant's investment portfolio is potentially relevant in every action for personal injury.

CDL wrote in February 2025 to the Discount Rate Subcommittee of the Civil Rules Committee to propose statutory reforms (mandatory standardized PJI rates) to address this issue. While we hope for reform, the abolition of examinations for discovery would only defer the issue until trial – with the evidence surrounding the plaintiff`s investment portfolio coming out for the first time in cross-examination, further lengthening trials and congesting the courts.

Cross Jurisdictional Comparisons and Implications re Abolition of Oral Discovery

The Proposal states: *"Other Commonwealth jurisdictions – including the U.K., Australia, New Zealand, and Singapore – provide ample examples of robust and thriving civil justice systems that succeed without the need for oral discoveries."*[71] There is no data offered by the Working Group to support this statement – no law reform or academic articles, not bar association reports, no jurisprudence – only anecdotal commentary about telephone calls to lawyers in these foreign jurisdictions.

The Proposal provides examples, without evidence, of foreign jurisdictions wherein (in the "belief" of the Working Group) thriving civil justice systems exist without the need for oral discovery, but it ignores the more relevant and direct comparisons which should be addressed – those of other common-law provinces within Canada.

Ontario Will be Off-Side When Compared to All Other Common-Law Provinces in Canada

Every other province in Canada has oral discovery in civil proceedings. If Ontario proceeds with the proposed changes, it will be the only province and territory in Canada with this system.

The Proposal justifies the abolition of examinations for discovery in Ontario because it is a "time-consuming" process[72] (p. 34) in the way of the "facilitation of earlier settlement."[73] No data has been presented to support these contentions, offered by the Working Group for their wholesale transformation of the civil justice system.

Other Provinces Permit Expanded, Not Reduced, Discovery Rights

Several Canadian provinces currently have even broader rights of discovery than Ontario's current system, with no indication or evidence that civil actions in those provinces take longer to litigate, cost more to litigate and/or fail to achieve early resolution. In fact, the Proposal acknowledges that under the current disclosure system in Ontario, "settlement rates in Ontario have historically been very high."[74]

In Ontario, when the defendant is a corporation, the examining party can select the witness to be examined. A party may theoretically examine more than one individual,[75] but litigants tend not to bring such motions and instead rely on the sole witness to produce documents or undertake to give answers. In the alternative, they might name as a defendant every individual they would like to depose. It is common for plaintiffs to sue both an employer and an employee, so as to be *prima facie* entitled to examine both a corporate representative of the employer and the specific employee with the most direct knowledge of the incident.

This "sue first and sort it out later" attitude towards employees of defendants is avoided in North American jurisdictions where multiple corporate representatives, fact witnesses, and experts, can be examined. Alberta permits extended discovery of both corporate representatives of parties as well as employees and witnesses[76]. In Alberta, counsel for

one litigant may examine several witnesses for a defendant, with one being proffered as a corporate representative and the others being proffered for their factual knowledge. In both Newfoundland[77] and Nova Scotia,[78] parties are permitted to examine non-parties without a court order, subject to the court's discretion to limit unnecessary or vexatious examinations.

There is no indication that civil actions in other provinces which permit extended discovery rights are facing delays or increased costs. There is also no evidence that those provinces do not enjoy the "facilitation of early settlement."

Effect on Mobility Rights of Lawyers

At a time when Canada's provinces – including Ontario - are seeking to break down economic barriers between provinces,[79] the Proposal will restrict the mobility rights of lawyers across Canada. Currently under the *National Mobility Agreement*[80] and the *National Mobility Agreement 2013*[81] lawyers are permitted to practice up to 100 calendar days per year in common law provinces and can transfer their legal practice easily among common-law provinces.[82] Ontario is a signatory to the agreements.[83] It is in the public interest for lawyers to have freedom of movement. It is the spirit and intent of the agreements that the provinces and territories strive to resolve any differences among them which inhibit this public benefit.[84] The Proposal's abolition of discoveries contradicts that intent. The process would be so unique to Ontario as to render it impracticable and inaccessible to lawyers in other common law jurisdictions. Similarly, as new Ontario lawyers are trained both at law school and at work solely on the Ontario system, their lack of knowledge of the common examination for discovery process would limit any realistic opportunity to practice across the country outside of Ontario – thereby limiting the provincial mobility rights of lawyers both within and outside of the jurisdiction.

United States of America

As noted in the Campbell *Report on Discovery Process in Ontario*,[85] the United States process of discovery contains the following distinct features:

- A requirement to disclose documents only on request;
- A general right to conduct both oral discovery and written interrogatories; and
- Few restrictions on the pre-trial examination of non-party witnesses.[86]

Ontario's Campbell Report also commented on ongoing civil justice reforms of the discovery process in several states, including Arizona, California, New York, Texas and at the Federal Court. In all instances, none of the reforming states recommended abolishing examinations – not one single state or court considered removing the most efficient method of fact-finding for parties to litigation. Instead, those reforming states encouraged counsel driven solutions and provided sanctions for parties abusing the discovery process.

The Proposal to abolish examinations for discovery in Ontario would result in an Ontario civil process which is at odds with the remainder of the common law provinces and territories in Canada and when compared to our largest trading partner, the United States of America. The Proposal's citation of selective foreign jurisdictions in attempting to justify its recommendations, while ignoring the effectiveness of systems utilized in other provinces and territories of Canada and the United States, shows it was prepared without adequate investigation, reflection or consultation. The Proposal will negatively impact the mobility rights of lawyers in Canada at a time when inter-provincial mobility rights are of the utmost importance.

Settlement, Mediation and Pre-Trials

It is common knowledge that over 95% of personal injury cases settle prior to trial, most without court intervention such as case conferences or pre-trial. The CRR Working Group's Proposal does not recognize this reality.

In personal injury cases, settlements regularly happen pre-litigation or early in the litigation process and well before burdening the court for interlocutory relief or trial scheduling. The CRR Working Group's Proposal mandates a pre-litigation process for personal injury matters. Many personal injury litigants are already engaging in pre-litigation discussions and settlement negotiations at the insurance adjuster level. Cases are frequently settled prior to the issuance of a claim.

Settlements Arise from Examinations for Discovery

Cases often settle prior to examinations for discovery if sufficient documentation exists to support early resolution. Even with fulsome documentary production, examinations for discovery provide an excellent opportunity to facilitate settlement discussions. As previously described in this response, it is clear from the results of CDL's survey of its Ontario members: 96% cases settle prior to trial, 71% of cases settle before trial scheduling, and 60% of cases settle without any court timetabling or intervention. The lack of data from the Proposal should be provided by the court in order to refine the statistics as to when in the litigation process personal injury cases resolve. Unsurprisingly, 90% of CDL members said abolishing examinations for discovery will result in increased trials.

Examinations for discovery are an essential part of the settlement process: 96% of CDL members said they are very important/important. Oral discoveries allow parties to learn about the case and gather, understand and test important evidence and seek additional necessary productions. Rather than hinder the litigation process, they often expedite it, and assist in facilitating settlement. The examination for discovery process ultimately facilitates settlement, or assists parties in considering the next steps in the action. Notably – this is an out of court process which does not require any judicial resources.

Mediation

The Proposal to mandate mediation across Ontario is a long overdue change to the civil litigation process. CDL welcomes this change. Insurance defence litigators and personal injury litigants already take mediation very seriously. Mediation is already mandatory under the *Insurance Act* motor vehicle accident litigation, and is mandatory in Toronto, Windsor, and Ottawa pursuant to the *Rules of Civil Procedure*.[87]

Mediation is not a *pro forma* process in the personal injury world; quite the contrary. It is already an essential element in the litigation process which regularly facilitates settlement. Plaintiffs and defendants work hard to prepare for mediation, reviewing all of the relevant documentation and briefing their clients on the importance of the process. The mediators are experienced insurance litigators who follow appropriate facilitative mediation protocols to ensure meaningful settlement discussions increasing the chance of resolution. The vast majority of personal injury cases that proceed to mediation settle. While it often results in settlement, there are also no consequences to either party if it does not. As a result, parties have an opportunity to put their best foot forward, and make compromises as needed. Mediation is always a springboard to further settlement discussions.

Evaluative Mediation is Unworkable

In that context, CDL is concerned about the proposed implementation of evaluative mediation. Evaluative mediation will not work in personal injury matters. Evaluative mediation requires the mediator to act as arbitrator, proposing a settlement which would be documented in writing, sealed, and filed with the court for the trial judge's consideration when evaluating trial costs. This is problematic for several reasons, as already acknowledged in Proposal:[88]

- Mediators are not qualified to provide assessments, nor will they be willing to do so and if not, cannot be compelled since they are not under the jurisdiction of the court or subject to the *Rules of Civil Procedure*.[89]

- It will create a mini-trial atmosphere which displaces the frank dialogue intended by the mediation process; posturing and performing will be encouraged whereas honest settlement dialogue will be marginalized.

- Parties may "shop" for mediators, based on the perceived favourability of their past assessments in order to protect their clients' best interests.

- Most importantly, damages in personal injury cases are fluid, particularly with respect to past and future loss of income and future medical rehabilitation expenses, and the mediator's number at mediation will not reflect the value of the case at trial. The parties cannot be married to the position they held at mediation, given that damages assessments in personal injury litigation can shift dramatically as time goes on.

Pre-Trial Conferences

The working group proposes to abolish Pre-Trial Conferences (PTCs) on the basis that these meetings are a strain on judicial resources and "result in a backlog in some regions". These comments are made without any supporting data or evidence. As with mediations, PTCs are, in addition to trial management meetings, yet another opportunity for the parties to discuss settlement, but this time with the assistance of a judge who is empowered to bring their own opinions to the table because they are unable to then sit as the trial judge.

The Proposal to abolish PTCs is internally inconsistent, since the Working Group also says "Pre-trial conferences have come to occupy an important place in the life of an action and contribute to a consistently high rate of resolution before trial year over year."[90] Will the court actually want to cancel the one opportunity it has to assist the parties who have not been able to resolve the case at mediation or earlier?

Instead, judges will merely conduct a trial management conference (TMC) in the weeks leading up to a trial. There is no indication from the working group that the TMC will consist of anything more than trial management and procedural discussions.

Maintaining PTCs with a settlement conference component is critical to ongoing settlement discussions between the parties, and surely is far preferable to trial. Attending a mandatory mediation (as is already in place in many parts of the province or litigation areas such as MVA cases) will reduce the numbers of cases that must be pre-tried. Procedural requirements can be considered to streamline the hearing, including joint document brief index, witness list, undertakings complied with, draft jury questions, etc. Pre-trial memoranda could be limited in page number and attached pages. The last offer to settle made by a party at mediation could become a Rule 49 offer to settle to be served within 30 days of the failed mediation.

To remove the ability of the parties to hear a judge say how they would treat/view an action, removes a significant resource that a judge can provide to represented and unrepresented litigants. There is simply no justifiable basis to remove this critical opportunity for the parties to seriously discuss the strengths and weaknesses of their respective positions, this time with the benefit of a trial judge.

Self-Represented Litigants (SRLs)

The Proposal makes no reference to the large civil litigation role played by self-represented litigants ("SRLs"). Over the past two decades, multiple Canadian studies have noted increases in SRLs. The majority of SRLs (57.7%) are involved in civil matters.[91]

This access to justice crisis is something all Ontarians take seriously and seek to address. The Proposal said: "Inequality of access to civil justice creates the risk that some individuals may be able to unlawfully infringe the rights of others without consequence.

When that happens, confidence in the justice system and the rule of law is diminished."[92] However, that is the end of the discussion about SRLs in the Proposal – there is no section in the paper addressing this major issue confronting our courts.

It must be recognized that most SRLs are self-represented generally not by choice but because they cannot afford a lawyer. In 2024, Pro Bono Ontario[93] (which is largely funded and supported by Ontario's lawyers) received over 100,000 calls and served 34,000 Ontarians who were unable to pay for a lawyer.[94] In addition to Pro Bono Ontario, the Law Society of Ontario (LSO)[95] and the court[96] make resources available to SRLs through its website

There is actual data as to the litigation role played by SRLs in civil cases. The October 2021 report *Tracking the Trends of the Self-Represented Litigant Phenomenon: Data from the National Self-Represented Litigants Project, 2019-2021* found:[97]

- 63.4% of participants were the plaintiff in the case;
- 91% reported that the other party was represented by counsel;
- 41.3% identified as a person with a disability[98];
- 50.8% had annual income under $30,000, with an additional 15% reporting their incomes was between $30,000 - $50,000; and,
- 62.6% had a negative experience with the legal system (discrimination, confusion over the rules and feelings of inequality).

The Proposal – specifically the addition of the PLP, the abolition of discoveries, the joint expert presumption and the costs provisions - will make it even more difficult for SRLs to access the civil justice system. The Proposal mandates that SRLs must comply with the PLP, but fails to consider that SRLs:

- Will be unaware of the PLP as typically processes historically and universally start with claim issuance;
- Who are already unable to afford counsel will similarly be unable to fund disbursements for compliance with the PLP;[99]
- Will be less able to secure sworn witness statements required in the up-front evidence model (if they can even source the witnesses and draft the witness statements) since they are not Commissioners of Oaths;
- Will be ill-equipped to determine whether a case is suitable for the presumptive joint expert; and,
- Will be less able to meet the strict deadlines and therefore will be exposed to costs orders - when they are least able to afford it.

The unique concerns of SRLs were not considered by the working group. Consideration should have been given to the Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons*[100] and to the recognition of the need to relieve against harsh consequences of technical procedural requirements which can bring about inequalities for SRLs opposed by lawyer-represented parties.[101] Represented parties benefit from the court's flexibility to address matters involving SRLs and the ability

to access interlocutory and case management assistance. Instead, the Proposal is silent on the role SRLs play in its inflexible approach to deadlines, advocating a strict no-adjournment approach.

While SRLs are expected to adhere to the *Rules* when they represent themselves (regardless of whether they were forced to represent themselves due to impecuniosity), the proposed changes will increase the impediments to access for justice for a significant portion of Ontarians.

Equity-Seeking Groups

The Proposal does not consider how its contemplated strict "no adjournment" policy and drastically increased costs penalties to litigants might affect litigators in all types of litigation, in all regions of the province of Ontario. No consultation took place across practice areas or even geographically across the province, with the Working Group members almost entirely from Toronto.

There is no consideration to the disproportionate effect on the rules that decimate judicial discretion might have on equity-seeking groups of litigators. CDL, like other bar associations, has representative constituencies from its Women's Caucus (WC), its Young Lawyers Committee (YLC) and its Diversity and Inclusion (D&I) Committee. The Proposal to remove the inherent discretion of the court to administer its process in favour of a strict no adjournment policy is misguided and will have detrimental effects on litigators who deserve support from the courts and the civil justice system.

Women Litigators

Recent studies by the Law Society of Ontario (LSO) have shown that despite continually constituting more than 50% of Ontario law school graduates, women continue to leave private practice, or the profession altogether, after five to ten years of practice. With this understanding, CDL WC is concerned that the introduction of fixed hearing dates and restricted allowances of adjournments will have a detrimental impact on women in the profession. This is a result of women disproportionately being caregivers of children and elderly family members, which already makes them prone to leave the legal profession for a variety of reasons (11.2% of all women licensees are "retired or not working" compared to just 5% for men). We are concerned this could result in a significant set-back in the advancement of women in the profession when they are already continuing to fight against numerous negative biases.

Young and New Litigators

Young and new lawyers will be significantly affected by the proposed changes to the *Rules of Civil Procedure*:[102]

1. Young and new lawyers learn to question witnesses at examinations for discoveries. The abolition of discoveries will deprive them of this important skills development opportunity.

2. Young and new lawyers learn to advocate on motions, and with the inability to appear in court will be deprived of this meaningful litigation experience.
3. Increased trials – as CDL is confident will be the case resulting from the abolition of discoveries – will see inexperienced young and new lawyers appearing at trials as their first court attendance, which is less than desirable for the court and for clients.

Regardless of any transition provision that might be eventually incorporated, the detrimental consequences for lawyer training (from the abolition of discoveries and reduction in access to interlocutory court appearances) will result in lawyers appearing in court without the valuable experience from which they, their clients and the administration of civil justice in Ontario benefit.

Diversity and Inclusion (D&I)

CDL's D&I Committee is concerned that the strict no adjournment policy will unfairly impact racialized licensees as recognized by the Law Society of Ontario (LSO). One example is the tone-deaf missive in the Proposal that only significant life events (i.e. a death in the family) will justify an adjournment. The Proposal makes no mention of religious holidays adhered to which are not statutory holidays.

LSO statistics show that racialized and Indigenous licensees disproportionately practice law in small firms, whereas white licensees are the least likely to work in small firms.[103] In 2023, 25% of First Nations and Inuk lawyers, 20% of Metis lawyers, and 22% of racialized lawyers are sole practitioners, compared to just 16% of white lawyers. Indigenous, Black, Filipino, Latin American, South Asian and Southeast Asian lawyers are substantially more likely to work in the smallest firms, with figures ranging from 35% to 48%, compared to 24% of white lawyers. Lawyers who work in small firms or as sole practitioners will be less adaptable to a strict no adjournment regime as they do not have colleagues they can rely upon to attend court appearances in their stead.

Experts

The CRR proposes three areas of reform for expert evidence:[104]

1. Presumptive joint litigation experts;
2. "Hot tubbing" of experts (meet and confer); and,
3. One expert per issue per party without leave.

The proposed introduction of categories for experts **is reasonable**: a) "litigation experts" (hired by the parties); b) "participant experts" (not hired by the parties like family doctor or fire marshal); and c) "non-party experts" (hired by a non-party like SABS insurers). However, the Proposal's wording requires clarification as it is not consistent as to which experts rule will apply to which type of expert, i.e. litigation experts, participant experts and non-party experts.

1. Presumptive Use of Joint Litigation Experts

The proposed imposition of joint experts will lead to more experts, not fewer, and will increase the number of interlocutory motions seeking relief from this onerous rule.

The current practice in personal injury litigation is for parties to rely on a singular expert for opinions on facts that can be agreed upon, and/or are based on documentary evidence. One example may be a litigation accounting expert calculating different assumptions based on objective facts like tax-declared income. This process is already frequently employed by parties in personal injury and insurance cases that reach trial in order to save costs and reduce time at trial.

However, because experts typically provide opinions based on disputed facts that are to be litigated, it is neither reasonable nor practical to expect parties to retain experts jointly when key underlying facts are in dispute. This is especially the case in personal injury matters where the facts are not contained in a document:

a) A medical expert witness conducts their own fact-finding (specific to their medical specialty) after taking a history, performing examination and administering testing of the personal injury plaintiff. The very nature of a medical expert opinion precludes joint expert assessment since the facts underlying the opinion are unique and derived from that expert's own individual medical assessment process.

b) A future health care costs expert conducts their own fact-finding with an independent assessment of the plaintiff conducted in their own home, workplace or therapy/rehabilitation facilities. In serious personal injury cases, future care costs are often the most contentious issue of the greatest damages value.

The Proposal specifically suggests joint experts for engineering analyses, which is not feasible. For example, in a fire loss case the expert engineering opinions are not based on documentary evidence, but on real evidence at the fire scene. The first fire investigator on site is usually the one retained by the insurer for the damaged property. The investigation may then identify potentially liable parties. An electrical fire scene may suggest liability on an electrical contractor hired many years earlier by a previous property owner, who is only identified after an investigation and often only after examinations for discovery. Once added to the civil action, there are several considerations that arise including the following:

- Would the defendant electrical contractor be bound to accept the opinion of the first expert, whose report resulted in them being added into the action, merely because that first expert was first on site?
- Does the property insurer who was first on site lose their expert, whose evidence is critical to their case, so that a mutually agreeable "joint" expert can be found later?

In technical matters requiring expert opinions, the following questions arise:

- How are the parties even to know that a joint retainer is the best option without first consulting their own expert to review the evidence and provide an opinion?
- Each party therefore will bear the cost of its own expert, and then if a joint expert is considered feasible – a third invoice will be incurred?

The Proposal, even if the matter is ultimately determined to be suited to a joint expert, will increase the costs to the parties. We contemplate the need for court intervention (at directions conferences or motions) to address the confusion which would be created by this proposed rule. The unworkability of the Proposal's joint expert presumption is obvious.

2. "Hot Tubbing" of Experts

The mandatory "hot tubbing" of experts in the absence of counsel is not an efficient use of an expert's time and will increase costs to the parties. Experts are mostly opining on contested facts so there is nothing to be gained from a conference between experts. Additionally, experts may be disinclined to provide their opinion to assist the court if they know they will first be confronted by another expert without the presence of the counsel retaining them. Does this Proposal realistically expect two expert doctors, each retained to opine on the applicable standard of care and whether it was breached in a medical negligence action, to arrive at an agreement on any issues? The responsibility of weighing evidence and making findings remains with the trier of fact.

3. One Expert per Issue per Party

The Proposal seeks "one expert per issue per party," but offers no clarification as to the meaning of "issue." Litigants in Ontario are already limited to three (3) experts without leave and only one per issue. The court maintains a gatekeeper function to ensure only relevant expert witness evidence is admitted. In personal injury, would the Proposal mean one expert per medical speciality? Could multiple experts with different specialities all speak to the issue of causation? Could separate experts be retained to opine on separate heads of damages (i.e. vocational expert and care costs expert)?

4. Timeline for Delivery of Litigation Expert Reports

While CDL acknowledges the concerns over late-served reports, the Proposal to exchange reports 90 and 60 days, respectively, prior to mediation is a concern because often mediations do not require expert opinions in order to be successful in personal injury cases. Many matters settle prior to or at mediation without expert reports. As such, the requirement to exchange expert reports prior to mediation increases costs (which results in increased premiums) and puts the Plaintiff to an unnecessary burden to attend medical examinations when unnecessary or premature. The earlier exchange of expert reports does not address the problem, whereas judicial application of the current Rules is a more balanced remedy.

While the use of “hired gun” experts is an issue worth addressing, it is the responsibility of the courts to review and consider the evidence, act as gatekeeper, and govern its own process. There is a role for joint experts especially regarding technical issues that are not at the heart of the dispute (calculating damages, etc.), and that is a discussion that CDL welcomes.

Pierringer Agreements – Partial Settlement Agreements

The Working Group has proposed: “to revert to the pre- *Laudon* v. *Roberts*[105] litigation scheme where the settlement monies paid under a Pierringer Agreement are not deducted from the damages awarded at trial.” The Working Group proposes that, “whatever the damages happen to be and whatever percentage of liability the court finds against the non-settling defendants is the amount the non-settling defendants must pay.” The Working Group believes this will “encourage parties to enter into these types of agreements.”

This Proposal misunderstands the law surrounding partial settlement agreements in accordance with *Laudon* and violates the most basic limiting principle underlying torts – to avoid over-compensation: “It is the fundamental principle of tort law in this country that an injured plaintiff should be neither over nor under but fully compensated by way of damages for injury sustained by the negligence of others.”[106] It is further stated in *Laudon* that:

> The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have had the tort not been committed, insofar as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of damages should be the plaintiff’s actual loss. It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle.[107]

The Proposal creates unfairness, increases legal costs, over-compensates plaintiffs, discourages settlement, increases the number of trials, and will increase insurance policy premiums.

In *Laudon*, total damages at trial amounted to $312,021, which was $277,698 net of the plaintiff’s contributory negligence, whereas the settling amount between the plaintiff and the settling defendant was $365,000. The settlement amount exceeded the total damages awarded at trial. At trial, the amount apportioned to the non-settling defendant was $144,464. The issue that arose was whether the non-settling defendant was required to compensate the plaintiff in circumstances where the plaintiff had already been fully compensated (actually, over compensated) by the settling defendant and the plaintiff was not required to return any of the settlement monies to the settling defendant. The court held the non-settling defendant was not required to compensate the already over-

compensated plaintiff. If the Proposal were to be applied to *Laudon*, the plaintiff would have received $465,000.00 (i.e. the settling amount of $365,000.00 plus $144,464).

If the Proposal were to be accepted, plaintiffs will be incentivized to proceed to trial with aspirations of over-compensation, particularly if the plaintiff is not required to disclose the settlement amount to the non-settling defendant. The Proposal's misguided suggestion to permit double-recovery while the non-settling defendant's exposure remains the same would reduce trials and costs is unrealistic.

The current law (including the limited circumstances where a party may be entitled to double recovery) and the recent amendment to the *Rules* regarding Partial Settlements - which codifies the existing caselaw - are sufficient and no change is required.[108] CDL participated in that *Rules* consultation and the adopted language reflects CDL's submissions. The recent Ontario Court of Appeal decision in *Cadieux* v. *Cadieux*, 2025 ONCA 405[109] accords with CDL's position herein and the prior caselaw – all of which upholds the compensation principle in tort, encourages settlements and promotes access to justice.

2025 Amendments to Ontario's No-Fault Insurance Regime – Impact on MVA Civil Actions

Although the Working Group recognizes that personal injury claims "represent the majority of civil cases commenced in the Superior Court of Justice,"[110] no insurance defence litigation counsel or insurer representative was appointed to the Working Group or even consulted.[111] The Proposal does not feature any discussion of the majority of civil cases: motor vehicle accident (MVA) tort cases. According to the Ontario Government, over 36,000 people are injured every year in over 26,000 car accidents.[112] For every car accident which results in a claim there is a companion no-fault claim for Statutory Accident Benefits[113] which is handled out of court at the Licence Appeals Tribunal.[114]

The most recent (2025) amendments to the *Statutory Accident Benefits Schedule* (*SABS*) will come into effect for insurance policies entered into or renewed on or after July 1, 2026. These changes will have a significant impact upon car accident tort lawsuits because benefits available pursuant to the *SABS* that were previously mandatory will now become optional: including income replacement, caregiver, non-earner benefits, in addition to lost educational expenses, visitors' expenses, housekeeping and home maintenance, and clothing, glasses etc.…[115]

Consequences to the Taxpayer

The following will be the resulting consequences to the taxpayer:

1. Ontario's experience is that the majority of consumers opt for lower premiums instead of purchasing optional benefits.

2. Starting in 2026, injured Ontarians who are at fault for their car accidents and who sustain an income loss due to disability will have recourse only to private collateral benefits (if they have them) or Social Assistance.
3. This will result in an increase of the burden on government-funded income replacement programs like the Ontario Disability Support Program[116] and hence, the burden on the Ontario taxpayer.[117]

Consequences to the Court

The following will be the consequences to the court system:

1. Most tort lawsuits for damages in car accident cases include income loss damages. According to the principle against double-recovery, these income loss damages are reduced by collateral benefits received or available – the most common being income replacement benefits paid pursuant to the *SABS*.[118] Without income replacement benefits to deduct from income loss damages, for a majority of claims, the value of tort damages in civil actions will increase. This increase highlights the necessity of examinations for discovery to address this head of damages (medical facts for disability from employment, educational and vocational history, etc.).
2. Examinations for discovery will be more crucial in the near future due to the *SABS* changes. As a direct result of the amendments to the *SABS*, which will be in force and effect on July 1, 2026, tort lawsuits will see a dramatic increase in claims for such issues in Court, which would necessitate the need for further discovery of information that could not ordinarily be obtained via exchange of documentation alone. One advantage of Examinations for Discovery in this instance, regarding such off-set benefits on the tort, would be the efficacy in narrowing down such issues going forward to a Trial based on Plaintiff information at Discoveries.
3. Fewer medical records and expert reports are contained in the Accident Benefits dispute resolution file if income replacement benefits are not in dispute. There will be much less insight into a personal injury plaintiff's case (injuries, employment, family circumstances) when income replacement benefits are no longer commonly received by car accident victims. This further reinforces the need for examinations for discovery in tort car accident cases.

Restricted Adjournments and Fixing Court Appearances – Experience at the LAT

The Proposal's strict anti-adjournment protocol will pose a barrier to justice.[121] A case study of reference is the procedural amendments that occurred within the *Statutory Accident Benefits Schedule* regime, which is under the jurisdiction of the License Appeal Tribunal. In 2022 to 2023, the LAT denied adjournments for all proceedings (similarly, without a guideline or factors to apply) – even if the parties consented. Significant concerns arose in respect of access to justice for the parties, when the insured became unrepresented shortly before a hearing and when unforeseen scheduling issues arose. It resulted in a sizable increase in Divisional Court and Superior Court appeals, which corrected the error of law and/or fact made regarding adjournments at the LAT. The

increase in Court appeals also had an adverse effect of burdening the Courts. Through consultation with stakeholders using the LAT, a comprehensive list of plausible instances where adjournments ought to be granted was developed and codified at the new Rule 16.3 of the *LAT Rules*.[122] This cautionary tale should serve as a warning to the CRR Working Group.

Any rule regarding the court's exercise of its discretion to grant adjournments should involve a consistent process while maintaining the integrity of proceedings focused on the efficient, proportional, and timely resolution of disputes on the merits.

Lack of Transition Provision

The Proposal gives no consideration to transition, or how the civil procedure will move from its existing process to the radical new system. The Proposal mentions only that there would be "a reasonable transition phase" but considers none of the complexities of that process. Every procedural rule, or statutory procedural or substantive amendment, requires a temporary rule to manage the introduction to a new system.

Instead, in the absence of a transition provision, the Working Group has repeatedly communicated to the Bar and the public that the "implementation date" (undefined) is "January 1, 2026." Questions in public webinar sessions to the Working Group about what "implementation" actually means are unanswered. The absence of any attempt to consider the complexities of transition from existing *Rules* to any new procedure fails to comply with the CRR's own "guiding principle" that the "proposed changes should be implemented efficiently and progressively/iteratively where possible." Moreover, the insistence that the "implementation date" remains January 1, 2026, without any consideration of transition, is in direct conflict with the recent comments from the Attorney General that the consultation process is in fact legitimate and that the concerns and suggestions of those providing feedback will be addressed.

Litigants and counsel have no choice but to assume that the "implementation date" will be defined to mean the proposed changes will apply to new claims issued as of January 1, 2026. Obviously, it is already too late for that. For example, in a case to be issued (due to the limitation period) on January 1, 2026, the parties are already in default of the PLP requirements. Rushing whatever the changes are to be, without consideration of transition, will lead to negative consequences to the litigants and professional liability concerns for the lawyers involved.

The Proposal says that the Working Group Co-Chairs recognize that the proposed 66,000 new case conferences (annually) and other court attendances will increase demand on judicial resources. They suggest that judges will be available for these attendances because they will no longer be working on the current court attendances under our present system. Without even considering transition, the entire system will grind to a halt, since there are – as everyone agrees - not enough judges for their current workload.

E & O Claims Against Lawyers

There is a real concern that a number of the proposed changes will expose Ontario lawyers to professional liability claims. Should this occur, it is likely that an increase in insurance premiums for lawyers will follow, which will be passed on to Ontarians making litigation more costly and negatively impacting access to justice. While some claims against lawyers may be resolved through "repair," some will result in new professional liability actions against lawyers, with each net new action placing new demands on judicial resources.

The following areas have been identified as particularly problematic for lawyers' professional liability if the Proposal is implemented:

- Service of an Originating Process on Lawyers: Permitting effective service of an originating process by email on a lawyer[123] will give rise to a new category of claims against lawyers who do not promptly inform their clients of new claims (even due to inadvertence), resulting in default proceedings against the clients. Many lawyers previously known to parties do not practice civil litigation and have limited knowledge of the *Rules of Civil Procedure*.[124] These lawyers may feel comfortable responding to demand letters or participating in negotiations but if the matter were to proceed to litigation, they would refer their clients to a litigator. The role of insurance has been ignored on this service issue: the majority of civil cases in Ontario are personal injury cases in which the defendants are most commonly individuals who have no prior relationship with the insurance defence lawyer who will be hired to defend the action. A defendant who has a litigator on retainer who will respond to a claim and is in a position to accept service of an originating claim is in the minority.
- Amending pleadings: The Proposal says any pleading amendment requiring the addition, deletion or substitution of a party will require leave of the Court, which will only be granted if the amending party pays all reasonable costs thrown away on a full indemnity basis (defined as 100% of actual legal fees). The current rule requires such amendments to be made on consent with a presumption in favour of partial indemnity costs. Full indemnity costs will increase what is to be paid out by the lawyer's E&O insurer in the event of a lawyer's negligence claim.
- Default: The Proposal says all reasonable costs thrown away on a request to set aside a Notice of Default or Default Judgment be paid on a full indemnity basis, and the threshold for setting aside a default judgment is more onerous. This could increase claims against counsel whose inadvertence results in a default judgment, and will increase pay-outs by the lawyer's E & O insurer in the event of a lawyer's negligence claim.
- Providing recommendations to clients to settle a case: A lawyer must fully inform the client of the law and relevant facts surrounding a recommendation to settle a case. The following passage from *Lawyers Professional Liability* 3rd Ed. explains the current standard of care expected of lawyers when making recommendations:

> "This requires a lawyer to obtain the information necessary to ascertain and inform the client of the likely results of litigation. The lawyer must also inform

> the client of any missing information that could affect the settlement recommendation, the means of obtaining it and the risks of settling without it. Ultimately the lawyer's advice must allow the client to decide whether to settle based on full knowledge of all of the options and risks. Providing such information allows the client to make a fully informed decision regarding settlement."[125]

The Proposal takes away the most important method by which lawyers obtain information – examination for discovery. With lawyers' fact finding ability dramatically decreased, it is expected the standard of care for lawyers will change. There will be an increase in claims against lawyers for improvident settlement (or in recommending against settlement and proceeding to trial) because lawyers will no longer be able to provide their clients with the information necessary to make an informed decision.

- Consequences of Fixed Hearing Dates: The Proposal contemplates a strict no-adjournment rule with a "delay penalty" of $500/day. No evidence is cited whether this is in any way a reasonable expectation of the majority of litigants in our court. The current *Rules* allow for various mechanisms to address delay: status hearings; case conferences; and motions to set aside a Registrar's dismissal Order. These are important mechanisms that are aimed at ensuring matters are tried on their merits, and, to a certain extent, preventing further litigation including claims against lawyers. Removing the ability of the court to govern its process will lead to an increase in claims against lawyers who have contributed to this delay, which will increase payouts by the lawyers E & O insurer.

- Addition of Parties After Discoveries: It is not uncommon in negligence cases for parties to be added after they are identified on examination for discovery. If the proposed abolition of examination of discoveries comes to pass, this discovery will occur at trial when witnesses are cross-examined that parties learn of additional liable parties who should have been added to the litigation under contract or under the *Negligence Act*.

Trials

No Trial Procedure Mentioned

The Proposal does not consider trial procedure. Despite the obvious need for a methodology to streamline the trials that actually do proceed – especially the long trials – the Proposal is silent. Instead, it proposes various documentary items be produced by the parties in advance of trial, like mandatory joint books of documents and chronologies which will be within the purview of the trial management conference judge. While there is opportunity for civil rules reform in the area of trial practice and efficiencies through technology, unfortunately the Proposal is silent on trials. CDL would be pleased to participate in consultation regarding ways of making the comparatively few personal injury and insurance cases that proceed to trial more efficient. This can be especially

accomplished in cases tried by judge alone. In jury cases, the case is already efficiently presented by the parties due to the exigencies of the civil jury trial system, which is to be maintained in Ontario and it is not under review as acknowledged by the Working Group. There is no discussion about various strategies that might be implemented to streamline the trial process itself, including motions in advance, agreed statement of facts, authorities provided to experts in advance of trial, joint statements of law, demonstrative evidence, limitations on length of testimony, consent to read-in of transcripts, filed damage calculations, recording of proceedings and written argument supplemented with oral submissions. CDL defers commenting on whether changes need to be made to the trial process itself until there are Proposals to which to respond.

Proposal Resorts to Judicial Intervention with Scarce Judicial Resources Which Will Affect Trials

While recognizing the scarcity of judicial resources, throughout the Proposal, every opportunity is taken to resort to judicial intervention. Instead of attempting to re-route even more procedures from the courthouse, the Proposal is singularly constructed to force litigants – even those who are consenting to their procedures – into court. Existing procedures that are private and cost the court and the public nothing, such as examinations for discovery, are abolished. Case conferences will force judges on parties who do not need their help. This will deprive litigants of the need to resort to the court for adjudication – either interlocutory or final – to wait.

Civil Jury Trials – Critical to the Survival of Ontario's Civil Justice System

As acknowledged by the Proposal, the majority of civil actions are personal injury cases. Many of these actions are tried by civil juries. The quality of justice administered by a civil jury is exemplary and speedy. Civil juries are a cherished part of the justice system and considered a right of all Ontarians. CDL has participated in every consultation pertaining to civil justice and never misses an opportunity to explain the importance of civil juries to litigators, parties, and the courts. [126]

Regrettably, the Proposal contains no data as to the number of civil jury trials in Ontario or their duration. In Ontario court Regions where special sittings for personal injury cases are adopted, the court finds significant efficiencies in trial scheduling and a near-100% settlement rate. No data has been provided regarding the mode of trial: jury or judge alone. While it may be that some jury trials take a few more trial days (and correspondingly file fewer expert reports), the verdict on the last day ends the case once and for all. Conversely, a judge sitting alone will spend months and months writing reasons. This not only delays justice for the parties, but during the designated writing weeks the judge is not sitting and hearing other matters. The justice system is on pause until that judge writes their reasons for the trial that took place months before. Support for the civil jury system throughout the province is strong, and for good reason: in the experience of personal injury litigators, jury trials save court time.

High Settlement Rates Must be Maintained

The survival of the civil justice system in Ontario requires the parties to settle their cases. Only a very small percentage can reach trial. The system is barely able to manage the scant number of civil actions that make it to trial in the current regime (less than 1% of all actions commenced). If there is any increase in the number of actions that proceed to trial, the court will not be able to manage the workload. Not only does the Proposal mandate procedures that will make more cases proceed to trial, it makes no sense to adopt a system that rushes actions to the courthouse steps at the two-year mark if there are no judges to hear the case. If the changes simply result in a lineup of cases waiting for trial capacity, then nothing will have been accomplished by these changes.

Increasing Trials by Reducing Availability of Evidence

The CRR should be concerned about any changes that jeopardize the current settlement ratio. Reducing the parties' ability to obtain and assess that evidence, whether by changing the disclosure obligations of documentary evidence, or by eliminating the ability to question the other parties about their allegations and evidence, risks increasing the number of cases that will proceed to trial. A party is less inclined to settle the more unanswered questions that remain. It would be unsustainable with the current judicial capacity issues if parties decided to test the evidence at trial, rather than apply those tests along the way.

Trial Evidence-Taking Will be Affected by Proposal

Trial procedures will be significantly affected by the proposed changes. The abolition of examinations for discovery will make trials longer and much less predictable. If a plaintiff is testifying for the first time in a personal injury case, and that first testimony is cross-examination with its broad scope, the testimony will be of indefinite duration and uncertain content. The Proposal does not indicate how the witness statements should be used at trial.

The Proposal contemplates that a plaintiff's evidence in chief will be provided by way of an affidavit. This document will be written by the party's lawyer and will not be a true reflection of the words of the party themselves. It would fall short of due diligence to take those words at face value and to eliminate the opportunity to test the veracity of that written testimony.

The availability of discovery transcripts reduces equivocation and allows the parties to address contradictory evidence properly through impeachment, a vital component of an adversarial process. Without meaningful challenges, the adversarial system is undermined. Further, limited discovery is likely to increase the chances of trial by ambush. The Proposal effectively acknowledges that witnesses may hold back relevant information. Trial is not a discovery procedure, and it is improper, and likely prejudicial, for new facts to be revealed at this stage. Information that is relevant and not disclosed until cross-examination can only be described as trial by ambush. That new information cannot be tested and the trier of fact will be deprived of the tools with which we assess

evidence. There are no Proposals on how to deal with new facts elicited under cross-examination.

This is the fundamental misunderstanding in the CRR Phase Two Report Proposal: throughout the post-report presentations, the Working Group blithely advised lawyers that evidence only needs to be tested through testimony at trial. This is an invitation from the Working Group for parties to proceed to trial to resolve their disputes, rather than the current system of early and ongoing fulsome disclosure. It is an invitation, by the Working Group, to bring more trials than the system can handle. Not only is there little in the Proposal that will decrease the need for a trial, but the evidentiary changes in the Proposal will increase the ratio of civil actions that proceed to trial, thereby overloading the system and resulting in no practical changes from the way the system currently operates and a gridlock like Ontario has never seen.

Conclusion

Canadian Defence Lawyers feels strongly that more and thorough consultation is needed, that the Proposal was ill-conceived and lacked a proper foundation, and that it fails to account for the realities of litigating in most areas of civil proceedings. Most concerning is that the single most prolific subset of civil litigation, which the Proposal concedes is personal injury litigation, was not seriously reviewed in terms of the detrimental effects of these proposed changes. The stakes are too high for Ontarians to rush into a complete overhaul of civil procedure. CDL welcomes participating in the process going forward and seeks to provide assistance to help the CRR understand the nature of personal injury and insurance litigation, the largest area of specialty civil litigation in the province.

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[1] Bill 227 *An Act to amend various Acts* (which received Royal Assent December 4, 2024) https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2024/2024-12/b227ra_e.pdf

[2] Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 https://www.ontario.ca/laws/regulation/900194

[3] *Enhancing Access to Justice Act, 2024,* S.O. 2024, c. 2 - Bill 157 https://www.ontario.ca/laws/statute/s24002

[4] CDL letter to Attorney General April 16, 2025 re "Request for Extension – Civil Rules Review Phase Two Consultation"https://www.cdlawyers.org/files/04_16_2025%20_%20Letter%20to%20the%20Ontario%20AG%20re%20CRR%20Timeframes.pdf

[5] *Civil Rules Review Phase One Report* May 2024, by Ontario Superior Court of Justice & Ministry of the Attorney General (Ontario) (2024) https://www.ontariocourts.ca/scj/files/rules/CRR-phase-one-report-may-2024-EN.pdf page 18

[6] Noel Semple, Faculty of Law, University of Windsor, *Look Before You Leap: Why Ontario's Civil Rules Review Needs a Research Phase* May 20, 2025 SSRN: https://ssrn.com/abstract=5258842

[7] *FOLA Calls on Ontario Government for Broader Representation and Data-Driven Reform of Ontario's Civil Litigation Rules* May 22, 2025 https://www.fola.ca/fola-calls-for-broader-representation-and-data-driven-reform-of-ontarios-civil-litigation-rules/

[8] *Ontario Civil Rules Reform - the Good the Bad and the Ugly*, Michael Lesage, Slaw, April 29, 2025

[9] Terms of Reference, Civil Rules Review https://www.ontariocourts.ca/scj/civil-rules-review/terms-of-reference/

[10] *A Modest and Principled Proposal for Civil Justice Reform in Ontario,* William Hourigan, J.A., Michael Wilson, Preston Jordan Lim of Villanova Law School, March 5, 2025 SSRN 5166916 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5166916 page 5

[11] *A Modest and Principled Proposal for Civil Justice Reform in Ontario,* William Hourigan, J.A., Michael Wilson, Preston Jordan Lim of Villanova Law School, March 5, 2025 SSRN 5166916 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5166916 page 5
[12] *Lesage v. Ontario (Attorney General)* - Court of Appeal for Ontario, 2024 ONCA 500 (2024), https://coadecisions.ontariocourts.ca/coa/coa/en/item/22485/index.do
[13] *"Ontario Court of Appeal broadens judicial independent to preclude judicial accountability"* (9 August 2024) *Canadian Lawyer https://www.canadianlawyermag.com/news/opinion/ontario-court-of-appeal-broadens-judicial-independence-to-preclude-judicial-accountability/387816*
[14] "We encountered many difficulties in obtaining information while conducting both these two audits…" p.6, Annual Report 2019 Report on Correctional Services and Court Operations https://www.auditor.on.ca/en/content/annualreports/arreports/en19/2019AR_v3_en_web.pdf
[15] Ontario, Office of the Auditor General of Ontario, *Annual Report 2023,* vol 2 (Toronto: Queen's Printer for Ontario, 2013) at 3, 12.
[16] Page 7 Annual Report 2019 Report on Correctional Services and Court Operations https://www.auditor.on.ca/en/content/annualreports/arreports/en19/2019AR_v3_en_web.pdf
[17] *Justice, Efficiencies and Access to the Justice System* referencing the Canadian Centre for Justice Statistics (CCJS) August 2022 in https://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/eff/p5.html
[18] CDL April 4, 2025 letter to Working Group "Re: Lack of Meaningful Consultation, Ontario Civil Rules Review Phase 2" https://www.cdlawyers.org/files/CDL%20Open%20Letter%202025-04-04_%20Re%20Lack%20of%20Consultation%20CRR%20Phase%202(1).pdf; CDL was not included in the initial list of consultees and requested to be added.
[19] "Believe" and "belief" occurred 57 times in the CRR's Phase 2 Report. "Data" occurred 2 times.
[20] *Delay No Longer. The Time to Act is Now,* The Advocates' Society 2023 https://www.advocates.ca/Common/Uploaded%20files/Advocacy/CivilJustice/2023/The_Advocates_Society_Delay_No_Longer_Final_Published_June_29_2023.pdf
[21] *Key Metrics: Unlocking the Power of Court Data to Transform the Justice System (March 10, 2025)*, by The Advocates Society (Canada) online: https://advocates.ca/TAS/Advocacy/Court_Data/TAS/Advocacy_Pages/Court_Data.aspx
[22] *Key Metrics, supra:* TAS proposes the following data categories: 1. Pending cases; 2. New cases; 3. Completed cases; 4. Age of pending cases; 5. Median time from case filing to disposition; 6. Median time from case filing to trial; 7. Pending cases per judicial fulltime equivalent; 8. Average number of court appearances before disposition
[23] From 2019 to 2023, the average number of new civil proceedings issued every year is over 63,000 (*Ontario Superior Court of Justice: Modernizing the Justice System 2019-2023 Report* 2024 ISSN 2560–710 https://www.ontariocourts.ca/scj/files/annualreport/2019-2023-EN.pdf) ; CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf
[24] Stats Canada, *supra.*
[25] From 2019 to 2023, the average number of new civil proceedings issued every year is over 63,000 (*Ontario Superior Court of Justice: Modernizing the Justice System 2019-2023 Report* 2024 ISSN 2560–7103 https://www.ontariocourts.ca/scj/files/annualreport/2019-2023-EN.pdf)
[26] "In 2023, there were 66,212 new civil proceedings commenced in Ontario" CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf page 14
[27] CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf page 22
[28] According to Stats Canada*, supra*, 16,000 new motor vehicle tort actions are issued in Ontario every year from 2019-2023. This figure is substantially less than the figures used by FRANK, the Ministry of the Attorney General database.
[29] CDL letter to the Working Group Co-Chairs April 4, 2025 "Re: Lack of Meaningful Consultation, Ontario Civil Rules Review Phase 2"https://www.cdlawyers.org/files/CDL%20Open%20Letter%202025-04-04_%20Re%20Lack%20of%20Consultation%20CRR%20Phase%202(1).pdf
[30] Approximately 17% of CDL members surveyed completed the survey which is much higher than average voluntary survey participation.
[31] Over 25% of CDL members surveyed also practice plaintiff-side personal injury litigation; 72% of CDL members surveyed practice in firms and 25% of CDL members surveyed practice as in-house staff insurance departments.

[32] *Loblaw Companies Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2024 ONCA 145 (CanLII) https://canlii.ca/t/k33l5
[33] CDL letter to CRR Working Group Re Lack of Meaningful Consultation, April 4, 2025 https://www.cdlawyers.org/files/CDL%20Open%20Letter%202025-04-04_%20Re%20Lack%20of%20Consultation%20CRR%20Phase%202(1).pdf
[34] CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf page 30
[35] *Courts of Justice Act*, R.S.O. 1990, c.C.21, as amended *Courts of Justice Act*, R.S.O. 1990, c.C.21, as amended https://www.ontario.ca/laws/statute/90c43
[36] 1.02 (1) "These rules apply to all civil proceedings in the Court of Appeal and in the Superior Court of Justice" Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 https://www.ontario.ca/laws/regulation/900194
[37] https://www.linkedin.com/pulse/proposed-changes-rules-civil-procedure-trauma-informed-4yvoc/?trackingId=hFhc0AML%2BybJVzPUXxCTPQ%3D%3D
[38] Phase 2 Report April 1, 2025, Ontario Civil Rules Review, Appendix B paragraphs 5-6 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf
[39] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s.2 https://www.ontario.ca/laws/statute/90f31
[40] Phase 2 Report April 1, 2025, Ontario Civil Rules Review, Appendix B paragraph 13 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf
[41] Lawyers *Rules of Professional Conduct,* Ontario https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/chapter-3
[42] Phase 2 Report April 1, 2025, Ontario Civil Rules Review, Appendix B paragraph 5 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf
[43] Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 https://www.ontario.ca/laws/regulation/900194
[44] Phase 2 Report April 1, 2025, Ontario Civil Rules Review, Appendix B paragraph 10 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf
[45] *Ibid*
[46] *Jones v. Tsige*, 2012 ONCA 32 https://canlii.ca/t/fpnld
[47] Phase 2 Report April 1, 2025, Ontario Civil Rules Review, page 20 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf
[48]*Insurance Act* https://www.ontario.ca/laws/statute/90i08; *Court Proceedings for Automobile Accidents that Occur On or After November 1, 1996,* O. Reg. 461/96 "Information before action" https://www.ontario.ca/laws/regulation/960461
[49] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s.2 https://www.ontario.ca/laws/statute/90f31
[50] https://www.fsrao.ca/oap-1-ontario-automobile-policy-owners-policy
[51] *Insurance Act,* R.S.O. c.I.8, as amended, s.256(14)
[52] Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 https://www.ontario.ca/laws/regulation/900194
[53] *Civil Rules Review: Phase 1 Report* May 2024 https://www.ontariocourts.ca/scj/files/rules/CRR-phase-one-report-may-2024-EN.pdf page 6
[54] *Civil Rules Review: Phase 1 Report* May 2024 https://www.ontariocourts.ca/scj/files/rules/CRR-phase-one-report-may-2024-EN.pdf page 7
[55] *Civil Rules Review: Phase 1 Report* May 2024 https://www.ontariocourts.ca/scj/files/rules/CRR-phase-one-report-may-2024-EN.pdf page 17
[56] Plaintiffs in personal injury cases are usually the subject of a Standard Contingency Fee Form Agreement as prescribed by the *Solicitors Act,* R.S.O. 1990, c.S.15 https://www.ontario.ca/laws/statute/90s15 O.Reg. 563/20 Contingency Fee Agreements October 6, 2020 https://www.ontario.ca/laws/regulation/r20563
[57] Despite the mandate to conduct examinations for discovery in person issued by the court in *Guidelines to determine mode of proceeding in Civil* (April 19, 2022) https://www.ontariocourts.ca/scj/practice/guidelines-mode-of-proceedings/guidelines-mode-proceeding-civil-april-19-2022/#:~:text=Examinations%20for%20discovery:,Assessment%20hearings:
[58] O. Reg. 293/92: Superior Court of Justice and Court of Appeal – Fees https://www.ontario.ca/laws/regulation/920293; under:*Administration of Justice Act*, R.S.O. 1990, c. A.6, s.5

[59] Despite the mandate to conduct examinations for discovery in person issued by the court in *Guidelines to determine mode of proceeding in Civil* (April 19, 2022) https://www.ontariocourts.ca/scj/practice/guidelines-mode-of-proceedings/guidelines-mode-proceeding-civil-april-19-2022/#:~:text=Examinations%20for%20discovery:,Assessment%20hearings:

[60] https://lso.ca/lawyers/practice-supports-and-resources/topics/opening,-operating-or-closing-a-practice/work-environment/home-office

[61] CRR Phase 2 Report April 1, 2025, page 75.

[62] Canadian Defence Lawyers' letter April 30, 2024 to the Chief Justice of Ontario (attention Ms. Laura Craig), "Proposed amendments to Rule 34.12 and Rule 30.03 of the *Rules of Civil Procedure"* regarding mandatory documentary disclosure in personal injury cases https://www.cdlawyers.org/files/CDL%20Letter%20re%20Ontario%20Rules%2030%20and%2034%20April%2030,%202024.pdf

[63] *Civil Rules Review: Phase 1 Report* May 2024 https://www.ontariocourts.ca/scj/files/rules/CRR-phase-one-report-may-2024-EN.pdf page 17

[64] Section 222(2) of *Federal Court Rules* https://laws-lois.justice.gc.ca/eng/regulations/sor-98-106/FullText.html

[65] CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf page 34

[66] The Woolf Report, *International Journal of Law and Information Technology*, Volume 3, Issue 2, Summer 1995, https://doi.org/10.1093/ijlit/3.2.144 pages 144–155.

[67] *Review of Civil Litigation Costs: Final Report,* (Jackson Report) December 2009, https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf page 368, section 3.2.

[68] UK Civil Procedure Rules https://www.justice.gov.uk/courts/procedure-rules/civil at Rule 31.5(3).

[69] UK Civil Procedure Rules https://www.justice.gov.uk/courts/procedure-rules/civil at Rule 31.5(7).

[70] Drafting Instructions for changes to the High Court Rules*, Rules Committee* (New Zealand), February 9, 2024.

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[72] CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf p. 34

[73] CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf p. 35

[74] CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf p. 35

[75] Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 https://www.ontario.ca/laws/regulation/900194 Rule 31.04

[76] Alberta Rules of Court, Alta Reg 124/2010 https://canlii.ca/t/8nhs Rule 5.17

[77] Newfoundland *Rules of the Supreme Court, 1986* SNL1986 c42 Schedule D https://www.assembly.nl.ca/legislation/sr/regulations/rc86rules.htm Rules 30.01(1), (2)

[78] Nova Scotia *Civil Procedure Rules https://courts.ns.ca/operations/rules/civil-procedure-rules* Rules 18.01(1), (2)

[79] "Premier Doug Ford says new bill introduced Wednesday will help Ontario and Canada weather U.S. tariffs" April 16, 2025, CBC News https://www.cbc.ca/news/canada/toronto/ontario-internal-free-trade-bill-1.7511660

[80] *National Mobility Agreement,* 2002 https://flsc-s3-storage-pub.s3.ca-central-1.amazonaws.com/mobility1-ns.pdf

[81] *National Mobility Agreement,* Federation of Law Societies of Canada 2013 https://flsc-s3-storage-pub.s3.ca-central-1.amazonaws.com/nationalmobility2013-withoutsignatures.pdf

[82] Federation of Law Societies of Canada, https://flsc.ca/what-we-do/national-mobility-of-the-legal-profession/

[83] Law Society of Ontario https://lso.ca/lawyers/lawyers-from-outside-ontario/mobility-and-inter-jurisdictional-faq#2-what-by-laws-govern-mobility-in-ontario--5

[84] National Mobility Agreement 2013, *supra,* section 3.

[85] *Report of the Task Force on Discovery Process,* 2003 **ONSC, MAG, Chair**: Justice Colin Campbell https://www.ontariocourts.ca/scj/news/publications/discoveryreview/

[86] *Report of the Task Force on Discovery Process,* 2003 **ONSC, MAG, Chair**: Justice Colin Campbell https://www.ontariocourts.ca/scj/news/publications/discoveryreview/
page 35.
[87] Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 https://www.ontario.ca/laws/regulation/900194
[88] According to the Proposal: evaluative mediation will increase the cost of mediation, "given the risk that the parties may expend considerable effort attempting to persuade the mediator of the righteousness of their positions." Evaluative mediation will "result in parties taking a more adversarial approach to mediation, which may tend to undermine the goal of the process."
[89] Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 https://www.ontario.ca/laws/regulation/900194
[90] CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf page 65
[91] Barbara Schlifer Self-Represented Litigants Project https://www.schliferclinic.com/self-represented-litigants-project/
[92] CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf page 2
[93] Pro Bono Ontario https://www.probonoontario.org/
[94] https://www.probonoontario.org/gateway/
[95] LSO Resources for Self-Represented Litigants https://greatguides.lso.ca/c.php?g=738519
[96] Instructions for Self-Represented Parties Preparing for Ordinary Procedure https://www.ontariocourts.ca/scj/civil/resources/ordinary-procedure/
[97] *Tracking the Trends of the Self-Represented Litigant Phenomenon: Data from the National Self-Represented Litigants Project, 2021-2023* January by Dr. Julie McFarlane, founder, founder of the National Self-Represented Litigants Project (NSRLP) and Charlotte Sullivan, Keerthi Chintapalli "Tracking the Trends of the Self-Represented Litigant Phenomenon: Data from the National Self- Represented Litigants Project, 2019-2021" October 2021, online (pdf): https://representingyourselfcanada.com/wp-content/uploads/2024/02/2021-23-Intake-Report.pdf
[98] 15.4% of Ontarians report having a disability: Ontario Human Rights Commission2015 https://www3.ohrc.on.ca/en/numbers-statistical-profile-people-mental-health-and-addiction-disabilities-ontario
[99] The Proposal requires each party to bear their own costs for complying with the PLP: CRR Phase 2 Report April 1, 2025 Appendix B Pre-Litigation protocol – Personal Injury Claims paragraph 9
[100] Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons*, 2006 https://cjc-ccm.ca/sites/default/files/documents/2020/Final-Statement-of-Principles-SRL.pdf
[101] *Critical Judicial Decisions for Self-Represented Litigants - Using important case law that establishes rights for self-represented litigants*, National Self-Represented Litigants Project, 2021 CanLIIDocs 880 https://canlii.ca/t/t3r7
[102] Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 https://www.ontario.ca/laws/regulation/900194
[103] LSO defines small firms as 5 lawyers or fewer.
[104] CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf pages 68, 74 – 82
[105] *Laudon v. Roberts*, 2009 ONCA 383 https://www.ontariocourts.ca/decisions/2009/may/2009ONCA0383.pdf
[106] *Laudon v. Roberts*, 2009 ONCA 383 https://www.ontariocourts.ca/decisions/2009/may/2009ONCA0383.pdf para 27
[107] *Laudon v. Roberts*, 2009 ONCA 383 https://www.ontariocourts.ca/decisions/2009/may/2009ONCA0383.pdf
[108] O. Reg. 50/25: Rules of Civil Procedure https://www.ontario.ca/laws/regulation/r25050
[109] *Cadieux* v. *Cadieux*, 2025 ONCA 405 https://coadecisions.ontariocourts.ca/coa/coa/en/item/23334/index.do?q=cadieux
[110] CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf page 22
[111] https://www.ontariocourts.ca/scj/civil-rules-review/
[112] *Preliminary 2023 Ontario Road Safety Annual Report Selected Statistics*, Ministry of Transportation, Safety Program Development Branch, https://www.ontario.ca/files/2024-07/mto-orsar-preliminary2023-en.pdf (relying on data from the 2023 Ontario Collision Database).

[113] Governed by the current version: *Statutory Accident Benefits Schedule – effective September 1, 2010* , O. Reg. 34/10 of the *Insurance Act,* R.S.O. 1990 c.I.8 ["*SABS*"], which provides mandatory coverage in all automobile insurance policies.
[114] https://tribunalsontario.ca/lat-aabs/
[115] O. Reg. 383/24 of O. Reg. 34/10, *Statutory Accident Benefits Schedule* – effective September 2010 of the *Insurance Act*, R.S.O. 1990, c.I.8. https://www.ontario.ca/laws/regulation/r24383
[116] https://www.ontario.ca/page/ontario-disability-support-program
[117] Ontario Works or Ontario Disability Support program https://www.ontario.ca/page/social-assistance
[118] *Insurance Act,* R.S.O. 1990, c.I.8, s.267.8.
[119] Section 33(2) of the *SABS.*
[120] Section 33(4) of the *SABS.*
[121] CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf pages 84 and 87
[122] *License Appeal Tribunal Rules*, effective July 1, 2024 ["*LAT Rules*"], Rule 16.3.
[123] "who has been communicating with the claimant or claimant's counsel regarding an issue that is the subject of litigation" CRR Phase 2 Report April 1, 2025 https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-Phase-2-Consultation-Paper.pdf
[124] Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 https://www.ontario.ca/laws/regulation/900194
[125] Campbell, Sean, *Lawyers Professional Liability* 3rd Ed. LexisNexis https://droit.coop/en/boutique/categories/responsabilite-16923/lawyers-professional-liability-3rd-ed-4030483
[126] As recently as June 15, 2020, CDL responded to a consultation from the Attorney General re "Proposed Amendments to the Courts of Justice Act Regarding Juries - Submissions from Canadian Defence Lawyers" https://www.cdlawyers.org/files/Submission%20re%20Civil%20Juries.pdf