



June 3, 2020

VIA E-MAIL

The Honourable Stephen E. Firestone  
The Honourable Calum U.C. MacLeod  
Superior Court of Justice  
330 University Ave.  
Toronto ON M5G 1R8

Dear Justices Firestone and MacLeod,

The Ontario Bar Association (the “OBA”) appreciates the opportunity to provide a preliminary response with respect to the discussion paper entitled *List of Rules Potentially Affected by Reforms to Civil Justice System, Including E-Filing and Virtual Hearings, dated May 22, 2020* (the “Report”), prepared by Justices Cavanagh and Myers and recently distributed to the Superior Court of Justice’s Civil Working Group.

The OBA has long advocated for modernizing Ontario’s Civil Justice System, and the experience during the suspension of regular court operations as a result of COVID-19 provides an opportunity to combine innovation and technology with an in-depth understanding of law and the justice system to create a sustainable future that works better for the courts, lawyers and the public we serve.

The Report contains many proposals that have the potential to meaningfully modernize Ontario’s Civil Justice System – providing a way both to improve operations for the future and to minimize the backlog anticipated when the court resumes regular operations. However, we have assessed the proposals not only in their potential for streamlining litigation, but for their effectiveness in ensuring they facilitate the justice system’s fundamental objective of yielding the fairest result in every case.

In the above context, the OBA is pleased to provide these comments:

1. A number of the proposals in the Report propose amendments that would align the rules with practices in place during the suspension of regular court operations. As noted above, the OBA has been a strong advocate for modernization, and we support these uncontroversial amendments, which would allow for such things as e-filing; service between counsel by e-mail and a general increased and default reliance on electronic platforms for documentary exchange between counsel and with the Court. The experience during the emergency period demonstrates that these changes can be carried out sufficiently using technologies that already exist, even if there is an opportunity to enhance effectiveness in due course through the adoption of improved technology/platforms. Consequently, we support these changes and welcome the opportunity to work with the Court to realize the implementation. However, in our view it is important to explore changes beyond these proposals in order to fully realize the opportunity to modernize

practice for the benefit of the courts, lawyers and the public we serve – to maximize access to justice and reduce anticipated court backlogs.

2. The OBA supports expanding the availability of motions in writing. Provided that the Court maintains its current turnaround time for such motions (approximately 2- 3 weeks from the date of filing to the release of the decision), motions in writing can shorten delays and reduce costs involved in scheduling and arguing routine and uncomplicated motions. They also allow for better utilization of judges' non-sitting time. We welcome the opportunity to work with the Court to realize the implementation of these proposals, such as amending Rule 37.12(5)(d) of the Rules of Civil Procedure to remove the ability of a single responding party to force an oral hearing in respect of specific, noncontroversial motions.

Such motions might include:

- a. motions in simplified proceedings
- b. motions to remove lawyers of record
- c. productions motions and motions for undertakings
- d. motions for particulars
- e. motions for default judgment
- f. production from non-parties
- g. motions in personal injury cases for surveillance evidence and persons who "might reasonably be expected to have knowledge" (Rule 31.06 (2))

Oral hearings should remain the norm in more complex or substantive motions such as:

- h. injunctions
- i. summary judgment

Certain motions fall within a third, discretionary, category where an oral hearing may or may not be beneficial depending on the nature of the motion. These include:

- j. motions to strike pleadings
- k. jurisdiction motions
- l. motions for security for costs

3. The OBA also supports greater use of technology to hear motions and other steps during a proceeding remotely. The OBA has been working with the Courts to ensure that the requisite technology and expertise is available to Judges in Ontario so that remote hearings can occur in a seamless manner. Further, the OBA recently collaborated with The Advocates' Society as well as Ontario's other legal associations to produce the Best Practices for Remote Hearings to provide guidance to anyone who is preparing for and participating in a remote hearing. It is likely that for those motions that fall into the third category above that do need to proceed orally, a motion by videoconference will suffice. Once again, it is important to recognize that this proposal shouldn't change the value of advocacy or necessitate a different balance between our oral and written traditions. Technology for video conferencing and document exchange provide modern ways for decisions to be made as they always have and always should: based on what is appropriate and likely to yield the fairest result in every case.

4. The Report also contains some proposals that provide much more significant departures from the current practice. In our view, these proposals merit a more robust consultation with the Bar in order to ensure that they will lead to a more efficient and streamlined process that also achieves the justice interest of the fairest outcome in each case. These proposals include: eliminating a geographic location for steps in a proceeding; making applications the default way of commencing proceedings; the format of electronic productions and right to inspect originals; and default virtual summary trials in the simplified procedure.

The recommendations in the Report set out a number of proposals, some of which should be implemented as quickly as possible; some of which should be implemented with certain modifications; and some of which require further consultation and deliberation; however none of which should be discarded outright.

As Justices Myers and Cavanagh state in the Report, “the judicial system in the province can be improved, streamlined and made considerably more efficient.”

The OBA is committed to working with the Court to achieve these important goals.

Sincerely,



Colin P. Stevenson, President  
Ontario Bar Association

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<sup>i</sup> Generally this would include the proposals with respect to Rules 1.03; 1.07(1); 2.03; 3.04(4); 4.01(3); 4.03; 4.05; 4.05.1; 4.06; 4.07; 4.09; 15.04(4); 16.01(4); 16.05(1)(f); 16.06.1(2); 34.17 and 34.18; 51.01; 52.04(1); 53.04(1); 59.02(1); 59.04(5); 59.05(1) and 60.

c.c. Scott Maidment, President, The Advocates Society; Laura Craig, Counsel, Office of the Chief Justice ; Marie-Andrée Vermette, Partner, WeirFoulds LLP; Kate Manning, Secretary, OBA Board of Directors; Katy Commisso, Northwest Region Representative, OBA Board of Directors; and Elizabeth Hall, Executive Director, OBA